



## EC Guidance presentation Implementation options and selection

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# **Guidance note**

# **Implementation options**

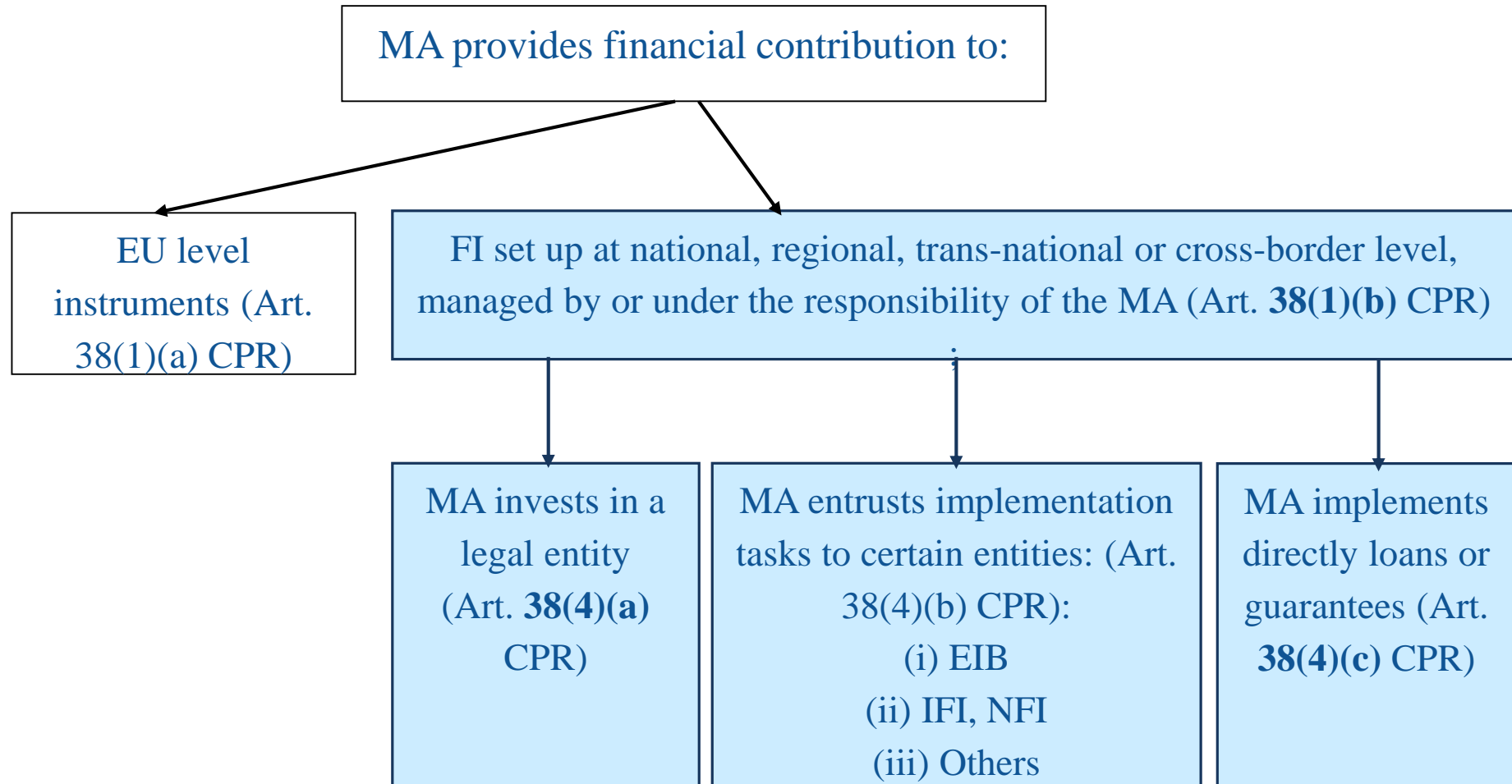
# **for Financial Instruments**

# **under Article 38(4) CPR**

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# GN Implementation options for FIs under Article 38(4) CPR



# GN Implementation options for FIs under Article 38(4) CPR

## Background and purpose:

Prepared in response to questions raised by Member States / Managing Authorities (MA) in relation to the applicable rules for each implementation option under Article 38(4) CPR.

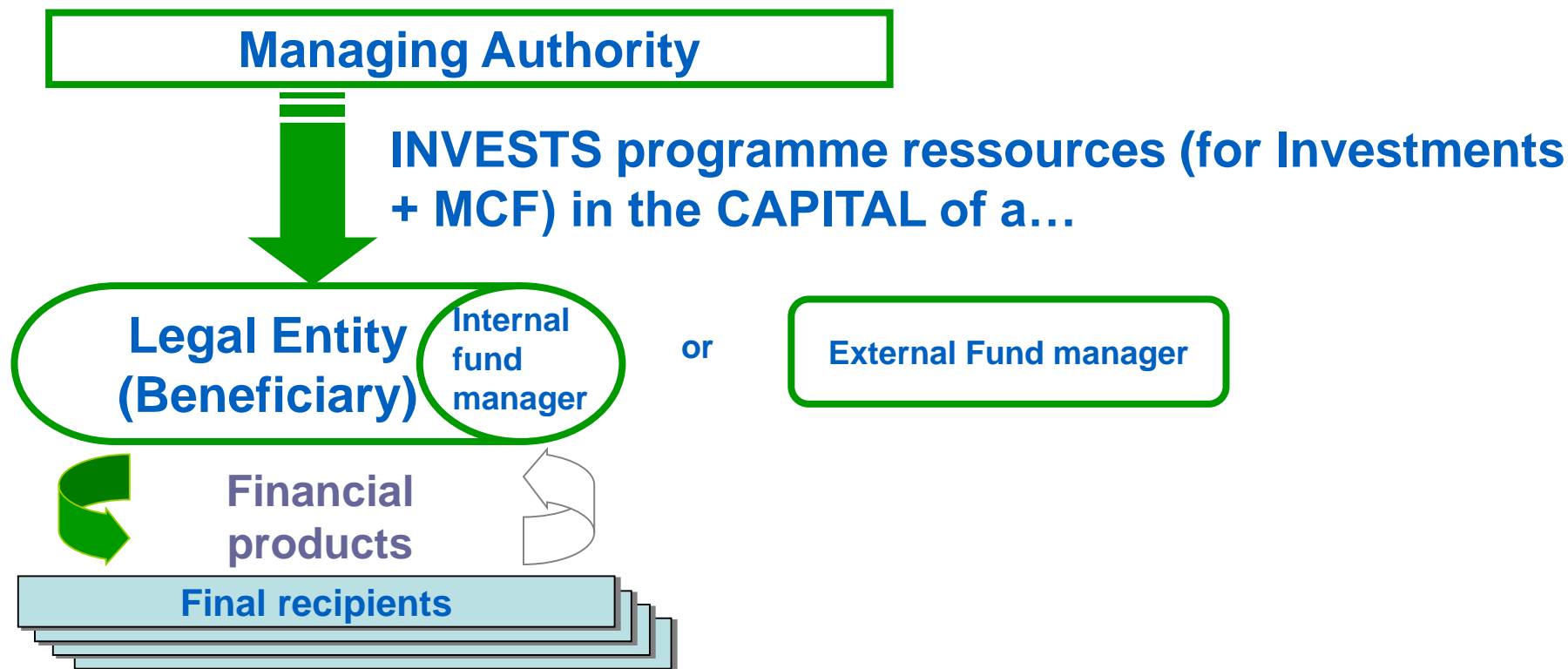
The purpose is:

- to clarify the main legal aspects of the implementation options, mainly for Articles 38(4)(a) and (c), and
- to draw the attention of the managing authorities on some relevant practical considerations for each implementation option

This guidance note covers the most important of the legal framework's key provisions related to the implementation modalities which are not covered by other guidance notes.

# GN Implementation options for FIs under Article 38(4) CPR

## Main considerations for implementation of FIs under Article 38(4)(a):



# GN Implementation options for FIs under Article 38(4) CPR

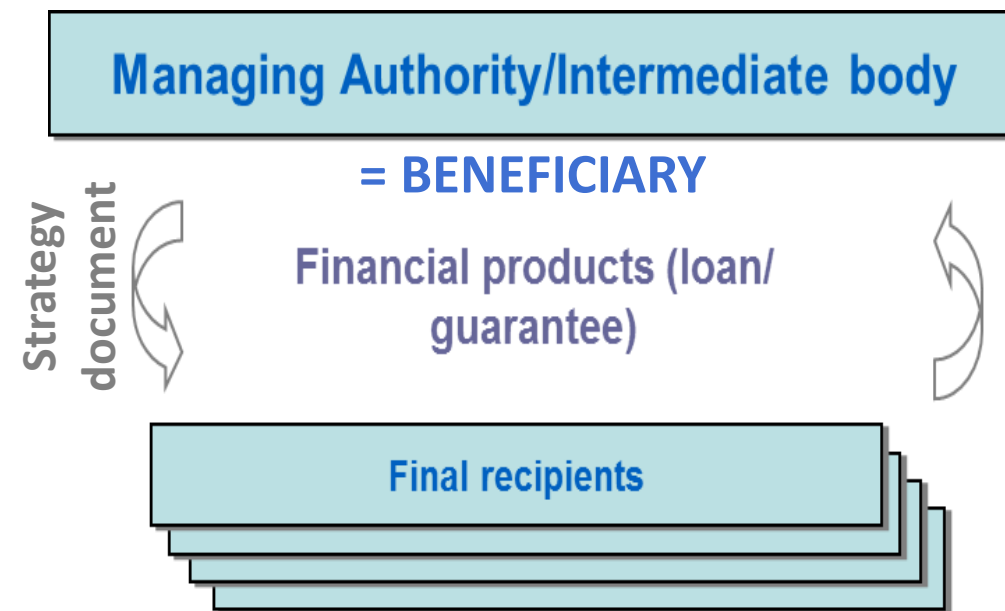
## Main considerations for implementation of FIs under Article 38(4)(a):

- The ESI Funds programme resources become part of the capital of the legal entity with all associated rights (e.g. voting rights, to receive dividends) and obligations (e.g. proportionate liability up to the amount of the subscribed capital in case of losses of the legal entity)
- The legal entity, regardless of the governance arrangements, is a beneficiary as defined in Article 2(10) CPR
- The legal entity must be dedicated to implementing FIs consistent with the objectives of the ESI Funds
- The ESI Funds programme resources must be fully used to deliver support to final recipients and limited to the amounts necessary to implement new investments – should not serve to simply recapitalise existing legal entities

# GN Implementation options for FIs under Article 38(4) CPR

## Main considerations for implementation of FIs under Article 38(4)(c):

- A new introduced option for implementation of financial instrument providing loans or guarantees
- The MA/Intermediate Body (IB) should have the adequate market and financial knowledge and the legal basis to be able to run a FI
- The selection of final recipients should be transparent and justified on objective grounds and shall not give rise to a conflict of interest
- The strategy document has to be examined by the Monitoring Committee





# GN Implementation options for FIs under Article 38(4) CPR

## Main considerations for implementation of FIs under Article 38(4)(c):

- Payment applications are based on the payments disbursed to the final recipients (or to the benefit of final recipients) and on the resources committed for guarantee contracts of the loans disbursed
- The costs created in the MA/IB may be covered from the ESI Funds programme technical assistance envelope or resources paid back
- The financial instrument is set-up in the accounts of the MA

## GN Implementation options for FIs under Article 38(4) CPR

### Some considerations for all implementation options, including Article 38(4)(b):

- If under Article 38(4)(a), the invested ESI Funds programme resources are part of the capital of the legal entity (an equity account "on balance sheet"), under Article 38(4)(b) the ESI Funds will constitute an account "off balance sheet" for the body implementing the FI;
- The managing authorities must transpose the tax requirements (Article 38(4)2nd paragraph) in their contracts with the selected financial intermediaries;
- The measures envisaged for the use of resources after the end of the eligibility period should be also clearly explained in the funding agreements or in the strategy documents.

**Thank you for your attention**

**Q&A**



# **Selection of financial intermediaries under public procurement rules:**

**Possibilities of direct award under Article 12 of  
Directive 2014/24/EU**



# New legal framework

- Directive 2014/23/EU - Concessions
- **Directive 2014/24/EU - Public sector**
- Directive 2014/25/EU - Utilities
- Transposition deadline: April 2016  
(except e-procurement: October 2018).



# **Two scenarios** **(now Article 12 Directive 2014/24)** *"Public-public exemptions":*

- "In house exemption"
- "Inter-administrative cooperation exemption"



# **Public-public exemptions as developed by Case law**

Still applicable for those contracts which have been directly awarded to in-house entities:

- until Directive 2014/24/EU is transposed
- or
- until 18 April 2016, whichever is earlier.

# 1. 'In-house' exemption

- first developed as case law
- codified and specified in 2014 Directives
- Key requirements:
  - **no undue benefit of private interest;**
  - **no distortion of competition**
- 3 key conditions, to be cumulatively fulfilled:
  - **control**
  - **activity**
  - **ownership**





# In-house conditions as developed by Case law

1. **Ownership**: 100 % public ownership of the entity
2. **Control**: contracting authority (CA) must exercise over the entity concerned a control which is **similar** to that over its own departments; individual or joint.  
*'similar control' - control enabling the CA to influence that entity's strategic objectives and significant decisions, not necessarily daily operational control. It is sufficient that it has the possibility to exercise it, even if it does not in practice.*

# **In-house conditions as developed by Case law**

**3. Activity:** the entity must carry out the **essential part** of its activities for the controlling contracting authority or authorities, i.e. in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

- "essential part" is not quantified in ECJ practice; Court rejected analogy with provisions of Utilities Directive in which a limit of 80% was applicable



# In-house conditions under Directive 2014/24/EU

- 1. Ownership: no direct private** capital participation in the controlled legal person with the **exception** of **non-controlling and non-blocking** forms of private capital participation **required by** national **legislative** provisions, in conformity with the Treaties, which do **not** exert a **decisive influence** on the controlled legal person.
  - thus, private shareholding now possible



# **In-house conditions under Directive 2014/24/EU**

**2. Control:** CA exercises over the legal person a control similar to that over its own departments (strategic, on significant decisions)

☞ **same requirement as stemming from case law**



# **In-house conditions under Directive 2014/24/EU**

**3. Activity:** controlled legal person must carry out **more than 80 %** of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance

☞ **Reasoning similar to case law, but 'essential part' set as "more than 80%"**



# In-house conditions under Directive 2014/24/EU

**Control** may also be **joint** if:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating CAs.

Representatives may represent several or all CAs;

(ii) CAs are able to **jointly exert decisive influence** over the **strategic** objectives and **significant** decisions of the controlled legal person; and

(iii) the controlled legal person does **not** pursue any **interests** which are **contrary** to those of the controlling CAs

## 2. 'Inter-administrative' cooperation exemption

- as with "in-house" the exemption was developed under case law and now it has been codified in the Directives of 2014, but the conditions changed more significantly compared to case law
- Key requirements:
  - **no undue benefit of private interest;**
  - **no distortion of competition**
- Focus on **cooperation**, not control



# Inter-adm. cooperation exemption as developed by case law

1. **cooperation** concerns **exclusively public authorities**, without **private participation**;
2. **equal treatment** is respected; no **private provider** of services placed in a **position of advantage** and
3. **implementation** of cooperation **governed solely by considerations and requirements** relating to the pursuit of **objectives in the public interest** which the authorities **have to** perform





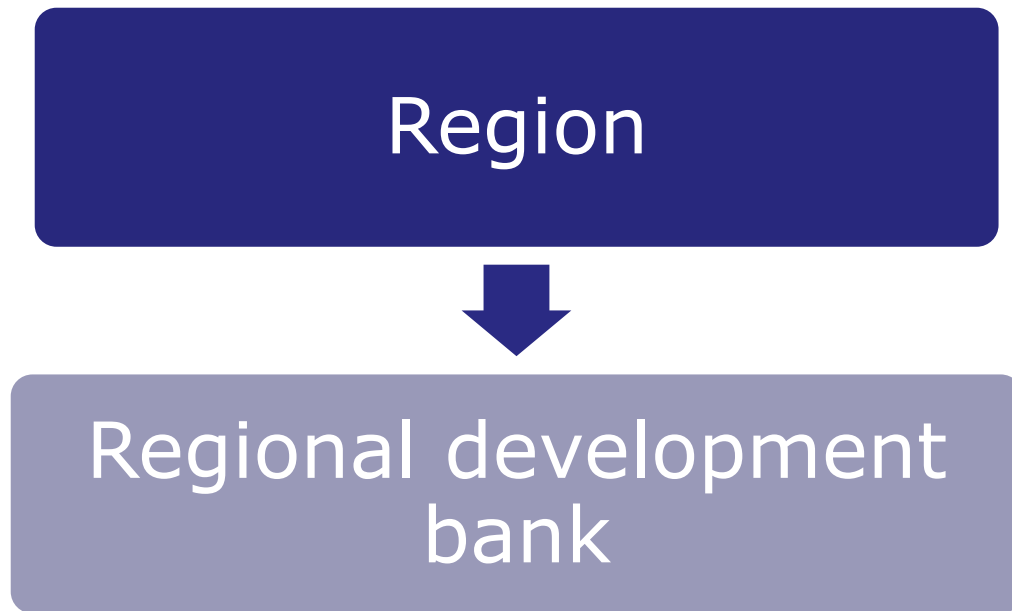
# Inter-adm. cooperation exemption under Directive 2014/24

1. the contract establishes or implements a **cooperation** between the participating **contracting authorities** with the aim of ensuring that public services they **have to perform** are provided with a view to achieving **objectives** they have **in common**
2. the **implementation** of that cooperation is governed solely by **considerations** relating to the **public interest**
3. the participating contracting authorities perform on the **open market less than 20 %** of the **activities** concerned by the cooperation.

# How to calculate the percentages (80%, 20%)?

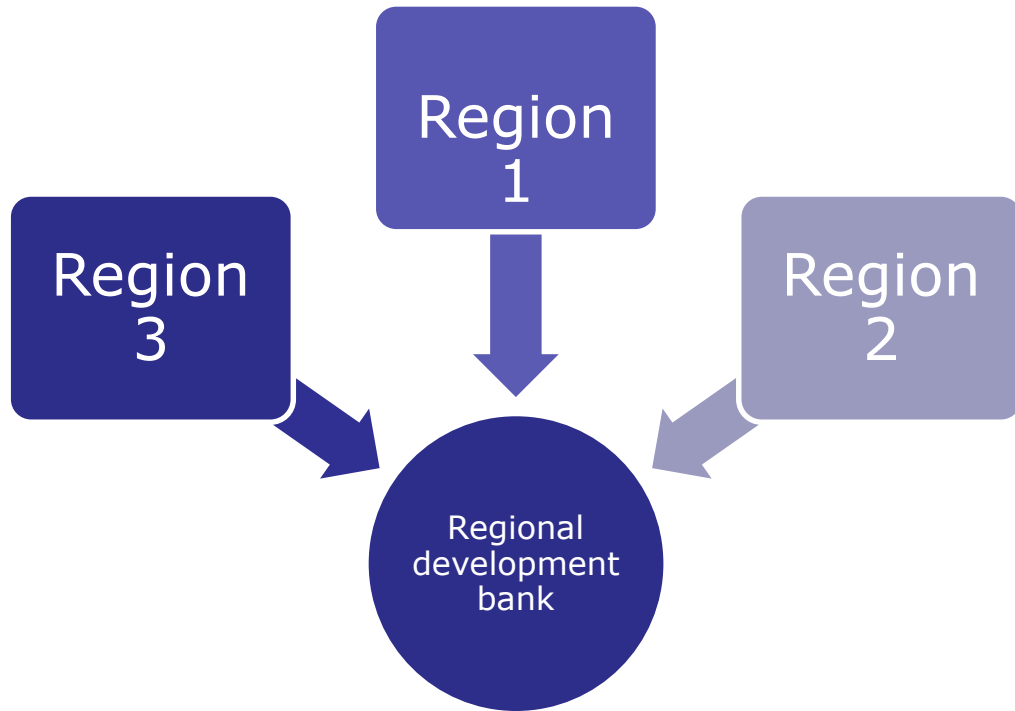
- the **average total turnover**, or an appropriate alternative **activity-based measure** (e.g. costs incurred with respect to services, supplies and works) for the **three years** preceding the contract award
- however, if this is not available for the preceding three years or no longer relevant (because the relevant legal person or contracting authority **did not exist** yet) or due to a **reorganisation** of its activities; ok to show the **measurement of activity** is **credible**, (**business projections** etc.)

## Example 1 – in house



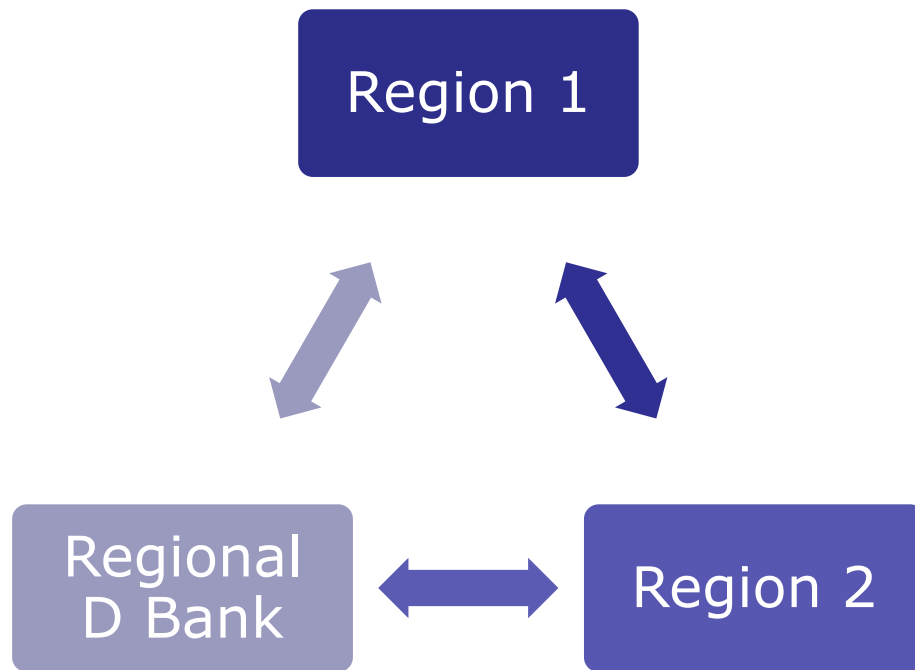
- Region fully owns and effectively controls a regional development bank
- Bank's task is to support economic development in the region.
- the bank has more than 80% activity carried out for the Region
- Region entrusts it with tasks of implementation of a financial instrument

## Example 2 – joint-'in house'



- Regions jointly own and effectively control a regional development bank
- Bank's task is to support economic development in the region.
- the bank has more than 80% activity carried out for the Regions
- Regions entrust it with tasks of implementation of a financial instrument

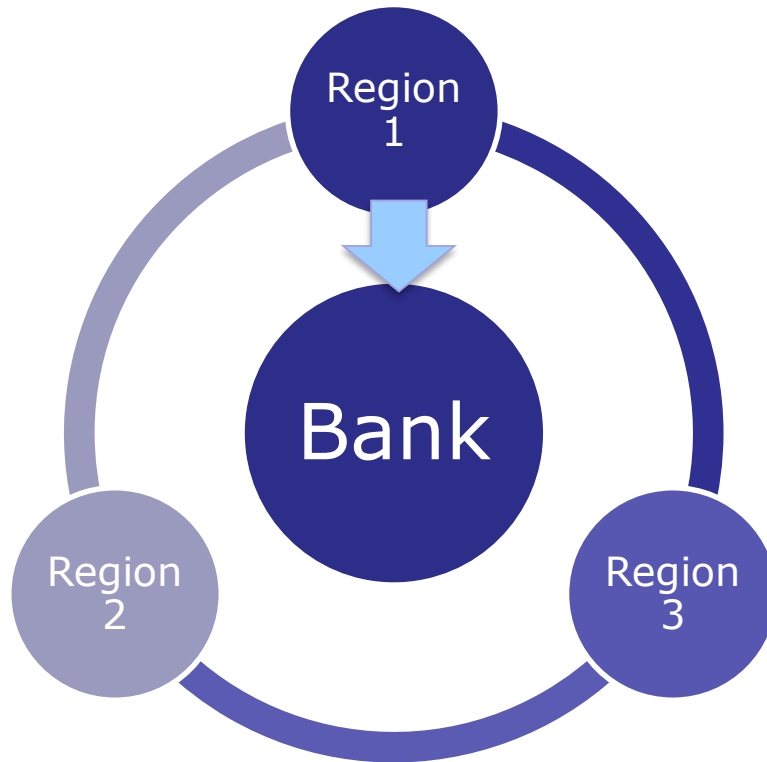
## Example 3 – inter-adm. cooperation



- Region 1, Region 2 and the bank (which is a CA\*) have a cooperation agreement governed solely by considerations relating to the public interest
- The Regions participate, for example by providing data and analyses
- bank implements the FI
- All of them together do not perform over 20% of the activity on the open market

*\* a "body governed by public law", if it "meets tasks in the general interest, not having industrial or commercial character"*

# Example 4– combined in-house and inter-adm. cooperation



- Region 1, Region 2 and Region 3 have a cooperation agreement as described in example 3
- Region 1 has a bank as an in-house as described in example 1
- Region 1 brings into the cooperation the service of FI management through its in-house bank



**Thank you!**



# **Selection of financial intermediaries under public procurement rules:**

## **Procedural choices and implications**



# Thresholds 2016-2017

- EUR 5 225 000 for public works contracts;
- EUR 135 000 for public supply and service contracts/design contests (central government authorities);
- EUR 209 000 for public supply and service contracts/design contests (sub-central contracting authorities)
- EUR 750 000 for public service contracts for social and other specific services.

# Procedures available under the Directive

## *Always possible:*

- **Open procedure**
- **Restricted**

## *Conditional access:*

- **Competitive procedure with negotiations**
- **Competitive dialogue**
- **Innovation Partnership**

## *Very limited access:*

- **Negotiated procedure without prior publication**

# Procedures most relevant to the selection of FIs

## 1. Open procedure

- 'Default' public procurement procedure
- Contracting authority (CA) publishes **call for tenders**
- **Any economic operator** may apply within deadline
- CA examines fulfilment of **exclusion** and **selection** criteria to select **tenderers**
- CA awards the contract to the **best** tender on the basis of the **award criteria**

# Procedures most relevant to the selection of FIs

## 1. Open procedure

- **Exclusion** grounds (negatives): some are **mandatory** (criminal organisation, corruption, fraud, terrorism, money laundering), some are **optional** (bankruptcy, grave professional misconduct, unresolved Conflict of interest...)
- **Selection** criteria (positives):
  - (a) suitability to pursue the **professional** activity – in the context of FIs, – a bank or a financial institution

# Procedures most relevant to the selection of FIs

## 1. Open procedure

- (b) **economic** and **financial** standing – high enough turnover (max x2 the value), a good ratio of assets and liabilities etc;
- (c) **technical** and **professional** ability - human and technical resources and experience to perform the contract to an appropriate quality standard

In other words, you want to select a bank/financial institution which is really capable of performing

# Procedures most relevant to the selection of FIs

## 1. Open procedure

- **Award** criteria – not assessing economic operator, focus solely on the proposed tender
- Now only one criterion (most economically advantageous tender), but it can be identified on the basis of the price or cost on a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio.
- linked to the subject-matter; can include quality, organisation, qualification and experience of staff (if impact on the contract) etc.



# Procedures most relevant to the selection of FIs

## **IMPORTANT!**

In all of the procedures, as well as for direct award,  
**additional** set of requirements is set out in **Commission  
Delegated Regulation (EU) No 480/2014 – CDR** in Art. 7

It covers the criteria broadly corresponding to selection and  
award criteria which must feature in the Terms of Reference,  
**in addition** to any other criteria

# **Procedures most relevant to the selection of FIs**

## **2. Restricted procedure**

- difference ( $\neq$  open): CA issues a call for competition and the economic operators request to participate (30 days); the number may be limited (not less than 5); then the selected ones send tenders (another 30 days).
- Useful when a large number of participants is expected





# Other available procedures under the directives

## 3 and 4 - Competitive procedure with negotiation, or Competitive dialogue

- May be used in a number of cases (innovation or specific needs etc.), but the likely one applicable here is when the CA received, in response to an open or a restricted procedure, only **irregular** (not comply with proc. documents, late, collusion or corruption, or abnormally low) or **unacceptable** (not have the required qualifications, or price exceeds the budget) are submitted – no need to publish if with all previously participating, not excluded/selection criteria.

# **Other available procedures under the directives**

## **5 – Innovation partnership (New)**

- Aims at development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works
- Combines a service and supply contract
- Not likely applicable because management of financial instruments typically does not involve development of innovative solutions



# Other available procedures under the directives

**6 - negotiated procedure without prior publication-** used exceptionally in certain cases, the only applicable here is when the CA received, in response to an open or a restricted procedure, **no** (or **no suitable**) tenders or requests to participate

**Not suitable tender:** irrelevant, manifestly incapable meeting the CA's needs and requirements

**Not suitable request:** economic operator under exclusion or does not fulfil selection criteria

# Time limits

- Open – normal: 35 days / 30 (if electronic submission) or 40 if no e-documents
- Possibility to use accelerated procedure in open and restricted in case of a "state of urgency duly substantiated" – not likely applicable
- Open: 15 days; Restricted: 15 days for requests, 10 for tenders.

# Framework agreements (FWA)

- agreement between one or more CAs and one or more economic operators, with terms governing contracts to be awarded during a period (FWA 4 years, contracts longer/shorter)
- General rule: specific contracts may not entail substantial modifications to the terms laid down in that framework agreement
- Single or multiple FWAs exist.

# Modification of contracts

- has been made clearer and simpler in order to remove any doubt and shed light on this corruption-prone phase.
- General rule is still: modification needs a new PP procedure. But exceptions:
  - 1)** "De minimis" or "safe harbour": If the value does not exceed the Directive thresholds **and** less than 10 % of the value of the original contract (15 % for works) – for successive, net cumulative value); not alter overall nature

# Modification of contracts

**2)** If **specified** in the original documents, by clear and unequivocal review clauses, regardless of value, but not alter overall nature;

**3) unforeseen** (with diligence) **circumstances**, not changing nature (up to 50% of original – for each modification).

**4)** for **additional** works, products or **services** which have become necessary; change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience and costs (up to 50% of original – for each modification).

# Modification of contracts

**5) new contractor** replaces the old in the cases of foreseen change, legal succession or the CA assumes the obligations of the operator to the subcontractors

**6)** where the modifications, irrespective of their value, are not substantial

- Modification is substantial? – case by case, but always if:
  - would allow other/additional participants/other tenders
  - changes economic balance in favour of contractor
  - extends the scope of contract/FA considerably
  - if new contractor outside of case under 5).