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**THE COMPETITION LAW REVIEW**

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Volume 10 Issue 1 pp 3-34

July 2014

Enforcement of State Aid Rules for Services of General Economic Interest  
before Public Procurement Review Bodies and Courts*Albert Sanchez Graells\**

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One of the criticisms against the new rules applicable to the granting of State aid to finance the provision of services of general economic interest (SGEI) in the ‘Almunia package’ is that enforcement is likely to be their weakest point. Similarly, in the more general setting of the ‘private’ enforcement of State aid rules, the *2006 Study on the Enforcement of State Aid Law at National Level* recommended that the European Commission create a common minimum standard of remedies applicable in all EU jurisdictions, stressing that ‘one possible means of creating such a standard would be to adopt a remedies directive for State aid cases, which could be modelled on the remedies directive for procurement cases’. Building upon these considerations, the extent to which the existing remedies within the system for the enforcement of EU public procurement rules provide an effective platform to enforce EU State aid rules, particularly those for the financing of SGEI, before public procurement review bodies and courts is assessed. The paper describes the main groups of cases where public procurement litigation ‘phagocytises’ State aid considerations. It then proceeds to explore the viability, from an EU law perspective, of configuring public procurement review bodies and courts as ‘State aid courts’ for the purposes of the simultaneous enforcement of both sets of rules in a single setting of ‘private’ litigation. It also submits that using the public procurement system in this way provides effective remedies for the enforcement of the Almunia Package for the financing of SGEI, and adds consistency in terms of harmonisation of the material rules to be applied.

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**1. INTRODUCTION**

One of the criticisms against the new rules applicable to the granting of State aid to finance the provision of services of general economic interest (SGEI)<sup>1</sup> in the ‘Almunia

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<sup>1</sup> As recently indicated, ‘the concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation. The Commission has clarified [...] that SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A public service obligation is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission. The Court has established that SGEI are services that exhibit special characteristics as compared with those of other economic activities’, Commission Staff Working Document, ‘Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest’, 29 April 2013, p 21 [ec.europa.eu/competition/state\\_aid/overview/new\\_guide\\_eu\\_rules\\_procurement\\_en.pdf](http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf).

package<sup>2</sup> is that enforcement is likely to be their weakest point.<sup>3</sup> Similarly, in the more general setting of the ‘private’ enforcement of State aid rules, the 2006 *Study on the Enforcement of State Aid Law at National Level*<sup>4</sup> pointed out that some of the difficulties for the enforcement of State aid rules through ‘private’ litigation were a result of the lack of clarity concerning the available remedies, and that enforcement would clearly benefit from the adoption of new regulatory instruments. Indeed, the 2006 *Study* recommended that the European Commission clarify the remedies available in case of breaches of State aid rules and created a common minimum standard applicable in all EU jurisdictions; and, more specifically, proposed that ‘one possible means of creating such a standard would be to adopt a remedies directive for State aid cases, which could be modelled on the remedies directive for procurement cases’.<sup>5</sup>

Building up on these considerations, this paper aims to assess to what extent the existing remedies within the system for the enforcement of EU public procurement rules provide an effective platform to enforce EU State aid rules (and, more specifically, those for the financing of SGEI) before domestic public procurement review bodies and courts. Where a sufficient link between State aid and public procurement can be found, dealing with potential breaches of State aid rules in the setting of public procurement litigation could contribute to bridge the gap identified in their enforcement through ‘private’ litigation. Moreover, joint enforcement of both sets of rules should strengthen the internal consistency of EU economic law and shape public procurement enforcement in a more pro-competitive (or at least, less competition-distortive) manner, as well as to contribute to a harmonization of the material rules and criteria applied across the board.<sup>6</sup> Given the almost indissoluble link between public

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<sup>2</sup> The expression ‘Almunia Package’ refers to the instruments adopted by the European Commission between December 2011 and April 2012 for the modernisation of SGEI rules. These are: 1) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Quality Framework for Services of General Interest in Europe*, Brussels, 20.12.2011, COM(2011) 900 final (the ‘SGEI Quality Framework’); 2) the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [OJ 2012/L 7/3] (the ‘SGEI Compensation Decision’); 3) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [OJ 2012/C 8/2] (the ‘SGEI Compensation Communication’); 4) Communication from the Commission—*European Union framework for State aid in the form of public service compensation (2011)* [OJ 2012/C 8/3] (‘2011 SGEI Framework’); and 5) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [OJ 2012/L 114/8] (the ‘SGEI de minimis Regulation’). The current rules are available at [ec.europa.eu/competition/state\\_aid/legislation/sgei.html](http://ec.europa.eu/competition/state_aid/legislation/sgei.html).

<sup>3</sup> W Sauter, ‘The Altmark Package Mark II: New Rules for State Aid and the Compensation of Services of General Economic Interest’ (2012) 33(7) *European Competition Law Review* 307, 313.

<sup>4</sup> T Jestaedt, J Derenne and T Ottervanger (eds), *Study on the Enforcement of State Aid Law at National Level*, Part I — Application of EC State aid rules by national courts (Brussels, OPOCE, March 2006) 34 [ec.europa.eu/competition/state\\_aid/studies\\_reports/studies\\_reports.html](http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html).

<sup>5</sup> *Ibid* 35.

<sup>6</sup> I am grateful to Francisco Marcos for highlighting that, indeed, public procurement and competition rules (including State aid rules) are two sides of a same coin and share their basic goals of ensuring effective competition in the internal market—both generally, and in the public procurement setting. Hence, much

procurement and State aid created by the Almunia package, this would create an effective and more consistent remedies system in the SGEI area. It will be argued that obtaining an effective ‘procurement remedy’ will also serve the purpose of ensuring compliance with State aid rules (at least in its negative aspect, *i.e.* preventing the grant of illegal State aid through procurement, particularly of SGEI).

In order to assess to what extent public procurement litigation is close to ‘private’ State aid litigation, and to consider how to include State aid issues in the public procurement remedies system the article is set out as follows. Section Two maps the main groups of cases where litigation is concerned simultaneously with State aid and public procurement rules. Section Three then focuses on the integration of State aid concerns in the system for the enforcement of the EU public procurement rules before domestic review bodies and courts, with a particular focus on the implications for SGEI. Section Four concludes with some critical considerations.

## 2. GENERAL OVERVIEW OF STATE AID AND PUBLIC PROCUREMENT LITIGATION

The relationship between State aid and public procurement rules has been debated for a long time from a substantive standpoint - while procedural rules have been markedly different in both areas of EU Economic Law. Such debate has generated a relatively large amount of litigation, mainly in three areas. Firstly, the award of public contracts was deemed as an instrument for the disguised granting of State aid and, consequently, public contracts have been challenged under the rules of Article 107(1) TFEU (§2.1).<sup>7</sup> Secondly, there is a growing body of litigation whereby competitors of the recipients of unlawful State aid seek to get them disqualified from public tenders on the basis that such State aid allows them to submit abnormally low offers - which has resulted in a consolidation of the applicable rules in Article 55 of Directive 2004/18 (§2.2).<sup>8</sup> Finally, in the specific area of the financing of services of general economic interest (SGEI), the integration of public procurement and State aid rules creates a particularly complex scenario that is clearly prone to litigation (§2.3). Each of these groups of cases will be assessed in turn and, as will be shown, the current rules and enforcement trends indicate that the bulk of the public procurement related State aid litigation will continue taking place within the limits of public procurement challenges. This will justify the analysis of the ways in which enforcement of State aid rules, particularly those for SGEI, can be sought before public procurement review bodies and courts (below §3).

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more intense integration and substantive harmonisation than currently exists is necessary. For general discussion on the need of greater substantive convergence in these areas of EU economic law, see A Sanchez Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart, 2011).

<sup>7</sup> [2010] OJ C83/47. See also Tim Bruyninckx, ‘Recovery as a multidimensional remedy in EU State aid law’, working paper, CLaSF conference, on file with author.

<sup>8</sup> For the sake of this discussion, reference will only be made to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114. There are ‘specialised’ rules for the utilities and for the defence and security sectors.

## 2.1. The use of public contracts as instruments to grant disguised State aid

Given that public contracts meet most of the requirements in the definition of State aid under Article 107(1) TFEU, for a long time they have been considered as potential instruments to grant disguised illegal State aid if they provide an undue economic advantage to the public contractor.<sup>9</sup> Nonetheless, the debate is for now relatively settled against such possibility. The growing academic consensus and, more significantly, the official position of the European Commission, rule out that the award of a public contract can amount to the grant of State aid as long as it is in compliance with the current EU public procurement Directives. However, it must be stressed that, on the contrary, the absence of a tendering procedure does not preclude a finding that State aid and other competition rules have not been violated.<sup>10</sup> Generally, the underlying idea is that compliance with procurement rules ‘objectivises’ the award of the contract and, hence, excludes the element of ‘undue economic advantage’ required by Article 107(1) TFEU - consequently eliminating all risks of disguised granting of State aid by means of public contracts.

Therefore, the scope for litigation in this area is fundamentally limited to the public procurement arena *as such*. Disappointed bidders will challenge the public procurement decision on the basis of the applicable procurement rules. If the decision was properly adopted following all tender requirements, there will be no breach of either set of rules (and consequently, no room for separate State aid litigation). On the contrary, if there was a breach of public procurement rules, the illegal award decision (or the ensuing contract) will generally be set aside and/or rendered ineffective<sup>11</sup> (and, again, there will be no need for follow up ‘private’ State aid litigation, despite the concurrent breach of such rules - and regardless of any proceedings that the European Commission may wish to open against the infringing Member State). It seems clear that, somehow, public procurement phagocytises State aid litigation.

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<sup>9</sup> See the landmark case of Case T-14/96 *BAI v Commission* [1999] ECR II-139. For a criticism of the formal approach adopted by the European Commission in the enforcement of State aid rules in the public procurement context and further references, see Sanchez Graells, *Public Procurement and the EU Competition Rules* (2011) 118-21.

<sup>10</sup> See Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, 237-9, confirmed on appeal by the CJEU, Case C-320/05 P *Olsen v Commission and Spain* [2007] ECR I-131.

<sup>11</sup> As a matter of principle, under the rules of the current EU public procurement remedies Directives, procedural breaches should result in an impossibility to award the contract or its ineffectiveness in case it was already awarded. However, provisions on ineffectiveness are still generating some relevant difficulties and, in some cases, Member States can substitute that remedy with money penalties against the contracting authority, and complement it with damages awards to the disappointed tenderers, which can make the litigation scenario more complicated (see below §3.1); J Golding and P Henty, ‘The New Remedies Directive of the EC: Standstill and Ineffectiveness’ (2008) 17 *Public Procurement Law Review* 146. On the duty to terminate illegally concluded contracts, see Case C-503/04 *Commission v Germany* [2007] ECR I-6153 and the comments by S Treumer, ‘Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Public Procurement Rules: The End of the Status on Concluded Public Contracts as Sacred Cows’ (2007) 16(6) *Public Procurement Law Review* 371. See below (n 88) and accompanying text.

In this respect, and under this interpretation,<sup>12</sup> State aid rules currently impose a very limited constraint on the use of public procurement as a means to grant disguised State aid. Determining whether an award was properly made according to the public procurement rules will generally be the acid test to decide whether State aid has been granted, which results in a circular test to establish in the first place whether the award of the public contract constitutes State aid in and by itself.<sup>13</sup> This limited scope for joint enforcement (and litigation) of State aid and public procurement rules rests in a very formalistic approach that relies on the apparent ‘rigidity’ and ‘objectivity’ created by public procurement rules - but does not actually prevent the granting of economic advantages in a significant number of cases. Its only advantage derives from legal certainty (for the awardee of the contract, even in very favourable economic terms), but excludes the economic gains derived from a stricter control of State aid implications of public procurement decisions.

However, there is growing pressure for a policy change in this area due to the modifications very recently introduced in the reform of the EU public procurement rules by Directive 2014/24.<sup>14</sup> Given the perceived difficulties that public procurement rules create for the carrying out of activities in the public interest, the European Commission has aimed at their simplification and introduced more flexibility, particularly by creating more room for the use of negotiated procedures - i.e. by making a ‘competitive procedure with negotiation’ generally available to contracting authorities where ‘the needs of the contracting authority cannot be met without adaptation of readily available solutions’ or ‘the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them’.<sup>15</sup>

Such increased flexibility in the public procurement rules frontally clashes with the assumption that they impose a tight procedure that works as a ‘black box’ and always ensures that the outcome is objective and excludes all possible economic advantages to the awardee of the contract. Hence, the feeble justification for the current position of the European Commission that compliance with EU public procurement rules excludes the risk of disguised State aid is in crisis, and the introduction of increased flexibility and the broadening of the scope for negotiated procedures will require new guidance as to the limits within which (negotiated) contractual conditions must remain for them to comply with EU State aid law. Given this change in the rules, it seems clear that there

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<sup>12</sup> For discussion, as well as for a proposal to reassess the current consensus on the basis of the very recent changes in EU public procurement rules, see A Sanchez Graells, ‘Public Procurement and State Aid: Reopening the Debate?’ (2012) 6 *Public Procurement Law Review* 205.

<sup>13</sup> Also referring to the circularity of the test, N Fiedziuk, ‘Putting Services of General Economic Interest Up for Tender: Reflections on Applicable EU Rules’ (2013) 50 *Common Market Law Review* 87, 89.

<sup>14</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65 (hereinafter, the ‘new public procurement Directive’).

<sup>15</sup> Article 26(4)(a)(i) and (iii) of the new public sector procurement Directive, which as clearly indicated by Recital (42) of the same Directive is likely to be interpreted in broad and flexible terms, following the blueprint of the WTO Government Procurement Agreement. See Sanchez Graells, ‘Public Procurement and State Aid’ (2012) 210.

will be a new ‘window of opportunity’ to litigate against the award of public contracts (exclusively) on the basis of State aid rules, regardless of the formal compliance with the (increasingly flexible) EU public procurement rules. However, this litigation will also be likely to take place within the remit of public procurement challenges.

Another future possibility for litigation in terms of the granting of implicit State aid despite (formal) compliance with public procurement rules concerns renegotiation of the terms of the contract and contractual modifications.<sup>16</sup> To date, material changes in the scope of a public contract were considered as ‘fresh’ direct (illegal) awards and, consequently, they could be challenged both for lack of compliance of public procurement and State aid rules. However, a special regime for the modification of contracts during their term is foreseen in Article 72 of the new public procurement Directive. Under the new regime, contracts can be modified during their term without the need for a new tender procedure as long as the modifications are not substantial (*i.e.* where they do not render the contract materially different in character from the one initially concluded)—and, remarkably, Article 72(2) introduces a *de minimis* threshold of ‘substantiality’ whereby it will not be necessary to proceed to a new award where ‘the modification is below both of the following values: (i) the thresholds [for the application of the Directive]<sup>17</sup> and (ii) 10 % of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts [...provided that the modification does] not alter the overall nature of the contract’ and always bearing in mind that ‘[w]here several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications’. This possibility to introduce (non-substantial) modifications of the contract during its term also comes to question the logic followed by the Commission and the strength of the presumption that compliance with public procurement rules in the design and running of the tender ensure the absence of an undue economic advantage. Under the new rules, given that the contractual conditions can be altered after award, those changes, while compliant with EU procurement law, could be a form of disguised State aid if they were not justified by the operative needs of the implementation of the contract or resulted in excessive (supra-competitive) compensation to the public contractor.

In this scenario, after the approval of the new public procurement Directive, the increased flexibility both at award phase and during the execution of public contracts imposes the need to adopt a new method in order to find an infringement of the State aid rules (or *rectius*, in order to reverse the presumption that compliance with public procurement rules excludes the existence of any undue economic advantage). Indeed, it is necessary to go back to a less formalistic and more substantive analysis of the conditions in which a public contract is awarded.

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<sup>16</sup> I am grateful to Carina Risvig Hansen for raising this issue.

<sup>17</sup> The value thresholds set out in Article 4 of the new Directive are €5,186,000 for public works contracts; €134,000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; and € 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities. Therefore, contract modifications below these thresholds can still be relatively large in terms of (absolute) economic value.

As suggested by Advocate General Jacobs, it is necessary to determine whether, despite having (formally) complied with procurement rules, the public contractor actually received an economic advantage because the terms of the contract (either originally, particularly if negotiated, or as amended) do not reflect normal market conditions,<sup>18</sup> bearing in mind that bilateral arrangements or more complex transactions involving mutual rights and obligations are to be analysed as a whole. Where for example the State purchases goods or services from an undertaking, there will be aid only if and to the extent that the price paid exceeds the market price.<sup>19</sup>

It follows that, despite the growing opportunities for litigation, in the absence of a clear disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer (which needs to be assessed in light of such complex criteria as the risks assumed by the contractor, technical difficulty, delay for implementation, prevailing market conditions, etc);<sup>20</sup> ‘general’ State aid rules will continue to generate relatively limited opportunities for public procurement litigation where it is difficult to establish the counterfactual ‘market price’.<sup>21</sup> This limitation will be particularly relevant in the case of SGEI, despite the fact that the Commission has developed a rather complicated system for the assessment of the elements of State aid implicit in their commissioning or procurement (below §2.3).

## 2.2. Participation of recipients of State aid in public procurement

A second area of significant overlap in public procurement and State aid enforcement (and litigation) involves the treatment of abnormally low tenders submitted by the recipients of State aid. The standard argument in these cases is that a tenderer should be excluded because it has received illegal State aid<sup>22</sup> - i.e. because the recipient of illegal State aid uses it to cross-subsidise its tender or, otherwise, is allowed to submit a tender in conditions unattainable for competitors that have not received State aid.

It is worth stressing that this is an area that has shown intense litigation before domestic courts. As the 2006 *Study* indicated, ‘the number of State aid cases initiated in the context of public procurement (i.e. in situations where the claimant competes with the aid recipient in a public tender) is increasing; however, there are not many cases in which tenderers have successfully invoked violations of [EU] State aid law’.<sup>23</sup> Along the same lines, the 2009 *Update* of that study stressed that ‘judges of lower instance courts

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<sup>18</sup> As regards the importance of the analysis of ‘*consideration*’ in public contracts to exclude the existence of a gratuitous advantage to the government contractor, JA Winter, ‘Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty’ (2004) 41 *Common Market Law Review* 475, 487–501.

<sup>19</sup> Opinion of AG Jacobs in case C-126/01 *GEMO*, [2003] ECR I-13769, 122. See also Opinion of AG Fennelly in case C-251/97 *France v Commission*, [1999] ECR I-6639, 19.

<sup>20</sup> In similar terms, A Doern, ‘The Interaction between EC Rules on Public Procurement and State Aid’ (2004) 13 *Public Procurement Law Review* 97, 117; and S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet and Maxwell, 2005) 224-7.

<sup>21</sup> Which, in my opinion, claims for a further development of the principle of the market economy agent as a workable test; see A Sanchez Graells, ‘Bringing the “Market Economy Agent” Principle to Full Power’ (2012) 33(10) *European Competition Law Review* 35, 39.

<sup>22</sup> *Study on the Enforcement of State Aid Law at National Level* (2006) 34.

<sup>23</sup> *ibid* 50-1.

play an important role in the enforcement of State aid rules, especially in public procurement and in the context of local public services'.<sup>24</sup> This relative importance of public procurement related State aid litigation seems likely to continue increasing in the future—particularly in some jurisdictions that are accumulating a relatively strong case law, such as Belgium, France, Germany, Italy or the Netherlands.<sup>25</sup>

In this type of litigation, the relationship between public procurement and State aid rules is relatively straightforward and it is more clearly structured, given that the current rules have consolidated the case law of the CJEU. Indeed, current EU public procurement Directives include special rules concerned with the possibility to reject abnormally low tenders and, in particular, those tainted with illegal State aid.<sup>26</sup> Article 55(3) of Directive 2004/18 states that

Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer<sup>27</sup> where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally (emphasis added).<sup>28</sup>

Therefore, if a tenderer that has submitted an apparently abnormally low tender<sup>29</sup> is the beneficiary of unlawful State aid (*i.e.* State aid granted without a prior notification to the European Commission and which cannot benefit from an exemption under any applicable block exemption regulations),<sup>30</sup> the contracting authority can decide to

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<sup>24</sup> 2009 Update to the 2006 *Study on the Enforcement of State Aid Law at National Level* [ec.europa.eu/competition/state\\_aid/studies\\_reports/enforcement\\_study\\_2009.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf). Indeed, public procurement related State aid cases represented 5% of the overall State aid litigation before the domestic courts of the EU-15 covered in the 2006 *Study*—which was up from 2% in 1999. 2006 *Study* (n 4) 41-2.

<sup>25</sup> Indeed, most of these jurisdictions have continued to accumulate a significant number of public procurement related cases in the 2009 *Update* (n 24).

<sup>26</sup> See Arrowsmith, *The Law of Public and Utilities Procurement* (2005) 531-9; and P Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, OUP, 2007) 59-60 and 474-7; and GS Ølykke, 'Submission of Low Price Tenders by Public Tenderers—Exemplified by Public Procurement of Railway Services in Denmark' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, DJØF Publishing, 2009) 253.

<sup>27</sup> The type of consultation to be carried out involves a written *inter partes* procedure that must comply with the requirements of Article 55(2) of Directive 2004/18, as recently interpreted by the CJEU in Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR I-0000.

<sup>28</sup> For discussion and further references, see Sanchez Graells (n 6) 326-9.

<sup>29</sup> The Directives do not include a definition of abnormally low offers and, consequently, there is a relevant debate going on concerning the boundaries of the concept and the methodologies that contracting authorities can use to identify them. For discussion, see GS Ølykke, *Abnormally Low Tenders with an Emphasis on Public Tenderers* (Copenhagen, DJØF, 2010). A proposal for screening of abnormally low offers was introduced in Article 69 of the original proposal for the new Directive, but it was abandoned in the 30 November 2012 and not reinserted in the final Compromise Text leading to the adoption of the Directive.

<sup>30</sup> Indeed, State aid will be 'unlawful' when it has been awarded in breach of the procedural obligations set out in Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 TFEU] [1999] OJ L83/1. In contrast, illegal State aid will be 'incompatible' if it distorts or threatens to distort competition within the internal market and, consequently, cannot be exempted by the European Commission from the general prohibition of Article 107(1) TFEU. Therefore, the test of 'legality' is merely formal, whereas the test of 'compatibility' triggers a substantive assessment. In some cases, however, both

exclude its tender without any further consideration and solely for that reason.<sup>31</sup> However, the use of this test of ‘legality’ rather than ‘compatibility’ of State aid significantly reduces the effectiveness of this provision—and there are doubts about whether the existence of incompatible State aid can be coupled with other reasons (remarkably, with the existence of a significant risk of non-performance or economic instability derived from a potential recovery decision) in order to reject abnormally low tenders under Article 55(1) and 55(2), rather than Article 55(3) of Directive 2004/18. It could even be questioned why the analysis of the duty to reject tenders tainted with illegal State aid is limited to the cases where they are abnormally low and cannot be extended also to cases where but for the existence of the illegal State aid, the tenderer would have submitted a much worse economic, not competitive offer.<sup>32</sup>

It is worth emphasising that this shortcoming in the possibility to reject all instances of tenders tainted by illegal State aid may be partly corrected (exclusively in relation to abnormally low tenders) under the new public procurement rules, since the wording of the equivalent of Article 55(3) [to be renumbered as Art 69(4)] states that

‘Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof’ (emphasis added).

Such change will, in principle, significantly expand the scope of this provision to capture not only unlawful, but also incompatible State aid.<sup>33</sup> However, given the exclusive competence of the European Commission to determine the compatibility or lack thereof of State aid measures,<sup>34</sup> the practical effects of such modification may be

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tests will be complicated by the issue of whether an existing block exemption regulation covered the aid and, consequently, there was no need for the notification to the European Commission.

<sup>31</sup> Indeed ‘national courts have found it easier to identify elements of State aid in public procurement cases, and this has led to a number of judgments in which the national court has ruled in favour of the claimants and found the existence of unlawful State aid’, *2009 Update* (n 24) 4.

<sup>32</sup> I am thankful to Sue Arrowsmith for this point. I am also thankful to Tim Bruyninckx for stressing that the possibility of rejecting sub-optimal offers by the contracting authority would raise monitoring costs and may have a perverse incentive in terms of participation of recipients of illegal State aid. As to the first point, obviously, rejection of sub-optimal offers should only be carried out if the contracting authority is in a position to do so, after having exhausted reasonable investigation possibilities—so, basically, this is just proposed as a possibility, but not a definitive obligation if it would otherwise impose an excessive and disproportionate burden on the contracting authority. As to the second point, discouraging recipients of State aid to participate in the first instance is a desirable collateral or spillover effect, in my view.

<sup>33</sup> For discussion on the treatment of abnormally low tenders under the proposal for a new Directive, see GS Ølykke, ‘How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?’ in C Tvarnø, GS Ølykke & C Risvig Hansen, *EU Public Procurement: Modernisation, Growth and Innovation* (Copenhagen, DJØF, 2012) 57, 66-75.

<sup>34</sup> I.e., the monopoly of enforcement of State aid rules under Article 107(2) and 107(3) TFEU, whereby national courts (and, by implication, national procurement authorities) do not have the power to declare State aid compatible with those provisions. See Case C-199/06 *CELF and Ministère de Culture et de la*

seen to exclusively amount to an obligation to suspend award procedures while the procedure before the European Commission is completed (a view dismissed below §3.2)—which would not be a practical solution, in view of the relevance of timing in public procurement and its related litigation.

On a different note, it is not clear that contracting authorities will have the proper incentives to investigate the existence of illegal (unlawful) State aid, since they may be interested in obtaining the implicit discount in the economic terms of the subsidised offer, or could have an interest in engaging in protectionism if the beneficiary of the State aid is a domestic producer<sup>35</sup>. In this regard, it has been stressed by the EU case law that this is ‘a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it’.<sup>36</sup> Indeed, as the CJEU has clearly emphasised, this is a positive and unavoidable requirement, and ‘Article 55 of Directive 2004/18 does preclude [...] a contracting authority from claiming [...] that it is not obliged to request a tenderer to clarify an abnormally low price’.<sup>37</sup> To be sure, contracting authorities are not expressly obliged to reject abnormally low tenders—rather, their duty is just to identify suspect tenders and scrutinize them following the *inter partes* procedure established in the directive, whereby ‘the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine’.<sup>38</sup> In this regard, the CJEU has stressed that the contracting authority is:

‘under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders’.<sup>39</sup>

Hence, the rules of the directive exclusively impose procedural guarantees to be complied with by contracting authorities prior to rejecting apparently abnormally low tenders;<sup>40</sup> and, consequently, seem to be mainly oriented towards providing affected tenderers the opportunity to demonstrate that their tenders are genuine<sup>41</sup> - i.e. are *primarily* a mechanism to prevent discretionary (or arbitrary) decisions by contracting

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*Communication* [2008] ECR I-469, 38, and *Commission Notice on the Enforcement of State Aid Law by National Courts* [2009] OJ C85/1, 20.

<sup>35</sup> I am thankful to Sebastian Peyer for raising this issue.

<sup>36</sup> Case T-495/04 *Belfass* [2008] ECR II-781, 98. Similarly, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, 51.

<sup>37</sup> Case C-599/10 *SAG ELV Slovensko* [2012] ECR I-0000, 34.

<sup>38</sup> Case C-599/10 *SAG ELV Slovensko* [2012] ECR I-0000, 31.

<sup>39</sup> Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, 55.

<sup>40</sup> Case 76/81 *Transporoute* [1982] ECR 417, 18; Case 103/88 *Costanzo* [1989] ECR 1839, 16-21; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, 33-45.

<sup>41</sup> Case 103/88 *Costanzo* [1989] ECR 1839, 18; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, 47; Case T-495/04 *Belfass* [2008] ECR II-781, 97.

authorities.<sup>42</sup> Therefore, it seems necessary to couple these rules with a duty to go beyond the mere investigation and proceed to the rejection of the tenders once the existence of illegal State aid has been determined (below §3.3). Moreover, it seems necessary to ensure that competing tenderers have access to sufficient details about the winning bid to be able to identify the existence of State aid or, if that creates excessive transparency in the post-award debriefing process, that they can otherwise challenge the award decision on the grounds of the existence of State aid.<sup>43</sup>

In any case, when the assessment of the abnormality of the tender tainted by illegal State aid (clearly for unlawful aid, but most likely equally for incompatible aid, or even with more intensity) reaches the courts, it seems that current judicial practice is less formal than one would expect upon reading Article 55(3) of Directive 2004/18, and that domestic courts impose a strict analysis of the ‘abnormality’ of the tender and its causal link with the receipt of the (unlawful) State aid. The findings of the *2006 Study* are worth noting:<sup>44</sup>

‘it appears that in practice, in most cases, tenderers that relied on this clause have been unsuccessful. The reason is that a tenderer must show that the illegal aid actually had an impact on the tender by his competitor and made that tender “abnormally low”. It would appear that, in practice, it is almost impossible to make such a showing unless the aid is specifically related to the tender’.<sup>45</sup>

Therefore, it seems clear that litigation in this area faces the significant hurdle of the burden of proof concerning the effect of the illegal State aid in the specific terms and conditions of the tender submitted by the beneficiary of such aid. However, this is not specific to public procurement related cases and, more generally, it is one of the relevant obstacles to effective (decentralized) enforcement of the EU State aid rules.<sup>46</sup> In any case, it is worth stressing that the *2006 Report* recommended that:

<sup>42</sup> For further references and discussion, see A Sanchez Graells, ‘Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions’ in S Treumer and R Caranta (eds), *Award of Public Contracts under EU Procurement Law*, 4 European Procurement Law Series (Copenhagen, DJOF, 2013) 267-302, [ssrn.com/abstract=2248590](http://ssrn.com/abstract=2248590).

<sup>43</sup> On certain issues concerning the confidentiality of financial assessments of the tenders submitted by other undertakings, see Joined Cases T-339/10 and T-532/10 *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)* [2013] ECR II-0000. For a comment, see A Sanchez Graells, ‘The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives’ (November 2013). University of Leicester School of Law Research Paper No. 13-11. Available at SSRN: <http://ssrn.com/abstract=2353005>.

<sup>44</sup> *2006 Study* (n 4) 50-1.

<sup>45</sup> This is a very unlikely scenario, given that aid measures are usually not directly linked to tendering processes. For an interesting case, where the European Commission was expressly concerned with the beneficiary of State aid engaging in predatory pricing (i.e. submission of abnormally low tenders) in the rolling stock market, see Commission Decision of 7 July 2004 on the aid measures implemented by France for Alstom [2005] OJ L150/24, 220.

<sup>46</sup> Indeed, ‘State aid cases are often complex and involve economic considerations (in particular for the qualification of aid in the event of an application of the market investor test or of the Altmark principles) for which national courts often lack the appropriate means to establish the factual information necessary for their decision. The burden of proof, therefore, is often a hurdle that leads to the claimant being unsuccessful’, *2009 Update* (n 24) 3. On this issue, it is relevant to stress that the CJEU has adopted a

‘An efficient remedy would probably require that a tenderer that has received illegal State aid be excluded from the tender altogether, regardless of whether the State aid had a specific influence on the tender submitted. At least, one should consider [reversing] the burden of proof as to the effects of the illegal aid on the tender: the tenderer should not be excluded only if it is able to prove that the illegal aid had no effect on its bid’<sup>47</sup> (emphasis in the original).

Beyond that recommendation, which ‘softer’ alternative of reversing the burden of proof is sensible and desirable, it can be argued that there is a general obligation to dismiss those tenders tainted with illegal State aid in order to ensure the *effet utile* of the provisions in Article 107 TFEU and Regulation 659/1999 and, consequently, that domestic courts (and procurement authorities) cannot make it excessively burdensome to challenge an abnormally low tender tainted with illegal State aid. In my opinion, a joint reading of Article 4(3) of the Treaty on European Union<sup>48</sup> (i.e. the duty of sincere cooperation) and Article 69(4) of the new public procurement Directive is particularly clear in that respect (on this duty of sincere cooperation, see more discussion below §3.2).

In this regard, the result of the very recent reform of the public procurement rules may create opportunities for a ‘new wave’ of litigation in this area, in order to test the limits of the new drafting requiring that the tenderer having submitted an apparently abnormally low tender justifies that it is (cross)subsidised by State aid compatible with the internal market within the meaning of Article 107 TFEU. Again, this litigation is highly likely to remain within the confines of procurement challenges and their judicial review.

### **2.3. Financing services of general economic interest (SGEI)**

Finally, it is worth stressing that, in parallel to the general developments of the public procurement rules already mentioned that can have an impact on State aid related litigation (*ie* the introduction of more flexibility and room for negotiations, above §2.1; and a change in the rules concerning the treatment of abnormally low tenders tainted by illegal State aid, above §2.2), there is a third area of State aid procurement-related litigation that is due to gain relevance in the near future: that of the commissioning and financing of SGEI.

The reform of the rules on State aid applicable to SGEI approved by the European Commission in late 2011 and the first quarter of 2012 (the ‘Almunia package’) has strengthened the already close links between this area of competition law and the enforcement of EU public procurement rules. It is worth stressing that the recent reforms of the EU public procurement rules - and, particularly, the adoption of special

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permissive approach towards the use of domestic rules on evidence in order to allow courts to gather the necessary information and to reduce the information asymmetry faced by claimants. See Judgment of the European Court of Justice in case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529 at para 55. I am grateful to Tim Bruyninckx for this point.

<sup>47</sup> 2006 Study (n 4) 51.

<sup>48</sup> [2010] OJ C83/13.

rules for social services within the ‘general’ public procurement Directive,<sup>49</sup> and of a new Directive on concession contracts<sup>50</sup> - have completed the revision of the regulatory package applicable to the control of State aid in the area of SGEI and provided legal clarification<sup>51</sup> (and, equally, more flexibility) in the rules applicable to the selection of the undertaking to be entrusted with the public service obligations implicit in the provision of SGEI. However, they have also stressed the inherent tensions in the public procurement and the State aid ‘legs’ of this control system.

A main principle that emerges from the Almunia package is that proper compliance with certain EU public procurement rules excludes the existence of State aid in the award of contracts for the provision of SGEI.<sup>52</sup> Similarly, even where State aid exists because the public procedures followed are not sufficient to ‘ensure least cost to the community’, compliance with EU procurement rules makes it more likely that the aid can be declared compatible with the internal market - particularly in view of the codification of the ‘fourth *Altmark* condition’.<sup>53</sup> This regulatory scenario seems very similar to the general issues discussed above (§2.1), where public procurement litigation is likely to phagocytise State aid litigation, given that compliance with certain public procurement rules will be the key to avoid State aid scrutiny under the Almunia Package. However, given the higher degree of sophistication shown by the European Commission in the treatment of public procurement requirements within the Almunia Package, this specific area of interaction of State aid, competition and public procurement rules deserves particularly careful analysis.

Moreover, the approval of the new public procurement Directive cannot leave the current scenario unchanged and it requires a revision of the guidance offered by the Commission regarding the enforcement of State aid, public procurement and competition rules in the area of SGEI and social services of general interest (SSGIs).<sup>54</sup>

<sup>49</sup> See Articles 74 to 77 of the new public procurement Directive. See also the special regime for the reservation of contracts for certain services in Article 77, which is prone to create significant complications due to the, in my view, excessive leeway it grants to Member States. For discussion, see A Sanchez Graells & E Szyszczak, ‘Modernising Social Services in the Single Market: Putting the Market into the Social’, in JM Beneyto and J Maillo (eds) *Fostering Growth: Reinforcing the Internal Market* (Madrid, CEU Ediciones, 2014) pp. 61-88.

<sup>50</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, [2014] OJ L94/1. For a critical appraisal of the proposal on concessions, see A Sanchez Graells, ‘What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of their Economic Balance?’ (2012) 2 *European Public Private Partnership Law Review* 94.

<sup>51</sup> See Fiedziuk, ‘Putting Services of General Economic Interest Up for Tender’ (2013); C Bovis, ‘Public Procurement, State Aid and Services of General Economic Interest’ (2011) *ERA* [era-comm.eu/dalaw/kiosk/documentation/Public\\_procurement\\_issues/2011\\_05%20Bovis\\_paper.pdf](http://era-comm.eu/dalaw/kiosk/documentation/Public_procurement_issues/2011_05%20Bovis_paper.pdf).

<sup>52</sup> This is particularly clearly stated in several of the answers in the 2013 version of the ‘Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest’ (n 1).

<sup>53</sup> For commentary, see the various contributions to E Szyszczak and JW van de Gronden (eds) *Financing Services of General Economic Interest. Reform and Modernization*, Legal issues of Services of General Interest (The Hague, TMC Asser / Springer, 2013). See also Sauter, ‘The Altmark Package Mark II’ (2012).

<sup>54</sup> ‘Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest’ (n 1) 20, where it is clearly stated that ‘It is planned to update the public procurement section of this guide once the new public procurement rules have been adopted in order to bring it in line with the new provisions’.

The adoption of new EU public procurement and State aid rules and the concurrent reform of the structures for the provision of public services that almost all Member States are undertaking as a result of the economic crisis are likely to create some grey regulatory areas and opportunities for litigation. Hence, it is worth exploring their implications and potential contradictions in some detail.

As already mentioned (above §2.1), compliance with public procurement rules is usually understood to exclude the existence of any undue economic advantage and, consequently, of State aid. In the specific field of the financing of SGEI, and following the conditions imposed by the CJEU in *Altmark*,<sup>55</sup> it is understood that the selection of the provider of such services pursuant to a public procurement procedure (which would allow for the selection of the tenderer capable of providing those services at the least cost to the community)<sup>56</sup> excludes the existence of excessive remuneration and, consequently, any element of illegal State aid. However, in the Almunia Package, the European Commission elaborates on this assumption. In short, its understanding of the procurement requirement in *Altmark* has been clearly spelled out in the following terms:

‘Based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at “the least cost to the community” (emphasis added).’<sup>57</sup>

And, in even more detailed terms,

‘... full compliance with open or restricted public procurement procedures awarded on the basis of either the lowest price or, under certain conditions, the most economically advantageous tender means that the contract is awarded at the “least cost to the community” as required by the Court as one of the conditions for excluding the existence of State aid’ (emphasis added).’<sup>58</sup>

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<sup>55</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

<sup>56</sup> For discussion on whether the part between brackets constitutes an essential element or an obiter dictum of the CJEU, A Sanchez Graells, ‘The Commission’s Modernisation Agenda for Public Procurement and SGEI’ in E Szyszczak and JW van de Gronden (eds) *Financing Services of General Economic Interest. Reform and Modernization*, Legal issues of Services of General Interest (The Hague, TMC Asser / Springer, 2013) 161, 163-6. As indicated there, in my opinion, reading an absolute requirement for ‘lowest cost’ in the fourth *Altmark* condition seems highly contentious and at odds with the purpose and reality of public procurement rules. Therefore, it seems clear that a less restrictive approach, with a looser link to (absolute) ‘least cost’ implications can be extracted from the final findings of the CJEU in its reply to the preliminary questions put in *Altmark*, where the only requirement is that the undertaking which is going to discharge public service obligations is chosen in a properly designed and adequately run public procurement procedure aimed at avoiding economic inefficiency through competition (or, alternatively where that is at all possible, that the remuneration for the discharge of the public service obligations is determined against the benchmark of an efficient typical undertaking, well run and adequately provided with the relevant material means).

<sup>57</sup> *SGEI Compensation Communication* (n 2) 65.

<sup>58</sup> *SGEI Quality Framework* (n 2) 6. For a sound criticism, JL Buendia Sierra and JM Panero Rivas ‘The Almunia Package: State Aid and Services of General Economic Interest’ in E Szyszczak and JW van de Gronden (eds) *Financing Services of General Economic Interest. Reform and Modernization*, Legal issues of Services of General Interest (The Hague, TMC Asser / Springer, 2013) 125, 137.

The Commission is clearly indicating that it will adopt a restrictive approach in the analysis of those criteria different than price used to assess which is the most economically advantageous tender. Hence, the approach adopted by the European Commission is rather restrictive. It excludes the possibility to use a significant number of public procurement procedures and award criteria as part of a process aimed to exclude the existence of State aid in the commissioning of SGEI.<sup>59</sup> On the flip of the same coin, by reducing the scope of the ‘public procurement exemption’, the guidance of the European Commission in the Almunia Package significantly extends the possibilities to litigate award decisions on the basis that they constitute illegal State aid—unless they are covered by either the SGEI *de minimis* Regulation, the SGEI Compensation Decision or the 2011 SGEI Framework.

Under the structure of exemptions of the Almunia Package, the SGEI *de minimis* Regulation exempts aid given to an undertaking carrying out SGEI activities as long as it does not exceed €500,000 over any period of three fiscal years. Aid under this threshold must be granted in a manner that complies with the EU public procurement rules, but only as a general matter of EU law,<sup>60</sup> so an infringement of the public procurement rules would not affect the benefit of the exemption.<sup>61</sup>

For aid that exceeds the *de minimis* threshold, its compatibility with the internal market will be determined in accordance with the SGEI Compensation Decision (which works as a block exemption regulation) and, failing that, under the 2011 SGEI Framework.<sup>62</sup> The exemption under the SGEI Compensation Decision is generally available in three cases: i) to compensation for the provision of SGEI not related to transport and transport infrastructure where it does not exceed €15 million per year; ii) without an annual limit, to compensation for the provision of SGEI by hospitals providing medical care, including, where applicable, emergency services (and ancillary activities); and iii) without an annual limit, to compensation for the provision of SGEI meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.<sup>63</sup> Therefore, the 2011 SGEI Framework will only be applicable to SGEI of

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<sup>59</sup> For interesting discussion, even if prior to the adoption of the Almunia Package, see P Dethlefsen, ‘Public Services in the EU—Between State Aid and Public Procurement Rules’ (2007) *Public Procurement Law Review* NA53.

<sup>60</sup> See Recital (21) of the SGEI *de minimis* Regulation, which indicates that ‘This Regulation should apply without prejudice to the requirements of Union law in the area of public procurement or of additional requirements flowing from the Treaty or from sectoral Union legislation’.

<sup>61</sup> In this regard, Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, 238-9, confirmed on appeal by the CJEU, Case C-320/05 P *Olsen v Commission and Spain* [2007] ECR I-131. As already mentioned (n 10), the CJEU has confirmed that the absence of a tendering procedure does not preclude a finding that State aid rules have not been violated.

<sup>62</sup> On the hierarchy of the documents in the Almunia Package and the logic for their application, see E Szyszczak, ‘Modernising State Aid and the Financing of SGEI’ (2012) 3(4) *Journal of European Competition Law & Practice* 332.

<sup>63</sup> It also covers exemptions to ports and airports, depending on the number of travellers that use them. For details, see Article 2(1) of the SGEI Compensation Decision.

large dimensions (to the exclusion of social SGEI) and to those of a medium scale (in all sectors) that fail to meet all the requirements in the SGEI Compensation Decision.

It is important to stress that, in contrast with the SGEI *de minimis* Regulation, both the SGEI Compensation Decision and the 2011 SGEI Framework mandate compliance with public procurement rules as a condition for exemption of the aid granted to the undertaking entrusted with the SGEI.<sup>64</sup> Therefore, failing to comply with the public procurement requirements as set out in these documents will imply that the State aid given to the undertaking cannot be exempted under Article 106(2) TFEU.<sup>65</sup> In short, then, strict compliance with public procurement rules is a compatibility requirement for all SGEI State aid, to the only exception of *de minimis* aid (which, in any case, would most likely remain outside the scope of the EU public procurement rules due to the low value of the contracts and the likely inexistence of cross-border interest). At first sight, this may run contrary to the case law of the European Courts, which in *Olsen* held that:

‘it is not apparent either from the wording of Article [106(2) TFEU] or from the case-law on that provision that a general interest task may be entrusted to an operator only as a result of a tendering procedure. In those conditions, contrary to the applicant’s claims, there can be no requirement for the contested decision to contain a particular statement of reasons for the absence of such a procedure’.<sup>66</sup>

However, precisely by introducing the requirement of compliance with public procurement procedures - and, as will be explored, not any procedures, but only certain of the ones envisaged in the EU public procurement rules, and under relatively demanding conditions - the European Commission is creating such an obligation through secondary legislation and soft law (which can be much more contentious<sup>67</sup>) and, consequently, the *Olsen* case law is effectively overridden.<sup>68</sup>

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<sup>64</sup> Fiedziuk (n 13) 97; A Sinnaeve, ‘What’s New in SGEI in 2012?—An Overview of the Commission’s SGEI Package’ (2012) 11(2) *European State Aid Law Quarterly* 347, 352.

<sup>65</sup> This has been criticised as an excess on the part of the European Commission. See Fiedziuk (n 13) 97-9, who considers that ‘by establishing a criterion of compliance with the applicable public procurement rules for State aid to be found compatible, the Commission seems to be transgressing the limits of its broad discretion in shaping the application of Article 106(2) TFEU by ignoring the purpose of State aid rules in relation to which it serves as a derogation. Paradoxically thus, the Commission may be actually distorting Member States’ incentives to tender the provision of SGEI created by the [CJEU] in the *Altmark* judgment’. *Cfr.* Sauter (n 3) 311, who finds no problem in such approach and considers that ‘The relationship with the public procurement rules that follows from the *Altmark* case itself is strengthened in the new Framework by a provision that aid which is granted in violation of the procurement rules is considered to be contrary to the interest of the Union within the meaning of TFEU art. 106(2)’.

<sup>66</sup> Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, 239. See Dethlefsen, ‘Public Services in the EU’ (2007) NA62, who considered that this was not in contradiction with the public procurement rules and that the Court limited itself to declare that ‘an exemption from competition and State aid under art. [106(2) TFEU] could be available even if the contract had not been awarded in a tendering procedure [...] nothing excludes other Treaty provisions and principles from requiring the very same task to be put up for competition’.

<sup>67</sup> For general discussion on the use of soft law as a main instrument of policy and regulation in State aid and, more generally, in EU competition policy, see O Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (The Hague, Wolters Kluwer Law & Business, 2012). See also A Sanchez

Indeed, even if all documents in the ‘Almunia Package’ are careful to indicate that they do not alter in any manner the general obligations derived from the EU public procurement rules - i.e. that they apply without prejudice of the requirements imposed by EU law in the field of procurement - one can wonder whether that is the case. A critical reading of the documents shows how there is a significant push for an ‘expanded application’ of public procurement rules in full (even when they are not directly applicable), particularly in view of the ‘preferred route’ approach to procurement that the Almunia Package shows vis-à-vis the alternative means of compliance with the fourth *Altmark* condition (that is, a benchmark appraisal against a theoretical efficient SGEI supplier). This can clearly be seen in the SGEI Compensation Communication, where it is stated that:

‘The simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with [Directive 2004/18 ...] the conduct of such a public procurement procedure is often a mandatory requirement under existing Union rules. [...] Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid’.<sup>69</sup>

Such an approach to the use of public procurement as a device to exclude State aid can be misleading, since it presents the discharge of public procurement obligations as an advantage that contracting entities can benefit from (at their discretion) - whereas the conduct of procurement procedures that ensure the effectiveness of the general principles in the Treaties is not optional, but a mandatory requirement under EU law, even when the EU procurement Directives are not or are only partially applicable (as long as there is a cross-border interest, which is likely to happen when the SGEI *de minimis* Regulation is not applicable).<sup>70</sup> Therefore, it is not the easiest way to meet the fourth *Altmark* condition, but the only way that contracting entities can meet their general obligations under EU public procurement law.

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Graells, ‘Soft Law and the Private Enforcement of the EU Competition Rules’, in JL Velasco San Pedro (ed), *Private Enforcement of Competition Law* (Valladolid, Lex Nova, 2011) 507-20.

<sup>68</sup> Which can (and will) be criticised in view of the restriction that this imposes on the potentially separate analysis of public procurement and State aid rules, particularly by commentators that consider that breaches of public procurement rules should not have an effect on the analysis under Articles 106(2) and 107(1) TFEU, as purchases outside the tight public procurement procedures are apt to exclude the existence of any undue economic advantage, such as argued by S Arrowsmith, *The Law of Public and Utilities Procurement*, 3rd edn (London, Sweet & Maxwell, 2014) forthcoming. The same arguments were already explored in the 2nd edition of her book.

<sup>69</sup> *SGEI Compensation Communication* (n 2) 63-4.

<sup>70</sup> On the mandatory application of the general principles of TFEU to all procurement activities and the positive obligations that it implies, see C Risvig Hansen, *Contracts not covered, or not fully covered, by the Public Sector Directive* (Copenhagen, DJØF, 2012). Regarding the type of arrangements that must be considered a ‘contract’ and, therefore, subjected to procurement rules, see GS Ølykke, ‘The Definition of a “Contract” Under Article 106 TFEU’ in E Szczyrak *et al.* (eds), *Developments in Services of General Interest*, (The Hague, TMC Asser Press/Springer, 2011) 103.

Moreover, this approach suggests that the European Commission favours the full subjection of SGEI tendering to the rules of the EU public procurement Directives and the national rules that transpose them,<sup>71</sup> but only as long as they are applied in the specific terms of the SGEI Compensation Communication (which the Commission intends to amend sometime soon, once new Union rules on public procurement have been adopted, in order to clarify the relevance for State aid purposes of the use of the procedures foreseen in these new rules).<sup>72</sup> This is in clear contrast with the new light-touch regime applicable to the procurement of social and other specific services under articles 74 to 77 of the new procurement Directive, which create a light-touch regime that goes as far as to allow for the existence of reserved contracts for certain services (Art 77). Therefore, there seems to be a clear divergence between the new procurement rules applicable to the contracting of (some) SGEIs and the presumption that compliance therewith suffices to ensure State aid law compliance too. Therefore, if the Commission is to maintain the view that not any type of procurement-compliant procedure suffices to (simply) benefit from the *Altmark* exemption, but that only those tailored to the guidelines of the SGEI Compensation Communication do - there will be problems of reconciliation of the existing State aid guidance and the newly agreed public procurement rules (which seem to include a very clear political message from Member States, which have created a carve out in the procurement of social services that will trigger litigation in the SGEI area).

Furthermore, in my view, the position of the Commission in the 2011 SGEI Framework for those cases where SGEI compensation does not meet the criteria in the SGEI Compensation Communication has a similar defect, since it states that:

‘Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty’ (emphasis added).<sup>73</sup>

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<sup>71</sup> This is radically contrary to proposals to reduce the burden of public procurement rules in the tendering of SGEI on the basis of Article 106(2) TFEU, as proposed by Fiedziuk (n 13) 110-3 and HM Stergiou, ‘The Increasing Influence of Primary EU Law and EU Public Procurement Law: Must a Concession to Provide Services of General Economic Interest be Tendered?’ in JW van de Gronden (ed), *The EU and WTO Law on Services: Limits to the Realisation of General Interest Policies within the Services Markets?*, European Monograph Series (Alphen aan den Rijn, Kluwer Law International, 2009) 159, 184. However, applying the public procurement rules to putting the task of conducting the services of general economic interest up for competition has not been considered an obstruction to the development of those services and cannot be the object of an automatic exemption under art 106(2) TFEU; see Opinion of AG Stix-Hackl in case C-532/03 *Commission v Ireland* 98-108. Along the same lines, see Opinion of AG Mazák in case C-480/06 *Commission v Germany* 56-63. See also Sanchez Graells, *Public Procurement and the EU Competition Rules* (n 9) 126-7.

<sup>72</sup> *SGEI Compensation Communication* (n 2) 63 and fn 88.

<sup>73</sup> *2011 SGEI Framework* (n 2) ¶19.

Even if the wording of the 2011 SGEI Framework is clearer in presenting the non-discretionary obligation to comply with primary and secondary EU procurement law, the consequences that it attaches to non-compliance can create a circular test - which can be particularly prone to litigation in view of the specific reference to the general principles derived from the EU Treaties and the final indication that failure to comply with such requirements (automatically) ‘would be contrary to the interests of the Union [under] Article 106(2) of the Treaty’. Surely, the requirements cannot be interpreted in absolute terms and the analysis will have to focus on material compliance with public procurement rules and principles.<sup>74</sup> Otherwise, the test could become even more formal than it currently is (above §2.1) and lead to an excessive number of findings of illegal State aid to SGEI (which would be particularly disproportionate if they were exclusively concerned with formal irregularities that would not have affected the outcome of the tender or the main conditions of the award in a substantial manner).<sup>75</sup>

Summing up, under the approach (re)adopted by the European Commission, i) if compliance with EU procurement rules in a manner that ‘allows for the selection of the tenderer capable of providing the service at the least cost to the community’ ensures meeting the fourth *Altmark* criterion (i.e. no existence of State aid), ii) compliance with procurement rules (at a lower level of restrictiveness, particularly for social services?) ensures exemption under the SGEI Compensation Communication or compatibility under the 2011 SGEI Framework (if all other conditions are met, and at least until this guidance is revised in view of the new public procurement rules), and iii) non-compliance with EU procurement rules (primary and/or secondary, where applicable) determines that the SGEI scheme cannot benefit from Article 106(2) TFEU (except if *de minimis*); then, the analysis seems once more limited to whether procurement rules were complied with or not. Indeed, in this enforcement framework, non-compliance will imply the double, simultaneous breach of procurement and SGEI State aid rules, while compliance with EU public procurement rules would be a safeguard for the application of the SGEI rules - as long as the other *Altmark* conditions are met, which seems relatively easy (inasmuch as the terms of the tender and the contract are clear regarding the definition of the SGEI as the contractual object, the conditions of the entrustment and the design of the compensation mechanism).

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<sup>74</sup> This is one of the open challenges in the area of EU public procurement where, rather counterintuitively, an excessively strict requirement of full compliance with all (minute) rules can be self-defeating and jeopardise the attainment of the goals pursued by the contracting authorities. For discussion, see A Sanchez Graells, ‘Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement’ (2013), forthcoming [ssrn.com/abstract=2248590](http://ssrn.com/abstract=2248590).

<sup>75</sup> Similarly, the General Court has recently excluded the obligation to award damages to disappointed tenderers where the breaches of the EU public procurement rules were ‘merely’ formal and insufficient to have altered the outcome of the tender. In the case at hand, the insufficient motivation of the award decision and the lack of disclosure of certain information during the debriefing of a disappointed bidder would not have altered the award of the contract and, consequently, it did not have a right to be compensated; see Case T-668/11 *VIP Car Solutions v Parliament* [2013] ECR II-0000. Analogously, the same breaches would not support an automatic finding of illegal State aid under Article 107(1) TFEU that would of necessity be contrary to the interests of the Union under Article 106(2) TFEU. A more substantive approach would be necessary, as advocated by AG Jacobs and Fennelly and as discussed above §2.1.

Therefore, once again, this tends to perpetuate the very formalistic approach adopted by the European Commission in the analysis of public procurement as a tool to grant disguised State aid (above §2.1)<sup>76</sup> and also in this area, the bulk of the litigation will take place within public procurement procedures.

### 3. INTEGRATING STATE AID ISSUES IN PUBLIC PROCUREMENT LITIGATION

As seems clear from the analysis in the previous section, the bulk of the public procurement related State aid ‘private’ litigation will continue taking place within the limits of public procurement challenges, be it because determining compliance (or lack of) with EU public procurement rules will determine the (in)existence of State aid - either generally under Article 107(1) TFEU, or under Article 106(2) TFEU in the case of SGEI - or because the assessment of tenders affected by illegal State aid needs to take place as part of the tender process, in an *inter partes* phase of the public procurement procedure [Art 55(3) Dir 2004/18 and 69(4) of the new Dir]. Given the clear push towards integrating public procurement compliance as a requisite for the declaration of compatibility of State aid in the Almunia Package, it should not be surprising that the European Commission continues to push for the development and consolidation of joint methods of enforcement<sup>77</sup> - not least because, in the absence of a unified approach towards the regulation of remedies in economic or market-related cases.<sup>78</sup> Alternative ways to strengthen enforcement in these relevant areas of EU economic law must be sought.

Consequently, it seems clear that the rules and recommendations on the enforcement of State aid rules by the courts of the Member States need to be adapted (or transferred) in this specific setting to the particularities of the system for the enforcement of public procurement rules before the competent review bodies and (administrative) courts (below §3.1). Moreover, seeking to integrate State aid considerations in the system for the enforcement of public procurement rules may achieve the same practical results as creating a specific ‘remedies’ Directive for State aid cases (as proposed by the experts involved in the *2006 Report*<sup>79</sup>) and could contribute to strengthening the enforcement of State aid rules in the public procurement setting. This section attempts such an integration of relevant State aid issues in the system for the enforcement of public procurement rules, with special attention on the implications for SGEI. It focuses on the main areas identified in the *Notice on the Enforcement of State Aid*

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<sup>76</sup> With similar concerns, see B Heuninckx, ‘Defence Procurement: The Most Effective Way to Grant Illegal State Aid and Get Away With It ... Or Is It?’ (2009) 46 *Common Market Law Review* 191.

<sup>77</sup> Along the same lines, although raising the issue that the General Court and the CJEU may not concur with this strategy of the European Commission, at least when Article 258 TFEU infringement procedures are involved (which is a different aspect of this trend of convergence), Fiedziuk (n 13) 97-8.

<sup>78</sup> As highlighted by Sebastian Peyer in one of his comments, this discussion is linked to the issue of remedies in the area of enforcement of Articles 101 and 102 TFEU. In that regard, general future developments in the area of ‘private’ competition law remedies will be relevant. See the Proposal of 11 June 2013 for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU, COM(2013) 404 [ec.europa.eu/competition/antitrust/actionsdamages/proposal\\_directive\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/proposal_directive_en.pdf).

<sup>79</sup> *2006 Study* (n 4) 35.

*Law by National Courts*, where it is clear that the main role for domestic courts (and authorities) in the enforcement of State aid rules focuses on preventing the payment of unlawful aid, imposing interim measures against unlawful aid, and granting relief for the damages suffered by competitors and other third parties.<sup>80</sup>

After providing a succinct description of the public procurement remedies system envisaged in EU law (§3.1), exploring the viability of a system of ‘single private’ litigation based on both public procurement and State aid issues, particularly in view of the lack of competence of domestic courts (and review bodies) concerning declarations of compatibility of State aid (§3.2), and discussing the existence of a general duty to ensure the *effet utile* of State aid rules across the public procurement remedies system (§3.3); this section explores the following specific issues: the legal standing of disappointed tenderers, competitors and third parties to challenge procurement decisions with State aid implications (§3.4); the commonality of the rules on standstill and (additional) interim measures (§3.5); and, finally, the possibility to claim damages and their subjection to domestic law of the Member States (§3.6). As the analysis will show, there seems to be no impediment in the EU rules of State aid and public procurement that prevents their joint enforcement in procurement challenges.

### 3.1. Brief description of the public procurement remedies system

EU public procurement rules include a set of Remedies Directives<sup>81</sup> that establish a minimum standard for the challenge and review of procurement decisions covered by the substantive procurement Directives<sup>82</sup> (although certain remedies may also be required for contracts not or not fully covered,<sup>83</sup> and some Member States have extended the same remedies to public procurement not covered by EU rules and principles) - and, beyond that minimum standard, ‘remedies and procedural law concerning breaches of [EU public procurement] law are considered matters for the

<sup>80</sup> To be clear, national courts also have a salient role in the recovery of unlawful aid (regardless of its compatibility) and the recovery of illegality interests, as stressed in the *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 26. However, in view of the anticipatory nature of the public procurement remedies system, these additional roles will remain largely marginal, if not non-existent in this particular setting.

<sup>81</sup> Directives 89/665/EEC and 92/13/EEC, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31. Collectively referred to as ‘Remedies Directives’.

<sup>82</sup> For a basic description of the enforcement system, see S Treumer, ‘Remedies and Enforcement’ in S Arrowsmith (ed), *EU Public Procurement Law: An Introduction* (2010) 288-97 [nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf](http://nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf). For more in-depth analysis, including interesting comparative assessments, see S Treumer and F Lichère, *Enforcement of the EU Public Procurement Rules*, 3 European Procurement Law Series (Copenhagen, DJØF, 2011).

<sup>83</sup> A Brown, ‘EU Primary Law Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts outside the Procurement Directives’ (2010) 19(5) *Public Procurement Law Review* 169; S Treumer, ‘Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues’, in *ibid* and F Lichère, *Enforcement of the EU Public Procurement Rules*, 3 European Procurement Law Series (Copenhagen, DJØF, 2011) 17, 44-9; and, for further detail, C Risvig Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (Copenhagen, DJØF, 2012) 251-316.

national legislator, according to the principle of national and remedial autonomy'.<sup>84</sup> The purpose of the Remedies Directives is to create the possibility for disappointed tenderers and other sufficiently interested parties to challenge procurement decisions (and, remarkably, contract award decisions) before any public contract is signed or, if the contract has been executed anyway, to seek its ineffectiveness. Depending on the decisions of the Member States in the transposition of the Remedies Directives, such challenges can be brought either before specialised review bodies (administrative tribunals, some of them with quasi-judicial structure and powers) or (administrative) courts.<sup>85</sup> Even if the legal basis that can support a challenge is not clearly defined in the Remedies Directives - which only indicate that 'Member States shall take the measures necessary to ensure that [...] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible [...] on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law' [Art 1(1) Dir 89/665] and that 'Member States shall ensure that the measures taken concerning the review procedures [...] include provision for the powers to [...] either set aside or ensure the setting aside of decisions taken unlawfully' [Art 2(1)(b) Dir 89/665]—the general position in the Member States is that any infringement of the applicable EU rules constitutes a sufficient ground for the challenge.<sup>86</sup>

Remarkably, the Remedies Directives provide for a set of minimum remedies that Member States must make available to the challengers of procurement decisions,<sup>87</sup> which include: i) a standstill obligation that prevents the signature of a contract before

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<sup>84</sup> Treumer 'Enforcement of the EU Public Procurement Rules' (2011) 17.

<sup>85</sup> Indeed, most EU jurisdictions have located the competence for the review of public procurement decisions in either specialised administrative review bodies or tribunals, or directly assigned them to the administrative courts. In any case, the decisions of the specialised bodies are subject to judicial review. According to the European Commission's *Annual Public Procurement Implementation Review 2012* 'First-instance independent reviews are carried out by judicial bodies in 13 MS (DE, FI, FR, EE, EL, IE, IT, NL, PT, LT, LU, SE and UK), and by an administrative body in 14 MS (AT, BE, BG, CY, CZ, DK, ES, HU, LV, MT, PL, RO, SI and SK). The actual difference between the type of review body chosen is less acute than the terms 'administrative' or 'judicial' would suggest. On the one hand, many of the administrative bodies in the MS are quasi-judicial in nature (information explicitly substantiating this was available from AT, HU and SI, but the situation is likely to be similar in many other countries). In these countries the standing of the persons deciding the cases is also similar to a judge. On the other hand, in some of the MS which provide for judicial review, the courts work to special, shorter deadlines for giving a decision' 21 [Brussels, 9 October 2012, SWD(2012)342 final] [ec.europa.eu/internal\\_market/publicprocurement/docs/implementation/20121011-staff-working-document\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf).

<sup>86</sup> However, some significant disparities remain and, for instance, the UK system tends to focus on major formal violations, whereas the French courts tend to look for violations of each and every procurement rule; for more discussion, see R Caranta, 'The Comparatist's Lens on Remedies in Public Procurement' (2011) 2 *ECLI European and Comparative Law Issues Working Papers* 5-7 [workingpapers.iuse.it](http://workingpapers.iuse.it)

<sup>87</sup> See Treumer (n 83) 28-44. Due to the different options made by Member States in the transposition of the Remedies Directives, the systems still present relatively large differences; Caranta, *The Comparatist's Lens on Remedies in Public Procurement* (2011). Nonetheless, the effectiveness of the public procurement rules is perceived to have increased across all jurisdictions. Indeed, the data reported in the *Annual Public Procurement Implementation Review 2012* (n 85) 31-4 show that, on average, 8.5% of public procurement procedures are subjected to review procedures, with some countries reaching almost 20%. Around one third of complainants prevail in their claims in almost all jurisdictions. Even if quantitative assessments may be of limited value, this seems to indicate that (relatively) effective remedies are available in the Member States.

at least 10 days have elapsed since the publication of the award decision (which is extended to 15 days if electronic means of communication are not used); ii) interim measures (in case the standstill proves insufficient and other provisional relief is necessary to ensure the effectiveness of a final decision); iii) the annulment of any challenged procurement decision, including the contract award decision, if it is proven unlawful; iv) ineffectiveness of the contracts awarded in breach of the EU procurement rules<sup>88</sup> (which is mandatory for the most flagrant breaches, as a matter of EU law) or, if ineffectiveness is not an option, a set of alternative monetary penalties to be imposed on the contracting authority at fault; and v) the right to claim damages.<sup>89</sup> In any case, Member States retain the discretion to expand this list of remedies and to create stricter ones.

### **3.2. The viability of a system of ‘single private’ litigation based on both public procurement and State aid issues**

As briefly mentioned (above §3), the main role for domestic courts (and authorities) in the enforcement of State aid rules focuses on: i) preventing the payment of unlawful aid (or imposing interim recovery of the unlawful aid already paid, regardless of its compatibility with EU law, pending a Commission decision to that effect), ii) imposing interim measures against unlawful aid (mainly aiming to secure future recovery decisions), and iii) granting relief for the damages suffered by competitors and other third parties. Given that this role is fundamentally equal to what is expected from public procurement review bodies and courts, and that the Remedies Directives provide them with the powers to do so effectively (as briefly discussed above §3.1), as a matter of principle, there seems to be no difficulty in the configuration of public procurement review bodies and courts as ‘State aid courts’ for the purposes of the simultaneous enforcement of both sets of rules in a single setting of ‘private’ litigation. However, given the different distribution of competences between the Commission and the Member States for the enforcement of public procurement and State aid rules, a further check is necessary to ensure the viability of such system.

One of the apparent obstacles for the joint enforcement of public procurement and State aid rules, particularly where breaches of public procurement law are found, is that domestic review authorities and the courts cannot reach a final decision on the compatibility of the aid.<sup>90</sup> Consequently, defendants may claim that, despite the breach of the public procurement rules - and, consequently, the unavailability of the ‘public procurement exemption’ under Article 107(1) TFEU and the several mechanisms of

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<sup>88</sup> Moreover, the rules on ineffectiveness and termination of contracts can be expanded by Article 73 of the new public procurement Directive (n 14).

<sup>89</sup> On the use of damages as a remedy in procurement, see S Treumer, ‘Damages for Breach of the EC Public Procurement Rules. Changes in European Regulation and Practice’ (2006) 15 *Public Procurement Law Review* 159, and all the contributions to D Fairgrieve and F Lichère (eds) *Public Procurement Law: Damages as an Effective Remedy* (Oxford, Hart, 2011).

<sup>90</sup> Along these lines, see Sauter (n 3) 312-3, who considered that ‘once it is clear that not all relevant conditions are met the process stalls and intervention by the Commission becomes necessary in order to determine whether a case of exemptable aid is involved. A complaint to the Commission ... will then be the only remedy, with generally a limited chance of success’.

exemption under Article 106(2) TFEU (above §2) - the aid implicit in the award of the public contract is still compatible with Article 107(1) TFEU under the general rules. In that case, domestic review bodies and courts would need to freeze their review procedures until the European Commission issued a decision on the compatibility of the aid. Indeed, as indicated in the *Notice on the Enforcement of State Aid Law by National Courts*:

‘National court proceedings in State aid matters may sometimes concern the applicability of a Block Exemption Regulation or an existing or approved aid scheme, or both. Where the applicability of such a Regulation or scheme is at stake, the national court can only assess whether all the conditions of the Regulation or scheme are met. It cannot assess the compatibility of an aid measure where this is not the case, since that assessment is the exclusive responsibility of the Commission’.<sup>91</sup>

However, in my view, this may create a difficulty that is more apparent than practical since the conclusion that the contracting authority has breached EU procurement rules will allow review bodies and courts to adopt the necessary measures to prevent the contract from being awarded and, ultimately, any implicit State aid to become effective (regardless of its alleged compatibility).<sup>92</sup> Indeed, in view of the breach of the public procurement rules (and exclusively on that basis), the review body or the court will be perfectly capable of (actually, will be forced to) declaring the relevant decision (generally, the award of the contract) illegal and, consequently, set it aside and/or render it ineffective (above §3.1).<sup>93</sup> In that regard, there will be no need for a further State aid investigation by the European Commission, since it would be superfluous to try to justify a breach of the EU public procurement rules on the basis of the rules on State aid (since, regardless of the circularity of the general test discussed above §2.1, it is precisely compliance with procurement rules that excludes the existence of State aid).

Moreover, given the insertion of compliance with public procurement rules as a condition for the compatibility of the aid measure - at least in the case of SGEI (above §2.3), but more generally as an attempt by the European Commission to increase the effectiveness of public procurement rules - it seems highly implausible that a compatibility decision could be adopted by the European Commission in any case where the contracting authority has not followed the required procedures, or has breached the general principles of the EU procurement system (and, remarkably, the

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<sup>91</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 16.

<sup>92</sup> Admittedly, the problem is much more relevant in the opposite situation, where the court finds no breach of EU procurement rules or, despite minor, formal breaches, decides to let the procurement decision stand and remain effective—in which cases the self-standing consideration of State aid rules would need to be addressed before the European Commission due to its exclusive (positive) competence to declare compatibility. However, tackling those issues, which are not connected to (sufficiently relevant) breaches of public procurement rules, remains outside the scope of these proposals and analysis.

<sup>93</sup> Nonetheless, it must be reckoned that, in those instances in which ineffectiveness is not an adequate remedy from a public procurement perspective (and Member States have substituted it for monetary penalties against the contracting authority), the effectiveness of State aid rules can be jeopardised. In those cases, it could be necessary to impose ineffectiveness in order to ensure the *effet utile* of State aid rules (below §3.3) and not strictly speaking as a ‘public procurement remedy’.

principles of transparency, equal treatment or competition). Even in the specific case of the rejection of tenders tainted by illegal State aid [above §2.2, and particularly in view of art 69(4) of the new public procurement Directive], it should be stressed that it is incumbent upon the tenderer to prove that the aid used to subsidise the apparently abnormally low tender was legal at the time of submitting the tender (or, at the latest, at the time of award of the contract). Any subsequent decision by the European Commission would not need to be taken into consideration, given that it would not have sanatory or retrospective effects.

Therefore, in view of the lack of need for any further investigation by the European Commission when public procurement rules have not been followed and, as a result, there is an element of illegal (unlawful) State aid in the award of the contract; in my opinion, there is no obstacle in the allocation of competences for the enforcement of Article 107 TFEU that prevents configuring public procurement review bodies and courts as ‘State aid courts’ for the purposes of the simultaneous enforcement of both sets of rules in a single setting of ‘private’ litigation.

### **3.3. The general duty to ensure the *effet utile* of State aid rules across the public procurement remedies system**

If public procurement review bodies and courts are to work as ‘State aid courts’ in the joint enforcement of both sets of rules, it is important to clarify the extent of their duty to take State aid issues into account when dealing with procurement challenges. In my opinion, review bodies and courts within the public procurement remedies system are under a general obligation to ensure the *effet utile* of State aid rules across the board and to prevent illegal State aid from generating any anticompetitive effects. This has been recognised by the CJEU in *CELF II*:

‘The last sentence of Article [108(3) TFEU] is based on the preservative purpose of ensuring that incompatible aid will never be implemented. The intention of the prohibition thus effected is therefore that compatible aid alone may be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission’s final decision [...].

The objective of the national courts’ tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision’.<sup>94</sup>

In my view, this is simply an emanation or specific case of the duty of sincere cooperation imposed by Article 4(3) TEU<sup>95</sup> - which is one of the pillars of the system

<sup>94</sup> Case C-1/09 *CELF* and *Ministre de la Culture et de la Communication* [2010] ECR I-2099, 29-30. For Discussion, see T Jaeger, ‘*CELF II*: Settling into a Weak *effet utile* Standard for Private State Aid Enforcement’ (2010) 1(4) *Journal of European Competition Law & Practice* 319.

<sup>95</sup> The basis of these obligations was established in Case C-80/86 *Kolpinghuis* [1987] ECR 3969, 12. On the extension of these duties not only to national courts, but also and notably to national authorities, see J Temple Lang, ‘The Duty of National Courts under Community Constitutional Law’ (1997) 22 *European Law*

of 'private' litigation, both of State aid rules<sup>96</sup> and public procurement.<sup>97</sup> Consequently, review bodies and (administrative) courts are under a positive obligation to identify the possible existence of illegal State aid (i.e. non-notified or unlawful State aid, as will typically be the case of the aid implicit in the improper award of a public contract). In this regard, it is worth stressing that a breach of public procurement rules will, in a significant number of cases (and almost in all cases involving SGEI) imply the existence of (potential) unlawful State aid, which the (review bodies) and the courts are under an obligation to identify.<sup>98</sup> Once that possibility is identified, they should draw all appropriate legal consequences to prevent the unlawful State aid from generating any effects (and, by implication, to prevent the award of the contract).<sup>99</sup>

As mentioned in passing, this is particularly clear in the litigation concerned with the treatment of abnormally low tenders tainted with illegal State aid [Article 55(3) of Directive 2004/18 - and, even more so, in connection with Article 69(4) of the new public procurement Directive; above §2.2], in relation to which it can be argued that there is a general obligation to dismiss them in order to ensure the *effet utile* of the provisions in Article 107 TFEU and Regulation 659/1999 [coupled with Art 108(3) TFEU].<sup>100</sup> This issue was touched upon in the *ARGE* case, where the CJEU had to address the more general issue of the potential participation of recipients of State aid in public procurement procedures - which was challenged on the basis that allowing them to participate would be a breach of the principle of non-discrimination. In that case, the CJEU found that:

‘the mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment’.<sup>101</sup>

Nonetheless, allowing the recipients of State aid to participate does not mean that the authority cannot be bound by a more general obligation to ensure the *effet utile* of the State aid rules and, consequently, to reject their abnormally low offers if they are tainted by illegal (unlawful) State aid. As the CJEU also said in *ARGE*:

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*Review 3*; *ibid*, ‘The Duty of National Authorities under European Constitutional Law’ (1998) 23 *European Law Review* 109, 114; T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) 44-7; and JH Jans et al, *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007) 111-2.

<sup>96</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 77.

<sup>97</sup> Treumer (n 83) 26.

<sup>98</sup> *Ibid* 8-13.

<sup>99</sup> *Ibid* 28 and the case law cited therein, which I consider applicable by analogy, if not directly. Similarly, Treumer (n 83) 24 uses the existence of illegal State aid as an example of a contract that should have never been entered into and that, consequently, should be terminated.

<sup>100</sup> *Cfr* Ølykke, ‘How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?’ (2012) 70.

<sup>101</sup> Case C-94/99 *ARGE* [2000] ECR I-11037, 32.

‘it is not excluded that, in certain specific circumstances [the procurement Directive] requires or at the very least allows, the contracting authorities to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid’ (emphasis added).<sup>102</sup>

Consequently, it is submitted that domestic courts (and procurement review bodies) are under a general obligation to ensure that tenders tainted with illegal State aid are rejected in order to ensure the *effet utile* of the TFEU provisions on State aid and, consequently, they cannot make it excessively burdensome to challenge the award of a public contract on the basis of an abnormally low tender tainted with illegal State aid. This obligation will be particularly strong when the State aid in question has been the object of a prior negative decision by the European Commission, given the even stronger link of such situation with the direct effect of Article 108(3) TFEU and the duty of the courts to take full account of its effectiveness when preserving the interests of the individuals concerned.<sup>103</sup> This will be relevant in the setting of the tendering of SGEI, given that these provisions are equally applicable. Moreover, in case the tenderer has already received the entrustment for the provision of other SGEI, the rules on financial transparency<sup>104</sup> and the need to avoid cross-subsidies between SGEI<sup>105</sup> will strengthen this conclusion. Finally, such duty to ensure the *effet utile* of State aid rules across the public procurement remedies system must be taken into consideration when a purposive interpretation of the public procurement rules is required.

### **3.4. The issue of legal standing of disappointed tenderers, competitors and third parties to challenge procurement decisions with State aid implications**

If the system for the ‘joint litigation’ of public procurement and State aid rules is to work effectively, it must be equally accessible to potential claimants under each of these sets of rules. From the perspective of public procurement requirements, under Article 1(3) of Directive 89/665, ‘Member States shall ensure that the review procedures are available [...] at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement’. This provision has been implemented in ample terms and most Member States are generous in the recognition of active standing to challenge public procurement decisions,<sup>106</sup> which is not limited to the undertakings that have effectively participated in the tender. On their part, rules on State aid require that ‘national rules [do not] limit legal standing only to the competitors of the beneficiary. Third parties who are not

<sup>102</sup> Ibid, 29.

<sup>103</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 22, with references to the relevant case law.

<sup>104</sup> See Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version) [2006] OJ L318/17.

<sup>105</sup> *2011 SGEI Framework* (n 2) 44.

<sup>106</sup> Caranta (n 87) 3-4.

affected by the distortion of competition resulting from the aid measure can also have a sufficient legal interest of a different character'.<sup>107</sup>

Both requirements for legal standing seem easy to reconcile, particularly in view that both share the same basic principles for the recognition of legal standing. On the positive side, both sets of rules require that not only undertakings in close competitive relationships with the beneficiary of the measures are allowed to challenge the decision. And, on the negative side (or outer limit of legal standing), taxpayers or, generally, the public must not necessarily be granted standing to challenge any procurement or State aid decisions, unless they can show that they risk being harmed by the decision or can otherwise show sufficient legal interest. Therefore, bringing State aid complaints within the framework of public procurement challenges does not seem to impose any restriction on the legal standing required by the principles of equivalence and effectiveness of the remedies<sup>108</sup> - which are equally applicable in the public procurement arena.

### **3.5. Commonality of the rules on standstill and (additional) interim measures**

Similarly, public procurement and State aid rules on standstill and (additional) interim measures are fundamentally compatible. Within the procurement system, and in order to allow sufficient time for effective review of the contract award decisions taken by contracting authorities, Article 2a(2) of Directive 89/665 imposes a mandatory standstill period of at least 10 calendar days (extended to 15 days where means of electronic communication are not used) after the announcement of the award decision, in which the contract cannot be concluded.<sup>109</sup> That is reinforced by Article 2(3), which requires that, 'When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review' and always provided that this 'suspension shall end no earlier than the expiry of the standstill period'. Therefore, contract award decisions are subject to a non-waivable standstill period that prevents their implementation before sufficient time for a potential challenge has elapsed. Moreover, the infringement of this standstill period requires that the contract eventually concluded be declared ineffective under the provisions of Article 2d(1)(b) if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies or has affected its chances to obtain the contract. Therefore, public procurement rules envisage automatic standstill and provide for the ineffectiveness of the decisions adopted in breach thereof.

On their part, State aid rules impose a mandatory standstill (without a time limit) on Member States, which 'shall not put [the] proposed [State aid] measures into effect until this procedure has resulted in a final decision' [Art 108(3) TFEU]. As explained by the Commission:

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<sup>107</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 72.

<sup>108</sup> *Ibid* 70.

<sup>109</sup> Article 2b of Directive 89/665 establishes limited derogations from this standstill obligation.

‘the standstill obligation laid down in Article [108(3)] of the Treaty gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary). These affected parties can enforce their rights by bringing legal action before competent national courts against the granting Member State.’<sup>110</sup>

National courts are obliged to protect the rights of individuals affected by violations of the standstill obligation. National courts must therefore draw all appropriate legal consequences, in accordance with national law, where an infringement of Article [108(3)] of the Treaty has occurred. However, the national courts’ obligations are not limited to unlawful aid already disbursed. They also extend to cases where an unlawful payment is about to be made. [...] Where unlawful aid is about to be disbursed, the national court is therefore obliged to prevent this payment from taking place’.<sup>111</sup>

Consequently, national courts are also under a clear obligation to uphold the mandatory standstill period and to prevent unlawful State aid from being implemented before its compatibility with the EU rules has been declared.

In my view, the essence of both standstill obligations is the same, and the ensuing obligation of the (first instance, independent) review bodies and courts to uphold such obligation - or, otherwise, prevent or neutralise the effects of the decisions adopted in breach thereof - is almost identical. A joint reading of both sets of provisions would allow reconciling their requirements by extending the mandatory standstill foreseen in the public procurement rules until a final decision is adopted by the review body [along the lines of Art 2(3) Dir 98/665] when there is an allegation that the infringement of the procurement rules would imply the disguised granting of State aid (above §2.1), would contravene the rules applicable to the financing of SGEI (above §2.3), or would deprive from the effectiveness of Article 107 TFEU if an abnormally low tender tainted by illegal State aid was accepted (above §2.2). In all these cases, given that the standstill obligation derived from the State aid rules would run for longer than the procurement *Alcatel* standstill obligation,<sup>112</sup> and even if the parties had failed to expressly request the extension of the standstill period as an interim measure, the review body or the court should automatically extend it until the end of the challenge procedure.

In any case, parties could apply for an extension of the standstill as an interim measure, both under procurement [Art 2(1)(a) Dir 89/665] and State aid rules.<sup>113</sup> And, in those cases, the review body or the court would apply similar standards of *fumus boni iuris* and *periculum in mora* to reach a decision.

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<sup>110</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 24.

<sup>111</sup> *Ibid* 28.

<sup>112</sup> The standstill period is also known as the *Alcatel* period, since it was declared by the CJEU in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.

<sup>113</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 56-62.

### 3.6. Possibility to claim damages and their subjection to domestic law of the Member States

One last element that deserves consideration in order to ensure that channelling State aid issues through the public procurement remedies system does not deprive the State aid rules of their effectiveness is the compatibility of the provisions on claims for damages in both sets of rules at the EU level.

The Remedies Directives expressly regulate the powers of public procurement review bodies and courts to award damages to persons harmed by an infringement [Art 2(1)(c) Dir 89/665], but it is for the domestic law of the Member States ‘to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts’.<sup>114</sup> Moreover, the CJEU has configured the right to claim damages under Article 2(1)(c) of Directive 89/665 as implying objective liability, since it cannot be made conditional upon proving that the infringement of public procurement rules was culpable.<sup>115</sup> This is in line with the case law of the CJEU in the area of damages derived from illegal State aid, whereby ‘as part of their role under Article [108(3)] of the Treaty, national courts may also be required to uphold claims for compensation for damage caused to competitors of the beneficiary and to other third parties by the unlawful State aid’.<sup>116</sup> Identically to the situation in the public procurement sphere, actions for damages ‘are obviously dependent on national legal rules. Therefore, the legal bases on which claimants have relied in the past vary significantly across the [EU]’.<sup>117</sup> In any case, the liability for damages due to an infringement of State aid rules and, particularly, the breach of the mandatory standstill in Article 108(3) TFEU has also been configured in objective terms, given that there is a large body of case law and Commission guidance that excludes any possibility to claim that the infringement was excusable.<sup>118</sup>

Regardless of the disparities in the rules applicable to the damages that can be obtained as compensation for an infringement of procurement and State aid rules across the 28 jurisdictions of the Member States - which are not unique to these areas of EU law, but a general difficulty for the effectiveness of EU competition law (and, more generally, EU law) that derives from the lack of EU competence for the harmonisation of tort law<sup>119</sup> - it is also clear that the heads of damages or legal bases for such claims are equally available in the ambit of public procurement and that of State aid remedies. Consequently, also in this important aspect, the unification of the ‘private’ litigation of

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<sup>114</sup> Case C-314/09 *Strabag and Others* [2010] ECR I-8769 33.

<sup>115</sup> *Ibid* 45.

<sup>116</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 43. Case C-199/06 *CELF and Ministère de Culture et de la Communication* [2008] ECR I-469 53 and 55; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957 56; and Case C-334/07 P, *Commission v Freistaat Sachsen* [2008] ECR I-9465 54.

<sup>117</sup> *Notice on the Enforcement of State Aid Law by National Courts* (n 34) 44.

<sup>118</sup> *Ibid* 47.

<sup>119</sup> For general discussion and further references, see F Marcos and A Sanchez Graells, ‘Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonising Tort Law through the Back Door?’ (2008) 16(3) *European Review Private Law* 469.

public procurement and State aid rules shows no impediment from the point of view of EU law.

Regarding specific issues, such as the quantification of the damages, there can still be some need for harmonization of the guidance and case law in this area. Even if the European Commission has suggested that, in those cases where the claims for damages focuses on lost profit, ‘Determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant. The national court can then calculate the revenue which the claimant was likely to generate under this contract. In cases where the contract has already been fulfilled by the beneficiary, the national court would also take account of the actual profit generated’; in the public procurement setting, compensation for lost profit is still not the universal rule and there are significant disparities across the Member States.<sup>120</sup>

#### 4. CONCLUSIONS

As this paper has shown, there is a growing area of State aid litigation that is intrinsically linked to public procurement procedures. There are three main groups of cases where public procurement litigation phagocytises State aid ‘private litigation’ because: i) compliance with public procurement rules or lack thereof implies the (in)existence of State aid under Article 107(1) TFEU (§2.1); ii) (non)compliance with public procurement rules prevents the exemption of State aid to SGEI under the rules of the Almunia Package for the application of Article 106(2) TFEU (§2.2); or iii) the rejection of abnormally low tenders tainted by illegal (unlawful) State aid is the only option conducive to the effectiveness of Article 108(3) TFEU (§2.3). These groups of cases constitute around 5% of the State aid litigation in the Member States, although a trend of expansion seems clear.

In light of this convergence or ‘unification’ of the ‘private’ litigation of State aid rules and challenges against breaches of the EU public procurement rules - which is particularly strong in the area of SGEI - this paper has assessed whether the procedural rules applicable to both types of litigation are compatible and whether EU law poses any impediments against configuring public procurement review bodies and courts as ‘State aid courts’ for the purposes of the simultaneous enforcement of both sets of rules in a single setting of ‘private’ litigation. The argument of the different distribution of competences between Member States and the Commission in each of these areas of EU Economic Law has been dispelled (§3.2) and, following the recognition of a general duty of procurement review bodies and courts to ensure the *effet utile* of the State aid rules (§3.3), it has been shown that there is nothing in the rules on legal standing (§3.4), standstill periods and interim measures (§3.5) or the possibility to claim damages (§3.6) that alters such conclusion.

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<sup>120</sup> Caranta (n 86) 8: ‘A few jurisdictions are ready to award lost profits [...] Others would award either costs for participating in the procedure or lost profits. A few would also consider damages to the professional standing of the firm which was affected by the unlawful management of the procurement procedure (loss of future business chances)’.

It has also been submitted that using the public procurement system in this way provides effective remedies for the enforcement of the Almunia Package for the financing of SGEI and, consequently, can strengthen its effectiveness.