

VINGE

Competition and Green Public Procurement

A study under Directive 2014/24

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Green public procurement (GPP)

“a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured”

Commission Communication, *Public procurement for a better environment*,
COM (2008)400



Rationale behind the most recent update of the directive

“Public procurement plays a key role in the [Europe 2020 strategy for smart, sustainable and inclusive growth] *as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.*”*

GPP perceived as an obstacle to competition by some MS**

Competition as an obstacle to GPP?

* Recital 2, Directive 2014/24

** Report from the Commission on the Implementation and best practices of national procurement policies in the Internal Market, 20 May 2021, COM(2021) 245 final

The principle of competition

Article 18(1) of Directive 2014/24:

“The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of **artificially narrowing competition**.

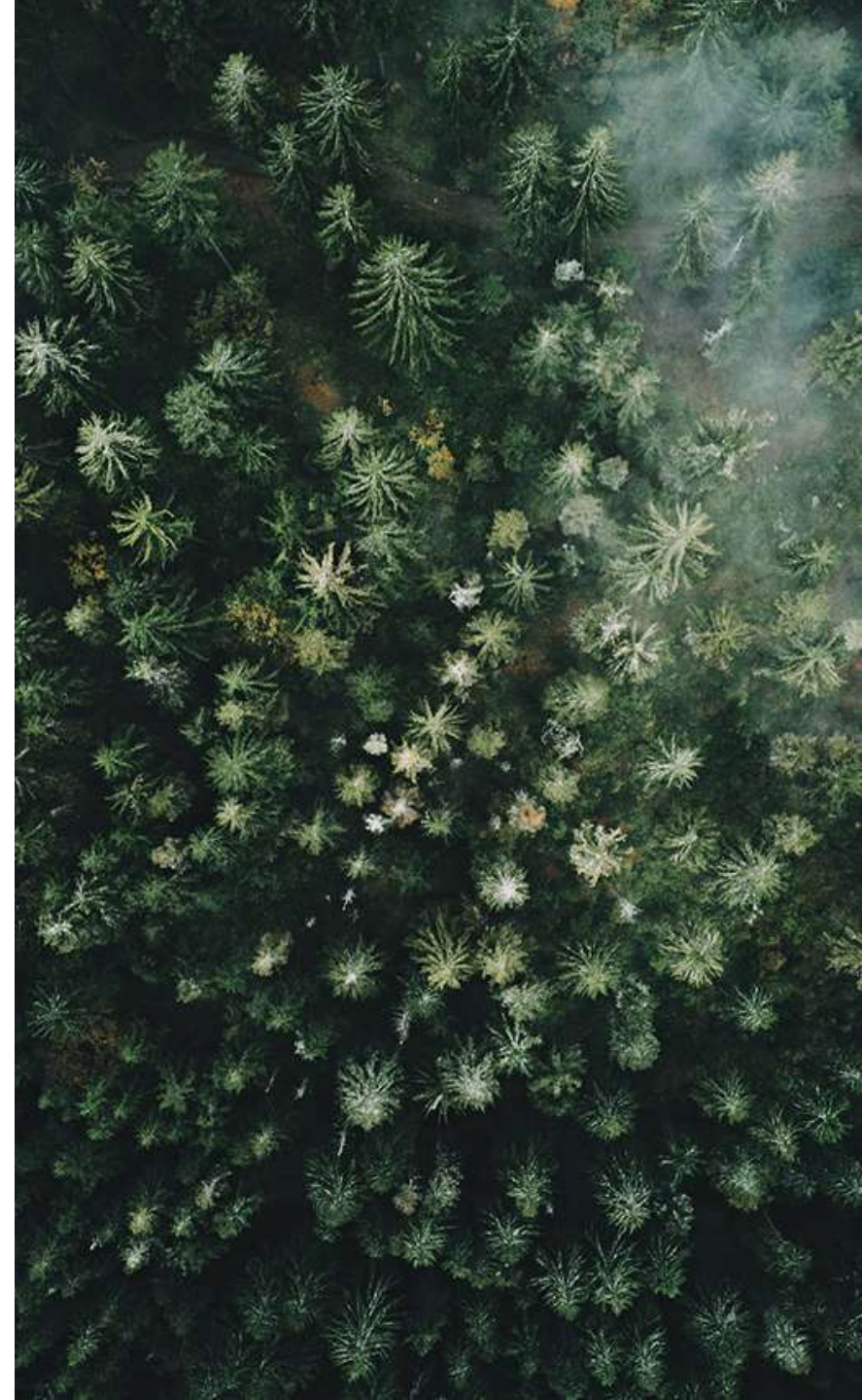
Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of **unduly favouring or disadvantaging certain economic operators**.”



The principle of sustainability

Article 18(2) of Directive 2014/24:

“Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators **comply with applicable obligations in the fields of environmental, social and labour law** established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.”



Research question

Does the principle of competition affect GPP under the Directive – and if so, how?

In a mirrored way:

Can GPP constitute a prohibited limiting of competition under the principle of competition – and if so, under what conditions?

Some starting points

A study in EU law

- A study within the framework of the Directive
- No analysis of national law as such (although parallels may be drawn)
- The CJEU's methods of interpretation at the forefront

Legal dogmatics

- Not a law and economics approach
- No analysis of whether the Directive protects certain interests “well enough”
- Coherent system of rules, viable solutions to legal problems

Green public procurement = GPP

- Other aspects of sustainability not part of the study



Outline

Part I Introduction and methodology

Part II *Competition* within EU public procurement law

Part III General scope for GPP

Part IV Competition within the Directive's GPP tools

Part V Conclusions

Part II

Competition within EU public procurement law

2. Directive 2014/24 and its competition aim

→ *Competition is a fundamental aim of EU public procurement law, together with free movement*

3. Defining the aim of competition further

→ *Essentially, as many participants as possible*

4. Reference to competition in Article 18 of the Directive

→ *“Unduly” – ought to be context based*

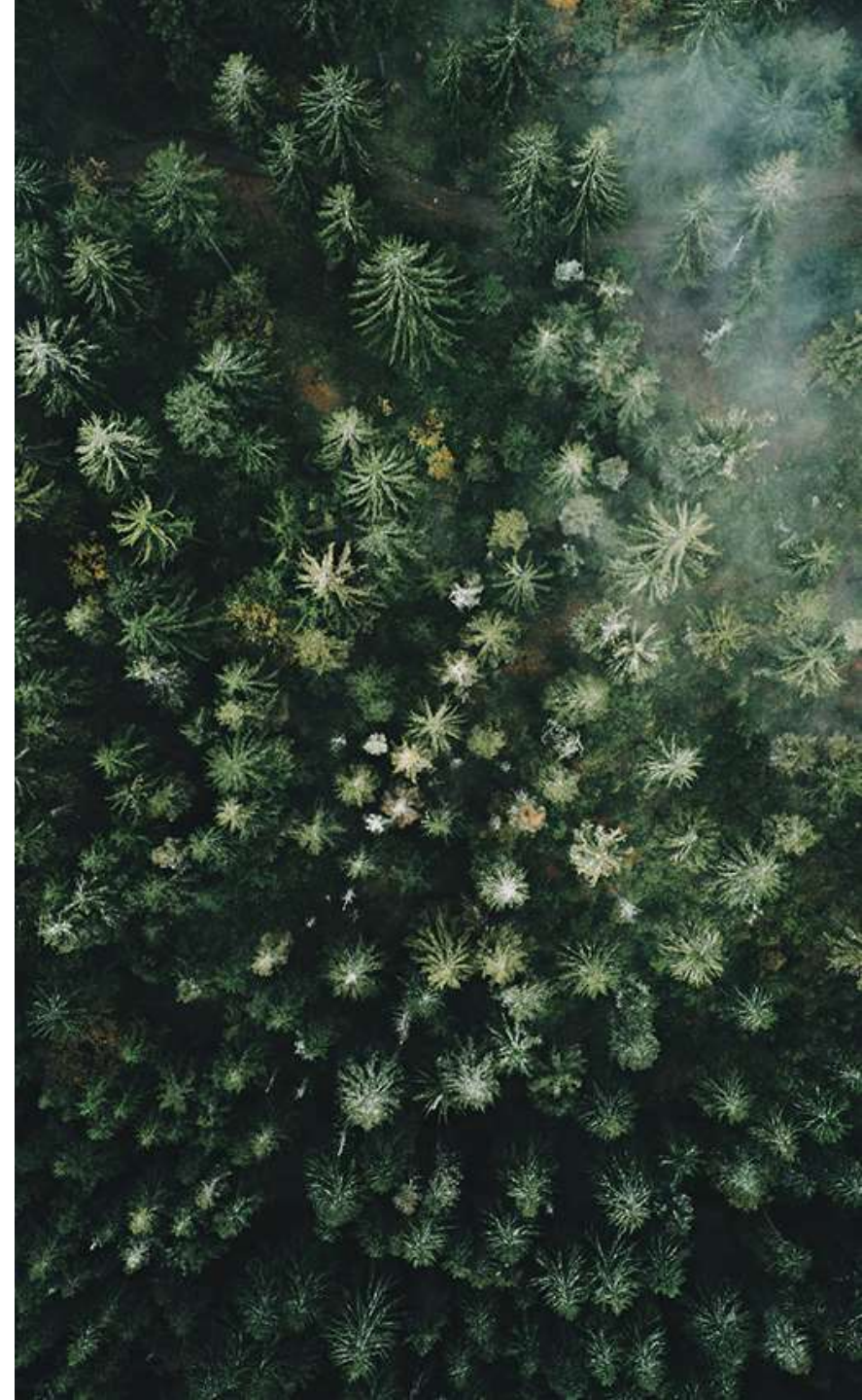


Part III

General scope for GPP

5. Environmental integration into EU public procurement law
 - Article 3 TEU; Article 11 TFEU; Recital 91 of the Directive
 - A number of (mostly) facultative *GPP tools* in the Directive

6. GPP under the Directive: the outer scope
 - The principle of sustainability
 - Proportionality
 - Link to the subject-matter of the contract



Case C-395/18 *Tim*, para. 38:

- Article 18 is a general provision, which lists the principles of procurement
- By providing in that article that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article
- In the general scheme of the directive, such a requirement constitutes a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2).

	Benchmark for interpretation?	Enforceability of the provision by way of the remedies directive?

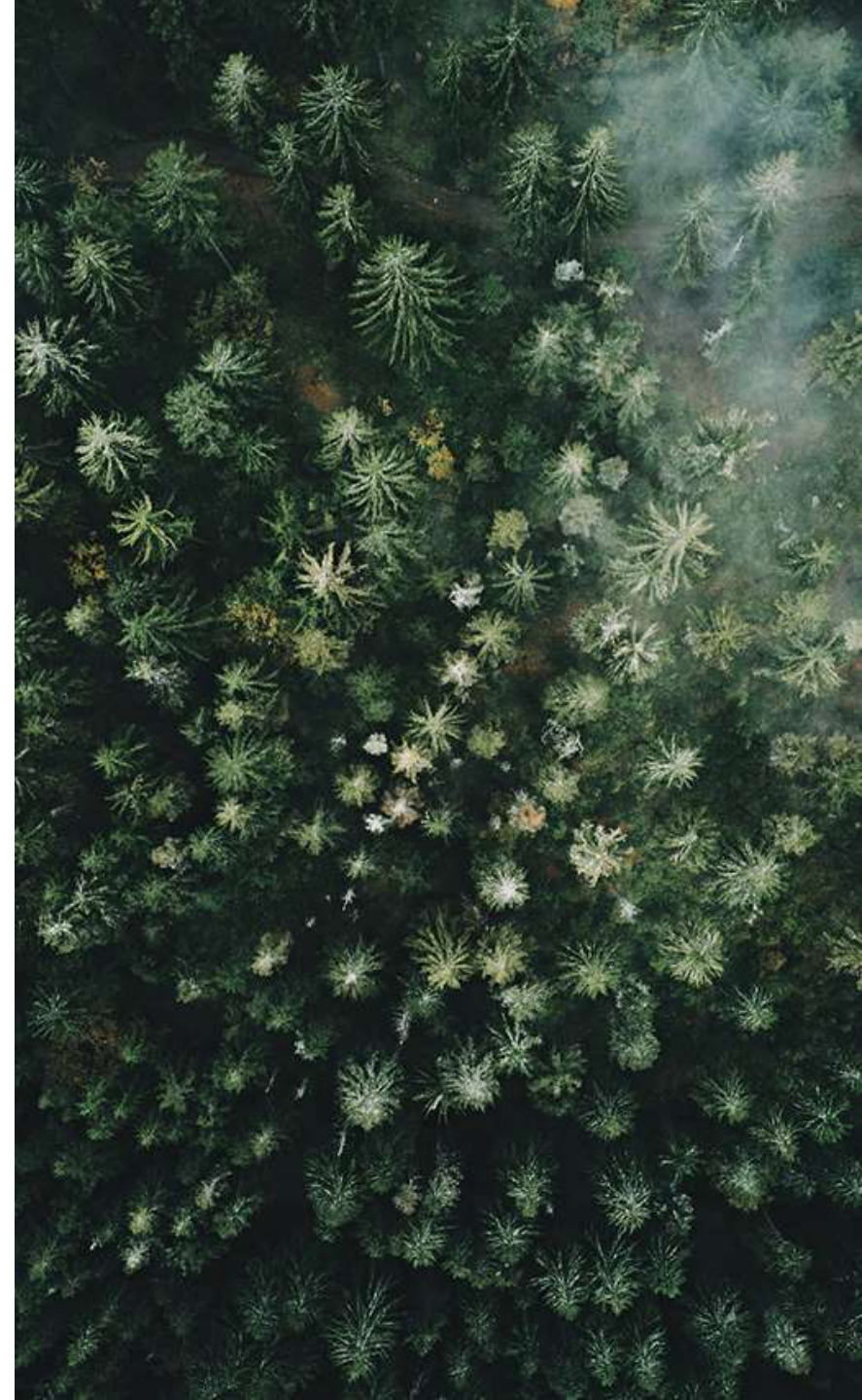
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Principle of sustainability Art. 18(2)		
Principle of competition Art. 18(1)		

	Benchmark for interpretation?	Enforceability of the provision by way of the remedies directive?
Principle of sustainability Art. 18(2)	Yes <ul style="list-style-type: none"> • Cardinal value 	No <ul style="list-style-type: none"> • Places an obligation on Member States to regulate in a certain way • Seemingly no new obligation
Principle of competition Art. 18(1)		

The principle of sustainability

Article 18(2) of Directive 2014/24:

“Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.”



Part IV

Competition within the Directive's GPP tools

7. Definition of the product or service to be procured
8. Choice of participants
9. Contract award
10. Conditions for contract performance



GPP tools with explicit references to competition	Condition concerning competition	Factors relevant for the assessment of effect on competition
<p>Environmental characteristics as technical specifications Art.42(3)</p>	<p>“not have the effect of creating unjustified obstacles to the opening up of procurement to competition”</p>	
<p>Green award criteria Arts 67 68</p>	<p>Generally, Art.67: “ensure the possibility of effective competition”</p> <p>Life-cycle costs, Art.68 “method for calculating life-cycle costs must not unduly favour or disadvantage certain economic operators”</p>	

GPP tools with explicit references to competition	Condition concerning competition	Factors relevant for the assessment of effect on competition
<p>Environmental characteristics as technical specifications Art.42(3)</p>	<p>“not have the effect of creating unjustified obstacles to the opening up of procurement to competition”</p>	<ul style="list-style-type: none"> • avoid requirements that mirror key characteristics of the products of certain economic operators (Recital 74) • functional and performance requirements are better than than individual characteristics (Recital 74) • contracting authority’s discretion and the level of detail of the specifications both relevant for the assessment; the risk of undue favouring increases with an increased level of detail (C-413/17 <i>Roche Lietuva</i>)
	<p>Generally, Art.67: “ensure the possibility of effective competition”</p>	<ul style="list-style-type: none"> • the nature and the specific characteristics of the public contract in question should be considered (C-247/02 <i>Sintesi</i>)
<p>Green award criteria Arts 67 68</p>	<p>Life-cycle costs, Art.68 “method for calculating life-cycle costs must not unduly favour or disadvantage certain economic operators”</p>	<ul style="list-style-type: none"> • risk for issues in particular where the method has not been established for repeated use (Article 68[2][a]) • “to avoid distortions of competition through tailor-made methodologies”, the methods used for assessing costs imputed to environmental externalities should not be “set up specifically for a particular public procurement procedure” (Recital 96)

Can GPP constitute a prohibited artificial narrowing of competition?

- “Competition requirements” within the directive’s GPP tools + absolute requirements
 - Seemingly little room for an independent application of the principle of competition in the specific context of GPP, but it cannot be excluded
- Environmental considerations take precedence over considerations related to competition:
 - Abnormally low tender due to lack of compliance with environmental obligations – must be rejected
 - Overriding reasons relating to the public interest, e.g. protection of the environment – ok not to exclude a tenderer in certain cases
- Directive 2014/24 clearly a strengthened emphasis on *both* sustainability and competition – but a missed opportunity from the perspective of legal certainty

An aerial photograph of a dense forest with a winding dirt path. The image is overlaid with a semi-transparent teal filter. The text 'VIN' is centered at the top, and 'Thank you.' is centered in the middle of the path.

VIN

Thank you.

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