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Creating Change Together

# **SIGMA**

# **Public Procurement**

# **Training Manual**

## **Update 2015**

## **Module A**

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**SECTION 1 - INTRODUCTION**

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**1.5. LEGAL INFORMATION HELPFUL TO HAVE TO HAND**

In [the 2014 Directive](#), you should consider in particular [recital 1](#) and [article 18](#).

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**[Additional information](#)**

**[SIGMA Public Procurement Briefs:](#)**

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[No. 25, Establishing Procurement Review Bodies](#)

[No. 30, 2014 EU Directives: Public Sector and Utilities Procurement](#)

**SECTION 2 - NARRATIVE**

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**2.2.3.1 The main [directives](#)**

There have been a number of [directives](#).

[From 2004 there was a single directive that applied to the public sector, which replaced three separate directives covering the award of works, supplies and services contracts in the public sector. A further directive applied to the utilities sector:](#)

- The public sector [directive was Directive 2004/18/EC](#).
- The utilities sector [directive was Directive 2004/17/EC](#).

- Deleted: In the public sector, there have been three main Directives covering works, supplies and services, which have been amended many times. These Directives did not include contracts awarded by entities operating in the utility sectors of water, energy, transport or telecommunications, which have been covered since 1990 by a different series of Directives specifically for the utilities sector.¶
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[Public procurement is one of the market-based instruments to be used to deliver the Europe 2020 Strategy. Therefore in 2014 a package of three new directives on procurement were adopted. The three new directives focus on ensuring transparency, increasing flexibility, and encouraging the involvement of small and medium-sized enterprises in public procurement. Additional provisions deal specifically with environmental and social issues, innovation,](#)

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[cross-border trade, e-procurement, in-house transactions, changes of contracts, governance and professionalisation of public procurement. The three new directives are:](#)

- [the new Public Procurement Directive 2014/24/EU, referred to in this publication as the “2014 Directive”, to replace Directive 2004/18/EC](#)
- [the new Utilities Directive 2014/25/EU, referred to in this publication as the “2014 Utilities Directive”, to replace Directive 2004/17/EC](#)
- [the Concessions Directive 2014/23/EU; referred to in this publication as the “2014 Concessions Directive”, which creates a new regulated regime for the award of concession contracts](#)

These [directives cover predominantly](#) the procedural rules.

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[Both of](#) the above two Remedies Directives [significantly amended Directive 2007/66/EC. The 2014 Concessions Directive made some minor amendments to the Remedies Directives. See Module F1 for further details.](#)

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- [Regulation 842/2011 establishes](#) standard forms for the publication of notices in the [field](#) of public procurement procedures, [repealing Regulation 1564/2005. New legislation on the standard forms to reflect the 2014 Directives will be adopted.](#)
- [Directive 2014/55/EU establishes electronic invoicing in public procurement.](#)

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### 2.2.3.3 Structure of the [directives](#)

▽One of the improvements brought about by the consolidation of the various [directives](#) in 2004 .....the sequential steps of the procurement process itself. ▽ [The 2014 Directive generally follows this structure.](#) This is also the general approach taken in this training programme.

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In this sense, “*value-for-money*” broadly equates in EU terms, the award [criteria of the best price-quality ratio or cost, using a cost effectiveness approach which falls within the criterion](#)

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[of the “most economically advantageous tender” as redefined in the 2014 Directive. These criteria allow.....](#)

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**SECTION 4 THE LAW**

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*Insert new paragraphs at the start of SECTION 4 - THE LAW*

**Important Note: This SECTION 4 - THE LAW has not been updated to reflect the changes in the 2014 Directive. See below for general information on where relevant provisions can be found in the 2014 Directive.**

**2014 Directive**

In this context it is helpful to look at both the following recitals and articles of the 2014 Directive:

Recital 1 - Context

Article 18 - Principles of procurement



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## SECTION 1 - INTRODUCTION

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*Insert at end of SECTION 1 - INTRODUCTION*

### Additional information

#### SIGMA Public Procurement Briefs:

[No. 25, Establishing Procurement Review Bodies](#)

[No. 26, Organising Central Public Procurement Functions](#)

[No. 30, 2014 EU Directives: Public Sector and Utilities Procurement](#)

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[See the SIGMA publication \*Selected Judgements of the Court of Justice of the European Union on Public Procurement \(2006-2014\)\* for further information on the way in which the ECJ operates.](#)



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**SECTION 1 - INTRODUCTION**

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**1.5. LEGAL INFORMATION HELPFUL TO HAVE AT HAND**

*Insert at end of SECTION 1 - INTRODUCTION*

**Additional information:**

[SIGMA Public Procurement Briefs:](#)

[30 2014 EU Directives: Public Sector and Utilities Procurement](#)

**SECTION 2 - NARRATIVE**

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**2.2.5 The 2004 Consolidated Directives**

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▼ They were adopted against the background of the developments of the Treaty itself, which are also reflected in the new Directives. ▼

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▼ The most obvious change in the public sector was.....the new public sector Directive was simplified and streamlined▼, and it showed a greater degree of procedural logic.

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**2.2.6 The 2014 Directives**

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[In 2014 a package of three new directives on public procurement were adopted with the stated aim of simplification and “flexibilisation” of public procurement, easier access of SMEs to public procurement contracts, new governance rules and legal certainty for the use of secondary procurement criteria, such as innovative, ecological, “fair trade” and social aspects.](#)

[The package consists of:](#)

- [the new Public Procurement Directive 2014/24/EU, referred to in this publication as the “2014 Directive”, to replace Directive 2004/18/EC](#)
- [the new Utilities Directive 2014/25/EU, referred to in this publication as the “2014 Utilities Directive”, to replace Directive 2004/17/EC](#)
- [the Concessions Directive 2014/23/EU, referred to in this publication as the “2014 Concessions Directive”, which introduces the first overall set of regulatory rules on concessions](#)

[The key changes in the 2014 Directive include:](#)

- [more procedures involving negotiation and easier access to these procedures](#)
- [new procedures, such as innovation partnerships, and revised procedures, such as competitive dialogue, DPS, and framework agreements](#)
- [new rules on e-catalogues](#)
- [the abolition of the distinction between Part A and Part B services and the introduction of a new “light” regime for certain services](#)
- [new provisions for co-operation in the public sector \(e.g. central purchasing, public-public co-operation and other “in-house” models\)](#)
- [new exclusions from the scope of the directives, such as legal and notary public services, international financial aid](#)
- [official lists of approved economic operators and certification schemes](#)
- [European Single Procurement Document \(ESPD\) - an updated self-declaration as a preliminary evidence in replacement of certificates issued by public authorities](#)
- [online repository of certificates \(e-Certis\) to facilitate cross-border tendering](#)
- [improvements to facilitate SME participation \(including the possibility of direct payment for subcontractors, and tendering in lots\)](#)
- [the most economically advantageous tender, as redefined in the 2014 Directive as the only award criterion, and new provisions on life-cycle costing](#)
- [new rules on the use of secondary aspects of procurement, such as innovative, environmental, social and “fair trade” criteria](#)
- [general strengthening of social aspects \(applicable obligations in the field of environmental, social and labour law, for instance in the exclusion grounds, subcontracting, and identification of abnormally low tenders\)](#)
- [new regulations on modification of contracts during their term and on termination of contracts](#)

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[The 2014 Utilities Directive resembles the new 2014 Public Procurement Directive much more closely than their respective predecessors, due to the more flexible procedures and award principles in the public sector.](#)

[The 2014 Concessions Directive creates a new regulated regime for the award of concession contracts.](#)

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### 2.2.7 Recent developments

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∇There have been two recent developments:

**Directive 2007/66/EC** ..... The deadline for implementation was 20 December 2009. ∇ [The 2014 Concessions Directive makes some minor amendments to the Remedies Directives.](#)

### 2.3.1 The GPA

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**Important note:** [On 30 March 2012 the GPA Parties reached an agreement and adopted a Protocol amending the 1994 GPA. The revised WTO GPA entered into force on 6 April 2014. The revised GPA opens up the public procurement markets of each of the Parties. The narrative below has not been updated, referring to the 1994 GPA and not to the revised GPA that entered into force on 6 April 2014.](#)

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### 2.3.2 The UNCITRAL Model Law

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**Important note:** [On 1 July 2011 the Model Law on Public Procurement was adopted by UNCITRAL. This law replaces the 1994 Model Law on the Procurement of Goods,](#)

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[Construction and Services. The narrative below has not been updated and refers to the 1994 Model Law, not to the 2011 Model Law.](#)



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## SECTION 1 - INTRODUCTION

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### 1.5. LEGAL INFORMATION HELPFUL TO HAVE AT HAND

In addition to looking at the economics of public procurement, you will need to be aware of the following recitals and articles in the 2014 Directive:

- Article 34 concerns the use of electronic means of communication for central purchasing bodies.
- Article 37 sets out the clarification on the responsibility between central purchasing bodies and contracting authorities.
- Article 38 permits occasional joint procurement of two or more contracting authorities.
- Article 39 confirms that contracting authorities may use purchasing activities offered by central purchasing bodies established in another Member State.
- Recital 59 confirms that aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access for small and medium-sized enterprises.
- Article 46, Recitals 78 and 79 concern an expanded provision on lots, with the aim of encouraging contracting authorities to divide contracts into lots and thus increase the participation of SMEs.

#### Additional information

##### SIGMA Public Procurement Briefs:

No. 26, Organising Central Public Procurement Functions

No. 29, Detecting Common Errors in Public Procurement

No. 30, 2014 EU Directives: Public Sector and Utilities Procurement

## SECTION 2D - SPLITTING CONTRACTS INTO LOTS

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### 1 OVERVIEW

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▼We will also consider how to split contracts into lots while minimising the risk of collusion between economic operators.▼

[The 2014 Directive encourages contracting authorities to divide contracts into lots as one of the means of facilitating SME participation in public procurement. Article 46\(1\) obliges contracting authorities to provide an indication of the main reasons for their decision not to subdivide into lots. According to article 46\(2\), contracting authorities must indicate, in either the contract notice or the invitation to confirm interest, whether tenders may be submitted for one, several, or all of the lots. Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. See Modules E3 and E4 for further information on the provisions in the 2014 Directive on splitting contracts into lots.](#)