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# SOCIAL AND ENVIRONMENTAL CONSIDERATIONS AND THE LINK WITH THE SUBJECT MATTER: HOW TO AVOID COMMON MISTAKES

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**GPP Helpdesk Webinar:  
12.12.2023**

# L2SM

- born w **C-513/99 - Concordia Bus Finland**
- clarified by **C-448/01 - EVN and Wienstrom**



# Contract Design

- Possibility to design contracts w environmental and/or social components
- 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 (Art. 18(1)).
- ALSO Mind proportionality principle (Art. 18(1))



# MIND THE DISTICTION!

- Mandatory requirements
  - Art. 18 MSs
  - Art. 56
  - Artt. 57(1) and 57(4)(a)
- Requirement going beyond legal requirements
  - NB here you have the L2SM!



# A general principle

Article 18(2). MSs 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.



# Case C-395/18, *TIM*

- Article 18, entitled ‘Principles of procurement’, is the first article of Chapter II of that directive devoted to ‘general rules’ on public procurement procedures.
- by providing in § 2 that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, EU law sought to establish that requirement **as a principle**, like the other principles referred to in § 1 (equal treatment, non-discrimination, transparency, etc)
- such a requirement constitutes, in the general scheme of the directive, a **cardinal value** with which the MSs must ensure compliance



# MIND NEW REQUIREMENTS

- ❖ **Art. 24 Directive (EU) 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms**
- ❖ **Art. 25 Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation**
- ❖ **ETC**
- ❖ **FORTHCOMING CSDDD?**



# RECITAL 97

- the condition of a link with the subject-matter of the contract **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.





# Case T-578/19 *Sophia Group*

Award criteria for EP procurement of managing services (help desks, small repairs etc) to its buildings.

- for equal treatment (*Diversité/égalité des chances*),
- combatting sexual harassment (*Lutte contre le harcèlement*),
- the inclusion of persons with disabilities (*Inclusion de personnes en situation de handicap*),
- quality of the working environment (*Bien-être au travail*),
- formation as well as certification schemes attesting to quality systems, including ISO 9001 or equivalent



# The Judgment

- criteria chosen concerned the working conditions of **those tenderer's employees providing the services to the European Parliament's building**, and as such had to be considered to be linked to the subject matter of the contract (paragraphs 109 ff).
- even if EP had not articulated the label requirements to be met by the tenderers, the specific titles of the award sub-criteria were deemed sufficient to make clear which those requirements were (paragraphs 130 ff).

# MEANS OF PROOF



## LABELS/EMAS etc:

- CA shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer proving EO fulfils the requirements of the specific requirements indicated by CA

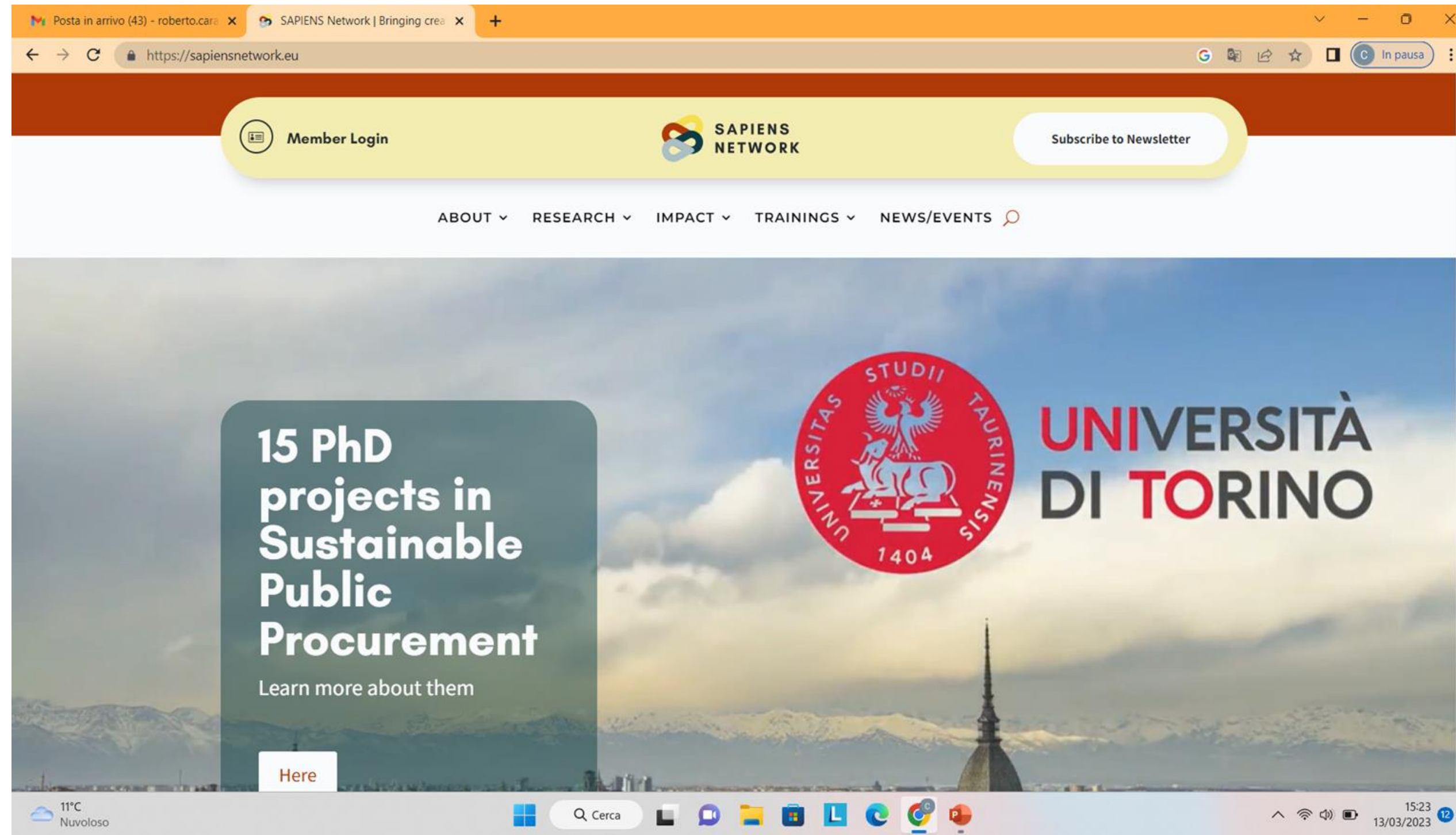
## 3 TAKES HOME

- act on mandatory criteria
- focus on the implementation of your specific contract!
- allow equivalent means of proof



This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 956696.

# THANKS!



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