

The 'link to the subject-matter' and sustainable procurement

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2014 Directives and SPP

- Ambition to make public procurement more 'strategic' – but also to simplify and provide greater flexibility
- Parliament tabled 253 amendments, mostly from a social protection angle – majority of these were rejected by the Council and Commission
- Provisions on technical specifications, labels, award criteria and life-cycle costing remain, and more generous provisions on reservation of contracts
- Only one truly mandatory SPP provision in 2014 directives: must reject an abnormally low tender if this is due to non-compliance with applicable environmental, social or labour law (after seeking explanation) (Art. 69.3)
- Proliferation of environmental requirements which apply to procurement, but are not in the procurement directives (eg Energy Efficiency Directive)
- Broader context: Revision of WTO Government Procurement Agreement and expansion of membership, bilateral transatlantic trade agreements, new binding climate agreement (?)

Limiting principles for SPP

Three concepts:

1. Environmental, social and labour law and collective agreements which are **applicable** (Art. 18(2))
2. Methods of production or provision (or other factors) which **define the characteristics required** of a supply, service or work (Annex VII)
3. Criteria which are **linked to the subject-matter of the contract** (Art. 67(2); Art. 70) AND **proportionate to its value and objectives** (Art. 42; 58) or **appropriate to define characteristics** of the supplies, services or works (Art. 43)

What is meant by a link to the subject-matter?

Definition in Art. 67(3):

Award criteria shall be considered to be linked to the subject-matter of the public contract where **they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle**, including factors involved in:

(a) the specific process of production, **provision or trading** of those works, supplies or services; or

(b) a specific process for another stage of their life cycle

even where such factors **do not form part of their material substance**.

Recital 97: “...excludes criteria and conditions relating to **general corporate policy**, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services.

Contracting authorities should hence not be allowed to require tenderers to have a **certain corporate social or environmental responsibility policy** in place.”

Origin of LtSM requirement

Case C-513/99 *Concordia Bus Finland*

“Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with [the provisions on award criteria set out in the directives] must themselves also be linked to the subject-matter of the contract.” (para 59)



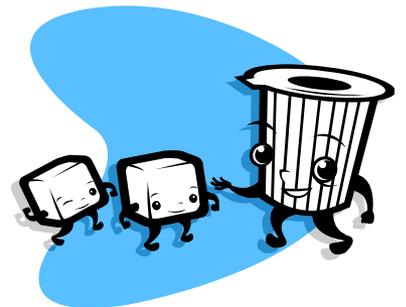
Case C-Case C-448/01 *EVN and Wienstrom*

Renewable energy capacity criterion was NOT linked to the subject-matter



Case C-368/10 *Commission v the Netherlands*

Fair trade/organic criteria **were** linked to the subject-matter (but lacked adequate transparency)



What does LtSM mean in practice (I)

- Example of a contracting authority which wishes to increase renewable energy generating capacity in its region:
- Following EVN, it **can** require 100% of its own electricity to be from renewable sources, or award additional marks based on %
- It **cannot** examine suppliers' general capacity to supply renewable electricity, unless this is proportionate to its needs (Art. 58)
- It **cannot** require a supplier to invest in its renewable energy capacity beyond what is needed for the contract (Art. 70)
- It **can** require a guarantee of origin, which may form part of a green certificate scheme which is restricted to suppliers in a particular area (*Essent Belgium, Vindkraft*) but could not reject an equivalent guarantee of origin from another scheme (Arts. 42, 44)

What does LtSM mean in practice (II)

- Example of a contracting authority which wishes to compare the carbon footprint of printer cartridges:
- It **can** include this in its award criteria, either with or without monetisation of the emissions as part of life-cycle costing
- *[If it does not monetise, can it avoid the specific requirements for LCC such as the requirement that data be available with 'reasonable effort' by all operators including those from third countries?]*
- It **can** look at the production processes and methods, and environmental management measures, specific to printer cartridges
- It **cannot** look at the overall carbon footprint of the bidders, or at past or planned measures to reduce this beyond the contract scope

What does LtSM mean in practice (III)

- Example of a contracting authority which wishes to include training and apprenticeship requirements in a works contract:
- It **can** include this in technical specifications, award criteria and contract performance clauses to the extent that they relate to the specific activity being carried out under the contract.
- It **cannot** require operators to have a general apprenticeship or training programme in place
- Possible consequence: apprenticeships end when the contract does, or are allocated in a way which is less efficient/effective at achieving the targeted objectives (e.g. reduction in unemployment, development of specific skills) than would otherwise occur

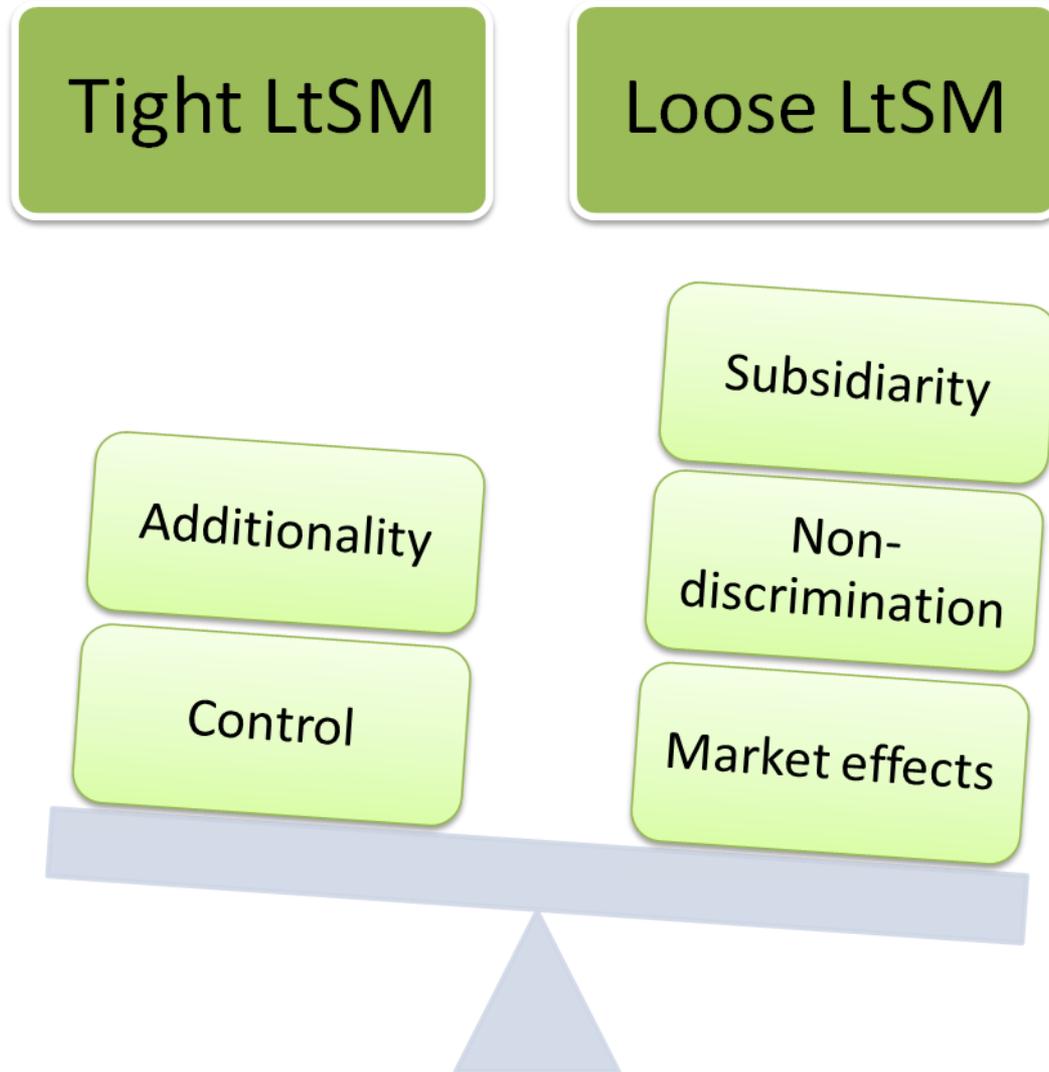
Where does this lead?

- For both environmental and social criteria, a strict interpretation of the link to the subject-matter may make SPP **counterproductive**
- Due to iterative and limited nature of public contracts, it may cause **fragmentation** in supply markets, instead of **transformation**
- Example: if contracting authorities can only assess product-specific fair trade criteria, this removes the incentive for longer-term investment in producer communities
- These effects can be difficult to isolate, and in practice some bidders will opt to adjust their overall practices – but usually only where this makes economic sense for them anyway
- May also lead to tighter application of exclusion/selection criteria to avoid operators with poor overall sustainability performance

Alternative approaches

1. Emphasis on **verification** as opposed to link to the subject-matter
But problems with this: many environmental and social criteria cannot be effectively verified in the context of tender procedures
2. Court applies a general **proportionality** test to environmental and social criteria (arguably LtSM is just a partial proportionality test)
But this does not score very well in terms of legal certainty – and may actually have more of a chilling effect than the LtSM
3. Contracting authorities adopt a **broader approach** to defining the subject-matter of their contracts, e.g. ‘We are buying renewable electricity for our own needs AND investment in future capacity’ or we are buying cleaning services AND training for unemployed ?

Risks and benefits



Thank you.



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