



Selection of bodies implementing financial instruments under ESIF

Selection of bodies implementing financial instruments on the basis of exceptions foreseen by the Directive 2014/24/EU and the TFEU

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Selection of financial intermediaries under public procurement rules:

**Possibilities of direct award
under Article 12 of Directive 2014/24/EU
(1/2)**

New legal framework

- Directive 2014/23/EC - Concessions
- **Dir. 2014/24/EC - Public procurement ('classic')**
- Directive 2014/25/EC - Utilities

- Transposition deadline: **18 April 2016**
 - ☞ (except e-procurement: October 2018).

Key objectives of the reform

- **Simplify** public procurement procedures and make them more flexible: 'Toolbox' approach
- Greater focus on **quality** of outcomes
- Public procurement as a more **strategic** tool (green, social, innovative...)
- Easier access for **SMEs**
- Going **digital**: e-Procurement
- Greater focus on **integrity**
- Improved **governance** (new reporting obligations)



Direct award under 'Public-Public' exemptions

Two scenarios:

- **'In house'** exemption
- **'Inter-administrative cooperation'** exemption
- Case law 'incorporated' in legislation
- Case law still applicable to awards before transposition deadline (or transposition if earlier)

I. 'In-house' exemption

- first developed as case law
- codified and specified in 2014 Directives
- Rationale/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) exercises 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" not specified by ECJ;
- Court rejected analogy with provisions of Utilities Directive (80%)

'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.

👉 **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 contracting authorities.

II. 'Inter-administrative cooperation' exemption

- Also case law development
- Incorporated in 2014 Directives but conditions changed more significantly than for 'In-house'
- Rationale/Key requirements:
 - **no undue benefit of private interest;**
 - **no distortion of competition**
- Focus on **cooperation** rather than on control

'Inter-adm. Cooperation' conditions as developed by case law

- 1. Cooperation** concerns **exclusively public authorities**, without **private participation**;
- 2. Equal treatment** 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' conditions under Directive 2014/24

- 1. 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. Implementation** of cooperation governed solely by **considerations** relating to the **public interest**
- 3. Participating contracting authorities** perform on the **open market less than 20 %** of the **activities** concerned by the cooperation.

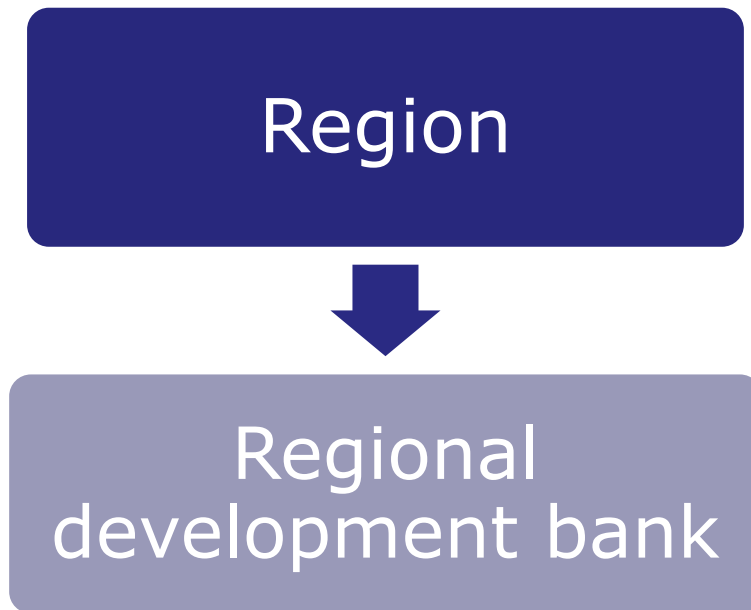
How to calculate the percentages (80%, 20%)?

- **Average total turnover**, or appropriate alternative **activity-based measure** (e.g. costs incurred with respect to services, supplies and works) for the **three years** preceding the contract award
- **If** either **not available** or **irrelevant** for preceding 3 years (e.g. because relevant legal person or contracting authority **did not exist** yet or because **of reorganisation**):

then

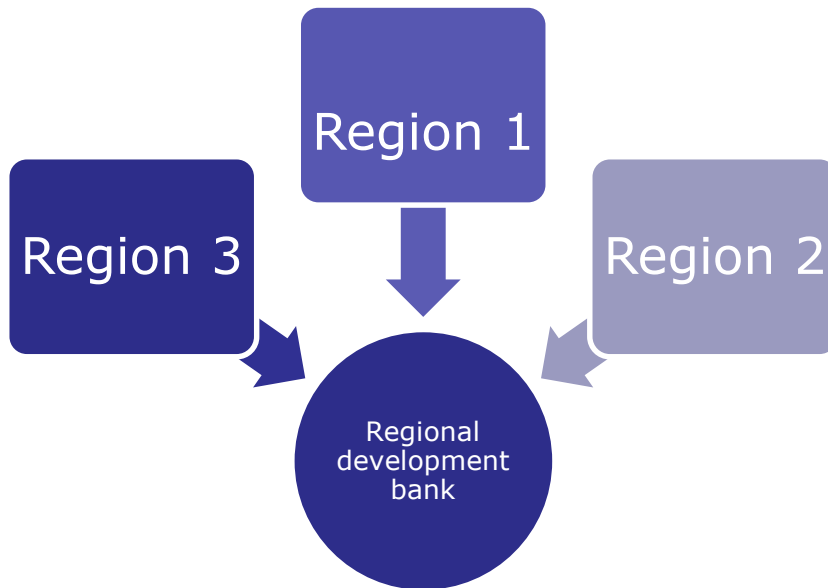
- Sufficient to show that the **measurement of activity** is **credible**, (by way of **business projections** etc.)

Example 1 – 'In-house'



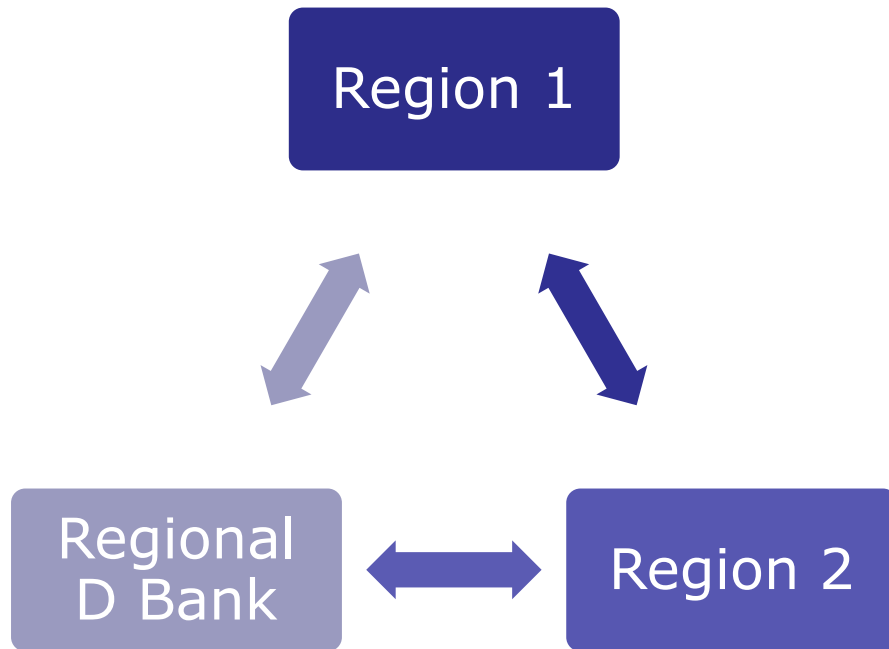
- Region fully owns and effectively controls a regional development bank
- Bank's task is to support economic development in the region.
- Bank has > 80% activity carried out for Region
- Region entrusts it with tasks of implementation of a financial instrument ('FI')

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.
- Bank has more than 80% activity carried out for the Regions
- Regions entrust it with tasks of implementation of a FI

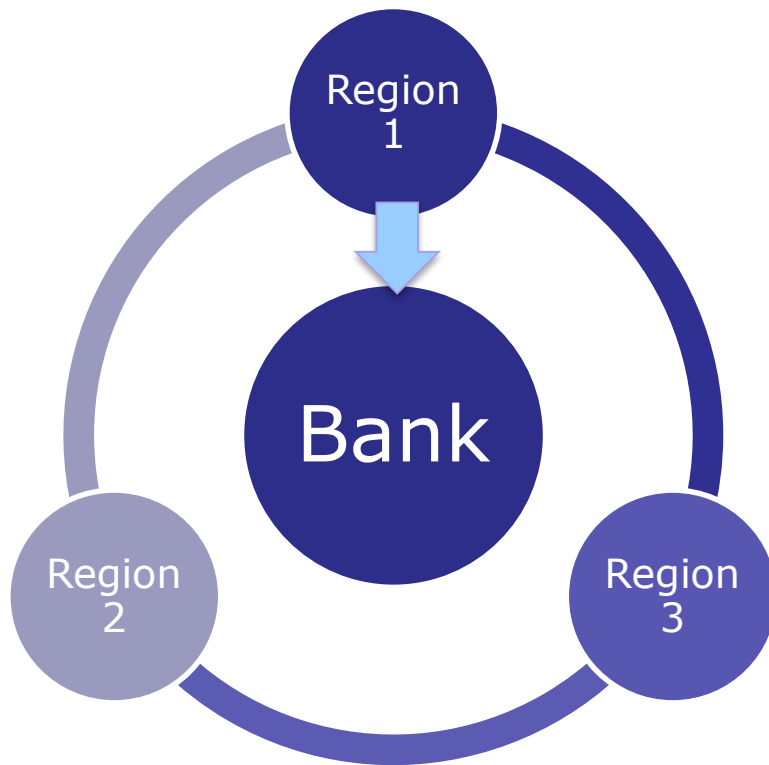
Example 3 – 'Inter-adm. coop.'



- 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' + 'Inter-adm. Coop.'



- 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!

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http://ec.europa.eu/growth/single-market/public-procurement_en



financial instruments revolving capacity building
 added value **ERDF** funding agreement **ESF** EU guidance
 governance ex-ante assessment
 technical support seminars leverage financial intermediaries microfinance
 co-financing case studies
investments ESIF fi-compass final recipients
 business plan **Thank you** thematic objectives
 advisory services **EaSI** equity
 guarantees banks loans life cycle combination of support
EAFRD private investors conferences factsheets
 fund of funds **EMFF** investment strategy **CF**
 managing authorities manuals

