

Approaches to the 'seriousness' of the breach: The EFTA Court vs the UK Supreme Court

Dr Albert Sanchez-Graells

*BECCLE Seminar Damages for breach of Public Procurement
Law—Fosen-Linjen AS v AtB AS and its implications*

Bergen, 1 March 2018



Agenda

To discuss the specific issue of the seriousness of the breach of EU/EEA public procurement rules that triggers a risk of liability in damages for contracting authorities

To compare the EFTA Court's 'simple breach' approach with the UK Supreme Court's 'sufficiently serious breach' canon, in the context of minimum harmonisation and with *Spijker* in mind

Background -

Spijker

CJEU could not have been clearer that

- **Art 2(1)(c) of the Remedies Directive**
‘gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law’ (para 87)

Background - *Spijker*

CJEU could not have been clearer that

- In the absence of EU rules, ***'it is for the internal legal order of each member state, once those conditions [ie Francovich] have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined'*** (para 92)

Why doubt *Spijker*?

Scope for confusion due to CJEU inconsistencies in [Strabag](#) – *Spijker*?
(eg [Treumer, 2011](#); [Caranta, 2011](#))

Normative separation thesis
([Schebesta, 2016](#))



No doubt about *Spijker*

***Nuclear Decommissioning Authority v
EnergySolutions EU Ltd*** [\[2017\] UKSC 34](#)

- ***‘the liability of an awarding authority is to be assessed by reference to the Francovich conditions’*** – L Mance [23]



No doubt about *Spijker*

***Nuclear Decommissioning Authority v
EnergySolutions EU Ltd*** [\[2017\] UKSC 34](#)

- ***‘liability of a contracting authority under the Remedies Directive ... is in particular only required to exist where the minimum Francovich conditions are met, although it is open to States in their domestic law to introduce wider liability free of those conditions’ – Lord Mance [25]***



Who cares about *Spijker*?

Fosen-Linjen AS v AtB AS ([E-16/16](#))

- EFTA Court takes a very different approach and considers *Strabag* the relevant standard
- Creates argument based on the unacceptability of a general exclusion or a limitation of the remedy of damages to only specific cases



Who cares about *Spijker*?

Establishes that a 'simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link' (para 82)



A few problems with *Fosen-Linjen*

It simply does not fit with *Spijker*, or minimum harmonisation

Overestimates the relevance of a subjective test in general State liability case law by the CJEU

Internally inconsistent regarding balance of incentives

Creates excessive incentives for private enforcement in a setting where public enforcement and public interest are not comparable to other areas (eg competition law)

Will put pressure on concept of procurement if ‘special’

Does not fit with *Spijker* or minimum harmonisation

Largely ignores *Spijker* and exaggerates harmonization goal of Remedies Directive

- ***'fundamental objective of the Remedies Directive is to create the framework conditions ... in a way that is as uniform as possible for all undertakings active on the internal market. Thereby, as is also apparent from the third and fourth recitals to the Remedies Directive, equal conditions shall be secured (sic)' (para 66)***



(Implicitly) overestimates subjectivity in State liability

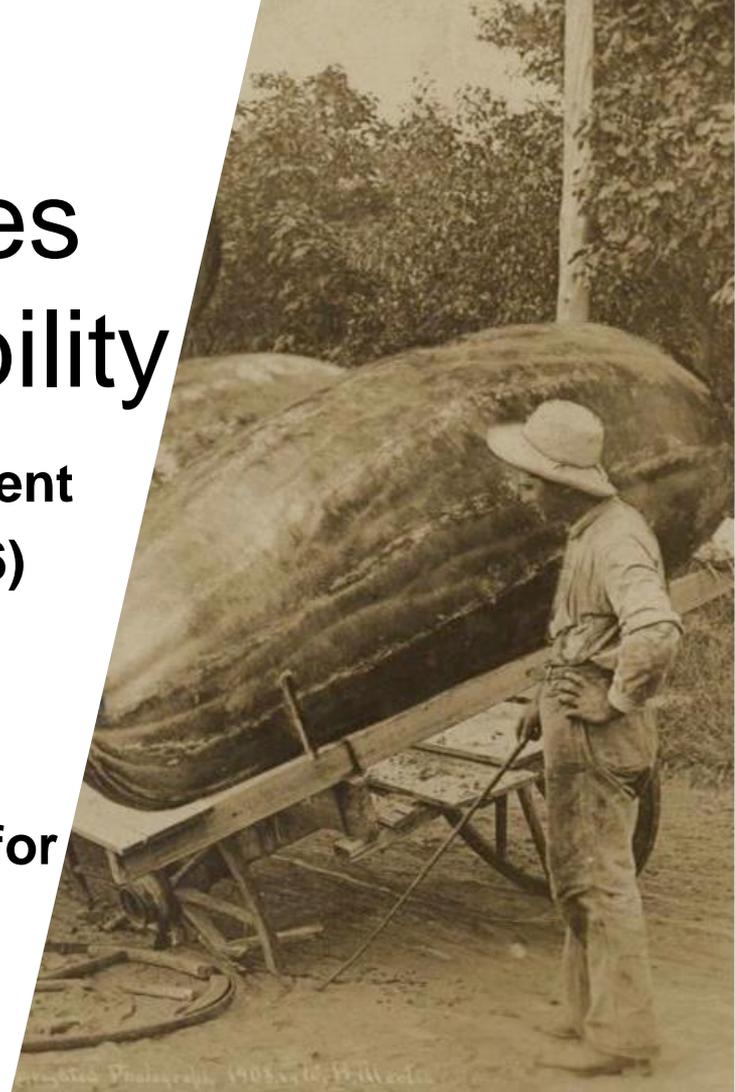
By establishing parallel with fault requirement

Echoes separation theory (Schebesta, 2016)

Misinterprets evolution of CJEU case law,
which has objectified the analysis

(cf [Sanchez-Graells, 2016](#))

Comes to establish practical *strict liability* for
contracting authorities



Internally inconsistent balancing of incentives

'... damages seek to achieve a three-fold objective: to compensate for any losses suffered; to restore confidence in the effectiveness of the applicable legal framework; and to deter contracting authorities from acting in such a manner, which will improve future compliance with the applicable rules. Liability through damages may also provide a strong incentive for diligence in the preparation of the tender procedure, which will, ultimately, prevent the waste of resources and compel the contracting authority to evaluate the particular market's features. Were liability to be excluded, this may lead to a lack of restraint of the contracting authority' (para 76)



Internally inconsistent balancing of incentives

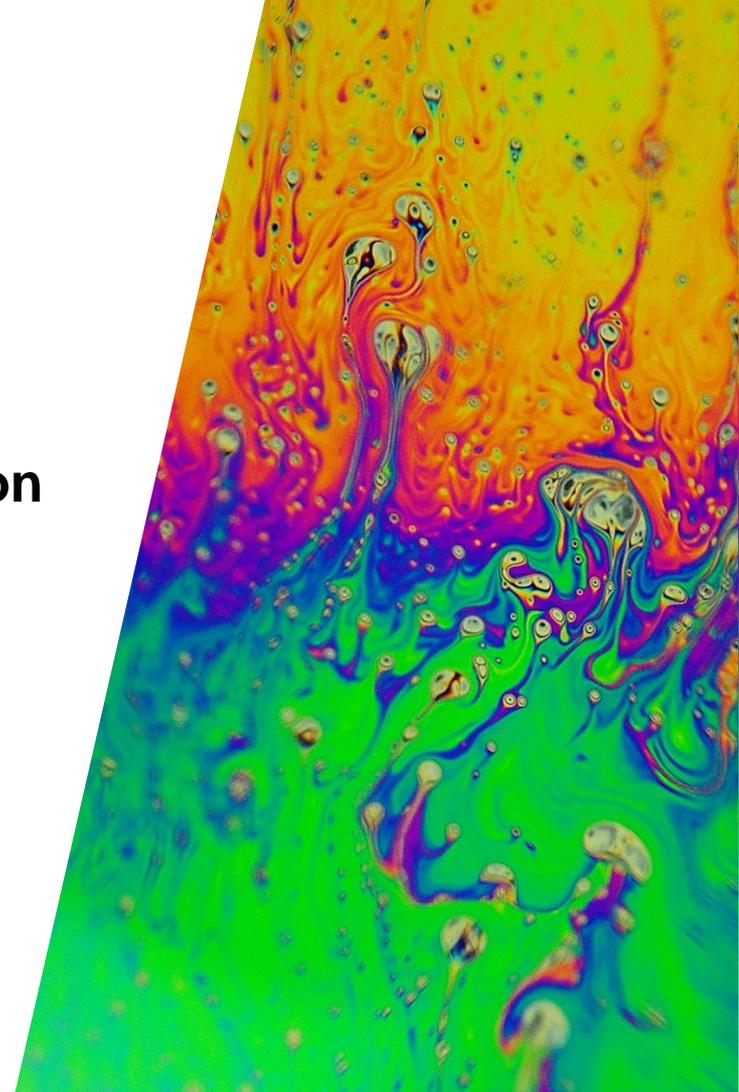
'... exaggerated liability of the contracting authority could lead to excessive avoidance costs, reduce the flexibility of the applicable framework and may even lead to the unjust enrichment of an unsuccessful tenderer.
Furthermore, excessive liability may provide an incentive for a contracting authority to complete award procedures, that were evidently unlawful, or impinge upon the freedom to contract ' (para 101)



Push for private enforcement

Different from other settings (eg competition law) in several ways

- **Conflicting public interest**
- **Significant difficulties establishing counter-factual (which will also be problematic in the context of ‘causality-based’ counterbalances)**



Further pressure on concept of procurement

If liability for breaches of EU/EEA public procurement law are subjected to special liability rules (in particular, triggering threshold), this will put additional pressure on concept of procurement—likely to be of opposite direction than [Falk Pharma](#) (and [Tirkkonen?](#))



Final thoughts

Will we get some clarification from CJEU
in the pending case of [Rudigier](#)?

What to do in the meantime?



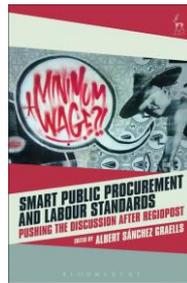
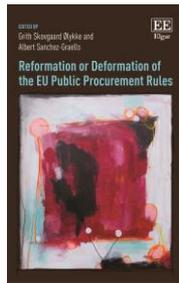
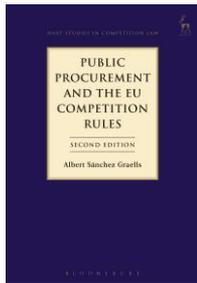
Fuller discussion

A Sanchez-Graells, '*You Can't Be Serious: Critical Reflections on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Law*' (February 24, 2018). Presented at the BECCLE seminar on 'Public Procurement and Damages,' University of Bergen, 1 March 2018. Available at SSRN: <https://ssrn.com/abstract=3129430>

Thank you for your attention & stay in touch

a.sanchez-graells@bristol.ac.uk

[@asanchezgraells](https://www.instagram.com/asanchezgraells)



How to Crack a Nut
A blog on EU economic law

[bristol.ac.uk](https://www.bristol.ac.uk)

