The Link to the Subject Matter in Practice

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Scope of the LtSM requirement

• Under the Public Sector Directive, a link to subject-matter is required for:

• **Technical specifications** (Art. 42(1))
• **Labels** (including environmental/social labels) (Art. 43(1)(a))
• **Variants** (Art. 45(1))
• **Selection criteria** (Art. 58(1))
• **Award criteria** (Art. 67(2))
• **Contract performance clauses** (Art. 70)

• Equivalent provisions exist under the Utilities Directive (except variants)
What does it mean?

- **Article 67 (3) of Directive 2014/24/EU**: Award criteria shall be considered to be linked to the subject-matter 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 those factors do not form part of their material substance.”

- **Recital 97 of Directive 2014/24/EU**: “…the condition of a link with the subject-matter of the contract **excludes criteria and conditions relating to general corporate policy** …”
LtSM in practice: Link or no link

• In Case C-448/01 *EVN Wienstrom* the CJEU held that awarding marks for the total amount of renewable electricity which bidding companies could produce (in excess of buyer’s requirements) was not LtSM. In Case C-368/10 *Dutch Coffee*, the Court accepted fair trade criteria were LtSM.

• In the absence of further case law, GPP should focus on impacts which
  a) arise as a direct result of the contract being awarded; and
  b) can be addressed by firms or their subcontractors as part of the delivery of that contract.

• Examples of criteria which probably would not pass the LtSM test: *Overall carbon footprint* of a company, *overall recycling rate* of company, *general environmental commitments*, *offsetting* or *donating* to environmental charities, *green pension investments*. 
LtSM in practice: Additionality + accounting

- The link to the subject matter requirement can support concrete environmental benefits in public contracts if it promotes **additionality** and prevents **double counting**

- Various protocols for carbon accounting, procurement falls under **Scope 3 emissions**

Source: GHG Protocol/Carbon Trust
Further reading

• Sjafjell and Wiesbrock (eds) Sustainable Procurement under EU Law (Cambridge University Press, 2016)
