



JESSICA

***JOINT EUROPEAN SUPPORT FOR
SUSTAINABLE INVESTMENT IN CITY
AREAS***

**JESSICA architecture in
the West-Netherlands region**

EVALUATION STUDY

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I WHAT IS JESSICA?

I.1 The Cohesion Policy

The Treaty on the Functioning of the European Union (**TFEU**) regards the economic, social and territorial cohesion as a shared competence between the EU and the Member States (Article 4 (2) (c) TFEU). Title XVIII TFEU ("Economic, Social and Territorial Cohesion") contains the basis for the policy in that regard, commonly referred to as the cohesion policy.

The cohesion policy is an investment policy with the aim of strengthening the EU's economic, social and territorial cohesion, in order to promote its overall harmonious development (**Cohesion Policy**). The objective is in particular to reduce the disparities between the various regions of the EU and the backwardness of the least favoured regions. Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps (Article 174 TFEU).

The Cohesion Policy is executed by means of the various mechanisms laid down in Article 175-178 TFEU. Aside from the Member States' responsibility to conduct their economic policies in accordance with the objectives of the Cohesion Policy, the EU must contribute to these objectives through its policies and actions as well. Moreover, the EU supports the Cohesion Policy particularly through, among others, the structural funds and the cohesion fund. The budget that has been allocated by the EU to these funds for the programming period 2007-2013 amounts to EUR 348 billion, representing about 35% of the EU's total budget.

I.2 The Structural Funds

The structural funds providing assistance under the Cohesion Policy are the European Social Fund (**ESF**) and the European Regional Development Fund (**ERDF**) (**Structural Funds**). While the aim of the ESF is to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living (Article 162 TFEU), the purpose of the ERDF is to help redress the main regional imbalances in the EU through participation in the development and structural adjustment of less developed regions and in the conversion of declining industrial regions (Article 176 TFEU). A total of approximately EUR 1.9 billion Structural Funds has been allocated to The Netherlands for the programming period 2007-2013.

An important characteristic of the Structural Funds is the application of the principle of co-financing. This means that expenditure can only be eligible for contributions if it is complemented by public or private funding, in accordance with a rate fixed by the European Commission (**EC**) in its decisions approving Operational Programmes. Consequently, the currently applicable rates may differ as per OP; pursuant to the national

strategic reference framework pertaining to The Netherlands, co-financing of at least 50% is required for projects aiming to achieve the regional competitiveness and employment objectives defined by the Cohesion Policy, whereas at least 75% is needed for projects which aim to achieve the European territorial cooperation objective defined by the Cohesion Policy.¹

I.3 Stratified authority in respect of the application of the Structural Funds

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (the **General Regulation**) includes general provisions in regard of the Structural Funds and the cohesion fund, establishing inter alia the objectives, geographical eligibility of the funds, the principles of assistance, the financial framework and the stratified authority structure regarding the application of the Structural Funds. The General Regulation has been amended by Regulations (EC) 1341/2008 and (EU) 539/2010.

As a consequence of the principle of subsidiarity, Member States have a certain discretion to determine which projects may be eligible for funding from the Structural Funds. The General Regulation prescribes a stratified authority structure in that regard.

Article 25 of the General Regulation contains the basis of the stratified authority structure. It prescribes that *“the Council shall establish at Community level concise strategic guidelines on economic, social and territorial cohesion defining an indicative framework for the intervention of the Funds, taking account of other relevant Community policies”*. These guidelines have been laid down in the Community Strategic Guidelines on Cohesion, setting out the overarching priorities and providing a framework for all the actions which can be funded by the funds for the current programming period (2007-2013).

The second layer is contained in Article 27 (1) of the General Regulation, which states that Member States “shall present a national strategic reference framework which ensures that assistance from the Funds is consistent with the Community strategic guidelines on cohesion, and which identifies the link between Community priorities, on the one hand, and its national reform programme, on the other”. The Dutch National Strategic Reference Framework was accepted by the EC in June 2007 and includes a significant commitment to the Lisbon strategy for jobs and growth. The Netherlands decided therein that the funds will be invested in six priority areas: (i) strengthening innovation and entrepreneurship, (ii) raising the attractiveness of regions, (iii) investing in the socio-economic viability of cities, (iv) increasing the labour supply, (v) promoting an inclusive labour market and (v) increasing adaptability/investing in human capital. It has furthermore identified one territorial priority: promoting effective cooperation with neighbouring countries.

¹ Ministerie van Economische Zaken, *“Nationaal Strategisch Referentiekader Structuurfondsen 2007-2013”*, (2007), p. 46.

The lowest layer has been prescribed in Article 32 of the General Regulation, which states that *“the activities of the Funds in the Member States shall take the form of operational programmes within the national strategic reference framework”*. In pursuance of that obligation, the Netherlands set up four operational programmes (**OPs**) in regard of ERDF funding, each stating the priorities of the regions concerned: OP North Netherlands, OP West Netherlands, OP South Netherlands and OP East Netherlands. One OP was set up for the allocated ESF, covering all of the Netherlands. The Commission approved these OPs. A Managing Authority (**MA**) has been assigned to each of the OPs.

The MA of OP West Netherlands, the municipal executive of the municipality of Rotterdam, has sub-delegated, in accordance with Articles 37 (6), 42 and 59 (2) of the General Regulation, parts of its duties to the municipal executives of the municipalities of Amsterdam, The Hague and Utrecht. These intermediate bodies within the meaning of the General Regulation, referred to in the OP West Netherlands as ‘programme authorities’ (**PAs**), are in charge of selecting projects carried out within their respective municipalities applying for ERDF funding. As the municipal executive of Rotterdam is the MA of OP West Netherlands, the Municipality of Rotterdam does not formally have its own PA.

The stratified authority structure pertaining to the establishment of the priorities intended to be achieved through the Structural and Cohesion Funds thus resembles a pyramid. The Council defines the overarching priorities, the Member States establish the national priorities within the frame of the prescribed European priorities and the regions set out the regional priorities within the scope of the established national priorities. Consequently it is possible to use the funds in a made to measure manner, while contributing to the objectives as stated in the General Regulation.

1.4 JESSICA

Initially, the Structural Funds were meant to support projects helping to achieve the priorities mostly by means of subsidies. These subsidies are granted on a non-recoverable basis and therefore qualify as one-off grant financing.

As the EC regarded the obstacles to grant other types of financing inefficient, it decided to develop JESSICA, an acronym for Joint European Support for Sustainable Investment in City Areas, jointly with the EIB and in collaboration with the Council of Europe Development Bank. The idea was to give Member States a special framework to employ a part of the Structural Funds allocated to them for making repayable investments in projects included in an integrated plan for sustainable urban development.

As a consequence, JESSICA enhances the Member States’ and regions’ possibilities to invest through urban development funds (**UDFs**) in sustainable urban development and regeneration projects. In lieu of granting subsidies to projects that help to attain these

objectives, they may disburse a part of the Structural Funds in the form of equity, participations, guarantees and loans (**JESSICA Funds**). This provides the following (principal) advantages in comparison to the subsidies provided by the Structural Funds:

- (i) **recycling of funds:** the returns/receipts generated by projects by means of JESSICA Funds invested in (eligible) projects before the expiry of the current programming period, may be retained by the UDF or the MA and reinvested to the same respectively new urban regeneration projects. JESSICA Funds thus have a lasting legacy, whereas subsidies, on the other hand, have a once-only life span;
- (ii) **leverage:** as JESSICA Funds need to be repaid and may only be granted to projects likely to generate revenue, JESSICA increases the potential ability of private sector engagement in urban regeneration projects. Besides the leverage it creates, it strengthens – as a result of the co-operation – the competence in project implementation and management. Due to the fact that subsidies are not repayable and may be granted to non-profitable projects, there is no interest/option for the private sector to be involved;
- (iii) **flexibility:** apart from the possibility of reinvesting JESSICA Funds in (other) UDFs (Article 78 (7) General Regulation), it enables the granting of a wide array of financing means. Instead of solely being able to provide subsidies, Member States may provide equity, guarantees and loans, or participate in projects via UDFs. Member States thus have the ability to grant tailor made financing; and
- (iv) **expertise:** as a result of the potential co-operation with the private sectors and banks, the Member States and regions will benefit from the expertise accrued by these entities.

A Member State or a MA may set up a holding fund (**HF**) to invest in several UDFs. The setting up of a UDF, which would serve as an intermediary between the MA and projects to be financed, is a necessity, whereas the incorporation of a HF, which would function as an intermediary between the MA and two or more UDFs, is optional (Article 44 General Regulation).

I.5 Implementation of JESSICA

As per end of February 2012 the EIB manages 18 HFs in 9 Member States in which a total amount of EUR 1,76 billion has been committed. 29 UDFs have been signed. The types of projects supported include, among others, brown field regeneration, sustainable urban infrastructure development and energy efficiency intervention in existing housing

stock. Disbursement of JESSICA Funds to final recipients is already taking place in Poland, Lithuania, Estonia and Germany. In Estonia and Germany the EIB is not involved in the operations.

As the financing climate in The Netherlands did not necessitate the implementation of JESSICA, The Netherlands initially chose not to implement it. However, in its evaluation study pertaining to JESSICA in the Netherlands (December 2010), ECORYS concluded that the implementation would nowadays probably provide added value as a result of the changed economic and financial conditions.

Since 2009 it has become increasingly difficult to obtain loans. Financial institutions, developers and investors can no longer afford to take risks and therefore demand high interest rates, while pension funds have difficulties meeting their statutory coverage and housing corporations are relatively low on liquidity. Due to budget cuttings, the public sector is also unable to provide the financing needed. Furthermore, urbanization, meaning urban renewal and urban regeneration, has become increasingly expensive. As the relatively easy and inexpensive construction sites have been developed already, the complex sites i.e. areas with diverse interests, various area applicants, legal requirements and building restrictions remain to be developed. Moreover, consumers and the Dutch government demand higher quality standards, resulting in higher costs of development.

As a consequence of the diminishing possibilities of funding and the higher costs of developments, an increasingly wider financing gap for the development of urbanization projects has arisen. ECORYS² concluded that JESSICA could, specifically with regard to projects in need of long term financing, improve the funding position of projects and thus help to fill the arisen financing gap.

The widening financing gap caused the Municipality of Rotterdam and the Municipality of The Hague, in their capacity of MA/PA within OP West Netherlands, to consider implementing JESSICA in order to set up three urban development funds. Due to the fact that the funds granted to The Netherlands for the current programming period have largely been earmarked, they decided to set up a pilot consisting of a small amount in anticipation of the upcoming programming period (2014-2020).

It is expected that more JESSICA operations will be implemented during the upcoming programme period. Other municipalities already expressed the intention to do so.

I.6 The regulatory framework pertaining to JESSICA

JESSICA financial engineering instruments are subject to the Structural Funds regulations; namely:

² See www.eib.org/jessica

- (i) **Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999:** it includes general provisions in regard of the Structural Funds and the Cohesion Fund, establishing inter alia the objectives, geographical eligibility of the funds, the principles of assistance, the financial framework and the stratified competences (**General Regulation**). The Regulation has been amended by Council Regulation (EC) No. 284/2009 and Regulation (EU) No 539/2010 of the European Parliament and the Council.
- (ii) **Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999:** it establishes the tasks of the EDRF and its scope of assistance regarding the objectives as defined in the General Regulation; that is (i) convergence, (ii) regional competitiveness and employment, and (iii) European territorial cooperation. It does not contain provisions pertaining to the structuring of the implementation of JESSICA (**ERDF Regulation**);
- (iii) **Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999:** it establishes the tasks of the ESF and its scope of assistance regarding the mentioned objectives as defined in the General Regulation. It does not contain provisions pertaining to the structuring of the implementation of JESSICA (**ESF Regulation**); and
- (iv) **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 Social Fund and the Cohesion Fund and of Regulation (EC) 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund:** it inter alia establishes the provisions relating to certain specific aspects of the funds, such as the financial engineering instruments. Section 8 (Articles 44-46) prescribes the criteria for the implementation of the projects, the UDFs and HFs (**Implementing Regulation**).

Under Article 103 of the General Regulation, the Coordination Committee of the Funds (**COCOF**) has been established in order to assist the Commission. COCOF has embodied its interpretations and decisions pertaining to the implementation of JESSICA in a number of guidance notes. These relevant guidance notes are:

- (i) **Guidance Note no. 1 on Financial Engineering in the 2007-2013 programming period (COCOF 07/0018/01; July 2007)**, including interpretations regarding Articles 43 and 44 of the General Regulation and decisions pertaining to the retention of supporting documents for expenditure;
- (ii) **Revised Guidance Note no. 2 on Financial Engineering (COCOF 08/0002/03; 22 December 2008)**, stating interpretations about the contribution of funds to inter alia financial engineering instruments and other implementation issues. Furthermore, it contains replies from the Commission to questions asked by the JESSICA expert working group;
- (iii) **Revised Guidance Note no. 3 on Financial Engineering Instruments under Article 44 of Council Regulation (EC) No 1083/2006 (COCOF 10/0014/04; 21 February 2011)**, revising, expanding and systemizing the guidance provided in the two earlier guidance notes, and recalling the principles of sound financial management;
- (iv) **Revised Guidance Note no. 4 on Financial Engineering Instruments under Article 44 of Council Regulation (EC) No 1083/2006 (10/0014/05; 8 February 2012)**, providing guidance and clarifying some issues regarding the setting-up and implementation of financial engineering instruments;
- (v) **Guidance note on eligibility of energy efficiency and renewable energies interventions under the EDRF and the Cohesion Fund (2007-2013) in the building sector including housing (COCOF 08/0034/04; 29 October 2008)**.

I.7 Commission state aid decision regarding the Northwest Urban Investment Fund (UK):

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32835

With this first decision, the Commission has clarified the guiding principles for the assessment of similar support measures that several Member States are currently envisaging.

The Commission has considered that aid granted pursuant to this initiative in the form of sub-commercial loans and equity capital is compatible with Article 107(3)(c) TFEU as it allows tackling urban regeneration market failures identified in preparatory studies.

The UK Northwest Urban Investment Fund will target regeneration projects with a financial viability gap that would not be undertaken by the market on its own. Private investors will finance at least 50% of each project costs, thus creating a leverage effect. Moreover, each

project must have a business plan to ensure the repayment of the public investment. Incentives for private investors will be limited to the minimum necessary to trigger urban projects and may not exceed a so-called Fair Rate of Return, established through a competitive process or, where it is not possible, by an independent expert. Professional and independent fund managers will ensure prudent investment decisions and the financial sustainability of the funds³.

II LEGAL REQUIREMENTS PERTAINING TO THE STRUCTURE

II.1 Urban development and holding funds

The incorporation of a UDF is a necessity for the implementation of a JESSICA operation. Article 44 of the General Regulation defines UDFs as funds investing in public-private partnerships and other projects included in an integrated plan for sustainable development. Whilst not specific on legal form, a UDF can be an independent legal entity, or be established as a “separate block of finance” within an existing financial institution

UDFs serve as intermediaries between the MA and the projects applying for JESSICA funding. The MA or HF (when in place) will select UDFs and take decisions on contributions from OPs to the UDFs in accordance with a transparent procedure, based on specific and appropriate selection criteria relating to the priorities mentioned in the relevant OP. The criteria, which are approved by the monitoring committee in charge of the supervision of the correct implementation of the OP, should be checked and adapted if necessary.

In addition to setting up (a) UDF(s), it is possible to incorporate one or more HFs. According to Article 44 of the General Regulation a HF may be created in order to invest in one or more UDFs. If a HF is implemented, it serves as an intermediary between the MA and the UDFs which have been incorporated under it.

Implementing a HF has several advantages of which the precise effects are dependent upon the specific circumstances: (i) it serves as a helping hand in the implementation of JESSICA, (ii) it provides an early access to the Structural Funds, (iii) it engages expertise in establishing appropriate projects and procuring UDFs, and (iv) it allows a possible aggregation of other public/private sector financial resources.

A funding agreement would be signed between the MA and the HF, specifying the terms, conditions, targeted investments, etc.

Although the tasks of UDFs and HFs are different, the legal requirements in regard of their structuring are similar in many ways.

³ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/876>

II.2 The implementation

Article 44 of the General Regulation prescribes that HFs must be implemented through (a) the award of a public contract in accordance with applicable public procurement law, (b) when the agreement is not a public service contract within the meaning of applicable public procurement law, the award of a grant, defined for this purpose as a direct financial contribution by way of donation to a financial institution without a call for proposals, if this is in accordance with a national law compatible with the Treaty; (c) the award of a contract directly to the EIB or the EIF.

II.3 The legal form

Pursuant to Article 43 (3) of the Implementation Regulation, both UDFs and HFs must be set up either as “*independent legal entities governed by agreements between the co-financing partner or shareholders*” or as a “*separate block of finance within a financial institution*”. In case the latter option is chosen, it shall be “*subject to specific implementation rules within the financial institution, stipulating, in particular, that separate accounts are kept which distinguish the new resources invested in the financial engineering instrument, including those contributed by the operational programme, from those initially available in the institution*”.

The term “*independent legal entities*” does not seem to imply that a UDF or a HF which is not set up as a separate block of finance within a financial institution must have a separate legal personality, meaning that a UDF or HF may have the form of a partnership agreement under Dutch law. The civil partnership (*maatschap*), general partnership (*vennootschap onder firma* or *v.o.f.*) and the limited partnership (*commanditaire vennootschap* or *c.v.*) do not have separate legal personality but they do have the features of independent legal entities: they can be sued and sue in their own name and the estate held in name of such partnership has certain features distinguishing it from the private estate of the partners. Reference is also made to the wording of the Implementation Regulation (“*governed by agreements between the co-financing partners or shareholders*”; emphasis added).

Within that context, it is important to note that in the UK a number of UDFs have been incorporated as limited partnerships, whereas a limited partnership under UK law enjoys no legal personality at all.⁴ These precedents support that the limited partnership under Dutch law qualifies as an (independent) legal entity within the meaning of Article 43 (3) of the Implementation Regulation.

II.4 Funding agreement

Pursuant to Article 43 (5) of the Implementation Regulation, the terms and conditions for contributions from OPs to UDFs must be set out in a funding agreement concluded

⁴ Source: EIB (Ruth Niland).

between the duly mandated representative of the financial engineering instrument and the Member State or the MA. The aspects to be covered therein are laid down in Article 43 (6) of the Implementation Regulation.

The funding agreement pertaining to HFs, concluded between the Member State or the MA with the HF concerned, should lay down the funding arrangements and objectives and take account of urban development studies or evaluations and integrated urban development plans included in the relevant OP. It shall in particular make provision for the aspects mentioned in article 43 (2) of the Implementation Regulation.

III THE RECOMMENDED LEGAL STRUCTURE

III.1 Three UDFs and one HF

The Netherlands has been divided into four distinct regions for the ERDF. One of these regions is West Netherlands. This region covers the four provinces North Holland, South Holland, Utrecht and Flevoland. The four provinces and the four major cities Amsterdam, Rotterdam, The Hague and Utrecht have decided to combine forces for the European Structural Funds 2007-2013 and to draw up a joint OP for West Netherlands. On 13 August 2007, the European Commission approved a Regional Operational Programme for West Netherlands for the period 2007-13 ("*Opportunities for West*").

The OP for West Netherlands (2007-2013) defines the following four priorities eligible for financial support from the ERDF funds:

- Priority 1 : Knowledge, innovation and entrepreneurship
- Priority 2 : Attractive regions
- Priority 3 : The urban dimension
- Priority 4 : Technical assistance

Based on Article 59 (1) of the General Regulation, the Netherlands, in consultation with the four provinces and the four large cities, has assigned the managerial authority for the OP West to the Rotterdam Municipal Executive.

Those parts of the programme that have a local character will be carried out by the relevant city. This is made possible by the provisions in the General Regulation for sub-delegation using global subsidies. This results in a separate part of the programme for the whole West-Region and individual sub-delegated programmes for the four cities. The municipal executives of the respective cities act as PAs in respect of the sub-delegated programmes.

As part of their sub-delegated programmes under the current OP for West Netherlands (2007-2013), the cities of Rotterdam and The Hague wish to implement UDFs. The Hague

wishes to set up two separate UDFs (one for Priority 1 and one for Priority 3) and Rotterdam wishes to set up one UDF under Priority 1.

In view of the advanced stage of the execution of the OP for West Netherlands (2007-2013), the available financing (including match funding) for these UDFs is relatively small (approximately EUR 8m for the two UDFs for The Hague and approximately EUR 6.5m for the UDF for Rotterdam). This has led Rotterdam to the view that, at this stage, it is not desirable to organise its operation through a HF; at a later stage, however, the structure should be flexible enough to allow Rotterdam to convert its direct interest in the UDF into an indirect interest in the UDF acting through a newly implemented HF. The Hague, on the other hand, wishes to set up a separate holding vehicle for its UDFs, which holding vehicle shall preferably qualify as a HF within the meaning of the General Regulation.

III.2 Overview of legal forms under Dutch law

Two categories of legal forms for ventures can be distinguished under Dutch law: legal forms with and without legal personality. While the former legal forms (usually) may be characterized as a cooperation between partners on a contractual basis, the latter constitute separate legal entities and are, unless incompatible with the nature of the legal form, on equal footing with natural persons as to their rights and duties. A chart of the legal forms possible under Dutch law and their main features is included hereunder.⁵

Legal form	Legal personality	Liability of partners / shareholders / members.	Tax-transparency	Governance regime
General partnership <i>(vennootschap onder firma)</i>	No	Joint and several liability of all the partners towards third parties.	Yes	Contractual
Limited partnership <i>(commanditaire vennootschap)</i>	No	Joint and several liability of all the managing partners towards third parties.	Only "closed" limited partnerships	Contractual. However, the limited partners may not conduct managerial acts.
Partnership <i>(Maatschap)</i>	No	Shared liability of all the partners towards third parties.	Yes	Contractual

⁵ Please note that the features of the various legal forms are described in a very generic manner and that this chart therefore may not be relied on as legal advice.

Private limited liability company <i>(besloten vennootschap)</i>	Yes	No shareholder liability towards third parties.	No	-Book 2 DCC ⁶ -Articles of Association -Shareholders' agreement (optional)
Public limited liability company <i>(naamloze vennootschap)</i>	Yes	No shareholder liability towards third parties.	No	-Book 2 DCC -Articles of Association -Shareholders' agreement (optional)
Foundation <i>(stichting)</i>	Yes	n/a	No	-Book 2 DCC -Articles of Association
Association <i>(vereniging)</i>	Yes	No liability of the members towards third parties.	No	-Book 2 DCC -Articles of Association

III.3 General description of the recommended legal structure for the UDFs

The recommended legal form of the 3 UDFs is a limited partnership under Dutch law (*commanditaire vennootschap* or CV).

The investors would participate as limited partners in the UDFs (*commanditaire vennoten*). It is possible to structure such investment via a special purpose vehicle, should the investor so require. In respect of the UDF for Rotterdam, both the MA of OP West Netherlands and the private investors shall participate, either directly or through a special purpose vehicles, as a limited partner. In respect of the UDFs financed under the implementation programme of the Municipality of The Hague, the holding vehicle set up by the Municipality of The Hague shall participate as limited partner.

⁶ Dutch Civil Code ("*Burgerlijk Wetboek*")

A special purpose vehicle would participate as sole managing partner (*enig beherend vennoot*) and be responsible for the management of the concerned UDF. The special purpose vehicle acting as the managing partner would be structured as a foundation under Dutch law (*stichting*) which is managed by a party to be selected, in accordance with Article 44 of the General Regulation, through a tender procedure in accordance with European public procurement laws as implemented in Dutch law by means of “*het Besluit aanbestedingsregels voor overheidsopdrachten*” (the **Fund Manager**).

An advisory committee will be tasked with advising the managing partner in its decision-making regarding the allocation of funds to projects (the **Advisory Committee**).

Pursuant to Articles 43 (3) and 44 of the Implementing Regulation, funding agreements shall be concluded on two levels: (i) between the Managing Authority and the HF (Level I) and (ii) between the Managing Authority or HF and the UDF (Level II). In order to avoid a confusion of tongues, the funding agreement between the MA and the UDF (in case there is no HF) or the HF and the UDF is in practice also referred to as an operational agreement.

Apart from meeting the requirements under the relevant regulations, a number of factors were considered in defining the recommended structure:

- The accession of co-financers into the partnership is relatively easy, while, pursuant to the “ *Holding Fund Handbook*”⁷, co-financers may still choose to step in at project level;
- A partnership can be structured in such way that it is tax transparent. As such profits and losses will be treated as being directly received and incurred by the respective partners, which may be attractive to private investors;
- Subject to restrictions relevant to the tax transparency, a partnership is flexible in structuring admissions and exits of partners, governance and distribution of profits; and
- A limited partnership combines these features with the possibility to limit the exposure of the (limited) partners.

Structure charts of the recommended legal structure are to be found in Annex I and II.

⁷ The Directorate-General for Regional Policy and European Investment Bank, “*JESSICA: Holding Fund Handbook*”; 2010, p. 10.

III.4 General features of a limited partnership under Dutch law

Contractual. A CV is an agreement to contribute to a business under a joint name and to share the proceeds thereof, entered into by one or more partners – the managing partners – who manage(s) the partnership and shall be (jointly) liable for the obligations entered into in the name of the partnership, and one or more other partners – the limited partners – who merely contribute(s) capital and does/do not conduct acts of management and in principle is/are not liable towards third parties. None of the partners need to be Dutch or resident in the Netherlands.

Consensual. The formation of a CV is not subjected to any specific requirement; it merely requires an agreement between at least one managing partner and at least one limited partner. The agreement may be concluded orally, although an agreement in writing is recommended. A notarial deed, as opposed to the formation of a limited liability company, is not required. Furthermore, no statutory minimum capital is required to bring into the CV. There are only very few mandatory provisions in Dutch law governing the CV, which is therefore perceived as a flexible structure.

No external liability of limited partners. A managing partner has unlimited liability for all obligations of the CV. A limited partner is in principle not personally liable towards a CV in excess of the amount it has agreed to contribute to the CV. However, if (i) the name of the limited partner (or characteristic elements of its name) is noted in the name of the CV; or (ii) the limited partner engages in any act of management or control or exercises a predominant influence over the acts of the CV, the limited partner will incur unlimited liability towards third parties (as if it were a managing partner).

No legal personality. A CV has no separate legal personality (*rechtspersoon*). Legal title to the assets can only be acquired by the partners jointly or by one or more of the managing partners for the risk and benefit of the CV. In the latter case, the other partners have a mere contractual right with respect to asset, in principle exercisable vis-à-vis the managing partner(s) holding the legal title only and also referred to as a mere economic ownership; as opposed to an absolute right *in rem*. Notwithstanding the foregoing, limited partnerships have legal capacity to sue and be sued in their own name. The supreme court has also held that the estate held in the name of a CV, which assets are legally owned in co-ownership by the partners, is a separate legal estate, distinct from the estate of its managing partner(s) (*afgescheiden vermogen*).

Tax transparency. The CV is a commonly used Dutch contractual form of partnership, since it offers the limited liability of limited partners in combination with tax transparency, provided that the CV is regarded as closed for tax purposes. Tax transparency means that the partnership as such is not subject to corporate income tax, but each partner's share in the profits of the partnership is charged to income tax or corporate income tax. A CV is considered tax transparent when the admission and replacement of limited partners are subject to the prior written consent of all partners (including the managing partner).

III.5 General features of a foundation under Dutch law

Stand alone legal entity with no members or shareholders. A stichting is a legal entity (*rechtspersoon*) with the following main characteristics: (i) a stichting does not have any members or shareholders, (ii) a stichting aims at realizing a goal, as defined in its articles of association, by using “capital” designated for that purpose, (iii) the objects of a stichting may not include the making of distributions to any founder or members of its corporate bodies and (iv) a stichting may only make distributions to other persons if the distributions are for a charitable or non-commercial purpose. It is generally accepted that the restriction on distributions pertains to distributions of profits, capital or reserves and does not prevent a stichting to enter into commercial contracts, pursuant to which it is required to make payments to third parties (e.g. the payments made on depositary receipts or notes issued by it).

Incorporated by notarial deed. A stichting is incorporated through a deed of incorporation executed by a Dutch civil law notary. The deed of incorporation contains the articles of association of the stichting. The articles of a stichting may be amended by the corporate bodies (e.g. the board) of the stichting only if the articles provide for such possibility. However, the competent court may under circumstances upon request of *inter alia* the founder or the board of directors of a stichting amend the articles of association. A stichting must be registered with the trade register of the relevant Chamber of Commerce in the Netherlands.

Flexible vehicle. A stichting is a “stand alone” legal entity with few applicable mandatory provisions in the Dutch Civil Code, and is therefore generally perceived as a very flexible vehicle. The only mandatory corporate body of a stichting is its board (also called “board of directors”). The articles of association must provide for the appointment and dismissal of the board members. No requirements, however, as to the manner of providing for appointment of members of the board exist (unlike, for instance, in respect of a BV, where the board members must be appointed and can at all times be dismissed by the general meeting of shareholders, or, if the large company rules apply, by the supervisory board). Apart from the board, the articles of association may define other corporate bodies, with specific powers within the stichting (such as a supervisory board).

III.6 The managing partner and the Fund Manager

All partners of the CV must (i) make a contribution to the CV and (ii) be entitled to the distribution of at least a nominal part of the earnings, depending on which arrangement will be made between the partners. For the managing partner, the contribution may be cash, goods or labour. Since the fund management will be outsourced by the stichting for the account of the CV, the stichting has no labour or goods to contribute and a cash contribution is the simplest way to structure the CV. The cash contribution could be funded, e.g., by obligations of the investors to pay a step in fee to the stichting. The managing partner’s share in the distribution of the profits may also be kept very minimal.

After tendering the fund management in accordance with European public procurement laws as implemented in Dutch law, the fund manager (**FM**) shall be appointed as the sole managing director on the board of the stichting. The management contract with the FM will be concluded by the CV, represented by the stichting acting in its capacity of managing partner of the CV.

The articles of the stichting will contain provisions dealing with the representation of the stichting in default of a management board or in situations where there is a conflict between the management board and the stichting and/or the CV. Normally, the articles would provide that in such situation the stichting is represented by one or more members of its supervisory board. If the articles would not provide for a supervisory board, this power may be granted to third parties.

The governance of the managing partner would be effected through the partnership agreement and its annexes. These would provide for, *inter alia*, general guidelines regarding the management of the UDF, investment programmes to be prepared by the managing partner and approved by the Advisory Committee and listing of decisions which are subject to the approval of the Advisory Committee. In general, the managing partner would be initiating and carrying out the policy of the UDF, however subject to general guidelines, the supervision and specific prior approval rights of the public and private investors, acting through the Advisory Committee.

The managing partner – represented by the FM – shall not act in the stichting's name but in the CV's name. Being the sole managing partner, the stichting will be the only party to the limited partnership agreement (the CV) which is liable towards third parties in respect of such acts e.g. obligations under agreements with project developers and/or regarding projects; but such agreements shall be performed for the risk and account of all parties to the CV in accordance with their respective participations in the CV.

As the (sole) board member of the stichting, on the basis of Section 2:9 of the Dutch Civil Code, the FM shall be under an obligation vis-à-vis the stichting to properly perform the duties assigned to him. The general rule is that the board member of a stichting is only first liable for the improper performance of his duties, if a serious fault can be attributed to him. Improper performance of duties may arise in the event of acts (or omissions) in contravention of the law or the articles of association or acts which could not have been performed by any board member with a reasonable approach (test of reasonability). The answer to the question of whether a board member properly fulfilled his duties and whether a serious fault can be attributed to him depends on the actual circumstances of the case.

III.7 The Advisory Committee

The Advisory Committee would consist of nominees appointed by the investors in the CV.

The CV may provide that the UDF shall act in accordance with general guidelines and investment programmes to be approved by the Advisory Committee and shall only make certain types of decisions after obtaining prior advice from the Advisory Committee. If desired, the Advisory Committee can also be given specific approval rights in respect of the decisions of the UDF. The competences of the Advisory Committee are fully dependent upon the agreements made between the partners. The agreement may prohibit the members of the Advisory Committee to take part in the CV's management.

The competences may include a right of advice or approval regarding inter alia:

- (i) general policies and guidelines of the CV;
- (ii) prospective sectors for investment by the CV;
- (iii) transactions of the CV
- (iv) conflict of interests; and
- (v) payment of indemnities.

As stated above, the co-determination rights with respect to the management of the CV exercisable by the limited partners may not be as such that they would qualify as control or a predominant influence over the acts of the CV. Depending on the tasks that will be given to the Advisory Committee, it is therefore recommended to avoid that the investor appoints a nominee in the Advisory Committee and acts as limited partner at the same time, in order to minimize the risk of exposing the limited partner to external liability. To this effect, the investor could incorporate a special purpose vehicle to act as limited partner.

III.8 The limited partners

A limited partner may wish to exit the UDF after its project financed by the UDF is completed. Likewise, a private investor may want to join the UDF as a co-financer of a new project eligible for JESSICA-financing. In principle, such changes in the composition of the partners can be effected through informal agreements and will not necessarily lead to the dissolution of the CV.

The limited partnership agreement may provide that the interests in the CV are freely transferable or may be transferred subject to certain restrictions. For tax transparency purposes, the transferability of partnership interests is usually restricted and made subject to the prior approval of all partners.

A change in the composition of the partners should also be reflected in a change in the composition of the Advisory Committee.

III.9 The holding vehicle

The Municipality of The Hague shall provide public funds as match funding. In order to ring fence the provided public funds from the municipal budget right after repayment of the funds, the Municipality of The Hague wishes to incorporate a holding vehicle. The Municipality of The Hague favours the implementation of an independent legal entity managed by a person recruited by the municipality. The Municipality of the Hague prefers that such holding vehicle shall qualify as a HF. A qualification as a HF would enable the Municipality of the Hague gain experience for the upcoming programming period. It would furthermore allow an earlier drawdown of the EDRF funds and an easier reallocation of the funds returned by a UDF to other UDFs

The qualification as a HF depends, inter alia, on whether it has been implemented in conformity with Article 44 of the General Regulation as described under II.2, meaning that awarding a contract in accordance with applicable public procurement law is always mandatory in cases in which the EIB or the EIF, or financial institutions shall not act as the HF.⁸

In case the holding vehicle qualifies as a HF, its capital would be provided by the Municipality of The Hague (both in its capacity of PA and municipality), consisting equally of ERDF and municipal funds. If it does not qualify as such, its capital would merely consist of public funds provided by the Municipality of The Hague in its capacity of municipality; but the UDF itself would still be eligible for EDRF financing on the basis that the holding vehicle provides co-financing.

If the holding qualifies as a HF, it would preferably include an investment committee (the **Investment Committee**), implemented through the funding agreement, which could be granted approval rights in respect of propositions made by the fund manager. The Investment Committee would consist of nominees appointed by the Municipality of The Hague.

The incorporation of the holding vehicle for the Municipality of The Hague does not hinder the possibility to tender the fund management of the UDFs. The legal entity may be incorporated before the tendering, but could be given the status of a holding vehicle, and possibly HF, afterwards. After the foundation obtains the status of a holding vehicle, the Municipality of The Hague can transfer its position in its capacity of municipality in the UDFs to the holding vehicle. In case the holding vehicle qualifies as a HF, it should do so in its capacity of PA as well.

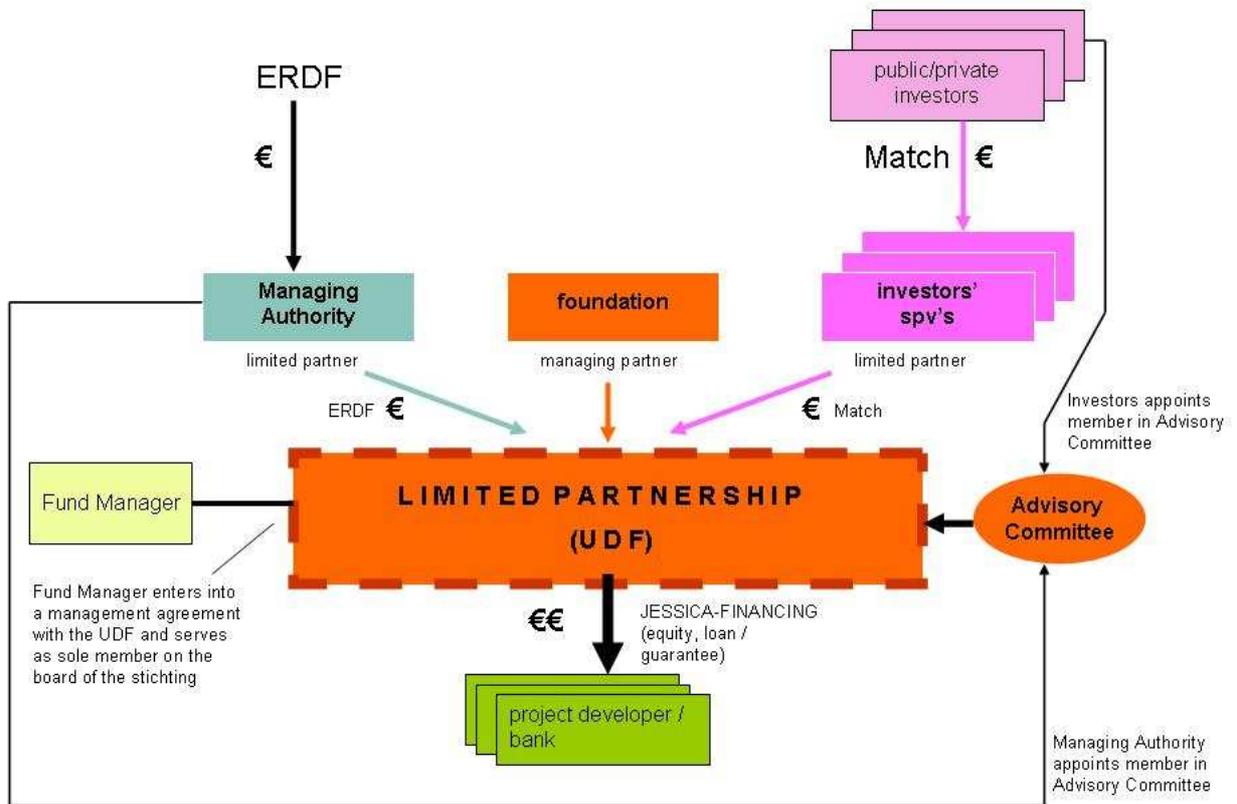
⁸ See also: guidance Note no. 1 on Financial Engineering in the 2007-2013 programming period (COCOF 07/0018/01; July 2007, section 2, p. 2.

Glossary

Advisory Committee	A committee tasked with advising the managing partner of a UDF in its decision-making regarding the allocation of funds to projects.
Cohesion Policy	An investment policy with the aim of strengthening the EU's economic, social and territorial cohesion, in order to promote its overall harmonious development
EC	European Commission
ERDF	European Regional Development Fund
ERDF Regulation	Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999
ESF	European Social Fund
ESF Regulation	Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999
EU	European Union
Fund Manager	The manager of the foundation acting as the managing partner of a UDF.
General Regulation	Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999
HF	Holding fund

Implementing Regulation	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 Social Fund and the Cohesion Fund and of Regulation (EC) 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund
Investment Committee	A committee which could be granted approval rights in respect of propositions made by the fund manager of the HF
JESSICA Funds	Structural funds disbursed in the form of equity, participations, guarantees and loans
MA	Managing Authority of OP West-Netherlands
PA	Programme Authority
Structural Funds	The European Regional Development Fund and the European Social Fund, both as defined under Council Regulation (EC) No 1083/2006 of 11 July 2006, and other funds which the Member States may agree from time to time in accordance with applicable EU legislation.
TFEU	Treaty on the Functioning of the European Union
UDF	Urban development fund

Annex 1: Structure chart of pilot UDF for Rotterdam



Annex 2: Structure chart of pilot UDFs for The Hague

