

# Public procurement and access to justice: a legal and empirical study of the UK system

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**Abstract:** This article presents the findings of an empirical study into suppliers' behaviour in enforcing EU public procurement law in the UK - where there is a low level of procurement litigation – and the factors influencing this. The study indicates that most suppliers have not perceived any breaches of EU procurement law. It also indicates that, for cases where problems *are* perceived, recent reforms required by EU law have led to more complaints and legal actions, and enhanced the practical effectiveness of remedies. However, the study also reveals important remaining obstacles to litigation, in particular the high cost of High Court proceedings, fear of reprisals and (although to a lesser extent) the courts' approach to interim relief. In the light of recent case law, these findings have interesting implications for the UK's compliance with its EU obligations to provide effective supplier remedies, and suggest a need to consider a different approach.

## 1) Introduction

In 1989 the EU adopted Directive 89/665 - the Remedies Directive - on public procurement<sup>1</sup>, providing for effective remedies for suppliers<sup>2</sup> before an independent national review body. Action by aggrieved suppliers was seen as the primary method for enforcing EU procurement law,<sup>3</sup> and a specific directive considered necessary at a time when rules governing national remedies for enforcing EU rights more generally was still in an embryonic stage.<sup>4</sup> A similar system of remedies was

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<sup>1</sup> Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, [1989] OJ L395/33. This covers procurement within the scope of Directive 2004/18 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, and Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

<sup>2</sup> For simplicity "supplier" refers here to anyone with an interest in supplying government as a main contractor; it is not limited to "suppliers" in the directives' technical sense of those interested in contracts for supplying products (see e.g. art.1(8), Directive 2004/18/EC).

<sup>3</sup> For the historical context see S. Arrowsmith, *The Law of Public and Utilities Procurement*, vol. 1, 3rd edn. (London: Sweet & Maxwell, 2014), [3-30]-[3-34].

<sup>4</sup> On these principles see P. P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, 6<sup>th</sup> edn. (Oxford: Oxford University Press, 2015), chapter 8.

later adopted for enforcing the separate rules on utilities procurement<sup>5</sup> and defence and security procurement.<sup>6</sup> In 2007 Directive 2007/66<sup>7</sup> (“the 2007 Directive”) introduced important amendments to remedies to enhance effectiveness.<sup>8</sup>

Whilst in many Member States there has been a flood of cases - hundreds, or even thousands, annually<sup>9</sup> - in the UK there is still, however, only a trickle, even after the 2007 Directive. Against this background this article presents the results of an empirical study into the system’s use in the UK. This sought to gauge the levels of both supplier complaints and legal challenge, and to understand the factors that influence this, including the impact of specific features of the UK remedies system and the

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<sup>5</sup> Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992] OJ L 076/14.

<sup>6</sup> In Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L 216/76. See M. Trybus, “The hidden Remedies Directive: review and remedies under the EU Defence and Security Procurement Directive” (2013) 22 *Public Procurement Law Review* 135.

<sup>7</sup> Directive 2007/66/EC of the European Parliament and 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 L335/31.

<sup>8</sup> See generally J. Golding and P. Henty, “The new Remedies Directive of the EC: standstill and ineffectiveness” (2008) 17 PPLR 146; J. M. Hebly (ed.) *European Public Procurement Law: Legislative History of the Public Procurement Remedies Directive 2007/66/EC* (Alphen aan den Rijn: Kluwer Law International, 2011).

<sup>9</sup> European Commission, *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts, Final Study Report, MARKT/2013/072/C* (Luxembourg: Publications Office of the EU, April 2015), 83-84.

2007 Directive. One aim was to contribute to an assessment of whether the UK system meets EU effectiveness requirements, and the article highlights the study's main implications for this.

The study indicates that most suppliers seeking public business in the UK have not perceived any breaches of EU procurement law to which remedies might be relevant. It also suggests that overall the 2007 reforms to the EU's Remedies Directive have led to more legal actions and complaints, and enhanced the effectiveness of remedies in practice. However, the study also reveals important obstacles to using remedies in the UK, in particular high cost and fear of reprisals. In addition, although to a much lesser extent, a deterrent to challenge is created by various obstacles to suspension of contract awards. These findings provide empirical support for arguments that both designation of the High Court as the forum for review without access to legal aid, and the approach adopted to suspension, may violate EU obligations. Given that recent reforms require legal aid, even for corporate entities, where not to grant this would violate EU rights on access to justice, such a conclusion may, as we explain, compel the provision of legal aid for procurement cases – a possibility that could perhaps drive reform of the UK regime.

From the perspective of EU policy-making our study is timely in that the European Commission has been reviewing the operation of the EU remedies system pursuant to an obligation to report to Council on the effectiveness of the 2007 Directive<sup>10</sup> and under the Regulatory Fitness and Performance programme (REFIT),<sup>11</sup> and has recently published a report<sup>12</sup> ("the Commission remedies report"). This

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<sup>10</sup> Art.12A.

<sup>11</sup> See European Commission, *Consultation on Remedies in Public Procurement* (July 7, 2014), [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8244&lang=en&title=Consultation-on-Remedies-in-Public-Procurement](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8244&lang=en&title=Consultation-on-Remedies-in-Public-Procurement).

<sup>12</sup> Commission remedies report, n 9 above.

could potentially lead to EU-level action to address deficiencies in national systems. It needs to be emphasised, however, that the present article contains no implicit endorsement of the EU's current approach. In fact, it is the authors' view that its premise that supplier remedies should be the main enforcement tool is questionable. Related to this, we consider that remedies should be limited to cases of serious fault in view, in particular, of the uncertain and complex nature of the procurement rules and the detrimental impact on the procurement function that results from the combination of this with the threat of litigation. Elaboration of this view is beyond the scope of this article, but it is mentioned to highlight that our findings do not necessarily entail the further conclusion that the EU should act mainly to enhance the effectiveness of the UK remedies system; they merely provide information to assist in developing a sound strategy *to the extent that judicial-type remedies are desirable* (as we believe is the case for serious fault).

From the perspective of domestic public law, our study contributes to the developing literature on the role of judicial remedies,<sup>13</sup> in this case from the specific perspective of use of remedies and barriers to access. The focus being on access to justice, we do not address the wider question of the actual impact of these remedies on compliance, but other research provides evidence of explicit consideration of the likelihood of, and likely impact of, litigation in compliance decisions in public procurement in the UK.<sup>14</sup> We also do not consider what other mechanisms and influences affect

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<sup>13</sup> See, in particular, S. Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004); G. Richardson, "Impact Studies in the UK" in M. Hetogh and S. Halliday (eds), *Judicial Review and International Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004); V. Bondy and M. Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (The Public Law Project, 2009).

<sup>14</sup> As to which see P. Braun, "Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK's Private Finance Initiative" (2003) 9 *European Law Journal* 575. Cf K. Gelderman, P.

compliance,<sup>15</sup> either at EU level or in the UK context. However, against the background of our findings on obstacles to legal remedies this is an interesting area for future research.

The analysis commences in section 2 by outlining the requirements of the EU Remedies Directive and their transposition in UK law, and examining problems relating to compliance with that Directive in the light of recent CJEU case law on access to justice. Section 3 explains the methodology of the empirical study. Section 4 then explains the study findings and their implications for the UK's compliance with the Directive. Section 5 concludes.

For the most part the remedies rules are the same under all the remedies legislation and for simplicity we generally refer only to the Remedies Directive.<sup>16</sup> We also refer generally only to the legislation in England, Wales and Northern Ireland, namely the Public Contracts Regulations 2006 (PCR 2006)<sup>17</sup>

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Ghijsen, and J. Schoonen, "Explaining Non-compliance with European Union Procurement Directives: a Multi-disciplinary Perspective" (2010) 48 *Journal of Common Market Studies* 243.

<sup>15</sup> A positive influence on compliance for both organisational pressures and expected gains was found by K. Gelderman, P. Ghijsen, and J. Schoonen, *ibid.* But *cf* C.J. Gelderman, P.W. Ghijsen, and M.J. Brugman, "Public procurement and EU Tendering Directives? Explaining Non-compliance" (2006) 19 *International Journal of Public Sector Management* 702; and see L. Ramsey, "The new Public Procurement Directives: a Partial Solution to the Problems of Procurement Compliance" (2006) 12 *European Public Law* 275, arguing for a focus on cultural change. For a recent UK study of influences on public law compliance in a different context (roads maintenance) see S. Halliday, "The Governance of Compliance with Public Law" [2013] *Public Law* 312.

<sup>16</sup> On the differences in the defence regime see Trybus, n 6 above.

<sup>17</sup> SI 2006/5, extensively amended by the Public Contracts (Amendment) Regulations 2009 (SI 2009/2992) to implement the 2007 Directive. Unless otherwise explained (see, in particular, the discussion of time limits), references here are to the version of PCR 2006 as amended by this 2009 instrument, as at the date of entry into force, which was the version of the PCRs applicable for the study.

(applicable during 2009-2012, the study period) and Public Contracts Regulations 2015 (PCR 2015),<sup>18</sup> the latter applying (with some exceptions) from 26<sup>th</sup> February 2016.<sup>19</sup> Differences in Scotland<sup>20</sup> are mentioned only when relevant.

## **2) EU requirements on remedies and UK implementation: a legal analysis from the perspective of access to justice<sup>21</sup>**

### **a) General**

The Remedies Directive, first, requires a system to ensure that decisions may be reviewed “effectively” and “in particular” as rapidly as possible<sup>22</sup> by any person having or having had an interest in obtaining a contract and who has been, or risks being, harmed.<sup>23</sup>

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<sup>18</sup> SI 2015/102, transposing Directive 2014/24/EU and retaining the same remedies.

<sup>19</sup> PCR 2015, s.118.

<sup>20</sup> Public Contracts (Scotland) Regulations 2012 (SI 2012/88); Utilities Contracts (Scotland) Regulations 2012 (SI 2012/79); Defence and Security Public Contracts Regulations 2011 (SI 2011/1848).

<sup>21</sup> See S. Treumer and F. Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Copenhagen: DJØF Publishing, 2011); S. Arrowsmith (ed.), *Remedies for Enforcing the Public Procurement Rules* (Earlsgate, 1993); D. Pachnou, “Enforcement of the EC Procurement Rules: The Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness” (2000) 9 PPLR 55; and, on the UK, M. Trybus, “An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales”, in Treumer and Lichère (eds), above, 201-234.

<sup>22</sup> Remedies Directive, art.1.

<sup>23</sup> Remedies Directive, art.1(3).

In view of the purposes of the Directive of both promoting the public interest in open markets and protecting tenderers so that they are not deterred from participating,<sup>24</sup> the general effectiveness requirement seems to entail effectiveness from the perspectives both of enforcing the public interest and protecting suppliers' rights (the latter being also a means to secure the public interest).<sup>25</sup> The Directive is to be interpreted in this regard in the light of art.47 of the Charter of Fundamental Rights of the European Union guaranteeing access to justice,<sup>26</sup> which, in view of the purpose of the Directive's purpose of providing access to justice to suppliers, probably means that the standards of the Charter and the EU's remedies legislation in procurement largely converge.<sup>27</sup> The standards of effectiveness that follow probably go in certain respects beyond those applicable for enforcing EU rights in general – and which apply to contracts outside the scope of the Directive – although how far is not clear.<sup>28</sup> The application of these principles in the context of specific aspects of remedies is examined further below.

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<sup>24</sup> As indicated in the Remedies Directive, recitals 4 and 5.

<sup>25</sup> The latter being the means to secure the public interest: see Opinion of Advocate General Jääskinen delivered on 7 May 2015 in *Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino - Città di Levico Terme and Others* (C-61/14) (ECLI:EU:C:2015:307), [21].

<sup>26</sup> *Orizzonte Salute* (Judgment) (ECLI:EU:C:2015:655), *ibid*, [48]-[49].

<sup>27</sup> *Orizzonte Salute* (AG Opinion), *ibid*, [34].

<sup>28</sup> See, in particular, Opinion of Mr Advocate General Jääskinen delivered on 7 July 2015 in *Consorti Sanitari del Maresme v Corporació de Salut del Maresme i la Selva* (C-203/14) (ECLI:EU:C:2015:445), [16]; see the discussion in Pachnou, n 21 above; and *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (C-91/08) [2010] ECR I-2815, indicating more limited remedies in cases not covered by the Remedies Directives.



In addition, the Remedies Directive restates<sup>29</sup> the general EU principle requiring remedies no less favourable than those for enforcing equivalent provisions of domestic law.<sup>30</sup>

## **b) Forum for review**

The review powers required under the Remedies Directive must be exercisable by judicial bodies or similar independent bodies.<sup>31</sup> In England, Wales and Northern Ireland the designated forum is the High Court;<sup>32</sup> in contrast with many Member States<sup>33</sup> there is no specialist review body, although some expertise in that many cases are heard by the Technology and Construction Court. In Scotland proceedings can be brought, however, either in the Court of Session or the Sheriff Court, the latter providing a less expensive forum.<sup>34</sup>

A notable feature of using the High Court is expense.<sup>35</sup> Court fees themselves were, during the study period, generally only a maximum of £2000 (for damages claims, depending on size),<sup>36</sup> and lower for

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<sup>29</sup> Remedies Directive, art.1(2), as interpreted in *Commission v France* (C-225/9) [1999] ECR I-3011. Equivalent provisions can be found in Directive 92/13/EEC, art.1(2), and Directive 2009/81/EC, art.55(3).

<sup>30</sup> See generally Craig and De Búrca, n 4 above, 246-250; and in relation to procurement in particular *Orizonte Salute* (AG Opinion), n 25 above, [26].

<sup>31</sup> See Remedies Directive, art.2(9).

<sup>32</sup> PCR 2006, reg.47C(2); PCR 2015, reg.91(2).

<sup>33</sup> For example, Denmark, Germany, Spain, Sweden. On other Member States see Treumer and Lichère, n 21 above, and the country fiches in the Commission remedies report, n 9 above.

<sup>34</sup> See C. Boch, "The Implementation of the Public Procurement Directives in the UK: Devolution and Divergence?" (2007) 16 PPLR 410.

<sup>35</sup> Unless stated otherwise, this section is based on information on costs obtained by the authors in 2015 from five UK solicitors.

<sup>36</sup> These varied little during the study period.

other claims, which are more common. However, from March 2015 the maximum for damages claims was raised to £10 000 (for unlimited claims or those exceeding £200 000), with a fee of 5 per cent of value for claims between £10 000 and £200 000,<sup>37</sup> although again fees are much lower for non-damages claims, starting at £480 for most review proceedings.<sup>38</sup> Overall litigation costs, however, are very high, primarily because of the need to pay costs of both solicitors and counsel, which are high both because of the amounts charged<sup>39</sup> and the complex nature of High Court proceedings. The short standstill and limitation periods (discussed below) mean that suppliers incur high costs at an early point when they have limited access to information. To obtain more it is often necessary to make an early application for specific disclosure, which alone may cost £25K - £50K. UK legal practitioners responding to the Commission<sup>40</sup> indicated a median overall cost of “a typical review case”<sup>41</sup> for clients of about 130 000 Euros, varying little by contract size - about twice the median for the Member States with next highest costs<sup>42</sup> - whilst information obtained for our own study<sup>43</sup> indicates average costs of £35 000-£100 000 for a suspension hearing (the stage at which most disputes are resolved) and from

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<sup>37</sup> The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 (SI 2015/576).

<sup>38</sup> Although additional fees may be payable for further steps.

<sup>39</sup> See J. Diamond, *The Price of Law* (Centre for Policy Studies, 2016), [www.cps.org.uk/files/reports/original/160202103206-ThePriceofLaw.pdf](http://www.cps.org.uk/files/reports/original/160202103206-ThePriceofLaw.pdf).

<sup>40</sup> Five in the UK.

<sup>41</sup> In the wording of the questionnaire sent to legal practitioners (not published, but on file with the current authors). This will presumably have been interpreted as including cases that do not proceed to judgment but this is not known.

<sup>42</sup> See Commission remedies report, n 9 above, 124 and also *Appendices to Final Report*, available at [http://ec.europa.eu/growth/single-market/public-procurement/studies-networks/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/studies-networks/index_en.htm), s 3.

<sup>43</sup> From four solicitors firms experienced in procurement litigation.

£350 000 up to £2 million for a case reaching final judgment.<sup>44</sup> Legal aid was not in practice conceivable in this context during the study period,<sup>45</sup> although conditional fee arrangements and “after the event” insurance were both available to some degree.<sup>46</sup> As we will see below, these high costs of litigation operate as a substantial barrier to access to review.

The Remedies Directive does not contain any specific rules on litigation costs. However, on court fees, the CJEU recently ruled in *Orizzonte Salute* that these are national “procedural rules” subject to the *San Giorgio*<sup>47</sup> principle that such rules must not render practically impossible or excessively difficult the exercise of rights EU rights,<sup>48</sup> and that “in addition” fees must not “compromise the effectiveness” of the Remedies Directive.<sup>49</sup> The Court in *Orizzonte Salute* referred to art.47 of the Charter<sup>50</sup> under which, as Advocate General Jääskinen pointed out, it is clear that court fees may constitute a hindrance to access to justice<sup>51</sup> (at least where not covered by legal aid). Applying these rules, the

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<sup>44</sup> Of this roughly three quarters is solicitors costs and one quarter barristers’ costs, court and other costs accounting for around three per cent.

<sup>45</sup> Being unavailable for companies or even generally individuals for breach of statutory duty, other than by way of judicial review: Access to Justice Act 1999, c. 22 and now under Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10.

<sup>46</sup> The authors are grateful to Stuart Brady for information on this.

<sup>47</sup> *Amministrazione delle finanze dello Stato v San Giorgio* (199/82) [1983] ECR I-03595.

<sup>48</sup> *Orizzonte Salute* (Judgment), n 25 above, [46].

<sup>49</sup> *Orizzonte Salute* (Judgment), n 25 above, [47], as established in *Universale-Bau and others v Entsorgungsbetriebe Simmering* (C-470/99) [2002] ECR I-11617.

<sup>50</sup> *Orizzonte Salute* (Judgment), n 25 above, [49].

<sup>51</sup> See eg *Teltronic-CATV v. Poland* (App. no. 48140/99) (ECHR, 10 Jan 2006), [48], and *Stankov v Bulgaria* (App. no. 68490/01) (ECHR, 12 Jul 2007) (concerning art.6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms).

CJEU indicated that fees depending on contract value are acceptable in principle, and that fees not exceeding two per cent of the value, as in that case, are lawful.<sup>52</sup> The Court did not give any indication of the legality of higher basic fees, or fees such as the 5 per cent of claim value applied in the UK for damages claims. The CJEU notably rejected an argument that fees may be rendered unlawful as discriminatory because of their particular impact on suppliers with weaker financial capacity - mainly Small and Medium-sized enterprises (SMEs).<sup>53</sup> The CJEU also ruled that levying multiple and cumulative fees “within the same administrative judicial proceeding” is acceptable, but only where “the subject matter of the actions or supplementary fees are in fact separate and amount to a significant enlargement of the subject matter”.<sup>54</sup> The Court itself did not elaborate on this, but the Advocate General considered that the basic unit for judicial protection is the contract award procedure.<sup>55</sup> This implies that cumulative fees related to a single award procedure should be assessed as a whole, covering those relating to both suspension and other remedies (even in separate courts) and supplementary measures, such as access to documents.<sup>56</sup> Further, the Advocate General elaborated that court fees may violate the Charter and hence the Remedies Directive when they render access to the review body “economically unviable”, even when they pursue legitimate aims such as financing the court system.<sup>57</sup>

It is less clear how far the existence of other costs, notably lawyers’ fees, can infringe the Remedies Directive, including whether it is relevant to consider the extent to which they are attributable to

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<sup>52</sup> *Orizzonte Salute* (Judgment), n 25 above, [58]-[65].

<sup>53</sup> *Orizzonte Salute* (Judgment), n 25 above, [62]-[64].

<sup>54</sup> *Orizzonte Salute* (Judgment), n 25 above, [74].

<sup>55</sup> *Orizzonte Salute* (AG Opinion), n 25 above, [52].

<sup>56</sup> Both relevant in *Orizzonte Salute* (AG Opinion), n 25 above, [58].

<sup>57</sup> See *Orizzonte Salute* (AG Opinion), n 25 above, [50]-[51].

government – whether because of the procedural rules applied, organisation of the legal profession and/or the designation of the High Court for review.<sup>58</sup> Such issues have not been resolved in the case law, including under the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>59</sup> which is relevant under the Charter.

Closely connected to both issues is the fact that art.48(3) of the Charter explicitly refers to legal aid as an element of access to justice,<sup>60</sup> a provision relevant for legal persons, as well as natural persons, in civil proceedings.<sup>61</sup> Whether legal aid is required depends on factors such as the subject matter of the litigation, including its economic importance; what is at stake; the complexity of the law and procedure; and the capacity of the applicant to represent itself<sup>62</sup> - although it may also be relevant whether the applicant is a profit-making company.<sup>63</sup> Some of these factors can certainly be invoked to support an argument that, to the extent that the costs of High Court litigation make it economically unviable given the nature of the undertaking and contract size, legal aid is sometimes required to avoid infringing the Remedies Directive. It is not clear, however, how far the CJEU will be willing to go

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<sup>58</sup> Advocate General Jääskinen in *Orizzonte Salute* (n 25 above) suggests that court fees might be unlawful *if combined with lawyers' fees* they make challenge economically unviable. Potential liability for high costs incurred by the contracting authority may also be relevant; see *Commission v United Kingdom* (C-530/11) (ECLI:EU:C:2014:67) (published in the electronic Reports of Cases (Court Reports - general)).

<sup>59</sup> Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (Oxford: Oxford University Press, 2010), [11.382].

<sup>60</sup> See S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart, 2014), [47.226]-[47.243].

<sup>61</sup> *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (C-279/09) [2010] ECR I-13849.

<sup>62</sup> *DEB, ibid*, [61]; *GREP GmbH v Freistaat Bayern* (C-156/12) (ECLI:EU:C:2012:342) published in the electronic Reports of Cases (Court Reports - general – “Information on unpublished decisions” section).

<sup>63</sup> *DEB, ibid*, [62].

in this direction and in giving a steer to national authorities on how to apply these factors in specific situations, including in light of budgetary considerations.<sup>64</sup>

A pertinent point in the present context, however, is that the cost of assisting litigants could be addressed by establishing alternative review fora. The argument for alternative fora could also be made in other areas of law, requiring the CJEU to adjudicate in each area on whether benefits of judicial fora outweigh the financial costs – but these are sensitive issues impinging on national budgetary and policy choices and involving difficult evidential questions which the CJEU has generally steered away from addressing directly.<sup>65</sup> It is possible, however, that the CJEU might side-step such broader issues by addressing the cost of procurement litigation not via principles concerning the linked questions of affordability of national judicial systems and legal aid for commercial litigation in general, but via the Remedies Directive's explicit requirement for effectiveness as requiring an economically accessible review forum in public procurement – which could presumably be provided (at the choice of Member States) either by supporting review through legal aid or by designating a low-cost forum.

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<sup>64</sup> It has been suggested that classification of art.48(3) as relating to procedural rules reduces the scope for arguments based on budgetary considerations (Peers et al, n 60 above, [47.241]). Clearly, however, budgetary considerations are recognised de facto in the above legal rules on legal aid, and also in the costs case law where financing of the court system is a recognised interest - see *Orizzonte Salute* (Judgment), n 25 above, [73]-[75]. This is in line with the CJEU's general recognition of budgetary justifications for national measures de facto if not de jure: see J. Snell, "Economic Aims as Justification for Restrictions on Free Movement" in A. Schrauwen (ed), *Rule of Reason: Re-thinking Another Classic of EC Legal Doctrine* (Europa Law Publishing, 2005) 52; S. Arrowsmith, "Rethinking the approach to economic justifications under the EU's free movement rules" (2015) 68 *Current Legal Problems* 307.

<sup>65</sup> See Snell, *ibid*; Arrowsmith, *ibid*; N. Nic Shuibhne and M. A. Maci, "Proving Public Interest: the Growing Impact of Evidence in Free Movement Case Law" (2013) 50 *Common Market Law Review* 965.

The CJEU's willingness to take this step with procurement may be bolstered by the widespread and increasing use in the EU of specialist review bodies as a means to comply with the Remedies Directive.<sup>66</sup>

From the UK perspective it is now significant that since 2012 one exceptional situation in which legal aid is available even for companies is where failure to provide it would breach Convention rights (within the meaning of the Human Rights Act 1998) or enforceable EU rights to the provision of legal services,<sup>67</sup> including art.47 of the Charter.<sup>68</sup> Thus if designating the High Court as a review forum *without* legal aid would violate the Remedies Directive, it appears that legal aid would potentially be available, so avoiding any actual violation. Were it established that the current approach indeed violates the Remedies Directive in the absence of legal aid, the implications for the legal aid system could provide an inducement to consider alternative approaches for procurement disputes, either to reduce pressure on the court system or, more likely, to replace it with a cheaper alternative.

As well as having cost implications, designation of the High Court as the review forum has consequences for the time for completing proceedings. In this regard, the Remedies Directive includes an express requirement for remedies to be “rapid” because of the particular importance of this in procurement, first, avoiding undue disruption to public projects and, secondly, ensuring that the opportunity for a direct remedy is not prejudiced by the conclusion, or even performance, of the contract. These points are closely connected since the greater the disruption to projects the more

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<sup>66</sup> n 33 above.

<sup>67</sup> LASPO Act 2012, n 45 above, Sch 3, para 3.

<sup>68</sup> Legal Aid Agency, *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)*, (9 June 2015) <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>, [31]–[35].

problematic it is to maintain a suspension. Most Member States set specific time limits for review bodies to resolve procurement cases<sup>69</sup> but the UK has not done this. Court judgments and anecdotal evidence indicate that the Court and parties often make strenuous efforts to ensure that procurement cases are concluded rapidly (with expedited trials),<sup>70</sup> and a current project of the Procurement Lawyers' Association (PLA) aims to help formalise this by developing a civil procedure protocol for procurement.<sup>71</sup> However, it is generally difficult to complete cases in less than a few months and the Commission remedies report found a median length for first-instance pre-contractual, non-interim proceedings of only just under 300 days – the sixth longest in the EU (with the five states with longer proceedings all also using judicial fora).<sup>72</sup> As we will see, this has led to a reluctance to suspend procurement decisions.

### **c) The standstill obligation<sup>73</sup>**

An important feature that supports access to remedies is a standstill period – that is, a delay between notification of the award (with reasons) and conclusion of the contract, allowing time for challenge. This was included in the 2007 Directive,<sup>74</sup> building on the CJEU's decision in *Alcatel*<sup>75</sup> which concluded effectiveness entailed a standstill.<sup>76</sup> Prior to *Alcatel* nothing appeared to prevent a regulated entity

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<sup>69</sup> Commission remedies report, n 9 above, section 5.7; this applies to 16 Member States with specified periods from 15 days to two months.

<sup>70</sup> See, for example, recently *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 (TCC), [36].

<sup>71</sup> The PLA has set up a working group for this purpose: see <http://www.procurementlawyers.org/projects.aspx>.

<sup>72</sup> Commission remedies report, n 9 above, s 5.7, fig 6.7.

<sup>73</sup> See further, in particular, Golding and Henty, n 8 above.

<sup>74</sup> 2007 Directive, n.7 above, art.2, adding this provision in Remedies Directive, art.2a.

<sup>75</sup> C-81/98 *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671.

<sup>76</sup> As interpreted in C-444/06 *Commission v Spain* [2008] ECR I-02045.



from concluding a contract without notifying the award decision. Combined with a general rule that Member States may limit remedies to damages once a contract is concluded, which still applies<sup>77</sup> and which has been adopted in the UK,<sup>78</sup> this meant that suppliers could be deprived of any chance to challenge the award directly, a possibility open to abuse. The UK regulations introduced the standstill obligation after *Alcatel*, recasting it slightly in 2009 following the 2007 Directive.<sup>79</sup> In general the UK's required standstill period is ten calendar days from notification,<sup>80</sup> the minimum allowed by EU law.<sup>81</sup>

#### **d) Interim measures and automatic suspension**

Remedies Directive art.2(1)(a) requires review bodies to have the power to take interim measures aimed at correcting infringements or preventing further damage, and the 2007 Directive added<sup>82</sup> an obligation for *automatic* suspension once a legal challenge is instituted that prevents any *conclusion of the contract* prior to a decision of a review body either on interim measures or on the review action.<sup>83</sup> Combined with the standstill, this aims to secure for suppliers a real opportunity to overturn unlawful decisions, in particular without this being lost or prejudiced by the contract's conclusion. The

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<sup>77</sup> Remedies Directive, art.2(7).

<sup>78</sup> PCR 2006, reg.47J and PCR 2015, reg.98.

<sup>79</sup> PCR 2006, reg.32A; PCR 2015, reg.87.

<sup>80</sup> 15 days when notification is other than by fax or electronic means. PCR 2006, reg.32A(2) and PCR 2015, reg.87(2); and see PCR 2006 reg.32A(6); PCR 2015 reg.2(4).

<sup>81</sup> UK authorities must supply automatically with the standstill notice more information than EU itself requires (the full information required on request under Directive 2014/24, art.55(2), rather than merely a summary of that information as required by the Remedies Directive itself).

<sup>82</sup> Remedies Directive, art.2(3) and (4), added by the 2007 Directive, art.1.

<sup>83</sup> Or before the end of the standstill period: Remedies Directive, art.2(3).

UK regulations provide for this.<sup>84</sup> However, as EU law permits, the UK courts have power to lift the automatic suspension.<sup>85</sup> Both in awarding interim measures<sup>86</sup> and lifting automatic suspensions<sup>87</sup> the courts have almost invariably applied the “*American Cyanamid*” principles that govern interim measures in other domestic contexts,<sup>88</sup> rejecting an argument that automatic suspension implies a presumption in favour of maintaining a suspension.<sup>89</sup> However, the fact that suspension of conclusion of the contract is now automatic places the onus of taking action in relation to suspension on the procuring entity rather than supplier.

Application of *American Cyanamid* entails, first, that if there is not a serious case to be tried, a suspension will not be granted/maintained – a limitation clearly permitted under EU law, especially in light of the low threshold test for this in UK law.<sup>90</sup>

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<sup>84</sup> PCR 2006, reg.47(8); PCR 2015, reg.96(1)(c) and (d) and (automatic suspension) PCR 2006, reg.47G; PCR 2015, reg.95.

<sup>85</sup> PCR 2006, reg.47H(1); PCR 2015, reg.96(1).

<sup>86</sup> In numerous cases, and assumed to apply without discussion by the CA in *Letting International v London Borough of Newham* [2007] EWCA Civ 1522.

<sup>87</sup> *Exel Europe v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332.

<sup>88</sup> As set out in *American Cyanamid Co v Ethicon Ltd (No.1)* [1975] AC 396. On possible differences of approach in Scotland see *Patersons of Greenoakhill v South Lanarkshire Council* [2014] CSOH 21 where the court, however, specifically declined to decide whether the position is different.

<sup>89</sup> *Exel*, n 87 above.

<sup>90</sup> *CS Communications Systems Austria v AUV (C-424/01)* [2003] ECR I-03249. On application of the threshold in domestic see, in particular; *Newcastle upon Tyne Hospital NHS Foundation Trust v Newcastle PCT* [2012] EWHC 2093; *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876 (TCC).

Secondly, if damages would provide the challenger with an adequate remedy the court will deny/lift a suspension,<sup>91</sup> at least in England, Wales and Northern Ireland<sup>92</sup> (and even if damages are not adequate, their availability is a consideration in the overall assessment of the balance of interests, as discussed below).<sup>93</sup> The application of this adequacy of damages condition provides the backdrop for the empirical study, but it is submitted that it is in fact incompatible with the Remedies Directive,<sup>94</sup> particularly in light of *Alcatel*, which indicates<sup>95</sup> that the Directive requires not merely an effective system of remedies but, specifically, an effective remedy to overturn unlawful decisions. Denying suspension - and hence any real opportunity to overturn a decision<sup>96</sup> - because of an alternative damages remedy seems inconsistent with this.<sup>97</sup> Even if an adequacy of damages condition is

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<sup>91</sup> Examples are numerous, one early case being *McLaughlin and Harvey v Department of Finance and Personnel* (No.1) [2008] NIQB 25, [9]-[10]; and on automatic suspension see eg *Exel*, n 87 above and *NATS v Gatwick Airport* [2014] EWHC 3133. This involves a discretionary assessment, the outcomes of which are hard to predict and often difficult to reconcile: contrast, for example, *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922, where a tender had been submitted for specific work, with the cases cited in n 98 below.

<sup>92</sup> On Scotland see n 88 above.

<sup>93</sup> *National Commercial Bank Jamaica v Olint Copr* [2009] 1 WLR 1405, 1409, [17].

<sup>94</sup> Sue Arrowsmith, "Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts" in Arrowsmith (ed.), n 21 above, 67, and S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2<sup>nd</sup> edn. (London: Sweet & Maxwell, 2005), [21-60]. See also F. Banks and M. Bowsher, "Damages Remedy in England & Wales and Northern Ireland", in D. Fairgrieve and F. Lichère (eds), *Public Procurement Law: Damages as an Effective Remedy* (Oxford: Hart, 2011), 62-74.

<sup>95</sup> *Alcatel*, n 75 above, in particular [33]-[34] and [38].

<sup>96</sup> Since, as noted, this is generally ruled out in the UK once the contract is concluded.

<sup>97</sup> Note that the General Court has accepted an adequacy of damages condition in proceedings against the EU institutions (see e.g. *Esedra Sprl v Commission* (T-169/00R) [2000] ECR II-2951) which are in general subject to equally stringent remedies standards as the Member States (*Brasserie du Pêcheur SA v Germany* (C-46/93)

acceptable in principle, it is doubtful whether the way in which it has been applied is lawful, given that suspension is often denied despite significant uncertainty over the amount or existence of loss.<sup>98</sup> Further, even if suspension is not required from a supplier's perspective, it seems necessary to protect the EU interests in open markets. There is in fact support for a different approach in early case law: thus in *Harmon* Judge Humphrey Lloyd suggested, obiter, that effectiveness required various modifications to the *American Cyanamid* principles, including rejecting an adequacy of damages condition,<sup>99</sup> whilst in *Partenaire*<sup>100</sup> and in *Henry Brothers No.1*<sup>101</sup> Coghlin J effectively reached the same outcome by different reasoning, stating that damages cannot be "adequate" because of the public interest and requirement for injunctive relief as the primary remedy. Moreover, in *OCS*<sup>102</sup> the Irish

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[1996] ECR I-1029; *Bergaderm (Laboratoires Pharmaceutiques) SA v Commission* (C-352/98P) [2002] ECR I-5291, [41]; however, differences in procurement may be explained by the fact that the Remedies Directive does not apply to the EU institutions.

<sup>98</sup> E.g. when the challenge concerns admission to multi-supplier framework agreements under which no specific work is guaranteed e.g. *McLaughlin and Harvey*, n 91 above; *European Dynamics v HM Treasury* [2009] EWHC 3419; and see also *Exel*, n 87 above, where no tender had been submitted.

<sup>99</sup> *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (1999) 67 Con LR 1; (2000) 2 LGLR 372; [1999] EWHC 199, [235]; and see also *BFS v Secretary of State for Defence* [2006] EWHC 1513.

<sup>100</sup> *Partenaire v Department of Finance and Personnel* [2007] NIQB 100, [31] (High Court (QBD) of Northern Ireland).

<sup>101</sup> *Henry Brothers (Magherafelt) Limited and others v Department for Education for Northern Ireland (No.1)* [2007] NIQB 116.

<sup>102</sup> *OCS One Complete Solution Limited v Dublin Airport Authority plc and Maybin Support Services (Ireland) Ltd (Notice Party)* [2014] IEHC 306.

High Court recently interpreted the applicable Irish regulations<sup>103</sup> as rejecting *American Cyanamid*<sup>104</sup> in favour of a more general balance of interests test, one reason being that the adequacy of damages condition was considered incompatible with EU law.<sup>105</sup> However, surprisingly given the academic view and this early case law, arguments against the adequacy of damages condition were ignored for many years in most<sup>106</sup> UK cases. In 2014 *OCS* was referred to in *NATS*,<sup>107</sup> but the High Court there dismissed the arguments with no real consideration.<sup>108</sup> In 2014 in *DWF*<sup>109</sup> the Court of Appeal expressly declined

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<sup>103</sup> The European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010, SI 131 of 2010. The case concerned utilities but is equally relevant for other cases covered by EU remedies legislation.

<sup>104</sup> Which applies in Ireland in other contexts: *Campus Oil v Minister for Energy (No. 2)* [1983] IR 88.

<sup>105</sup> The case went to the Supreme Court ([2014] IESC 51) which did not, however, consider the issue since it decided that the regulations did not allow the lifting of a suspension at all. This has led to the Irish regulations being amended to allow this, but without clarifying the governing principles: see European Communities (Public Authorities Contracts) (Review Procedures) (Amendment) Regulations 2015, SI 2015 No 192; European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015, SI 2015 No 193.

<sup>106</sup> An exception was *European Dynamics v HM Treasury* [2009] EWHC 3419, where the argument was raised but briefly dismissed on the (fallacious) basis that if it were accepted ‘public procurements would grind to a halt’ ([22]).

<sup>107</sup> *NATS*, n 91 above.

<sup>108</sup> [29]. The Court has since continued to apply *American Cyanamid* without discussion, sometimes citing *NATS* (n 91 above) e.g. *Group M v Cabinet Office* [2014] EWHC 3659, [14].

<sup>109</sup> *DWF LLP v Secretary of State for Business, Innovation and Skills, acting on behalf of the Insolvency Service* [2014] EWCA Civ 900.

to examine the issue, stating itself “content to apply the *American Cyanamid* principles”<sup>110</sup> as this made no difference to the outcome. The position thus remains uncertain.

Were a strict adequacy of damages condition ruled out, it would still be important to consider how far availability of damages could be one relevant factor. Remedies Directive art.2(5), stating that the review body may “take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest” and decide not to grant such measures *when their negative consequences could exceed their benefits* implies that *all* interests can be taken into account to some degree. However, giving weight to availability of damages in an overall assessment differs only in degree from an adequacy of damages condition, and it is submitted that some limits exist on consideration of this factor. It is not clear how far the CJEU could review the overall impact of discretionary assessments by national review bodies, however, and any EU-level limit on national discretion is perhaps likely to take the form of rules to govern the exercise of discretion, such as a presumption in favour of the interest in open markets – something which we saw above was expressly rejected, however, in domestic case law on automatic suspension.

In addition, suspension will normally be denied unless the supplier undertakes to compensate the procuring entity<sup>111</sup> for losses, or at least certain losses, should the claim fail<sup>112</sup> (the cross-undertaking

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<sup>110</sup> DWF, *ibid*, [47].

<sup>111</sup> The same approach will apply when an undertaking is sought by others tenderers: see n 122 below.

<sup>112</sup> Such undertakings are expressly contemplated in PCR 2006, reg.47H(3) and PCR 2015, reg.96(3) (as interpreted in *Halo Trust v Secretary of State for International Development* [2011] EWHC 87). See, for example, *Partenaire*, n 100 above.

in damages), this is not an *automatic* bar to relief under the *American Cyanamid* principles<sup>113</sup> or the PCRs. Again, it has been argued, however, that to require such an undertaking infringes the effectiveness principle<sup>114</sup> both in general and in its application in specific cases, because of the deterrent effect on legal proceedings – a view endorsed, obiter, in *Harmon*<sup>115</sup> and also in *OCS*.<sup>116</sup> Some of these arguments are bolstered by the 2014 CJEU ruling in Case C-530/11 *Commission v United Kingdom*<sup>117</sup> concerning art.9(4) of the Aarhus Convention, stating that litigation on environmental matters should not be “prohibitively expensive”, a requirement arguably analogous to the Remedies Directive’s constraints on financial cost of litigation, as interpreted in *Orizzonte Salute*. The CJEU considered that the financial risk for the claimant must be taken into account,<sup>118</sup> arguably implying substantive constraints on the amount of potential liability, geared to the claimant’s resources. The CJEU also indicated the need for certainty in the rules on cross-undertakings,<sup>119</sup> thus arguably it is not permitted to leave this to discretionary judicial assessment, as currently applies in procurement cases.

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<sup>113</sup> *Belize Alliance of Conservation of Non-Governmental Organisations v Dept of the Environment (BACONGO case)* [2003] 1 WLR 2839, PC.

<sup>114</sup> Arrowsmith (2005), n 94 above, [21-65].

<sup>115</sup> n 99 above, [253].

<sup>116</sup> *OCS One Complete Solution Limited v Dublin Airport Authority plc and Maybin Support Services (Ireland) Ltd (Notice Party)* [2014] IEHC 306.

<sup>117</sup> *Commission v United Kingdom* (C-530/11), n 58 above.

<sup>118</sup> *ibid*, [59] (Judgment).

<sup>119</sup> *ibid*, [71] (Judgment).

If none of these considerations precludes suspension, the court examines the overall balance of convenience. This includes weighing, inter alia, the effect of delay on the public interest<sup>120</sup> and other tenderers<sup>121</sup> (including, in both cases,<sup>122</sup> the extent of protection through a cross-undertaking), the countervailing public interest in open markets,<sup>123</sup> the impact on the challenger of refusing suspension<sup>124</sup> (taking into account, as we have seen, the damages remedy), and the strength of the case<sup>125</sup> - a balancing exercise envisaged by Remedies Directive, art.2(5). Whilst there are some cases in which suspensions have been applied in spite of damage to the public interest that cannot be fully

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<sup>120</sup> For recent examples see *Group M*, n 108 above; *Advanced Business Software and Solutions Ltd v The Pirbright Institute* [2014] EWHC 4651 (TCC); *Solent NHS Trust*, n 70 above.

<sup>121</sup> E.g. *Solent NHS Trust*, n 70 above.

<sup>122</sup> In *DWF*, n 109 above, the CA indicated that the latter interests would not be considered if they *could* have been protected by the tenderers obtaining their own undertakings [54].

<sup>123</sup> E.g. *R v HM Treasury, ex p Edenred* [2014] EWHC 3555 (TCC), [31].

<sup>124</sup> E.g. *Federal Security Services Ltd v Chief Constable for the Police Service of Northern* [2009] NICH 3 (where this favoured a suspension); and *Rutledge Recruitment and Training v Department for Employment and Learning* [2011] NIQB 61 (where it counted against a suspension).

<sup>125</sup> E.g. *BFS*, n 99 above; *DeVilbiss Medequip Ltd v NHS Purchasing and Supply Agency* [2005] EWHC 1757 (Judgment of the High Court (Lewison J) of 29 July 2005).



compensated,<sup>126</sup> in about two thirds of cases<sup>127</sup> suspension is rejected,<sup>128</sup> with the public interest in proceeding carrying much more weight than the (more nebulous) open market interest (although in

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<sup>126</sup> For example, *Partenaire*, n 100 above; *Covanta*, n 91 above; *Edenred*, n 123 above, where the court emphasised public interest in the rules (para.31). The court in *Harmon*, n 99 above, *obiter*, also indicated that it would have suspended the procedure if that had been sought, and see also *DeVilbiss*, n 125 above, [64]. There have been several suspensions where damage from delay was negligible or non-existent eg *Lettings International v London Borough of Newham* [2007] EWCA Civ 1522, *First4skills Ltd v Department for Employment and Learning* [2011] NIQB 59, *Morrison Facilities Services Limited v Norwich County Council* (2010) EWHC 487 (Ch).

<sup>127</sup> That is, cases where the court considers the balance of interests.

<sup>128</sup> Suspension have been lifted/denied, or would have been if necessary to decide, on the basis of the balance of convenience in 22 of 30 cases since 2002. From Jan 2013-Oct 2015 suspensions were, or would have been, lifted on the balance of convenience in eight cases and were maintained in four: see (in favour of lifting) *Group M*, n 108 above; *Pirbright*, n 120 above; and *Solent NHS Trust*, n 70 above; *NP Aerospace Limited v Ministry of Defence* [2014] EWHC 2741; *Allpay Limited v Northern Ireland Housing Executive* [2015] NIQB 54; *Fox Building and Engineering Ltd v Department of Finance and Personnel (No 2)* [2015] NIQB 72; *Patersons*, n 88 above; *Hastings & Co (Insolvency) Ltd v The Accountant in Bankruptcy* [2013] ScotsCSOH 55; *Lowry Brothers v Northern Ireland Water No.2* [2013] NIQB 23; *Resource (NI) Limited v University of Ulster* [2013] NIQB 64; and (in favour of maintaining) see *NATS*, n 91 above, *DWF*, n 109 above, *Edenred*, n 123 above; *Bristol Missing Link*, n 90 above. In the study period 2002-2012 there were 12 cases in which suspensions were refused/lifted based on the balance of convenience (or would have been had it been necessary to decide) and five in which suspensions were granted/maintained (or would have been but for other factors). For the former group see *Henry Bros no 1*, n 101 above; *Lion Apparel Systems v Firebuy Limited* [2007] EWCH 2179 (Ch); *BFS*, n 99 above; *DeVilbiss*, n 125 above; *Newcastle NHS Foundation Trust*, n 90 above; *Shetland Line (1984) Limited v Scottish Ministers* [2012] CSOH 99; *Elekta Limited v The Common Services Agency* [2011] CSOH 107; *Rutledge Recruitment and Training v Department for Employment and Learning* [2011] NIQB 61; *The Halo Trust*, n 112 above; *Indigo Services v The Colchester Institute Corporation* [2010] EWHC 3237; *Alstom Transport v Eurostar International Limited, Siemens*

many of these decisions availability of damages to the challenger, even if not “adequate”, was a factor). In the same way that giving this factor significant weight might contravene the Remedies Directive so also might this be the case with an approach that routinely favours the public interest in proceeding, based again on arguments that direct redress is the primary remedy<sup>129</sup> and that the system overall must protect the public interest, as well as suppliers.

#### **e) Set aside**

One remedy required to be available at trial is a set aside of any unlawful decision.<sup>130</sup> UK case law is limited, as cases rarely proceed beyond suspension; however, it is established that factors similar to those applying to suspension are relevant, including adequacy of damages and the public interest in proceeding.<sup>131</sup> From the perspective of effectiveness, this approach is open to the same objections as apply to the approach to suspension, especially in light of the *Alcatel* ruling that set-aside must be effectively available. As with suspension, the High Court has also specifically rejected the existence of a presumption in favour of the remedy.<sup>132</sup>

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*Plc* [2010] EWHC 2747 (Ch); *Exel*, n 87 above. For the former group see *First4skills*, n 126 above; *Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland* [2009] NICH 3 (where, however, the adequacy of damages condition prevailed); *Lettings International*, n 126 above; *Partenaire*, n 100 above; *Rapiscan Systems v Commissioners of HM Revenue and Customs* [2006] EWHC 2067.

<sup>129</sup> This view finds some support in *McLaughlin and Harvey*, n 91 above, [16].

<sup>130</sup> PCR 2006, reg.47(8), and PCR 2015, reg.97(2). The Utilities Remedies Directive, n 5 above, art.2(1)(c) and (5) allows for an alternative approach of dissuasive payments but this alternative has not been applied in the UK.

<sup>131</sup> *Severn Trent Plc v Dwr Cymru Cyfyngedig (Welsh Water Limited) & Ors* [2001] EuLR 136; *Mears v Leeds City Council* (second judgment) [2011] EWHC 1031.

<sup>132</sup> *Severn Trent*, *ibid*.

**f) Concluded contracts, ineffectiveness, and related sanctions**

As noted, the Remedies Directive permit states to limit suppliers to damages only following conclusion of the contract,<sup>133</sup> as has been done in the UK,<sup>134</sup> but the 2007 Directive added the standstill obligation coupled with automatic suspension to ensure an opportunity of challenge *before* any contract is concluded. To support this, the 2007 Directive additionally introduced an exception to the sanctity of contracts principle, by requiring that contracts be declared ineffective<sup>135</sup> in two cases,<sup>136</sup> namely:

- a) When the contract was awarded without the required publicity.<sup>137</sup> This aims to secure an opportunity to challenge for this kind of serious violation (to which the standstill is not relevant).<sup>138</sup>

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<sup>133</sup> Remedies Directive, art.2(7).

<sup>134</sup> PCR 2006, reg.47(9); PCR 2015, reg.98(2).

<sup>135</sup> Subject to an exception for overriding reasons for public interest: Remedies Directive, art.2d(3) (as amended by 2007 Directive, art.1(2); PCR 2006, regs.47L; PCR 2015, reg.100.

<sup>136</sup> See Golding and Henty, n 8 above; M. Clifton, "Ineffectiveness – the new deterrent: Will the Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors" (2009) 18 PPLR 165.

<sup>137</sup> Remedies Directive, art.2d(1)(a) (as amended by 2007 Directive, art.1(2)); PCR 2006, regs.47K(2) and 47J(2)(a)); PCR 2015, reg. 99(2).

<sup>138</sup> This does not apply when the entity publishes a "voluntary 'ex-ante' transparency (VEAT) notice" indicating in its intention to rely on one of the exemptions from publicity and followed by a period of delay, where certain conditions are met, thus allowing an opportunity for challenge: Remedies Directive, art.2d(4) and 3a (as amended by 2007 Directive, art.1(2) and (4)); PCR 2006, regs.47K(3) and (4); PCR 2015, reg. 99(3) and (4).

b) When there is a violation of the standstill or automatic suspension,<sup>139</sup> coupled with some other breach affecting the supplier's chance of obtaining the contract,<sup>140</sup> and where the former violation has deprived the supplier of the chance of starting or completing proceedings. This ensures that the opportunity to challenge is not undermined by the entity's failing to adhere to the very rules that aim to preserve that opportunity.

Ineffectiveness in UK law is prospective only,<sup>141</sup> as allowed by the Remedies Directives,<sup>142</sup> with the detailed consequences being left to the Court's discretion.<sup>143</sup>

The 2007 Directive also introduced new penalties of fines and contract shortening to strengthen the remedies system in the kind of serious situations targeted by ineffectiveness remedy.<sup>144</sup>

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<sup>139</sup> Remedies Directive, art.2d(4) and 3a (as amended by 2007 Directive, art.1(2)); PCR 2006, reg.47K(5); PCR 2015, reg.99(5).

<sup>140</sup> Remedies Directive, art.2d(4) (as amended by 2007 Directive, art.1(2)); PCR 2006, reg.47K(5)(d); PCR 2015, reg.99(5)(d).

<sup>141</sup> PCR 2006, reg.47M(1); PCR 2015, reg.101(1)).

<sup>142</sup> Remedies Directive, art.2d(2) (as amended by 2007 Directive, art.1(2)).

<sup>143</sup> PCR 2006, reg.47M(3); PCR 2015, reg.101(3); and see also PCR 2006, reg.47M(4); PCR 2015, reg.101(4). Parties may alternatively agree on consequences in advance: PCR 2006, reg.47M(5)-(6), PCR 2015, reg.101(5)-(6).

<sup>144</sup> Thus the court *must* impose a fine when a prospective-only declaration of ineffectiveness is made:

Remedies Directive, art.2d(2) (as amended by 2007 Directive, art.1(2)). It must also provide for one of these penalties when ineffectiveness is not declared for various reasons: Remedies Directive, art.2d(3) (as amended by 2007 Directive, art.1(2)); PCR, 2006 reg.47N(2)(a) and 47N(3); PCR 2015, regs.102(2)(a) and 102(3). ON level of penalties see Remedies Directive, art.2e(2) (as amended by 2007 Directive, art.1(2)); PCR 2006, reg.47N(4)-(5); PCR 2015, reg.102(4)-(5).

### **g) Damages<sup>145</sup>**

The Remedies Directive also requires a damages remedy,<sup>146</sup> probably including lost profits.<sup>147</sup> The PCRs in the UK provide for this remedy,<sup>148</sup> which is based on principles of tort, requiring the supplier to be put in the position as if the breach had not occurred. In *Harmon*<sup>149</sup> the held that damages are available on the basis of either loss of chance,<sup>150</sup> where the supplier shows a substantial chance of an award, or full lost profits where the supplier show that it “would have” won the contract (satisfied in that case by showing a 90 per cent chance)<sup>151</sup> - a robust remedy compliant with EU obligations.

### **h) Time limits for proceedings**

The original Remedies Directive did not deal expressly with time limits for bringing proceedings, but the 2007 Directive introduced a specified minimum time period, corresponding with the length of the standstill, (generally) 10 calendar days with from the day *after* notification of the decision and the

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<sup>145</sup> See, in particular, Fairgrieve and Lichère, n 94 above.

<sup>146</sup> Remedies Directive, art.2(1)(c). It is unclear whether the right to damages under EU law itself is conditional on a ‘sufficiently serious breach’ but anyway such a condition does not apply in the UK: *EnergySolutions v Nuclear Decommissioning Authority* [2015] EWCA Civ 1262.

<sup>147</sup> Advocate General Cruz Villalón in *Combinatie Spijker Infrabouw v Provincie Drenthe* (C-568/08) [2010] ECR I-12655, [110]. Details of the damages remedy are not specified other than the Utilities Remedies Directive providing expressly for recovery of tender costs in certain cases: The Utilities Contracts Regulations 2006 (SI 2006/6), reg.45(8); Utilities Remedies Directive, art.2(7).

<sup>148</sup> PCR 2006, reg.47(8)(b) and (9); PCR 2015, reg.97(2) and 98(2)(b).

<sup>149</sup> *Harmon*, n 99 above.

<sup>150</sup> Rejected for lack of a causal link between breach and loss in *Nationwide Gritting Services v Scottish Ministers* (No.2) [2014] ScotsCS CSOH 151.

<sup>151</sup> Applied also in *Aquatron Marine v Strathclyde Fire Board* Outer House [2007] CSOH 185.

reasons for it.<sup>152</sup> Prior to 2009 the UK regulations required proceedings to be brought “promptly” and in any case within three months of an infringement, with a judicial discretion to extend for good reason (amended slightly in 2009 to attempt to meet the requirements of the 2007 Directive).<sup>153</sup> “Promptly” required action within a few days in the context of an on-going award procedure.<sup>154</sup> These were the time limits stated to apply for most of the period of the empirical study. However, they were later revealed by the CJEU in *Uniplex* not to comply with EU law.<sup>155</sup> In particular *Uniplex* indicated that: i) a requirement for promptness is too uncertain; and ii) a time limit cannot run until the supplier knows or ought to know of the infringement. Thus the time limits were amended by the Public Procurement (Miscellaneous Amendments) Regulations 2011,<sup>156</sup> applicable for the most part from 1 October 2011.<sup>157</sup> In general, proceedings must now be started within 30 days from when the supplier first knew, or ought to have known, that grounds for proceedings had arisen.<sup>158</sup> As before, the Court may extend the general period for “good reason”,<sup>159</sup> but not beyond three months from the date of

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<sup>152</sup> The period is longer (based on 15 days) when notification is given other than by fax or electronic means: Remedies Directive, art.2c (as amended by 2007 Directive, art.1(2)).

<sup>153</sup> PCR 2006, reg.47D provided that, where based on a decision, proceedings were not required to be started before the end of 10 days following the date the decision was sent, when accompanied by a summary of the reasons for the decision, or the day after the date on which the supplier was given the summary (with slight variation for communications sent other than by facsimile or electronic means).

<sup>154</sup> *Holleran v Severn Trent Water* [2004] EWHC 2508.

<sup>155</sup> *Uniplex (UK) v NHS Business Services Authority* (Case C-406/08) [2010] ECR I-00817.

<sup>156</sup> Public Procurement (Miscellaneous Amendments) Regulations 2011, SI 2011/2053.

<sup>157</sup> *ibid*, reg.1.

<sup>158</sup> PCR 2006, regs.47D(2); PCR 2015, reg.92(2).

<sup>159</sup> PCR 2006, regs.47D(4); PCR 2015, reg.92(4).

knowledge/constructive knowledge.<sup>160</sup> “Good reason” does not cover a case where a supplier does not know about the regulations or holds off from legal action for fear of damaging the relationship,<sup>161</sup> or has been trying to persuade the entity to change its mind or is having a complaint investigated by the Commission,<sup>162</sup> but exists when the entity has misled the supplier.<sup>163</sup>

Special time limits apply for ineffectiveness claims<sup>164</sup> - as EU law allows,<sup>165</sup> proceedings in the UK must be brought within six months of the date of contract<sup>166</sup> but there is also effectively a 30 day cut-off from when supplies have reasons for decisions.<sup>167</sup>

### **3) The empirical study: methodology**

As mentioned, the empirical research sought to gauge the level of supplier complaints and challenge activity, and to identify the factors influencing this, including key features of the remedies system described above. Data was collected using a structured questionnaire from (1) solicitors in private

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<sup>160</sup> PCR 2006, regs.47D(2); PCR 2015, reg.92(5). PCR 2006, reg.47D(3) and PCR 2015, reg.92(3) also contain a further provision to ensure that the time limit will never expire before the end of the standstill period.

<sup>161</sup> *Jobsin Internet Services v Department of Health* [2002] 1 CMLR 44; [2001] EWCA Civ 1241.

<sup>162</sup> *Matra Communications SA v Home Office* High Court [1999] 1 WLR 1646, CA.

<sup>163</sup> As in *Keymed (Medical and Industrial Equipment) Ltd v Forest Healthcare NHS Trust* [1998] EU LR 71.

<sup>164</sup> Remedies Directive, art.2f(2) (as amended by 2007 Directive, art.1(2)).

<sup>165</sup> Remedies Directive, art.2f(1)(b) (as amended by 2007 Directive, art.1(2)).

<sup>166</sup> PCR 2006, reg. 47E(2)(b); PCR 2015, reg.93(2)(b).

<sup>167</sup> For example, PCR 2006, 47E(2)(a) combined with regulation 47E(5) and (6); PCR 2015, reg.93(2)(a) combined with reg.93(5) and (6). If the reasons are not given with the notification of conclusion of the contract the 30 days runs from the time the authority informs the supplier of the summary of reasons: PCR 2006, 47E(5); PCR 2015, reg.93(5); and on contracts without competition see PCR 2006 reg.47E(2)(a) combined with reg.47E(3) and (4); PCR 2015 reg.93(2)(a) combined with reg.93(3) and (4).

practice, (2) procuring entities and (3) suppliers. The collection of overlapping data helped both to verify the accuracy of data, and to provide a more complete picture (for example, only suppliers can provide information on situations in which they do not litigate or complain at all). Participants could respond anonymously or, if willing to participate in follow-up questioning, could identify themselves.

Solicitors were invited via the Procurement Lawyers' Association (PLA)<sup>168</sup> and 18 of 96 member-firms<sup>169</sup> participated. Participants' experience covered all main types of procurement (construction, main types of services, and standard and complex supplies). Eleven had more than ten years' experience, thus covering the remedies system prior to the 2009 changes.<sup>170</sup> Regulated procuring entities were identified using Contracts Finder (the national website for public procurement information)<sup>171</sup> and 119 responded with a good spread amongst the main types of regulated entity,<sup>172</sup> other than utilities, and with all main types of procurement covered by a significant number. 114 suppliers participated, again identified through Contracts Finder. Information from the 74 non-anonymous supplier participants showed that all but one<sup>173</sup> were SMEs.<sup>174</sup> They again covered all main

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<sup>168</sup> <http://www.procurementlawyers.org/>.

<sup>169</sup> Participants in all groups were asked to liaise with colleagues and submit one response.

<sup>170</sup> Of other participants six had four to ten years of experience.

<sup>171</sup> <https://online.contractsfinder.businesslink.gov.uk/> where buying organisations are listed at <http://www.contractsfinder.businesslink.gov.uk/data-feed.aspx?site=1000&lang=en>. 1750 were invited.

<sup>172</sup> 12 central government bodies; ten non-departmental public bodies; 45 local councils; 12 schools or universities; 12 housing association; and 12 hospitals or other health care providers. Seven were entities purchasing for more than one entity.

<sup>173</sup> A subsidiary of a large plc, but by itself also a SME.

<sup>174</sup> Using the definition in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) (2003/361/EC).



categories.<sup>175</sup> Fifty three (46 per cent) had more than ten years' experience with public/utility sectors. Fifty eight indicated that 100 per cent of their business was in the UK and only 13 that 50 per cent or more of their business was elsewhere. There was, however, no significant variation in responses between these groups. Suppliers' views were especially important since they have direct knowledge of the factors affecting complaints and challenges, and the questionnaire responses were therefore explored with semi-structured telephone interviews with 35 responding suppliers (20 of whom had more than 10 years' relevant experience).<sup>176</sup>

#### **4) Findings**

##### **a) Levels of activity: legal challenges proceeding to a judgment, challenges instituted, and incidents of advice not leading to challenge**

A first question examined was the number of legal challenges proceeding to at least one judgment (including on suspensions).<sup>177</sup> Figure 1 presents the annual numbers.<sup>178</sup> Prior to 2006 judgments were rare and sporadic; the number then generally increased up to 2011 but peaked at only 22 in 2011, and then fell – probably because many of the 2010/11 cases concerned a single set of tendering exercises

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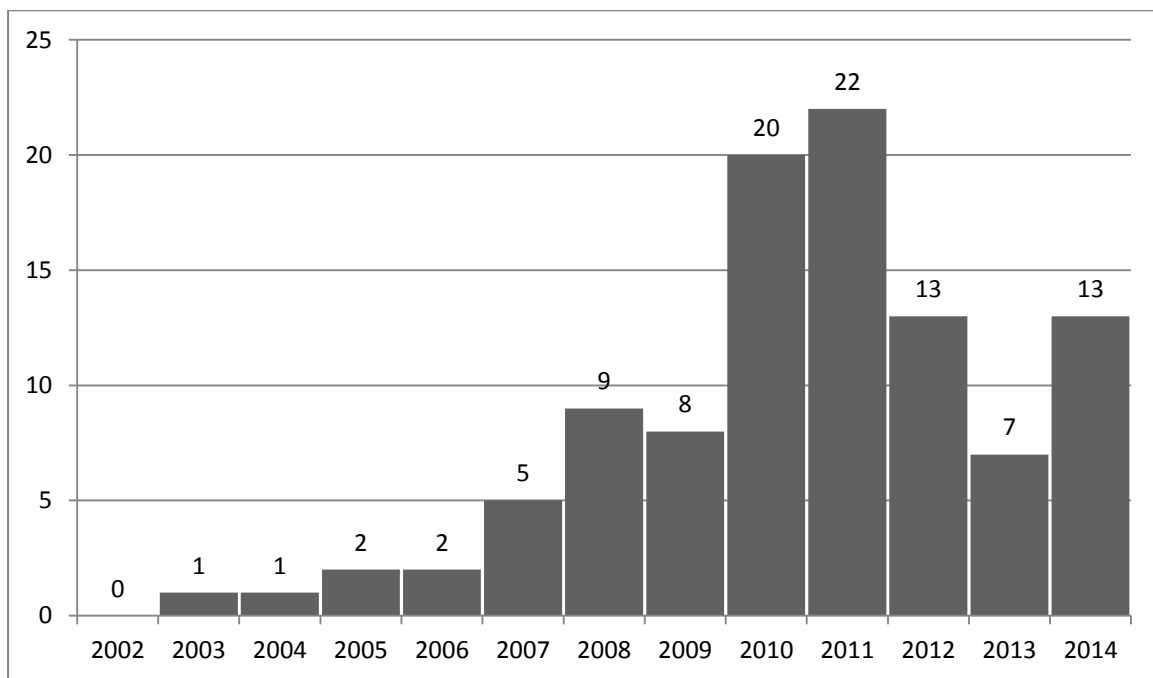
<sup>175</sup> With most categories covered by a significant number of respondents, although fewer had been involved in purchasing supplies and utilities than services and construction (with more involved in professional and complex services than manual).

<sup>176</sup> Nine had four-10 years' experience, four had one-three years' and two less than a year.

<sup>177</sup> Examined through the judgments in the Westlaw UK database (Sweet & Maxwell).

<sup>178</sup> Cases are included in the year of the date of the latest judgment in the case. The figures here for 2009-2011 are higher than in the Commission remedies report, n 9 above, table 6.2, 83, but those figures cover only more limited cases e.g. excluding utilities and defence and those concerning only the TFEU.

concerning publicly-funded legal services and did not represent any general trend. This number is very low in comparison with many Member States: the Commission's remedies report<sup>179</sup> shows that the vast majority of Member States have hundreds or even thousands of procurement cases annually,<sup>180</sup> only six had fewer than one hundred in 2012, and only Ireland fewer than the UK.



**Figure 1 - Number of UK cases concerning breach of EU procurement law that result in a judgment**

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<sup>179</sup> Commission report on remedies, n 9, table 6.2, 83.

<sup>180</sup> Not necessarily involving violations of EU procurement law itself. The UK has only a tiny number of procurement cases that do not involve such violations, however.

The research also explored the overall number and pattern of legal challenges.<sup>181</sup> The number settled or withdrawn<sup>182</sup> was examined via data from the lawyers, which indicated that the overwhelming majority do not proceed to final judgment. Twelve of the 16 lawyers with information reported that more than 50 per cent of cases did not do so, with 10 reporting that more than 70 per cent of cases did not do so and six that this was so in more than 90 per cent of cases . Changes over time were examined through information from lawyers<sup>183</sup> on the number of challenges dealt with from 2007-2012,<sup>184</sup> in relation to both supplier and procuring entity clients. The data, which appears to have a high level of accuracy,<sup>185</sup> shows a steady, and similar, year-by-year, increase: for supplier clients there was a rise from an average of 0.8 incidents in 2007 to three in 2012, and for procuring entities a rise from 0.7 to 3.9. Thus the number more than tripled - a trend broadly in line with the rise in reported judgments.

The study also explored the level of incidents in which suppliers sought external legal advice but did not institute a challenge. Here data from lawyers showed that for every case of advice that produced

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<sup>181</sup> The number of reported cases above includes those where there is a judgment other than a final judgment on the merits, so that there is an overlap between the category of challenge falling short of final judgment, described here, and the category of reported cases.

<sup>182</sup> This does not mean that they do not result in any judgment; this includes, for example, withdrawal after an automatic suspension is lifted. Note that the Commission remedies report (n 9 above) figures for proceedings lodged in Table 6.1, 82, are *lower* than the number of judgments in table 6.3, 83 – but the UK report in the Final Study Country Fiches states that figures of cases initiated are not provided for the UK, suggesting perhaps inclusion of data in table 6.1 is an error.

<sup>183</sup> Although legal challenges could theoretically be dealt with solely by internal advisors.

<sup>184</sup> A small number of participants provided data for years preceding 2007 - four for 2006 and 2005 and two for 2006 only, indicating two challenges in 2006 with none noted for previous years.

<sup>185</sup> Based on information supplied on the accuracy of data and records.

litigation, about four to six cases did not. The findings also indicate<sup>186</sup> that suppliers are *increasingly* seeking advice: there was a steady rise of incidents from an average 4.7 for each law firm in 2007 to 13 in 2012 – almost a tripling. This is in line with the trends in litigation and legal challenge examined above.

## **b) Reasons that suppliers who seek legal advice or make complaints do not litigate**

### **i) Introduction**

As just seen, the overwhelming majority of suppliers seeking legal advice decide not to litigate and the study explored the reasons for this. In addition, we examined whether suppliers also make other complaints to procuring entities<sup>187</sup> which do not result in litigation, and why, if so, litigation is not pursued.

Lawyers' input was relevant only where suppliers sought legal advice, whilst input of suppliers and procuring entities was potentially relevant also for situations where suppliers had complained without any legal advice. 25 of 114 responding suppliers had sought legal advice or made one or more other complaints, although almost were involved in only one or two such incidents, or one or two annually.<sup>188</sup> 36 of the 119 responding procuring entities had experienced one or more complaints; 13 had received only one and five two complaints, but 14 three to ten, and four more than ten (and two 20 or more). The three groups were asked to assess the relevance of certain defined reasons for

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<sup>186</sup> This data can be considered as reasonably accurate based on information supplied on accuracy.

<sup>187</sup> A complaint was defined in the questionnaire as a formal "complaint (e.g. following a process set out in tender documents) to the procuring public body/utility over a possible breach of procurement law, short of 'legal challenge'". (legal challenge also being defined).

<sup>188</sup> Exceptions were one respondent with about three complaints a year and another with 'too many to recall'.

suppliers' decisions on whether to make a legal challenge, as well as to identify any other reasons. Procuring entities expressed definite views on one or two points but generally felt unable to assess the reasons, so that the study findings here rest mainly on data from lawyers and suppliers.

The findings, which were consistent between these two groups, indicate a variety of reasons for not commencing proceedings. The most important, which were about of equal significance - and the same for decisions taken with legal advice as without - concerned the cost and adequacy of legal remedies, and fear of reprisals. In addition, decisions were significantly influenced by the existence of a non-confrontational legal culture, by action taken by the procuring entity, by the fact the complaint was not well-founded, and by difficulties of proof.

#### **ii) Cost and nature of legal remedies**

As noted above, reasons relating to legal remedies were one of the two most important influences. As regards the different aspects of remedies, the cost of proceedings and desire to focus resources elsewhere were most important. Difficulties with maintaining/obtaining a suspension were also relevant. The delay involved in legal proceedings was a consideration, but less significant. Finally, also relevant important were the time limits for bringing proceedings but, as we have seen, these have already changed since the study period.

#### **iii) Cost and need to use resources elsewhere**

Research by Pachnou in the 1990s<sup>189</sup> identified litigation costs as one of the two most significant deterrents to legal remedies, and the present research confirmed its importance.

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<sup>189</sup> D. Pachnou, "Bidders' Use of Mechanisms to enforce EC Procurement Law" (2005) 14 PPLR 256.

Lawyers regarded this as more important than difficulties with specific remedies, although not as important as time limits (see below). Fourteen of 18 lawyers responding said that cost was relevant to the decision not to litigate in at least 25 per cent of cases and seven considered it relevant in more than half. Financial cost was given even more prominence by suppliers, who identified this as one of the three main factors of roughly equal importance the others being inadequate remedies and fear of reprisals (see below). In fact, 17 of 20 suppliers who had sought legal advice or complained – and all for whom this was a potentially pertinent issue - referred to cost.<sup>190</sup> One specifically mentioned that cost precluded litigation despite the possibility of insurance, although another perceived that availability of insurance might lead to more litigation in future.

Also very important was the similar consideration of wishing to focus resources elsewhere: fifteen of eighteen suppliers considered it relevant, 12 of them in more than 75 per cent of cases.<sup>191</sup> A large number of comments referred to the need to devote resources to finding other opportunities – for example, “I could be better serving my firm by just forgetting it, walking away from it and spending that time on chasing new work...” – and the interviews also showed this to be an overwhelming consideration for many.

Several suppliers commented both on the fact that the public sector seemed willing to incur high costs to deal with the cases and the risk of being liable for those costs if the claim fails. Typical was the view that “Very specialised small companies don’t have the resources to take on the government machine”. The general perspective of suppliers on the remedies system was summed up thus: “The remedies

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<sup>190</sup> 15 stating that it was relevant in 76-100 per cent of cases, but were often commenting on only one or two incidents. Of the three who stated that it was not relevant this was because of considerations such as correction of the breach.

<sup>191</sup> Nine lawyers considered it relevant in at least 25 per cent of cases and four in more than half

system does [not] have any real effect in the case of SMEs. It only is a 'remedy' for vast companies with deep pockets and clever lawyers". Combined with uncertainties of outcome (see below) the overwhelming general sentiment was that "the commercial risk to business from seeking a remedy is seen to far outweigh any benefit of successfully achieving a remedy" - and many referred explicitly to the need to avoid "throwing good money after bad".

#### **iv) Legal remedies, time-limits and delay**

Lawyers were quizzed on the influence of specified features of the remedies system. However, it was considered that suppliers and procuring entities would often not understand these, and thus (apart from on delay) their views were sought merely on remedies in general.<sup>192</sup>

According to lawyers, several elements of the remedies system influenced suppliers not to institute proceedings after legal advice. As noted, most important – and perhaps more so than any other single reason, including cost – was the time limit for challenge: eight of 18 lawyer participants considered this relevant in at least 25 per cent of cases and four in more than half, and a further five in two-25 per cent of cases. Lawyers, but not suppliers themselves, perceived time limits as even more important – a difference possibly explained by the fact that time limits appear relatively more important to suppliers who *have* sought legal advice who will have an awareness of these. As explained, the explicit time-limits for most of 2007-2011, to which most experience related, in fact did not comply with EU law, and have been amended.<sup>193</sup> Another reason for not bringing legal proceedings, although much

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<sup>192</sup> Whether it was a factor that 'your organisation believed it would not be able to obtain suitable remedies even if a breach of the law was shown'.

<sup>193</sup> Interestingly, three lawyers suggested that time limits are now a *more* important reason for not litigating; but one commented that the new time limits have led to an increased number of 'precipitous' writs to avoid being out of time.

less significant, was the difficulty of securing suspension. Ten of the 18 lawyers considered this relevant, with five finding it relevant in more than 25 per cent of cases (and two in more than half). Similar importance was attached to the rules on undertaking in damages.<sup>194</sup> A good few – seven of 18<sup>195</sup> – also considered that even if the contract was not likely to be concluded by the trial remedies would be inadequate and that this was a reason for not litigating.

Suppliers' own responses similarly suggested that inadequacy of remedies is a factor: the vast majority of 18 responding thought it relevant in 76-100 per cent of cases<sup>196</sup> and none considered it irrelevant – although the one supplier with significant experience of complaints, considered this relevant only in 51-75 per cent of cases. In fact, suppliers identified this factor as one of the three main factors of roughly equal importance in decisions not to litigate, along with cost and fear of reprisals. A number of interviewees stated that they are not interested in compensation but only in obtaining the work, indicating that it is the perceived difficulty of obtaining a remedy to ensure latter that is the key issue.

Finally, the time for completing legal proceedings was perceived relevant by both lawyers and suppliers, although in far fewer cases than the reasons above.<sup>197</sup>

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<sup>194</sup> Nine of the 18 lawyers considered this relevant, five finding it relevant in more than 25 per cent of cases (three in more than half).

<sup>195</sup> Two considered this relevant in 51-75 per cent of cases, two in 25-50 per cent and three in 2-25 per cent.

<sup>196</sup> Two in 51-75 per cent of cases, and five saying they did not know. Many were commenting here only on one or two incidents but the same pattern is seen with the group with experience of more than two complaints, with four of five responding rating it relevant in 76-100 per cent of cases and one in 51-75 per cent of cases.

<sup>197</sup> Eleven of 18 responding lawyers, with one regarding it as relevant in more than half of cases and five in more than a quarter; and 12 of 16 suppliers, 10 considering it relevant in at least 50 per cent of cases. Four considered it not to be relevant, however, including the one supplier with significant experience of complaints.



#### **v) Fear of blacklisting and other reprisals**

Another very significant factor deterring legal challenge was fear of reprisals from the procuring entity. Suppliers considered this one of the three most significant reasons for not litigating, along with cost and inadequate remedies: all 18 responding referred to it.<sup>198</sup> Many interviewed expressed a fear of blatant blacklisting – for example “You just have to take it, it’s not a legal decision – you might win the case .....but you’ll never win any business with that local council again – you know it and they know it”, and “In local government it’s almost regarded as you will be put on a blacklist if you make any waves at all”. For a few, however, the concern was more about losing positive opportunities for good relationship: “We are interested in longer term partnerships.... focusing on a partnership and strong relationship and an adversarial approach does not set us off on the right foot”. Fear of reprisals from other entities was also not negligible although regarded as a little less important. This is clearly a concern, however, in small markets: “I’ve lived in [redacted] for over 25 years ... if you go down that road you’ll never get any business. It’s too small. The client base is too small and if you did start complaining you’ll not get any business – it would go round the place like wildfire”.

Lawyers also indicated that fear of reprisals was important to suppliers, although they did not give it quite the same importance as the concrete considerations above, nor the same importance as suppliers did.<sup>199</sup> Since, however, suppliers were addressing not only cases in which legal advice had been sought but complaints more generally, the latter point is unsurprising, since suppliers that have consulted lawyers already would naturally seem likely to be less influenced by this fear.

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<sup>198</sup> 14 considering it relevant in 76-100 per cent of cases although reflecting in some cases only one or two incidents.

<sup>199</sup> Nine of 18 considered it relevant in at least 25 per cent of cases (four in more than half of cases) and of similar perceived relevance was a fear of reprisals from other regulated purchasers.

#### **vi) Action by the procuring entity**

Although use of the remedies system is clearly, then, often affected by problems with the system or its use (reprisals), another common reason for not proceeding following a complaint is that the procuring entity takes action. Of course, the possibility of proceedings and hence, possibly, the effectiveness of remedies, may influence the entity's action.

In this regard direct corrective action, such as rewinding the procedure or reinstating a supplier, was often relevant. Lawyers considered this not quite as important as cost but still very significant. Thus 13 of 18 indicated that this influenced supplier decisions in at least 25 per cent of cases, six considering it a factor in more than half. Three of 13 suppliers addressing this also referred to this, commenting that it was quite common – for example, “A fault with a process – never a problem – the government department will stop and revisit it. I can't think of any government department who would stand up and carry on”. Suppliers responses seemed to give a bit less weight to this than lawyers' - but lawyers' responses relate only to cases in which legal advice had been sought, when action may be more likely, and also, although two thirds of suppliers assessing the issue did *not* experience any action by the procuring entity as relevant,<sup>200</sup> most were commenting on only one or two incidents. Further, 13 of 28 procuring entities reported direct corrective action as relevant.

Other action – for example, an apology (the illustration given in the question) or change in policy - was also cited by 11 of 18 lawyers as a factor,<sup>201</sup> though much less important than direct corrective action,

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<sup>200</sup> This was the case with 10 of 13 suppliers (corrective action), 10 of 11 (compensation) and nine of 14 (other steps such as an apology).

<sup>201</sup> Four stating that it was relevant in 26-50 per cent of cases and seven that it was relevant in two-25 per cent.

and also by 5 of 14 suppliers and 18<sup>202</sup> of 23 procuring entities who addressed this – the latter groups suggesting that such other action is *more* important than direct correction. Again, the difference might be explained by the fact that lawyers are addressing only cases in which they have already become involved.

These responses clearly indicate that many complaints are addressed by the procuring entity to the satisfaction of complaining suppliers – a point reinforced by the fact that the supplier with extensive experience of complaints was influenced by corrective action or other steps (other than compensation) in 51-75 per cent of cases.

Compensation, however, was much less important.<sup>203</sup> This was considered relevant by only two lawyers and obtained by only one of eleven suppliers addressing this, and none of the procuring entities had paid any. This figure, alongside the very limited number of successful reported damages claims<sup>204</sup> and the limited number of cases in which compensation is the reason for terminating litigation (see below), indicates a much smaller role for compensation than for other remedies. One reason could be that, as noted earlier, many suppliers are not interested in compensation but only in obtaining work.

#### **vii) A weak or uncertain legal case**

As might be expected, the weakness or uncertainty of a case was also often a reason not to litigate – as mentioned above, this fact combined with cost issues was often perceived to make litigation a poor

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<sup>202</sup> 11 indicating such measures to be relevant in 76-100 per cent of cases.

<sup>203</sup> And only in less than 25 per cent of cases.

<sup>204</sup> See *Harmon*, n 99 above and *Aquatron Marine*, n 151 above.

choice. First, suppliers are not always able to find out the facts to establish a breach.<sup>205</sup> Obviously it is not clear whether this operates as a barrier to *successful* proceedings. Several suppliers commented on the difficulty of proving the facts when there has been a “fix”. Secondly, legal uncertainty also deters litigation.<sup>206</sup> Thirdly, suppliers often conclude there has been no legal violation.<sup>207</sup> Some also referred to uncertainty as a factor rather than concluding that there was no breach because they had not sought legal advice and were unsure of the legal position. Finally, suppliers seeking legal advice quite often decided not to litigate because of a low chance of success despite a breach - for example, where the award decision is not affected. This was more common than the situation in which the supplier concluded after advice that there was no breach.<sup>208</sup> In addition, suppliers indicated that they did not bring legal action because the breach was trivial.<sup>209</sup>

#### **viii) Non-confrontational legal culture**

Pachnou’s study found the fact that there is a non-confrontational legal culture in this field to be an important reason for not litigating;<sup>210</sup> legal action was considered generally an undesirable feature of

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<sup>205</sup> Sixteen lawyers cited this (10 saying as a factor in more than 25 per cent of cases) and eight out of 16 suppliers.

<sup>206</sup> 13 of 18 lawyers considered this relevant with one regarding it as relevant in more than half of cases and five in more than a quarter; and 12 of 17 suppliers.

<sup>207</sup> 12 of 18 lawyers referred to this, with one regarding it as relevant in over 75 per cent of cases, three in more than half and another four in more than a quarter; and four out of 11 suppliers who replied on this stated it was relevant.

<sup>208</sup> Cited by 14 of 18 lawyers, with 12 stating it relevant in at least 25 per cent of cases and six in more than half of cases. Fifteen of the 17 suppliers likewise considered it a factor, suggesting that it is also more relevant than the other factors above in their experience.

<sup>209</sup> Five of 13 responding mentioned this and nine of 18 lawyers; and 30 of 31 procuring entities.

<sup>210</sup> Pachnou, n 189 above.

business, and to be avoided as disruptive to the business community. In the present study suppliers and procuring entities also gave this consideration some significance: five out of 12 suppliers who responded thought it relevant and six out of 12 procuring entities. As one supplier expressed it “You’re not looking for minor breaches. There is goodwill around. You know people and you’re trying to win a contract... In England businesses just want to get on with it” and another: “I don’t think that legal challenge is a sensible way forward in a business relationship – I don’t think any company unless it’s been severely wronged, or it’s a massive contract or it’s a last throw of the dice ... it just doesn’t strike me as anything that would be worth considering”. Lawyer participants did not consider this factor to be so important,<sup>211</sup> but, of course, their experience covers only cases where legal advice has been sought - a confrontational situation already.

#### **ix) Complaint as a “pressure” tactic**

Finally, a further factor was use of a complaint as a tactical weapon to pressure procuring entities without any serious intention to litigate. Two of 12 suppliers indicated that they had used complaints/threat of litigation in this way and 18 of 22 procuring entities perceived this to have happened.

#### **c) Reasons legal challenges do not proceed to judgment**

Using a similar approach, the research also examined why the vast majority of legal challenges are not carried through to final judgment.<sup>212</sup> The main source of information was lawyers, as responding suppliers and procuring entities had very limited experience of litigation (as might be expected given

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<sup>211</sup> Only six of 18 considered it not relevant and five of these considered it so in fewer than a quarter of cases.

<sup>212</sup> i.e. asking for an indication of the significance of defined reasons/other reasons for not proceedings, but with only lawyers asked to rate specific aspects of legal remedies.

its rarity). Only one supplier, involved in three cases over a decade, had any experience, and only four procuring entities had been subject to challenge.<sup>213</sup>

Reasons for discontinuing challenges were similar to those for decisions not to initiate them. However, the relative significance of the various reasons was quite different at the two stages, as might in fact be expected.

In this regard, the single most significant reason for terminating litigation (although far from overwhelmingly important) was direct corrective action. Nine of the 16 lawyers with challenge experience considered this relevant in more than 25 per cent of cases - seven in more than half of cases and two in more than 75 per cent. We have seen that this is an important reason that disputes are not pursued even prior to litigation, but it is much more prominent at the litigation stage. Compensation was not of great significance, but again was more important than prior to litigation: six of the 16 lawyer participants with experience of challenge mentioned this with two considering it a factor in more than 25 per cent of cases. Conversely, and unsurprisingly, lawyers indicated that action short of correction or compensation is much *less* relevant at this later stage.<sup>214</sup> The limited experiences of suppliers and procuring entities supported these conclusions.<sup>215</sup>

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<sup>213</sup> Two to one challenge and the other two to three each.

<sup>214</sup> Thus only four of the 16 lawyer participants with experience of challenge said that this was relevant (two in 26-50 per cent of cases and two in fewer than 25 per cent of cases).

<sup>215</sup> Thus the supplier with challenge experience said corrective action had been relevant in two cases and compensation in one. Likewise of procuring entities with litigation experience, three indicated that corrective action had been relevant, with one mentioning compensation and another 'other' action.

Another factor of some significance at this stage was use of legal proceedings to pressure the procuring entity, with little intention of completing proceedings. Eleven of 16 lawyers with experience of challenge mentioned this, although only five said that it was relevant in more than 25 per cent of cases.<sup>216</sup> Two 16 considered that this has become more important, one suggesting that automatic suspension now created “a perceived likelihood that the authority will then fold”.

Certain factors relating to the remedies system were also mentioned as relevant. However, these factors were not as important as the above reasons and not nearly as important as they were in deterring litigation in the first place.

In this regard, cost was mentioned by 12 of the 16 lawyer participants, but with only four considering it relevant in more than 25 per cent of cases. This is unsurprising, since proceedings might be expected only if the cost of pursuing them to the end is justified – although in some cases, as we have seen, proceedings may be instituted merely as a pressure tactic. The desire to concentrate resources elsewhere was also mentioned by lawyers, but only by a few<sup>217</sup> and again was much less relevant at this stage. Delay caused by proceedings was not a significant influence at all at this stage.<sup>218</sup> Likewise, one or two lawyers mentioned that difficulties with legal remedies were a reason for not proceeding in a limited number of cases, but this factor was again of negligible significance at this stage and much

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<sup>216</sup> The supplier with litigation experience said this was not a factor; of the four procuring entities with litigation experience three considered this relevant (all in more than half of instances).

<sup>217</sup> Seven of 16 lawyers, with five indicating it relevant in 25 per cent of cases or fewer.

<sup>218</sup> Four of 16 lawyer participants with three indicating it relevant in 25 per cent of cases or fewer. The supplier with experience of legal challenge mentioned cost as relevant in one case, and all three of the above factors were each mentioned by one procuring entity.

more influential at the earlier stage of bringing proceedings, as might be expected when the decision to litigate is based on legal advice.

Other reasons for terminating were lack of evidence of a breach,<sup>219</sup> and perceived low or uncertain chances of success because of legal uncertainty.<sup>220</sup> As we saw above, both are also significant in explaining why suppliers do not seek legal advice or make legal challenges in the first place and are more significant at that earlier stage. However, it seems these considerations might become clearer once proceedings have commenced – although withdrawal for these reasons could also occur when litigation is purely tactical.

Finally, we saw above that, as with financial cost, fear of reprisals, in particular from other public sector entities, is the most significant reason – along with cost and other difficulties with the remedies system - why suppliers with complaints do not institute proceedings. However, lawyers' responses indicated that suppliers' fear of reprisals – whether from the procuring entity, other regulated entities, or the wider market – is (as with cost) a much less significant reason for terminating a dispute after launch of proceedings. However, it was still mentioned as relevant by a few lawyers.<sup>221</sup>

#### **d) Factors affecting the level of legal challenge and complaints over time**

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<sup>219</sup> Cited by 12 of 16 lawyers commenting, with seven of these considering it relevant in more than 25 per cent of cases and three in more than half.

<sup>220</sup> 10 of 16 lawyers with experience of legal challenge in the former case, and seven in the latter, mentioned these. Legal uncertainty was mentioned by the supplier with litigation experience whilst two procuring entities mentioned lack of factual evidence and one legal uncertainty.

<sup>221</sup> And the supplier with litigation experience mentioned fear of reprisals from *other* regulated purchasers as a factor.



The study also examined the influence on complaints and challenge activity of the changes to the EU remedies regime that took effect in 2009, the Freedom of Information Act 2000 (FOIA) and the recent recession. Lawyers were asked to assess the impact of specified changes. Suppliers - both those with experience of litigation and/or complaints (26) and those without (88) - were asked to comment on how these factors had (or would be expected to) influence them. Procuring entities were presented with a similar question in relation to experience of legal challenge (relevant to four entities) and/or complaints short of legal challenge (relevant for 36).<sup>222</sup> Participants were also asked to identify other relevant changes.

The data indicates that the vast majority of suppliers are aware of the standstill requirement, automatic suspension and FOIA, and that all have increased the likelihood of both complaints and challenge, thus helping to explain the observed increase in litigation and requests for legal advice (although for the majority of individual suppliers they have had no effect). On the other hand, the ineffectiveness remedy is less known and influential, while the impact of the recession appears largely neutral.

So far as standstill is concerned, only seven of 111 suppliers responding did not know of this, and one-third<sup>223</sup> considered it likely or very likely to increase legal challenge<sup>224</sup> - although two-thirds thought it

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<sup>222</sup> Suppliers and procuring entities received a brief explanation of the legal factors (e.g. Ineffectiveness is “A remedy introduced in 2009 allowing the courts to set aside concluded contracts in certain situations”), with an option of indicating that they did not know what it was, as well as options for indicating its significance or that they did not know this.

<sup>223</sup> Of those able to assess this – 14 could not.

<sup>224</sup> 29, including the one with experience of challenge.

would make no difference and three that it decreased the risk of challenge.<sup>225</sup> 14 of the 18 lawyers also considered this to have increased the likelihood of legal challenge, two considering it made challenge *much* more likely (although three considered it reduced the likelihood of challenge). Sixteen of the 18 lawyers and 23<sup>226</sup> of 110 suppliers also considered that the standstill increased the likelihood of complaints *falling short of legal challenge*.<sup>227</sup>

Of the suppliers responding<sup>228</sup> 90 per cent<sup>229</sup> knew what automatic suspension was - a level of awareness only slightly lower than for standstill – and of those who made an assessment<sup>230</sup> about 20 per cent<sup>231</sup> considered that it likely or very likely to increase the likelihood of challenge or complaint (although, as with the standstill, the majority (around 70 per cent)<sup>232</sup> thought it would make no difference). About two thirds of lawyers thought it had increased the likelihood of both complaints and legal challenge.<sup>233</sup>

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<sup>225</sup> None had experience of legal challenge.

<sup>226</sup> Only seven had complaints experience. 26 of the 110 either did not know about standstill (12) or could not assess the impact (13); 57 thought it had no effect; and five that it made complaints less likely.

<sup>227</sup> None considered that it decreased the likelihood of complaints, the other two considering that it had no effect.

<sup>228</sup> 111 responding in relation to legal challenge and 106 in relation to complaints short of legal challenge.

<sup>229</sup> 10/111 in relation to legal challenge (none with experience of legal challenge) and 16/106 in relation to complaints (four with actual experience of complaints).

<sup>230</sup> About 85 per cent of respondents.

<sup>231</sup> 17/82 commenting in relation to legal challenge (none with experience of challenge) and 18/75 in relation to complaints.

<sup>232</sup> 59/83 in relation to legal challenge and 55/75 in relation to complaints.

<sup>233</sup> 13 of 18 of the lawyers 12 of 18 respectively. The other five and six respectively considered it had no effect.

Seven of 18 lawyers stated that FOIA has increased the likelihood of legal challenge (although two stated considered it made challenge less likely) and 10 that it has increased the likelihood of complaints falling short of challenge. Of suppliers responding, again only a very few<sup>234</sup> did not know what the Act was. Of those making an assessment,<sup>235</sup> about a quarter and a fifth considered that it would be likely or very likely to increase challenge or complaints respectively<sup>236</sup> although again the majority did not think it would affect decisions and about 10 per cent that it *decreased* the risk of challenge.<sup>237</sup>

The ineffectiveness remedy has had a less significant impact than other changes, as might be expected given its limited availability. This was also the least known reform, with roughly 30 per cent of suppliers responding not knowing about it.<sup>238</sup> 13 of the 18 lawyers considered that it has *not* increased the likelihood of legal challenge and 11 that it has not increased the likelihood of complaints, although the others – a significant minority - disagreed. Supplier responses likewise indicated that some were more likely to take action because of this remedy, although not so many as with the other reforms.<sup>239</sup>

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<sup>234</sup> 6/111 in relation to legal challenge (none had experience of legal challenge) and 10/107 in relation to complaints.

<sup>235</sup> Again about 85 per cent.

<sup>236</sup> 25/92 in relation to legal challenge and 20/84 in relation to complaints short of legal challenge.

<sup>237</sup> 9/92 in relation to legal challenge and 8/84 in relation to complaints short of legal challenge.

<sup>238</sup> 34/110 in relation to legal challenge and 27/107 in relation to complaints short of legal challenge.

<sup>239</sup> About 15 per cent of suppliers could not assess its significance; of the others 15 per cent thought it would affect their decision to challenge and less than 20 per cent thought it would affect their decision to complain or seek advice. Around 85 per cent thought it would make no difference in either case.

As regards the recession, as noted above this seems to have cut both ways. Lawyers considered this as important as any of the individual changes above to the remedies system, if not more important, in *increasing* likelihood of litigation (15 of 18 citing this) and complaints (17/18): “Suppliers are more likely to pick over the detail of losing a contract as their business may have declined somewhat due to the recession”. Use of larger frameworks and other aggregation measures were mentioned by several e.g.: “In certain specialist fields...authorities are seeking to consolidate contracts, purchase jointly and drive down costs, often with longer term partnering arrangements, therefore losing a tender means a much bigger loss of market share”. Around 15 per cent of suppliers making an assessment also thought the recession made challenges and complaints more, or much more, likely.<sup>240</sup> Interestingly, however, whilst only two lawyers considered that the recession had made challenge less likely, the proportion of suppliers who did so was much closer to the proportion who considered it would have the opposite effect – about 10 per cent<sup>241</sup> (although again the vast majority thought it made no difference).<sup>242</sup> The difference between lawyers’ and supplier’s perceptions might be because lawyers’ experience relates to suppliers who have sought legal advice, whilst other may have been deterred from acting by recession-related factors.

As for other factors, seven lawyers and two suppliers mentioned greater supplier awareness of rights and remedies, four lawyers referred to success of past challenges and five to awareness of competitors’ willingness to challenge; thus challenges may perhaps increase if a culture of litigation becomes established. Five lawyers also mentioned that procuring entities’ greater responsiveness to legal challenge was a factor in increased litigation.

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<sup>240</sup> 15/92 in relation to legal challenge and 13/91 in relation to complaints short of challenge.

<sup>241</sup> 10/92 in relation to legal challenge and 9/91 in relation to complaints.

<sup>242</sup> 67/92 in relation to legal challenge and 69/91 in relation to complaints.

#### e) Reasons for supplier inactivity

Thus far we have focused on suppliers who complain. However, an important part of the overall picture is the behaviour of those suppliers who do *not* take action. This could be because they do not consider that there are any violations or because they decline to act on them.

Nearly two-thirds of responding suppliers (74 of 114) had not, in fact, perceived any violations, and of those who had, for most this was merely one or two, or a few, incidences, although all were involved in seeking business with regulated entities.<sup>243</sup> This data may actually *under-represent* the number of satisfied suppliers, as disgruntled suppliers may be more likely to respond to the questionnaire. This is consistent with the findings of Pachnou that a significant reason for limited litigation in the UK is a general trust in the integrity of the process.<sup>244</sup> On the other hand, the response of the one supplier with extensive experience of complaints (“too many to recall”) presented a different perspective, suggesting that that “Every procurement exercise we have been involved in over nearly 15 years has been challengable [sic] to some degree or other”. It may be that this perception is informed by much knowledge of the law, that allows the supplier to identify breaches that may be regarded as technical, rather than substantive in the sense of impacting on fairness; the former may not be even suspected as unlawful by other suppliers. However, another supplier, that had had concerns in four cases, also commented, that “we have strong suspicions that many projects are defined in such a way as to prejudice/pre-select the winner”; and the limited evidence from the Commission’s remedies study (based on a sample of just 55 suppliers) suggested less trust in procurement procedures than in some

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<sup>243</sup> It is not known exactly how many of the 74 suppliers with no concerns had been involved in award procedures and/or how frequently but information given in the questionnaires showed that at least 42 had been involved and one definitely had not.

<sup>244</sup> Pachnou, n 189 above.

Member States<sup>245</sup> (although, as the Commission points out, this is not consistent with other data on trust in UK government).<sup>246</sup> Thus our study indicates that satisfaction with procedures affects the overall pattern of supplier behaviour but that satisfaction is far from universal; and, whilst this could provide part of the explanation for the difference in litigation levels between the UK and other states, further comparative research is needed.

What of cases in which possible breaches *were* perceived but no action taken?

We noted that 40 of 114 suppliers completing the questionnaire *had* perceived legal violations. Of these, 24 had encountered perceived violations over which they decided not to act.<sup>247</sup> Nine of these *had* taken action over some violations, leaving just 15 that had not taken action over any of perceived violations - thus a good majority (25 of 40) felt able at least to complain to the procuring entity. Overall, less than 15 per cent of the responding group had both perceived breaches and had not taken action in at least some cases.

Of the 24 who had perceived breaches but decided not to act, 20 provided requested information on the number and timing of breaches. Nearly all referred to one or two violations only, although some had encountered many more. These 24 suppliers were asked to assess the relevance of certain defined reasons for not acting,<sup>248</sup> as well as to note any additional reasons.

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<sup>245</sup> 55 per cent cited lack of trust as a reason for not participating in public procurement and 43 per cent cited it as a reason for dissatisfaction with outcomes: see Commission remedies report, n 9 above, appendices, 19-20.

<sup>246</sup> Commission remedies report, n 9 above, 75.

<sup>247</sup> Nearly all had only perceived only one violation (five suppliers) or two, or at most a handful.

<sup>248</sup> Again, suppliers were asked to assess the significance of each factor by reference to a defined percentage range of cases in which they were relevant, but since the vast majority of suppliers were referring to one or a

The main reasons for not acting at all were the same as the reasons that suppliers did not pursue complaints by seeking legal advice and/or instituting proceedings.<sup>249</sup> Thus most important, and of similar importance, were the cost of legal challenge, with 20 of 23 who made an assessment citing this, and 14 of 20 also citing the need to use resources elsewhere; and fear reprisals from the procuring entity or others, referred to by nearly all responding suppliers.<sup>250</sup>

In addition, often no action was taken because the supplier perceived it had a weak or uncertain legal case: the vast majority had been influenced by a perceived low chance of success for reasons other than the absence of a violation (17 of 20); legal uncertainty (13 of 20); or difficulty establishing the facts (11 of 20). Factors relating to the remedies system other than cost and use of resources were also cited, 16 of 21 citing the fact that they did not consider that they would obtain suitable remedies and 12 of 21 the time that legal proceedings would take.

Interestingly, 11 of 18 suppliers also referred to a non-confrontational legal culture - indicating that this is even more important at the stage of deciding whether to complain at all than in deciding

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very limited of incidences the text below will refer only to the simple fact of whether the suppliers considered the reason in question to be relevant or not relevant in any cases.

<sup>249</sup> Other listed factors were considered irrelevant or of limited importance: corrective action by the procuring entity (cited by two of 18), compensation (mentioned by none of 18), other remedial action (mentioned by four of 19) the trivial nature of the breach (five of 17), the fact that the organisation itself benefited from the breach (three of 18) and that the contract was not seen as sufficiently important (six of 19).

<sup>250</sup> 21 of 22 making an assessment referred to the first in relation to both the current and future contracts, with 19 of 22 noting possible reprisals from other regulated entities and 14/22 to the wider market.

whether to pursue a legal challenge.<sup>251</sup> Twelve of 19 also considered breaches a natural business risk not worth legal action.

## **5) Conclusion**

We have seen that from 2007-2014 there was an upward trend in the number of reported court judgments in the UK (final or otherwise), and also in the incidence of litigation generally, with many cases settled or withdrawn because of, *inter alia*, corrective measures. Alongside this, there was a largely parallel increase in the number of suppliers and procuring entities seeking external legal advice over disputes. Our study indicates that recent EU reforms have influenced this trend, in particular the standstill obligation and automatic suspension, as has the domestic Freedom of information Act; and that all these reforms have also made it more likely for suppliers to complain to the procuring entity itself. The EU's ineffectiveness remedy is less well-known and less significant, but this is unsurprising given that it applies to only a few types of violation.

Despite these developments, however, the numbers of suppliers taking legal action or seeking legal advice remains low. The study sheds some light on the reasons for this, although how far these factors account for differences with other Member States remains speculative. In so far as these reasons relate to the nature of the national remedies system, the findings also provide empirical support for arguments that some features of the system do not comply with EU requirements and that some attention should be given to alternative approaches to enforcement.

First, our study suggests that a significant proportion of responding suppliers have no concerns over legal violations, and for these the nature and availability of legal remedies is not an issue. There is no evidence to judge whether the reality or perception of violations is different from the position in other

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<sup>251</sup> Where, as explained, it was cited by slightly under half.



Member States and how far, if at all, such a difference helps to explain the low level of litigation, but this would be an interesting subject for examination.

What, however, of those suppliers that *have* perceived violations?

We saw, first, that many such suppliers decide not to litigate or even complain, and that the two main reasons are fear of reprisals and the cost or inadequacy of legal remedies. Secondly, we saw that when suppliers do complain, including with legal advice, the main reasons for not ultimately litigating are again both the costs (financial and resource costs) and remedial difficulties; and fear of reprisals.

The fact that costs of litigation are high and a significant obstacle to legal action could help explain the low level of litigation as compared with other Member States (although other factors, such as the level of corrective action, might be relevant). The findings on cost also provide empirical support for the argument that, in light of the case law on access to justice, the UK remedies system does not comply with the EU Remedies Directive unless legal aid is made available. Since, as explained, domestic legislation provides for legal aid where there would otherwise be non-compliance, UK law actually complies with EU obligations, but a conclusion that legal aid must be available in principle could have important implications for procurement litigation, as well as financial implications for legal aid funding. This may make it advisable to consider other enforcement solutions. These could include a cheaper system of judicial-type redress, such as a tribunal (an option recently rejected in Scotland,

however),<sup>252</sup> that would comply the Remedies Directive; establishment of an (optional)<sup>253</sup> first-instance review system that does not necessarily itself comply with the standards of the Remedies Directive (but could allow for appeal to a body that does); or informal enforcement mechanisms, such as the “Mystery Shopper” service for investigating complaints<sup>254</sup> (recently been strengthened and put on a statutory basis),<sup>255</sup> which could relieve pressure on the EU-compliant system and/or improve enforcement. Examination of such options is beyond the scope of this article, but in light of our findings on the limitations on the legal remedies system would be an interesting subject for research.

As regards the detail of remedies, the most important obstacle has been the rules on time limits for proceedings, but these were never compliant with EU law and were amended in 2011 (although it is not yet known whether this has improved access to remedies). The most significant remaining problem is the difficulty of securing suspension in view of the adequacy of damages rule, undertaking in damages requirement, and practical application of the balance of interests test. We have argued that these features of the system may also (as with the old rules on time limits) violate the

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<sup>252</sup> The Scottish Government, *Changes to the public procurement rules in Scotland consultation - an analysis of the responses* (August 2015) available at <http://www.gov.scot/Publications/2015/08/1618/downloads>, 71-78 and 82.

<sup>253</sup> Provision for *compulsory* external review is probably not permitted (C-410/01 *Fritsch, Chiari & Partner, Ziviltechniker GmbH v Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (ASFINAG)* [2003] ECR I-06413) although the amending Remedies Directive clarifies that review before the procuring entity may be a pre-condition of independent review: see Article 1(5) of the amended Remedies Directive 89/665.

<sup>254</sup> See <https://www.gov.uk/government/collections/mystery-shopper-results#about-the-mystery-shopper-scheme>. See also Cabinet Office, *Scope and remit of the Mystery Shopper Scheme* (2012) available at <https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit>.

<sup>255</sup> Small Business, Enterprise and Employment Act 2015, s.40, which includes specific statutory powers to obtain documents and information from procuring entities to assist investigations.

effectiveness requirement. This position is again reinforced by this empirical evidence of the influence of these requirements on litigation, although these obstacles are not nearly as important in practice as the previous (now repealed) time-limits for proceedings.

Suppliers were also clear that fear of reprisals from the regulated sector (although not the wider market) was a real issue and rated it of equal importance with problems with remedies, the vast majority considering it this a factor in all or most situations. It is impossible to say to what extent these fears are well-founded but they are very real. This has even been perceived as a problem with the less formal Mystery Shopper service.<sup>256</sup> This seems an inevitable limitation of any system of legal remedies or indeed other supplier-based action. How the UK compares in this regard with other Member States is not known, although the problem might be exacerbated by the UK's absence of a tradition of remedies, the significant costs of invoking the system, and the non-confrontational culture (which also contributed significantly to a reluctance to complain or litigate). The importance of this factor indicates that enforcement measures other than legal remedies or supplier-based complaints might be valuable, and in this light a recent initiative to develop more of a pro-active function for the Mystery Shopper Service<sup>257</sup> may prove important, as may the new duty in the 2014 EU procurement directives to monitor for compliance.<sup>258</sup>

We have also seen that it is a frequent occurrence that a supplier complaint – and especially litigation – leads to action by the procuring entity. This includes, in particular correction of the breach - such as

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<sup>256</sup> See *Growing your business – a report on growing microbusinesses*, Lord Young (May 2013) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/198165/growing-your-business-lord-young.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198165/growing-your-business-lord-young.pdf), 23. Whilst this makes provision for anonymity, where complaints relate to specific award procedures, it may be obvious who the complainant is.

<sup>257</sup> *ibid.*

<sup>258</sup> E.g. Directive 2014/24/EU, n 1 above, art.83(2).

might otherwise be obtained via legal remedies - and action such as apologies or changing policies for the future, although compensation (also provided by the remedies system) plays only a small role in settling complaints, even those leading to legal challenge. There is no information on other Member States to help assess whether action by procuring entities contributes to the low level of UK litigation. It might be expected that more effective remedies would lead to even more corrective action.

Overall, the picture is that recent reforms have led to greater use of remedies and more complaints and have improved effectiveness of remedies in practical terms in the UK in accordance with their objectives. However, important obstacles to the use of legal remedies remain, and in several respects there are issues around compliance with EU requirements. This suggests a possible need to consider a different approach to supplier enforcement in this field and this is an area in which future research would be particularly timely.