

# 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

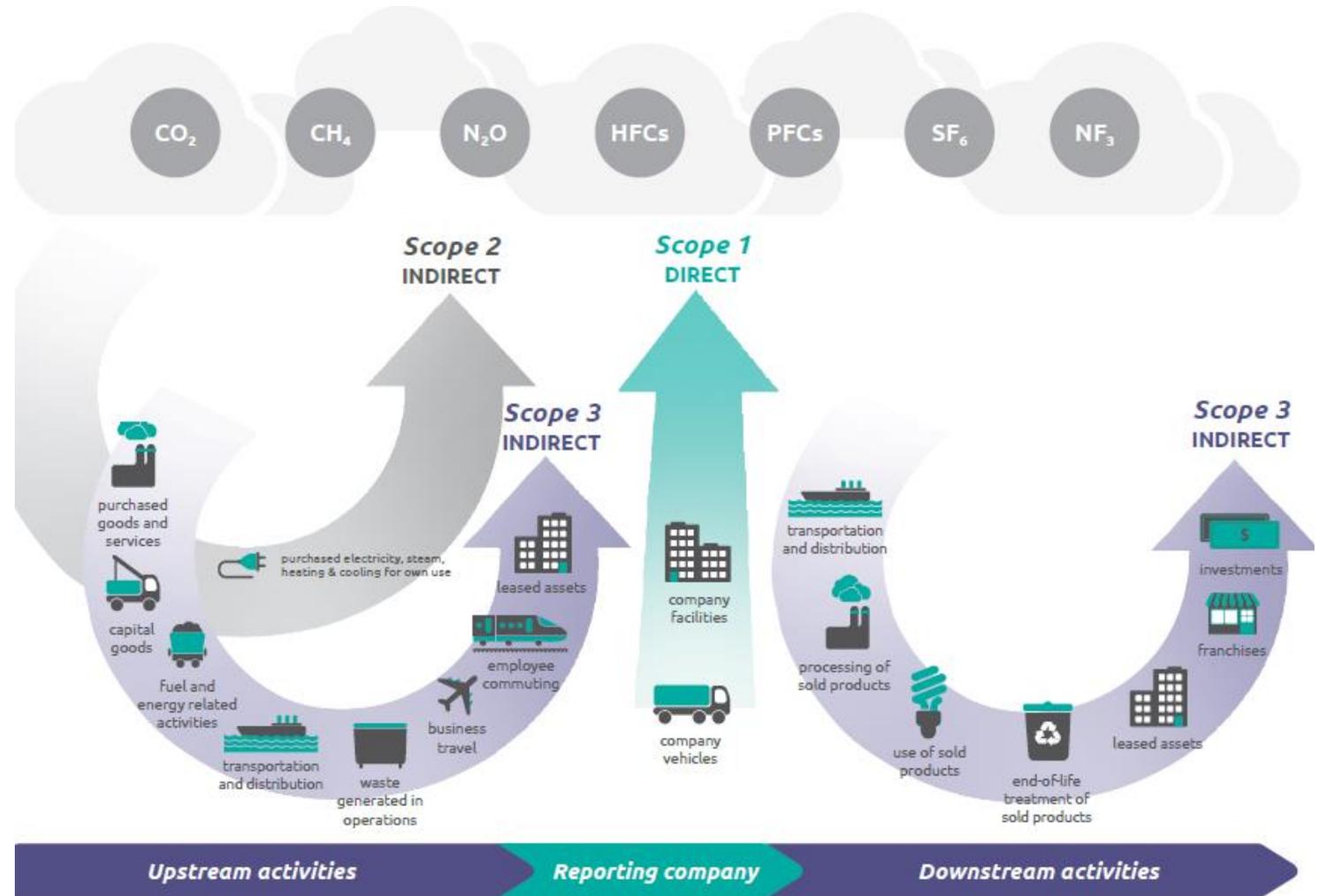
- In Case C-448/01 *EVN Wienstrom* the CJEU held that awarding marks for the total amount of renewable electricity which bidding companies could produce (in excess of buyer's requirements) was **not** LtSM. In Case C-368/10 *Dutch Coffee*, the Court accepted fair trade criteria **were** LtSM.
- In the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

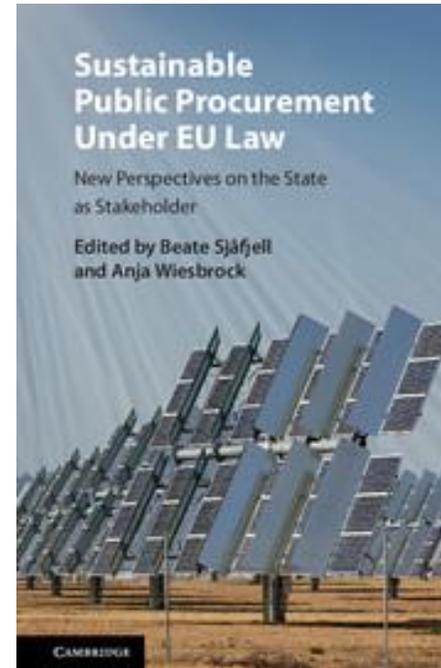


Source: [GHG Protocol/Carbon Trust](#)



## ○ Further reading

- Sjaafjell and Wiesbrock (eds) *Sustainable Procurement under EU Law* (Cambridge University Press, 2016)
- Semple (2015) *The Link to the Subject-matter: A glass ceiling for sustainable public contracts?* (Available on [SSRN](#))
- Andhov, Caranta, Janssen et al (2020) *Sustainability Through Public Procurement: The Way Forward – Reform Proposals* (Available on [SSRN](#))



SMART Project Report

**Sustainability through public procurement: the way forward – Reform Proposals**



Marta Andhov, Roberto Caranta (Eds.)

Authors: M. Andhov, R. Caranta, T. Stoffel, J. Grandia, W.A. Janssen, R. Vornicu, J.J. Czarnecki, A. Gronnica, K. Tallbo, O. Martin-Ortega, L. Mélon, Á. Edman, P. Göthberg, P. Nohrstedt, A. Wiesbrock

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