An Empirical Study of the Frequency and Distribution of Judicial Review in Resolving Public Procurement Disputes: Proposals for Legal and Policy Reform

Clear, Stephen; Cahill, Dermot

European Public Law

Published: 01/03/2021

Publisher's PDF, also known as Version of record

An Empirical Study of the Frequency and Distribution of Judicial Review in Resolving Public Procurement Disputes Within the UK: Proposals for Legal and Policy Reform

Stephen Clear & Dermot Cahill*

Unlike other EU Member States, existing studies on public procurement challenges in UK local government lack empirical analysis. The Law Commission has identified this as an area for review. Little is known about the frequency and distribution of such challenges within the UK. Consequently, observations made on the number of procurement disputes actually leading to judicial review applications are speculative. This article, for the first time, generates new empirical data on the subject and makes reform recommendations. Using data elicited from nearly 400 local government bodies, the national and regional frequency and distribution of such challenges is illuminated for the first time. Glaring inability by Local Government bodies to retain and retrieve data pertaining to Local Government procurement was revealed by the study; the frequency and distribution of challenges was seen to vary widely across different UK regions; the number of challenges has risen significantly following 2009 law and policy reforms (rather than reduce); and the insights generated in the article will support the Law Commission's call for further study of internal administrative review systems within public bodies so the connection between administrative justice and those seeking natural justice in procurement disputes is better understood.

Keywords: judicial review, local government, public procurement, freedom of information, policy reform.

1 INTRODUCTION

In recent years, consultations have highlighted that too little is known about the number of procurement disputes that are brought by means of judicial review.[1] To date, approaches have been speculative and not evidence-based. The area was data-deficient.[2] This article sets out the results of the first study to subject UK public

* Respectively Lecturer in Constitutional and Administrative Law and Public Procurement at Bangor University, and Professor of EU Law and Procurement Strategy.
Email: s.clear@bangor.ac.uk, dermotvcahill@gmail.com.

1 Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Consultation Paper Cm 8703).

2 In a helpful contribution, Arrowsmith and Craven have since investigated the European Union Directives route to challenging procurement decisions, but their findings were largely focused on *estimates* from practitioners and contracting authorities, in conjunction with the reported cases.

Clear, Stephen & Cahill, Dermot. 'An Empirical Study of the Frequency and Distribution of Judicial Review in Resolving Public Procurement Disputes Within the UK: Proposals for Legal and Policy Reform'. *European Public Law* 27, no. 1 (2021): 131–166.

procurement disputes brought by means of judicial review to empirical study. Whilst today more literature is emerging focusing on the relationship between public contracting and administrative law, discussion has largely focused on the boundaries of public law.[3] However this article, setting out our study's findings, *generates* and *analyses*, for the first time, quantitative data as to the *frequency* and *distribution* of public procurement legal challenges within local governments,[4] and how many lead to an application for judicial review.

This article finds that, within this area, approximately one in four legal challenges allege an application for judicial review will be made; with approximately half of those leading to an application. Overall, the responses facilitate an improved understanding of the role of administrative law in resolving public procurement disputes within the UK,[5] both inside and outside of the Court. The key findings are: (1) that the overall number of 'legal challenges' in response to local government procurement activity is rising; (2) that there are significant *regional variations* in these overall numbers; (3) that there is a rise in the number of legal challenges that are (at least) instigated without a lawyer; and (4) that local government policy and practice in relation to data retention and retrieval is sporadic and deficient. Consequently, this article makes recommendations for law and policy reform in order to improve the objectives of administrative justice in resolving public procurement disputes; as well as promote consistent data retention practices within local government.

In order to explain how we reached the above findings, we first set out below the research methodology which underpinned the study. This will explain how we came to define what is a 'legal challenge'; the appropriateness of freedom of information (FOI) as the principle mode of data gathering; and why the study covers local governments but not central government bodies. Following that we set out the interconnection between administrative law and public procurement, after which the findings of the study are discussed and analysed. The final section of

---

Furthermore, their study (unlike the present study) did not directly consider the other routes to seeking a remedy in public procurement, including judicial review. *See* S. Arrowsmith & R. Craven, *Public Procurement and Access to Justice: A Legal and Empirical Study of the UK System*, PPLR 227 (2016).

[3] The prevailing occupation of the literature to date has centred largely on identifying what questions are of public law concern and which must be, or could be, addressed using European Union legal provisions, or alternatively through finding an implied contract using contract law. *See* e.g., E Aspey, *The Search for the True Public Law Element: Judicial Review of Procurement Decisions*, PL 35 (2016).

[4] This article defines a 'legal challenge' as anything more than a general request for further information pertaining to the marking criteria, or procurement process. Rater the correspondence received by the contracting authority is specifically framed within the express context of the legal rules. Such communication explicitly refers to potentially seeking, or having already sought, legal advice; and/or potentially seeking, or having already sought, to make an application to the Court. Within the context of the FOI requests, the results encompass both alleging action will be taken, pre-action stage, and a Ministry of Justice N461 judicial review application form being submitted to the High Court.

[5] Administrative justice is concerned with the rights of individuals when the government, or those working on its behalf, act in a way which appears wrong, unfair or unjust.

the article will provide a series of recommendations for law and policy reform, designed to facilitate better local government data retention and retrieval practices, and thereby help achieve the objectives of administrative justice. The findings will also provide a new data set which the Law Commission can draw from, as part of its work on internal administrative review processes, currently underway as part of its *Thirteenth Programme of Law Reform*.[6]

2 METHODOLOGY

Within this study, 407 FOI requests were issued to every local government body in England, Wales, Scotland and Northern Ireland,[7] requesting data from 2009 to October 2015. 336 of the 407 local governments were able to respond to all five questions within the limits of a FOI.[8] Such constitutes a response rate of 83%, which far surpasses the response requirements to validate an empirical study.[9] Across the period of the study (seven years), 492 legal challenges pertaining to public procurement disputes were identified.

The rationale for limiting this research to local governments is threefold. Firstly, it was felt at the outset that, overall, local governments had longer historical existence, and were therefore more likely to hold data pertaining to the period requested, so as to facilitate fewer complex comparisons and analysis. Conversely central Government Ministries have more rapidly changing titles and remits (thus making comparing like for like data over a seven-year period more challenging). Similarly, in choosing to limit the investigation to local government, the sample was felt to be more definitive, in having a defined list of participants. This is opposed to, for example, the more frequently changing and complex list of agencies and other public bodies. Records

---

6 Law Commission, *Thirteenth Programme of Law Reform* (Law Com No 377, 2017) para. 2.7. *See* conclusion for further commentary.

7 As of Oct. 2015; there were 407 Councils in the UK and Northern Ireland. In order to identify trends in the relationship between administrative law and public procurement disputes, local governments were categorized into the 'regions' identified on the Government's website. Namely, in England: East Anglia, East Midlands, London, the North, the North East, the North West, the South East, the South West, and the West Midlands. Councils in other parts of the UK - Wales; Scotland and Northern Ireland were then simply classified into these regions based on their location. Wales has twenty-two single-tier principal areas, Scotland has thirty-two council areas, and Northern Ireland has eleven local councils. *See* DirectGov, *Find Your Local Council* (Gov.uk 2015).

8 83% of the original 407, when excluding all those that issued s. 12 refusal notices and those that responded saying the information was unavailable/not recorded (seventy-one contracting authorities in total). However, 91% of the 407 contracting authorities were able to answer at least two of the five questions of the 407: eighteen issued complete s. 12 refusal notices, and a further nineteen contracting authorities responded by saying none of the information was available/kept on file or recorded/ retained by them. Therefore, this research reflects meaningful data from a total of 370 contracting authorities at local government level.

9 *See* M. B. Youngman & M. Bredon, *Designing and Analysing Questionnaires* (Oxford: TRC-Rediguides 1982); for comparative law examples *see The Oxford Handbook of Empirical Legal Research* (P. Cane & H. M. Kritzer eds, OUP 2013).

as to these authorities are less accurate, with Committees, Commissioners, etc. dissolving and new ones coming in to existence over time. It was felt that to include such groups in the study would affect the reliability of the data, particularly in terms of annual historical comparisons and trying to identify trends.

The second reason was owing to triangulation within the data collection. In order to ensure consistency, particularly in terms of the validation of the data being sought from the sample, it was important that all FOI requests were made at the same time. This was so as to ensure like for like data was being compared for the period leading up to the same date in 2015. It took a period of forty-eight hours to issue all 407 requests for this investigation. In terms of cross verifying the data being sought, it would have been more complex and difficult with a sample consisting of tens of thousands of recipients, which would have taken several weeks to issue. Thirdly, there was a need to keep the sample size as manageable as possible.

2.1 Defining a legal challenge and formulating the FOI question

In issuing FOI requests to local governments reference was made to 'legal challenge/s'. Therefore, a working definition of the meaning of this term was needed. Within each FOI the following four definitions were cited in correspondence with all contracting authorities:

> A 'legal challenge' should be interpreted as more than simply a letter from potential suppliers asking for clarification on an evaluation/award decision. Rather a legal challenge is any action (whether alleged or threatened, leading to a formal application to the High Court or not) which seeks to challenge the procurement decision. This includes:
>
> a) Proceedings issued under Part 9 of the Public Contracts Regulations 2006;
>
> b) Proceedings issued under Part 3 of the Public Contracts Regulations 2015;
>
> c) Applications for judicial review (under Part 54 of the Civil Procedure Rules) of the Council's decisions relating to the award of public contracts for goods, works or services; and
>
> d) Any formal pre-action letters, emails or other means of correspondence, prior to such challenges (actual or threatened).[10]

Consequently, a 'legal challenge' should be regarded as more than a general request for further information pertaining to the marking criteria, or procurement process. Rather the correspondence received by the contracting authority is specifically framed within the express context of the legal rules.[11] Such communication

[10] This full definition was included within FOI request emails to all local governments. The definitions were amended for the requests made to the Scottish Councils, namely by substituting the legislative, regulation and rules references to a) Part 9 The Public Contracts (Scotland) Regulations 2006 b) Part 9 of The Public Contracts (Scotland) Regulations 2012 and, c) applications for judicial review under the Scottish Civil Procedural Rules, Court of Session Rules, Ch. 58.

[11] Expressly: Public Contracts Regulations 2006, Part 9, Public Contracts Regulations 2015, Civil Procedural Rules Part 54, or within the context of Scotland: The Public Contracts (Scotland)

explicitly refers to potentially seeking, or having already sought, legal advice; and/or potentially seeking, or having already sought, to make an application to the Court. Within the context of the FOI requests, the results encompass both alleging action will be taken pre-action stage, and within the context of question five, a Ministry of Justice N461 judicial review application form being submitted to the High Court.[12]

2.2 Formulating the FOI questions

After researching previous similar FOI requests,[13] and assessing the likelihood of achieving meaningful answers as to the areas of investigation covered by this research; five questions were formulated for all respondents:

Question One: How many legal challenges (i.e., written letters, emails or other means of correspondence) were received pertaining to the Council's procurement activities in 2009, 2010, 2011, 2012, 2013, 2014 and 2015 respectively?[14] **Question Two**: For each year, how many of these legal challenges were issued by the tenderer/prospective supplier, opposed to a lawyer/barristers/solicitor?[15] **Question Three**: For each year, how many of these legal challenges were issued by a third party to the procurement process for example a person who had not participated in the procurement process, such as a concerned citizen and other non-economic operator?[16] **Question Four**: For each year, how many of these legal

Regulations 2006 Part 9, The Public Contracts (Scotland) Regulations 2012 Part 9; and the Scottish Civil Procedural Rules, Court of Session Rules, Ch. 58.

12 *See* Further: Ministry of Justice, *CPR Forms* (Ministry of Justice Oct. 2015), https://www.justice.gov.uk/courts/procedure-rules/civil/forms accessed (14 Dec. 2020).

13 What Do They Know, *Tenders Where the Authority Has Been Legally Challenged* (5 Apr. 2011), https://www.whatdotheyknow.com/request/tenders_where_the_authority_has#incoming-171331 (accessed 12 Dec. 2020).

14 The first question posed aimed to generate data regarding the scale of legal challenges to public procurement activities under all challenge routes, including threat of actions under the Public Contract Regulations, judicial review, general contract law principles, or complaints to the European Commission. Furthermore, an indication as to the number of challenges received facilitates an opportunity to understand the scale of those that do not lead to a formal application to the Court, namely 'near-misses'; as well as comparable analysis as to the role judicial review plays within the wider context of available remedial routes.

15 The second question sought to elicit information regarding the identity of the person who issued the letter incorporating the legal challenge to the respective respondents. Its essence was to clarify whether the letters were issued by the tenderer or prospective supplier as against legal challenges via a legal representative. It was hoped that this would highlight any shortcomings in this empirical investigations with practitioners (barristers, judges and solicitors) conducted as part of this research, to *see* whether there was a sizable population of aggrieved tenderers attempting to bring a institute legal challenge themselves, without the use of legal representation.

16 Question three required respondents to provided information as to the number of legal challenges issued by a third party to the procurement process e.g., a person who had not participated in the procurement process, such as a concerned citizen and other non-economic operator. The essence of this question was to maximize the opportunity for understanding the potential scale for the use of

challenges were issued stating that an application for judicial review would be made (pre-action) by the person who issued the correspondence? **Question Five**: For each year, how many of these legal challenges led to a full application for judicial review (application made to the Court)?[17]

2.3 The significance of the reference period

As indicated above, each question requested a numerical breakdown of the number of legal challenges for each year between January 2009 and October 2015. This specific period was chosen because 2009 represents a period of regulatory change when the 2007 EU Remedies Directive was implemented in the United Kingdom, as the revised Public Contracts (Amendment) Regulations 2009. The regulation which entered into force on 20 December 2009 was expected to improve the rights of economic operators to challenge violations of the procedural procurement rules. This brought about greater certainty for challenging economic operators, for example via automatic suspension periods and the new remedy of ineffectiveness. Starting the information request pertinent to such regulatory changes increased the chances of identifying statistical trends in response to rule changes post the 2009 reforms. It should also be recognized that at the time of these changes, academics and practitioners held common widespread perceptions that the 2009 amendments would empower more economic operators to litigate.[18]

3 THE INTERCONNECTION BETWEEN PROCUREMENT LAW AND ADMINISTRATIVE LAW

Public procurement is the competitive tendering process by which contracting authorities (public buyers) acquire goods or services from economic operators (sellers). Within the UK such methods of contracting are currently governed by

---

judicial review litigation for resolving matters that arise from the public procurement activities and decisions of contracting authorities, principally. This is because save for complaints to the European Commission, judicial review is most likely the remedial route to be used by an aggrieved third party, or non-economic operators.

[17] Questions four and five were asked in recognition of other empirical studies, namely Bondy and Sunkin who recognized initial intentions to seek permission for judicial review (i.e., pre-action work) do not necessarily lead to a full application being made. (*See* V. Bondy & M. Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009), http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf (accessed 12 Dec. 2020).

[18] *See* T. Kotsonis, *All Change,* P&OJ 4 (2011) who identifies greater risks for contracting authorities, and greater appeal for economic operators to instigate legal action following the ineffectiveness remedy; and M. Dowden & S. Malik, *Procuring a Challenge?*, 160 NLJ 1102 (2010), who argues that the number of challenges brought to award processes would significantly increase because of the automatic suspension rules.

both EU Directives,[19] and corresponding UK implementing Regulations.[20] The scale of EU and UK public procurement activity can be summarized by the official statistics. Across the EU, government and utilities' expenditure accounts for one fifth of EU Gross Domestic Product (GDP), amounting to approximately 2.4 trillion Euros.[21] Of this total, EU expenditure on public goods and services, the UK accounts for 9.81% of the total EU market. Annually, the UK reports approximately 80.55 billion Euros worth of above threshold contracts to the European Commission.[22] However within the UK the scale of public procurement is significantly higher than just what is reported as above EU threshold contracts. For example, a more *realistic* figure, that also accounts for *below threshold spend*, can be found within the reports of the National Audit Office. According to the National Audit Office the total scale of all procured goods and services in the UK equates to a third of all public-sector spending, equating to GBP 236 billion GBP annually.[23] Of this, local government expenditure across the UK amounts to 49% or GBP 117.871 billion in procured goods and services (GBP 93.6 billion in England[24]; GBP 8.38 billion in Wales; 15.153 billion in Scotland; and GBP 738 million in Northern Ireland).[25]

---

[19] Remedies Directives 89/665/EEC and 92/13/EEC, as modified by Directive 2007/66/EC, Directive 2014/24/EU and Directive 2014/23/EU. The EU Directives create harmonized rules that set out Member States' obligations to promote and facilitate an open, fair, transparent markets; whereby any EU economic operator can bid for any contracting authorities' tenders across the EU, when the contract size exceeds a specified financial threshold. *See* further *The New EU Public Procurement Directives* (R. Nielsen & S. Treumer eds, Djøf Publishing, Denmark 2005). For example, for *all* (central and sub-central) works or services concessions: EUR 5,225,000. Specifically, for other sub-central contracting authorities; all services concerning social or other specific services: EUR 750,000; and all other service contracts, all design contests, subsidised service contracts, all supplies contracts: EUR 209,000. *See* further European Commission, *Thresholds* (2017), https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en accessed (14 Dec. 2020).

[20] Consolidated in the Public Contracts Regulations 2015 (as amended) and the Concession Contracts Regulations 2016.

[21] The European Commission estimates that 20% of this total is spent on purchases exceeding the value threshold set in the Public Procurement Directives, and in 2010 accounted for approximately 447 billion Euros from invitations to tender. European Commission *Annual Public Procurement Implementation Review 2012* SWD 2012 342 6 (Brussels Oct. 2012).

[22] These contracts were advertised on the OJ/TED. European Commission *Annual Public Procurement Implementation Review 2012* SWD 2012 342 (Brussels Oct. 2012) Table 1 at 7.

[23] National Audit Office, *The Efficiency and Reform Group's Role in Improving Public Sector Value for Money 2010–2011*HC 887 17 (London Mar. 2011), note this figure is different to total UK government spend, which in the financial year 2014–15 equated to GBP 734.4 billion, or 40.6% of the UK's national income.

[24] Department for Communities and Local Government, *Local Authority Revenue Expenditure and Financing: 2016-17 Final Outturn, England* (Gov.uk 16 Nov. 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/659752/RO_Final_Outturn_2016-17_Statistical_Release.pdf accessed (14 Dec. 2020).

[25] Figures for Wales, Scotland and Northern Ireland identified by combining local government and local government public corporations spend, 'Table 9.21 Identifiable expenditure on services for Scotland, Wales and Northern Ireland in 2015–16' in Treasury, *Public Expenditure Statistical Analyse 2017* (White Paper Cm 9467 2017) at 152.

However, public procurement within the UK is not purely an EU matter. An aggrieved party wishing to challenge a procurement award decision can seek recourse via a multiplicity of other routes, relying on different interlocking regimes. For example, by way of making a complaint to the European Commission[26]; or by invoking principles of contract law[27]; or, alternatively via judicial review, as per Part 54 of the Civil Procedure Rules.[28]

The ostensible purpose of administrative law is to ensure that there is accountability, transparency and effectiveness in the execution of executive powers, in accordance with the rule of law. [29] Related to administrative law is the concept of administrative justice.[30] A philosophical idea at the core of this area of law, administrative justice is concerned not just with decision-making, but also the concept of protecting the rights and interests of parties through appropriate safeguards i.e., upholding the rights of the individuals who are either acting as concerned third parties that can suffice the locus standi requirements[31]; or whom are economic operators pursuing the enforcement of a public law right.[32] Broadly, an individual may make an application for judicial review within public procurement disputes in three categories: firstly, where the decision is one to which the aforementioned Regulations do not apply; secondly, in circumstances where the where the economic operator is seeking to achieve some result not available under the Regulations (for example by pursuing some general public law right); or thirdly, in circumstances where the person bringing the claim is not an economic operator (such as a third party) but wishes to allege a breach of the Regulations.[33] The role of administrative justice in public procurement disputes must therefore be to ensure openness, fairness and transparency in holding contracting authorities to account to ensure they fulfil their public law obligations within their tendering activities. Such 'justice' in this area is rightly facilitated by judicial review intervention, as without such, the courts could not enforce public law obligations and the lines for remedial intervention

---

[26] Possibly resulting in the Commission bringing infringement proceedings or fining the contracting authority, as per Arts 258 and 260 of the Treaties of the European Union.

[27] *See* further *Blackpool and Fylde Aero Club* [1990] 1 WLR 1195.

[28] For further discussion as to the wider public procurement remedies regime *see* C Bovis, *EU Public Procurement Law* (2d edn, Elgar European Law Series 2012) Ch. 4.

[29] Administrative law is the means by which the judicial can intervene to ensure executive bodies act in conformity with the public law standards of legality, rationality, and procedural fairness, which, as set out by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1983] UKHL 6, [1985] AC 374, are all actionable grounds for domestic judicial review.

[30] For further exploration of the ideal of administrative justice *see* UKAJI, *What Is Administrative Justice?*, (UKAJI Nuffield Foundation), https://ukaji.org/what-is-administrative-justice/ (accessed 14 Dec. 2020).

[31] Considered in *R (Chandler) v. Secretary of State for Children, Schools and Families* [2010] LGR 1.

[32] For example, *see R (Law Society) v. Legal Services Commission* [2007] EWCA Civ 1264 where questions pertaining to the provisions of publicly funded legal services were determined as better addressed through public law legal action; judicial review may also be viewed as an appropriate remedial route in quasi-procurement cases. *See* further *Application of Watters and Others* [2009] NIQB 71.

[33] *See* further N Giffin, *Remedies in Public Procurement* (ICPS 2012), http://www.icps.bangor.ac.uk/brochures/presentations/ (accessed 12 Jul. 2019).

would become more blurred.[34] In understanding and reimagining the role of administrative justice in addressing public procurement disputes it follows that neither the purpose of public procurement nor administrative law can be evaluated unless one firstly understands how the existing system operates. In this regard, it is important to understand trends from a quantitative evaluation, in addition to a qualitative approach.

4 NUMBER OF UK LEGAL CHALLENGES: 'OUT OF LINE' WITH OTHER EU MEMBER STATES

The United Kingdom is recognized to be particularly weak at documenting information relating to public procurement legal challenges.[35] Furthermore, reports by the European Commission hypothesize that the number of challenges in the UK are comparatively very low (when compared to other European Union Member States).[36] For example, in Sweden it is estimated that there are 1,500 challenges annually in stark contrast to the UK's estimates.[37] Such potentially poses the possibilities of whether, in the UK: (1) disputes are being brought via one of the other remedial routes; or, (2) whether disputes are being settled outside of the Courts; or, (3) whether the UK simply does not have a culture of challenging public procurement decisions comparable to other EU Member States. Owing to this uncertainty as to operation of public procurement remedies within the UK, underpinning our study is the notion that accurate data as to the treatment of public procurement challenges *at all stages, across all remedial routes*, is needed in order, for example, to confirm whether there is a litigation culture (or not) within the UK, as well as reveal much about the use of the different remedial routes within this field. If contracting authorities were to take further action to document the number of challenges received pre-action, and post-application stage; as well as record details of out-of-court settlements (under public sector transparency and openness rules); such data would generate valuable data for analysis; as well as provide improved quantitative data as to how often breaches are alleged and illuminate the scale of claims that have alleged non-adherence to public procurement rules; as well as better inform any future policy reform.

---

34 These arguments were first advanced in 2000, *see* N. Zar *Public Procurement and Judicial Review,* JR 173 (2000), and thereafter by: S Bailey *Judicial Review of Contracting Decisions* PL 444 (2007).

35 *Supra* 2.

36 In forteen Member States there is an administrative public procurement review body (Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Croatia, Hungry, Malta, Poland, Romania, Slovenia and Slovakia). Across the EU, when accounting for all Member States, between 2009 and 2012, there were over 50,000 first instance decisions taken, *see* 'Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC' (European Commission, Brussels, 24 Jan. 2017) COM (2017) 28 final.

37 *See* A. Sundstrand, *Public Procurement in Sweden* (Practical Law 2014), https://uk.practicallaw.thomsonreuters.com/3-564-3085?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (accessed 12 Jul. 2020).

It is important to recognize that the UK has taken some progressive steps in some areas. For example, for the first time, in 2013–2014 the Technology and Construction Court (TCC) of the High Court specifically collated data on the number of procurement challenges being brought before the division.[38] During this period it reported that there were a total of fifty-one cases brought under the Public Contract Regulations, accounting for 11% of the Court's entire activity for that year.[39] Previously public procurement cases could have been reported by the Court in a multiple of possible categories, for example construction, planning, information technology and so on. Whilst the TCC acknowledges in its own report that the majority of procurement challenges are instituted before the TCC, it is also important to recognize that these fifty-one cases alone do not represent the total number of legal challenges arising from a procurement context in the UK in 2013–14, as the figure does not account for those applications made *outside* the TCC, nor those brought by means of judicial review, or those brought before the Scottish Courts. Whilst some, albeit limited, statistical reporting for public procurement applications has now only just started,[40] such does indicate a shift in attitude that recognizes the importance of documenting the number of procurement challenges, as a separate, standalone, category of case classification.

5 RESPONSES AND REFUSALS: DATA RETRIEVAL CONCERNS

All requests for information were issued via email between the twentieth and 22 October 2015. The majority (336 councils) responded to all questions (83%).[41] A relatively small number either refused to respond within the confines of a FOI request (eighteen councils),[42] or were unable to produce any meaningful response as they did not hold the requested data on file (nineteen councils).

The nineteen authorities who responded saying the requested information was unavailable or not recorded/kept of file raises a particular worrying practice, namely the way in which Local Councils maintain records pertaining to tendering exercises.[43]

---

38 Judiciary of England and Wales, *Annual Report of the Technology and Construction Court 2013–2014* (2014).

39 *Ibid*.

40 For example, the reports do not include out of Court settlements/correspondence, or legal challenges brought under other non-regulation routes.

41 For analysis of those that provided partial responses *see 1 Methodology*.

42 Freedom of Information Act 2000 s. 12, or in Scotland, Freedom of Information (Scotland) Act 2002 s. 12.

43 These nineteen were made up of the following contracting authorities: In England: East Anglia (two), East Midlands (four), London (one), North East (two), North West (two), South East (three), South West (one), West Midlands (one), and Wales: (two), Scotland (one). A further twenty-two were only able to provide partial responses on the basis of when their Councils came in to existence, e.g., there were problems pertaining recalling information in Northern Ireland from the legacy Councils, as the twenty-six contracting authorities were reduced to 11 in Apr. 2015. The regions that had partial unavailability of data are: England: East Anglia (six), East Midlands (two), London (two), North (two), South West (one), West Midlands (two); and Wales (one), Scotland (three), Northern Ireland (three).

Some responded by saying that they did not keep some or any records of the information being requested. The concern over this approach to data retention is summarized by East Anglia's Uttlesford District Council's written response:

> Under our Document Retention Policy, records relating to procurement (other than insofar as they relate to contracts awarded) are destroyed after 12 months and we have no records pre 2014.

This approach to data recording was not idiosyncratic, with Redcar and Cleveland Council, in the North of England stating as follows:

> I can confirm we do not hold the information requested for any year. We do not hold any record of any legal challenges under the definition of legal challenge which you have supplied, which go over and above a letter from potential suppliers asking for clarification on an evaluation/award decision. Owing to data protection law we only keep on file details of communication relating to the winner of the competition.

Whilst it is recognized that Uttlesford's response would permit an application for judicial review to be brought within the usual three months' time period, or thirty days if pursuing a Public Contract Regulations claim, there is still concern that such a practice of destroying 'would be suppliers' files within twelve months might frustrate potential economic operators' complaints under other routes, for example complaints to the European Commission which do not have as strict time limits. Such circumstances could equally potentially frustrate a claim based on an implied contract.

However, the concern as to Redgrave and Cleveland Council's practice is that their policies are an apparent barrier to permitting them to respond with details of even the immediate calendar year. Through destroying such information, this practice could have consequences for frustrating the prospect of future judicial review, as the Council claims to keep no details of any other economic operator, other than the one to which the contract is awarded. It follows that clear policy guidance should be issued to local governments regarding the keeping and maintenance of sustainable databases, so as to place an obligation upon contracting authorities to record such information.

6 FINDINGS FROM THE FREEDOM OF INFORMATION REQUESTS

This research, for the first time, reveals the number of legal challenges (492) that have been brought against public procurement award decisions made by 370 local government bodies within the United Kingdom during the seven-year reference period.[44] Such equates to an overall response rate of 83% for all

[44] For other studies as to the historic position *see Remedies for Enforcing the Public Procurement Rules* (S. Arrowsmith ed., Earlsgate Press 1993), and more recently C. Bovis, *Access to Justice and Remedies in Public Procurement*, 7 EPPPLR 195 (2012). However, these studies have not quantified the exact number of legal challenges, and none have empirically focused on the judicial review remedial route.

five questions;[45] with 91% of respondents being able to answer at least two of the five questions.[46]

The exercise has confirmed, and now also numerically quantifies for the first time, an increasing trend over the seven-year reference period. The number of letters received by local governments giving notices of a legal challenge consistently grew year-on-year; while simultaneously nationally, the number of challenges that were actually lodged before the Courts, by means of an application for judicial review, have remained consistently low. This study also finds that one in four challenges indicated that judicial review action would be sought at the pre-action stage[47]; with only half of those actually making an application to the High Court.[48] What is clearly revealed by the study data is that we can identify quantitative statistical trends in the number of legal challenges brought pertaining to public procurement decisions, and how many of these led to an application for judicial review. This is new information not previously available until now and, in turn, poses potential for further research to further explore the reasons underlying these trends.

6.1 National growth in the number of legal challenges (Question One)[49]

From the responses to Question 1, it is clear that the numbers of challenges pertaining to public procurement disputes are rising year-on-year.[50] As evidenced within figure 1, when accounting for the information received from all respondents, across the seven-year period, a total of 492 legal challenges were identified as falling within the four definitions:

---

45 Of the original 407 and when excluding all those that issued s. 12 refusal notices and those that responded saying the information was unavailable/not recorded (seventy-one contracting authorities in total).

46 Of the 407 contracting authorities questioned, eighteen issued complete s. 12 refusal notices, and a further ninetten contracting authorities responding by saying none of the information was available/kept on file or recorded/retained by them. Therefore, this research reflects meaningful data from a total of 370 contracting authorities at local government level.

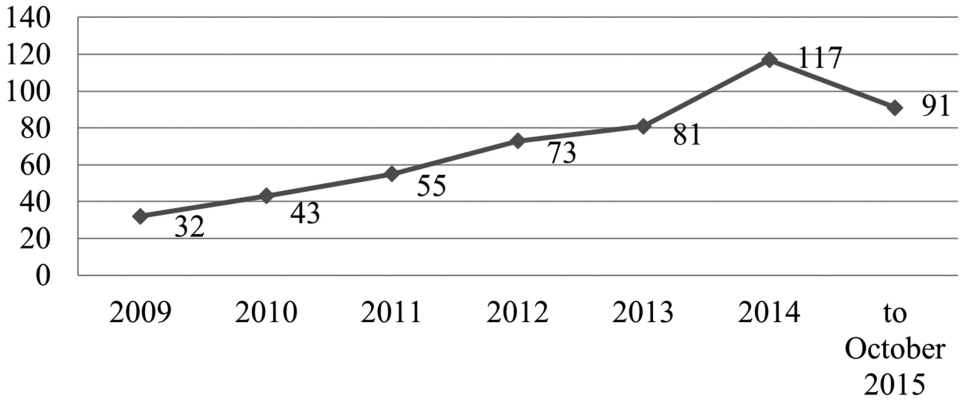
47 Of the 492 challenges recorded, 118 were issued stating an application for judicial review would be made (pre-action stage), amounting to 24%.

48 Of the 118 pre-action challenges that were issued stating an application for judicial review would be made, only sixty-three instances of a full judicial review application being made to the Court were identified, equating to 53%.

49 Question One: How many legal challenges (i.e., written letters, emails or other means of correspondence) were received pertaining to the Council's procurement activities?

50 Note 'to date in 2015' only records data up-until Oct. of that year.

Figure 1 Responses to Question 1 (Indicating Legal Challenges) Rising Trends 2009–2015



The data confirms and quantifies for the first time that, whilst nationally low, the total number of legal challenges consistently *grew* across all years between 2009 and 2014, with higher reported numbers nearer the time of the requests, in 2015. The above information indicates, nationally, a current average of seventy challenges per year across the UK, at pre-action stage, with the trend of procurement challenges drastically increasing between 2009 and 2014 by *366%*. This significant increase in economic operators,[51] 'potential suppliers',[52] and third parties,[53] seeking to legally challenge local government contracting authorities' procurement decisions is in line with the views of practitioners and academics,[54] i.e., their predictions that following the introduction of the Public Contract (Amendment) Regulations 2009, the changes would incentivise litigation; and lead to more public procurement challenges from 2010 onwards.

As evidenced within figure 2 and table 1, when collectively accounting for the responses from all regions to Question One, for all years between 2009 and 2015; Scotland had eighty-nine legal challenges, the highest region nationally, followed by London with fifty-four challenges; and East Midlands with fifty-two challenges. By contrast, according to the data received, the regions with comparatively the

---

51 An economic operator is a business or other organization which supplies goods, works or services within the context of market operations. Within the context of public procurement, the term could be used interchangeably with 'the seller'.

52 The would-be, or all things considered, 'potential seller'.

53 An individual or other organization which is not directly party to the procurement exercise, such as concerned citizens, pressure groups, non-governmental organizations, trade unions, charities and trade associations.

54 *Supra* 18.

fewest legal challenges are Wales with twelve challenges; the West Midlands with twenty challenges; and the North West of England with twenty-three.

The reason for this high concentration of legal challenges in specific regions with large cities could be explained by the high concentration of public procurement legal expertise, and in turn the appropriate specialist legal advice an aggrieved party can receive, within these regions.[55]

Figure 2 Regional Responses to Question 1

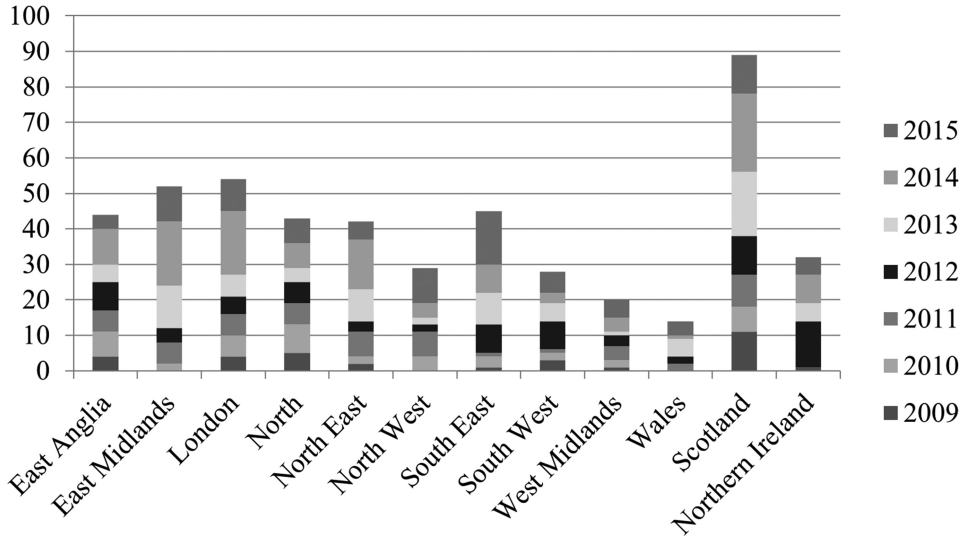


Table 1 Regional Responses to Question 1: Year-by-Year Breakdown

Regions	2009	2010	2011	2012	2013	2014	2015
East Anglia	4	7	6	8	5	10	4
East Midlands	0	2	6	4	12	18	10
London	4	6	6	5	6	18	9
North	5	8	6	6	4	7	7
North East	2	2	7	3	9	14	5
North West	0	4	7	2	2	4	10

[55] Discussed further below (figure 9). *See also* S. Nason & M. Sunkin, *The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law*, 76 MLR 223 (2013).

Regions	2009	2010	2011	2012	2013	2014	2015
South East	1	3	1	8	9	8	15
South West	3	2	1	8	5	3	6
West Midlands	1	2	4	3	1	4	5
Wales	0	0	2	2	5	1	4
Scotland	11	7	9	11	18	22	11
Northern Ireland	1	0	0	13	5	8	5

Contrary to the Ministry of Justice's hypothesis and estimates,[56] it is quantitatively confirmed, for the first time, from the above data that for a seven-year period, the UK overall has had *few challenges* to local government procurement decisions, however the numbers are growing (albeit minimally) each year. Across the 370 Local Councils who responded to the request,[57] the average number of challenges per year, per region is six challenges, equating to 0.2 legal challenges per Local Council per year.[58] The highest number of legal challenges received within a single year was twenty-two which occurred in Scotland in 2014, closely followed by eighteen challenges in Scotland again in 2013, and a similar figure in London and the East Midlands in 2014. By contrast some regions reported *zero legal challenges* within individual years, most commonly in the early periods of the sample, for example the East Midlands in 2009, the North West in 2009, Wales in 2009 and 2010, and Northern Ireland in 2010 and 2011. These findings contradict the views of the Ministry of Justice and highlight the need for greater evidence-informed approaches in proposing law reform.

6.2 Regions recording zero legal challenges and concerns about data retention/administrative justice

As evidenced within table 2, upon collating the responses, perhaps the most surprising finding was the number of Councils that claimed to have received no legal challenges *at all*, within the context of the four definitions, between January 2009 and October 2015.

---

[56] *See* Ministry of Justice, *supra* n. 1.

[57] Calculated based on 407 Local Councils from England, Wales, Scotland and Northern Ireland, less eighteen complete s. 12 refusals, and nineteen responses which stated that all data was unavailable, equating to responses from 370 Local Councils .

[58] Based on twelve regions, or 370 contracting authorities, having 492 legal challenges, across a seven-year period.

Table 2 Regional Responses to Question 1 Indicating Zero Legal Challenges

Name of Region	*Total Number of Councils*	*Number of Councils Responding with Zero*	*Percentage of Councils Responding with Zero*
East Anglia	48	23	48%
East Midlands	45	26	57%
London	33	8	24%
North	22	8	36%
North East	12	2	17%
North West	41	22	54%
South East	73	42	58%
South West	35	21	60%
West Midlands	33	21	64%
Wales	22	7	32%
Scotland	32	7	22%
Northern Ireland	11	4	36%
Total	407	191	47%

In terms of percentages, at Local Government level, 191, or 47%, of all UK Councils responded by stating that they had received *no legal challenges, threatened or otherwise*, over the seven-year period. The actual number of zero responses varied from region to region, with the West Midlands,[59] the South East,[60] and the East Midlands,[61] reporting the highest number of Councils with zero legal challenges. Ironically, these regions also have some of the highest numbers of Councils within the UK; with the South East having the most nationally. By contrast the figures suggest that the North East,[62] Scotland,[63] and London,[64] had the highest

[59] The West Midlands also had the richest data and the fewest number of respondents refuse to answer the questions under the Freedom of Information Act 2000 s. 12, with only one Council issuing such a notice.

[60] The South East had only three Councils state that the information was unavailable/not recorded.

[61] The East Midlands had only one Council refuse to answer any of the questions under s. 12, and one provided a partial response after being challenged, a further four said the information was fully unavailable/not recorded, and two said the information was partial unavailable/not recorded.

[62] In the North East only one Council refused to answer any of the questions under s. 12, two said the information was unavailable/not recorded.

[63] In Scotland only one Council four Councils were only able to provide partial responses under s. 12.

[64] In London five Councils refused to answer any of the questions under s. 12, a further three were only able to provided partial responses within the remit of a FOI request. One Council said the information was fully unavailable/not recorded, a further two responded by saying the requested information was only partially available.

percentage of Councils receiving one or more legal challenges, to their procurement activities.

Whilst this investigation did provide all respondents with a definition of the term 'legal challenges', which included letters or communication received which sought to challenge a tender award decision, or threatened legal action, the number of contracting authorities which responded with zero challenges still remained high. An alternative explanation is that the authorities may not be formally recording or storing correspondence as to 'challenges' in this regard, namely informal discussions which are had to avoid litigation. This further emphasizes the need to implement systems for recording such data, as such data could provide useful evidence for analysis of the number *and nature* of public procurement challenges occurring in the United Kingdom.

Flowing from concerns as to how many local governments could not retrieve the data, and how many claimed to never keep such information, is the wider question of frustrating or facilitating judicial review, and the objectives of administrative justice. The link between data retention rules and the potential for judicial review is well documented.[65] Under the Supreme Court Act 1981 section 33, or the County Courts Act 1984 section 52, an application for disclosure of relevant documents could be issued against a local government prior to judicial review proceedings. The requirement to offer the aggrieved party disclosure and inspection of such documents is contained with the Civil Procedure Rules Part 31, and forms part of their duty of candour.[66] Information as to how many challenges are received, that do not necessarily lead to court intervention, allows the judiciary to better understand the procurement tendering performance of the specific Council in question, as well as the efficiency of their internal review mechanisms. Furthermore, retaining accurate data as to the pre-application treatment of a specific legal challenge is vital, particularly in terms of the potential trajectory of a claim thereafter being made to the High Court. In not retaining such information a local government could, at the very least cause delay in responding to judicial review proceedings, or at the very most frustrate legitimate expectations of openness, fairness and transparency in responding to a challenge.[67]

---

[65] *See R (Davis & Watson) v. Secretary of State for the Home Department* [2015] EWHC 2092 (Admin) in relation to Data Retention and Investigatory Powers Act 2014, specifically regarding the safeguards governing access to communication data.

[66] As the Government's solicitors state, this duty extends to not only letters and emails, but drafts, calendars, manuscripts and post-it notes, voicemails, computer disks, documents stored on servers and back-up systems and documents that have been deleted, and blogs. *See* further, Treasury Solicitors Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (Gov.uk 2010).

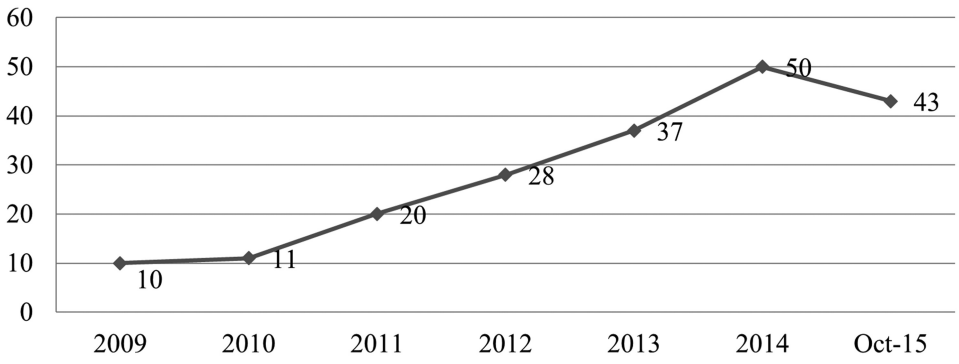
[67] For commentary *see R v. North and East Devon ex parte Coughlan* [2001] QB 213; *R (on the application of Bibi) v. Newham LBC (No 1)* [2002] 1 WLR 237; and I. Steele, *Substantive Legitimate Expectations: Striking the Right Balance?*, 121 LQR. 300 (2005).

6.3 Question 2: Growth in the number of legal challenges without lawyers[68]

One of the interesting findings from the research relates to the responses to Question 2, i.e., the number of legal challenges received by contracting authorities which were issued directly by economic operators themselves, as opposed to those issued by legal representatives. Evidence from the collected data indicate consistent national growth, and simultaneously vast regional differentiation, as to the number of legal challenges made directly by tenderers or interested suppliers. Across the indicated period (January 2009 to October 2015), the contracting authorities who responded to Question 2, identified 199 instances of receiving legal challenges from aggrieved parties directly, rather than directly from their legal representatives.

As illustrated within figure 3, the data reveals that between 2009 and 2010, the number of economic operators or potential suppliers instigating a direct legal challenge only grew marginally from ten to eleven, yet there were significant increases in direct legal challenges issued by tenderers and potential suppliers between 2011 and 2014 (rising from twenty in 2011 to fifty in 2014; the data collected for 2015 indicates a slight dip from the 2014 figures (from fifty to forty-three).[69]

Figure 3 Responses to Question 2 (National Trends 2009–2015)



[68] Question Two: 'For each year, how many of these legal challenges were issued by the tenderer/prospective supplier, opposed to a lawyer/barristers/solicitor?.

[69] This could be explained by the fact that data for 2015 relates to only part of the year and it is possible that other direct legal challenges may have been issued after the authorities sent in the responses to the FOI requests.

6.4 Rise in direct legal challenges without a lawyer

The above data pertaining to the number of legal challenges instigated directly by the aggrieved individual, rather than through a lawyer, may be an indicative reason for the relatively low number of public procurement legal challenges in the UK, when compared to other European Union Member States.[70] High numbers of economic operators, potential suppliers or third parties seeking to challenge procurement decisions without the assistance of legal representation gives rise to several concerns. First, as alluded to earlier, there are four possible remedial routes available to an aggrieved economic operator or tenderer: in the potential absence of legal advice, the intricacies of deciding upon whether the appropriate recourse is for action to be brought under (1) the Regulations, (2) under contract law, (3) by means of judicial review; or (4) alternatively via a complaint to the European Commission, is a complex one, and may be too burdensome for the average lay business person without a lawyer's expert assistance. Furthermore, failure to bring the legal challenge via the correct remedial route may frustrate the future prospective of re-instigating a challenge via one of the other routes, particularly when accounting for the need for certainty as to the future of the procurement exercise,[71] and the tight time limits which operate in this area.

It is equally possible that these economic operators or prospective suppliers are intending to represent themselves right through the legal challenge process, as litigants in person. This may be particularly true within the context of today's legal climate of limited legal aid, and the increase in parties choosing to argue their own cases in Court in person.[72] If such a hypothesis is true, then this does pose wider challenges for public law judges, which are not idiosyncratic to public procurement, particularly within the context of the traditional paradigm of the judge as a passive arbiter of the arguments put forward by the contending parties.[73] In this regard, this trend in public procurement would identically reflect other areas which have similarly seen 'an enormous rise in litigants in person'.[74]

---

[70] For example, compared to Sweden, which has amongst the highest number of public procurement challenges of any Member State in the EU. Whilst it is acknowledged that litigation is free of charge in the Administrative Courts, Sweden has approximately 1,500 public procurement legal challenges each year, with on average 700 of these appealed to the Appeal Court. Of these 700, approximately 200 are commonly granted leave to appeal to the Appeal Court, and only about nine are annually granted leave to appeal to the Supreme Administration Court (accounting for 0.3% of the Supreme Administrative Court's workload) *see Supra* 37.

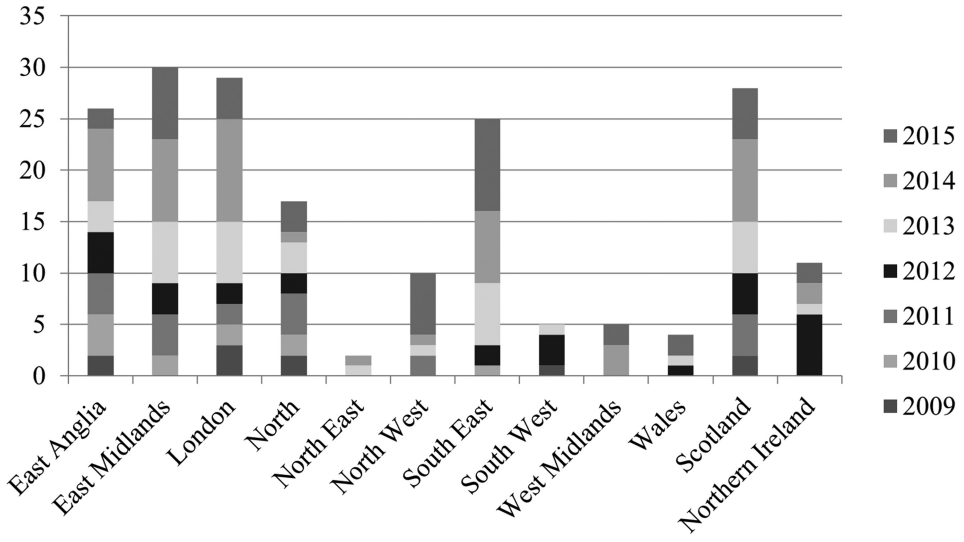
[71] *See Uniplex (UK) Ltd v. NHS Business Services Authority* (Case C-406/08).

[72] *See* S. McGahan, *The Rise in Litigants in Person – are we Ready?*, 223 LSNI Writ 5 (2014).

[73] *See* further R. Moorhead, *The Passive Arbiter: Litigants in Person and the Challenge to Neutrality*, 16 S&LS 405 (2007).

[74] Solicitors Journal, *Special Rules Needed for Litigants in Person, Judges Say* (Legal News 5 July 2013).

Figure 4 Collective Responses to Question 2 by Region



As illustrated within figure 4, over the sample period, across the UK, the East Midlands (thirty), London (twenty-nine), Scotland (twenty-eight), and East Anglia (twenty-six), had the highest number of aggrieved tenderers or prospective suppliers who sought to at least instigate a legal challenge without a lawyer.[75] By contrast, the North East (two) and Wales (four) had the fewest.

Linked to the issue of being a litigant in person is the growing cost of taking your claim to court. The cost of civil litigation has been a major public policy issue in the last twelve months,[76] particularly in terms of criticism as to the cost of 'accessing justice' within the UK.[77] One could surmise that this could be a reason for the high number of legal challenges that are not initially brought via a lawyer within the UK. However, this upward trend in self-representation also poses an additional potential concern within the field of public procurement. Prior to the latest EU Directive changes,[78] there was a recognized concern amongst aggrieved parties that seeking to challenge a

[75] However, it is unknown from this data whether the economic operators or 'would be suppliers' later sought legal representations after threatening, pre-action stage, that a legal challenge would be instigated.

[76] *See* e.g., The Judicial Office, *The Lord Chief Justice Report 2017* (Judiciary.gov 2017). In conjunction with Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report-Fixed Recoverable Costs*' (Judicial Office, 31 July 2017).

[77] For example: O. Bowcott, *Court Fees Jeopardise Magna Carter Principles, Says Lord Chief Justice* (The Guardian 8 Oct. 2015).

[78] Remedies Directives 89/665/EEC and 92/13/EEC, as modified by Directive 2007/66/EC, Directive 2014/24/EU and Directive 2014/23/EU.

contracting authorities' procurement award decision could lead to negative treatment, as a reprisal, in future tendering exercises.[79] Whilst the current Directives have strengthened measures to protect challenging parties, those who are seeking to challenge without using a lawyer are not necessarily aware of these rules, and might continue to hold a misconception about not wanting to 'bite the hand that feeds them'. This could potentially discourage aggrieved parties from making an application to the Court, even though they continue to feel there has been malpractice on the part of the contracting authority.

6.5 Question three: Legal challenges by third parties[80]

The third question sought to understand the number of challenges by third parties, whom can be defined generally as 'a person other than the principals in any proceedings',[81] as similarly reflected in the Civil Procedural Rules.[82] Within the context of the FOI requests, this was classified as being non-economic operators, or persons other than those who would be suppliers. Nationally, the responses to the number of legal challenges falling in to this category produced the lowest numbers of any of the five questions, with only thirty such instances between 2009 and to date in 2015, an average of approximately four challenges per year. Furthermore, unlike the responses to the other questions, looking at the collective national level of responses, there was no consistent identifiable trend as to number of third-party challenges.

As illustrated within figure 5, nationally the number of challenges peaked in 2012 to five, and more significantly again in 2014 to 12. However, these increases can be attributed to individual tendering exercises which attracted third party intervener support. For example, three of the five challenges in 2012 came from procurement exercises in Scotland, two of which from the same procurement award decision by Fife Council. Similarly of the twelve challenges in 2014, nine came from the same procurement award decision by Oadby and Wigston Borough Council in the East Midlands.

---

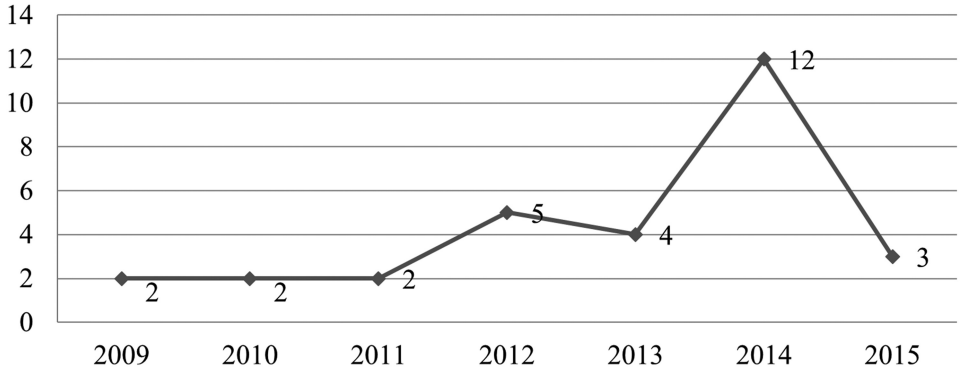
79 *See* C. Wolfenden, *Public Procurement – Should we Challenge* (Oct. 2011 Osborne Clarke), http://www.osborneclarke.com/media/filer_public/34/62/3462e5e0-300b-4d45-8d55-8f1fef2ce801/public-procurement-should-we-challenge.pdf (accessed 12 Dec. 2020).

80 Question Three: 'For each year, how many of these legal challenges were issued by a third party to the procurement process for example a person who had not participated in the procurement process, such as a concerned citizen and other non-economic operator?'.

81 For example: concerned citizens, pressure groups, non-governmental organizations, trade unions, charities and trade associations. *See* L. B. Curzon, *Dictionary of Law* 148 (6th edn, Pearson 2002).

82 Civil Procedural Rules 1998 Part 20, other definitions can be found in Contracts (Rights of Third Parties) Act 1999.

Figure 5 Regional Responses to Question 3: National Trends 2009–2015



The leading authority pertaining to third party challenges of public procurement decisions is *R (Chandler) v Camden LBC.*[83] Ms Chandler, a concerned mother, objected to the construction of an Academy School in Camden. The two key findings from this judgment were, firstly, that the appropriate remedial mechanism for these non-economic operators was to bring their challenge by means of judicial review; and, secondly, that their grievance must pertain to the execution of the public procurement process, not some general issue with the subject matter of the goods or service being procured. It is widely documented, for example by Bailey and Neill, that the *Chandler* judgment directly brought to public attention awareness of third party legal challenges in public procurement disputes, whilst also questioning whether standing tests for third parties in judicial review claims relating to public procurement are more onerous than traditional public law areas where judicial review is exercised.[84] The role of third parties in public procurement disputes has more recently been considered in *R (on the application of Wylde) v. Waverley BC.*[85] Whilst, nationally third party challenges remained at a constant low between 2009 and 2011, the numbers fluctuate significantly between 2012 and 2015.

---

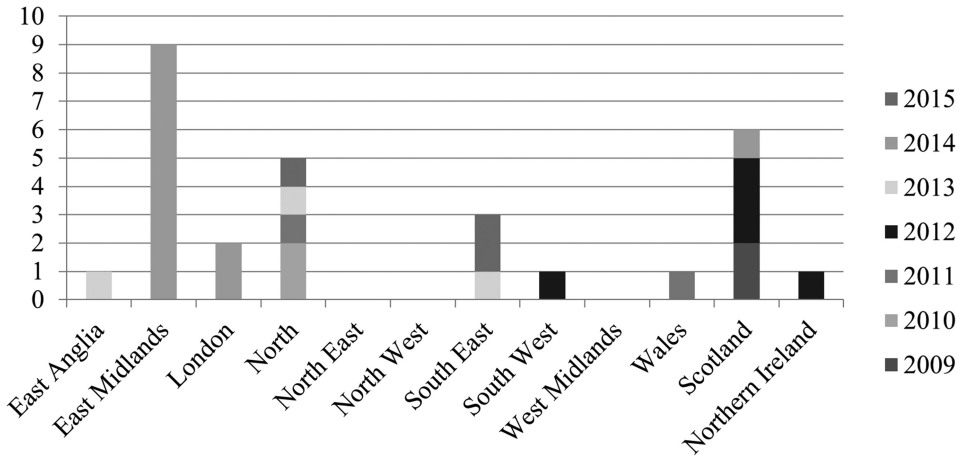
83 [2009] EWCA Civ 1011.

84 *See* further S. Bailey, *Reflections on Standing for Judicial Review in Procurement Cases*, 4 PPLR 122 (2015), S. Bailey, *Chandler in the Court of Appeal: The Issue of Standing: R. (on the Application of Chandler) v. Secretary of State for Children, Schools and Families*, 2 P.P.L.R NA68 (2010), and J. Neill, *Procurement Challenges and the Scope of Judicial Review*, 17 JR 61 (2012).

85 [2017] PTSR 1245 QB (Admin) relating to five claimants (members of the council and local civic societies) who did not have standing to challenge the council's decision to amend an agreement with developers concerning a redevelopment scheme in Farnham. *See* further S. H Bailey, *Judicial Review Standing in Public Procurement Cases: Some Further Thoughts on Wylde v. Waverley BC*, PPLR NA31 (2018).

As illustrated within figure 6, when looking further at the regional variations in the responses to question three, for the 352 local government contracting authorities that were able to answer the question, 339 of those claimed to have *never received a legal challenge from a third party*, equating to 96%. By region these Councils came from in England: East Anglia (forty-two), East Midlands (thirty-nine), London (twenty-two), North (sixteen), North East (nine), North West (thirty-three), South East (sixty-seven), South West (twenty-nine), West Midlands (thirty-nine), and in Wales (fifteen), Scotland () and Northern Ireland (ten). As a result, three regions, the North East, North West and West Midlands, claimed to have never received a legal challenge from a third party at all, across the seven-year sample period. This trend could be explained by the absence of lawyers/centres of expertise with public procurement experiences in these areas. However, this, at least prima-facie, disinterest or apathy on the part of third parties in challenging public sector contracting/projects warrants further investigation.

Figure 6 Regional Responses to Question 3



Given that judicial review is widely viewed as facilitating recourse for non-economic operators and third parties to challenge public decisions,[86] it is very evident from the data collected in this study that even though there were only thirty instances of *third party legal challenges* between 2009 and 2015, there were, by contrast, 427% more threatened instances of judicial review pre-action stage,[87] and 227% more judicial review applications actually made to the High Court.[88]

[86] *Supra* 84.
[87] Calculated based on 118 instances of pre-action judicial review, in response to Question 4.
[88] Calculated based on sixty-three instances where applications were made to the High Court, in response to Question 5.

Considering the responses to Question 2, it is clear that the majority of the legal challenges identified within this study are being instigated by *economic operators*, or *prospective suppliers*, rather than *third party interveners* and *non-economic operators*. Consequently, judicial review action in relation to public procurement decisions cannot be simplified as being instigated by third parties and non-economic operators alone. Rather there are an evidently high number of tenders/prospective suppliers who are viewing, and pursuing, the public law judicial review route as being an appropriate remedial route for them.

6.6 Number of legal challenges that threaten, and subsequently make, applications for judicial review (Questions 4 and 5)[89]

Pertinent to understanding the link between public procurement and administrative law was accurately quantifying the number of legal challenges that alleged judicial review action, and thereafter subsequently led to an application to the High Court. Consistent with other reports into traditional 'public law' areas of judicial review,[90] of the 492 legal challenges identified by this investigation in response to Question 1, at pre-action stage, 118 of them were issued stating that an application for judicial review would be made, equating to 24%, or approximately one in four legal challenges. Of the 118 instances where judicial review was threatened, only sixty-three, approximately one in every two, or 53%, led to a full application being made to the High Court for judicial review (accounting for 13% of the original number of legal challenges).[91] Whilst observations as to the reasons for the similarities between Bondy and Sunkin's research and this study are discussed below, namely in relation to Scotland; the new findings of this study warrants further research to understand why traditional areas of judicial review mirror areas of commercial judicial review, namely in terms of trends in the one in two legal challenges leading to a full application to the High Court.[92]

Collectively looking at the national responses to Question 4,[93] whilst there was a relative dip in the number of pre-action threats of judicial review action in

---

[89] Question Four: 'For each year, how many of these legal challenges were issued stating that an application for judicial review would be made (pre-action) by the person who issued the correspondence?' Question Five: 'For each year, how many of these legal challenges led to a full application for judicial review (application made to the Court)?'.

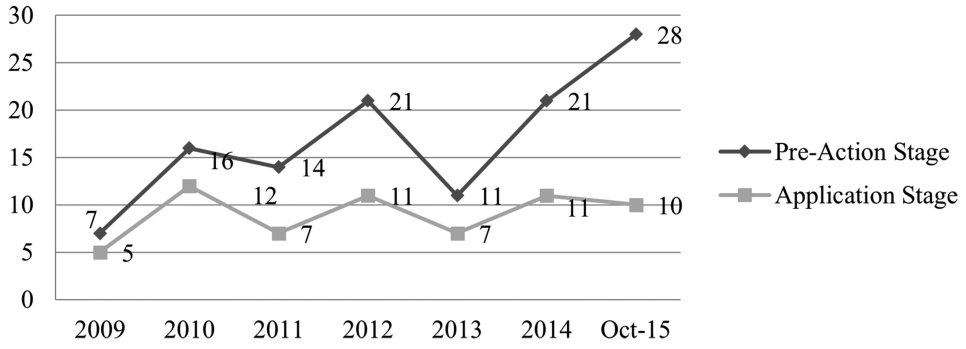
[90] *See* V. Bondy & M. Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009), http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf (accessed 14 Dec. 2020).

[91] Owing to the restrictions of using FOI requests, it is not known whether the other legal challenges that did not use the judicial review route utilized one of the other remedial mechanisms, complaint to the European Commission, or alternatively dropped their challenge entirely after issuing a challenge letter.

[92] For traditional public law study *see Supra* 90.

[93] Question relating to the number of legal challenges that were issued stating that an application for judicial review would be made (pre-action) by the person who issued the correspondence.

Figure 7 National Trends (Questions 4 and 5)



2011 and 2013; overall there has been growth of 400% in the number of pre-action claims over the reference period.[94]

Collectively studying the national responses to Question 5,[95] there is relative growth from 5 applications in 2009, to eleven applications in 2014, and ten up until October 2015. Nevertheless, it is evident that there is no consistent identifiable trend as to the number of applications being made to the High Court for judicial review in public procurement disputes, with consistently fluctuating figures being reported between 2009 and 2015. These national trends are depicted within figure 7 below.

From the above it is observed that there were two peaks in the number of applications in 2010 and 2012. In terms of contextualizing such patterns, 2010 and 2012 saw important public procurement judgments which clarified the purpose of judicial review in this area. For example, the Court of Justice of the European Union judgment in *Uniplex* (2010),[96] called in to question the time frame for instigating a judicial review claim; ruling the traditional UK requirement for bidders to act 'promptly' was too vague. Instead, the judgment encouraged Courts to utilize their discretion in extending the time limit within which a challenge may be brought, by treating the traditional three month limitation period as running from the time when the claimant *knew or ought to have known, of the breach; rather than the actual time of the breach (as was previously thought).*[97] Whilst, subsequent to *Uniplex*, the time frame has been reduced, (following Ministry of Justice judicial review reform for claims pertaining to Public Contract Regulations

[94] Calculated based on seven claims in 2009 compared with 28 up to Oct. in 2015.
[95] Question relating to how many of these legal challenges led to a full application for judicial review (application made to the Court).
[96] C-406/08, [2010] PTSR 1377.
[97] N Gibson, *Knowing Your Limits: Uniplex Delimited* (EUtopia Law 3 Nov. 2011), https://eutopialaw.com/2011/11/03/knowing-your-limits-uniplex-delimited/ (accessed 14 Dec. 2020).

rights)[98] there is a corresponding link between the time of this Court of Justice of the European Union ruling and the peak in the number of claims in 2010. Other examples include the flurry of *Law Society* and *Hossacks* cases,[99] which sought to challenge reforms to the award of public funded legal service contracts, and subsequently brought about a surge in appeals, generating more cases in the same area. The impact of these appeals could possibly be attributed to the later rises in 2012.

Within the context of the relatively high numbers for 2014–2015, one of the only attributable changes are those brought about by the Ministry of Justice, in terms of reforming judicial review and trying to curtail the number of public procurement claims, by reducing the time limit (from 3 months to thirty days) for instigating such claims. Whilst the number of judicial review applications across the UK has been consistently low, it is in stark contrast to the Ministry of Justice's claims (that judicial review needs to be curtailed),[100] and indeed there was in fact a marginal rise in applications following their reforms.[101]

6.7 Regional variations in the use of judicial review

As evidenced within table 3, the figures also illustrate significant regional differences in both the prevalence of the pre-action threat, and the number of applications for judicial review. Some of the regions in and around London had significantly higher responses to questions 4 and 5, for example 28% of the legal challenges in the capital threatened judicial review, with 53% of those leading to a formal application seeking review. Similarly, in the South West 68% threatened judicial review, with a further 68% making an application. The highest percentage figures could be seen in the North of England, where 16% referred to pre-action judicial review, with 86% making an application. Scotland responses similarly reported high numbers in responses to questions 4 and 5, with 18% at pre-action stage, and 63% leading to an application.

Looking at the regional differences in pre-action threats of judicial review, as depicted within figure 8, it can be identified that the South West

---

[98] Those that reduced the time limit in judicial review claims, where a Regulation right is being argued, from three months to thirty days, so as to bring the judicial review time frame in line with the other remedial routes.

[99] *R (Law Society) v. Legal Services Commission* [2010] EWHC 2550, *Hossacks (A Firm) v Legal Services Commission* [2011] EWHC 2700 (Admin).

[100] *See* Ministry of Justice, *supra* n. 1.

[101] When comparing five applications in 2009 to eleven challenges in 2014 and 2015.

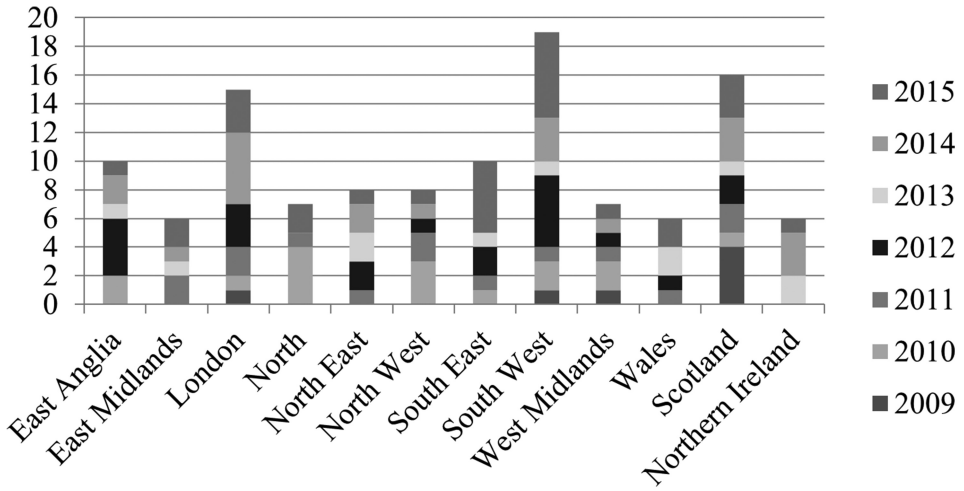
of England had the highest number of threats in a single year of any UK region, with six in 2015. This was closely followed by London in 2014, South East England in 2015, and South West England in 2012 which all, respectively, had five pre-action challenges. By contrast, there were twenty-four years where individual regions reported zero pre-action challenges, with the North of England and Northern Ireland being the highest, in reporting four such occasions each.[102]

Table 3 Regional Responses and Percentages to Questions 4 and 5

Region	*Number of Legal Challenges*	*Number of Challenges Stating an Application for JR Would be Made (Pre-action)*	*Percentage of Challenges Stating an Application for JR Would be Made (Pre-action)*	*Number of Challenges Leading to an Application for JR*	*Percentage of Challenges Leading to an Application for JR*	*Percentage of Challenges Stating an Application for JR Would be Made Leading to an Application for JR*
East Anglia	44	10	23%	5	11%	50%
East Midlands	52	6	12%	1	2%	17%
London	54	15	28%	8	15%	53%
North	43	7	16%	6	14%	86%
North East	42	8	19%	4	10%	50%
North West	29	8	28%	4	14%	50%
South East	45	10	22%	3	1%	33%
South West	28	19	68%	13	46%	68%
West Midlands	20	7	35%	3	15%	43%
Wales	14	6	43%	3	21%	50%
Scotland	89	16	18%	10	11%	63%
Northern Ireland	32	6	19%	3	10%	50%
National Totals	492	118	24%	63	13%	53%

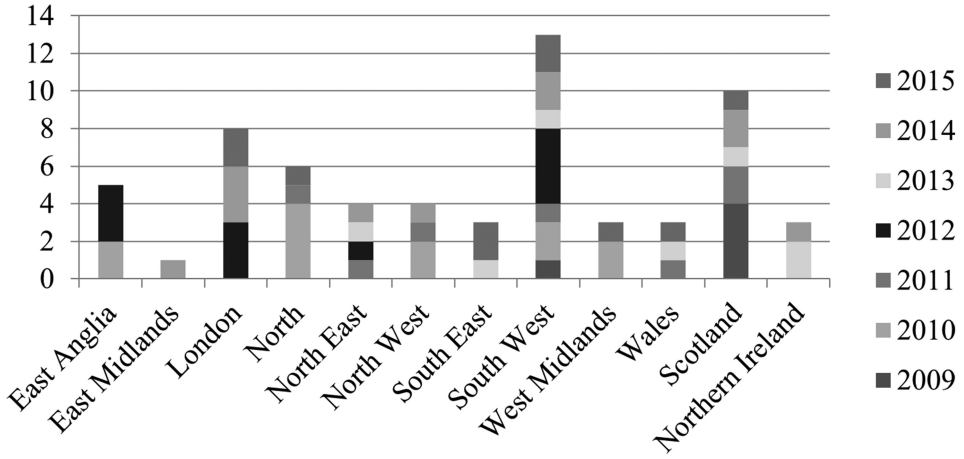
[102] However, there are limitations to the Northern Ireland findings please *see infra*.

Figure 8 Regional Responses to Question 4



When considering the individual year-by-year breakdown for the regions in response to Question Five, the East Midlands has the lowest number of judicial review applications nationally, with only one application in 2014. The below chart also recognizes that not only did the South West have amongst the highest number of applications for judicial review; but they were also the only region to have an application for judicial review made in every year of the sample period. These regional differences can be evidenced within figure 9.

Figure 9 Regional Responses to Question 5



Whilst the exact reasons for the fluctuating number of pre-action threats and applications for judicial review across the UK's regions is unknown from this data; hypothesizes can be drawn from other existing judicial review studies. Sunkin and Nason in their regionalization of judicial review research have cited concentration of legal expertise in specific central regions as one of the barriers to realizing the full benefits of judicial review across the other regions without non-centralization of expertise.[103] It is beyond the scope of this study to identify the individual locations of each lawyer for each of these pre-action threats and judicial review applications. However, it is known, from studying the reported judicial review cases in this area, that the majority are pleaded by the same London based Queens' Counsel member.[104]

Furthermore, Chambers and Partners recognize the top bands of public procurement solicitors as Addleshaw Goddard, Burges Salmon, Freshfields Bruckhaus Deringer, Hogan Lovells, Pinsent Mason, and Trowers and Hamlins.[105] Whilst several of these practices have offices around the country, public procurement expertise within firms tend to be centralized with their major UK offices in cities such as Manchester, Leeds and London; which correspond to some of the 'high' judicial review regions reflected in this study. It is possible to argue that this concentration of procurement law expertise is proportionate to the number of businesses within the region, and within areas where contracting authorities will be putting the highest number of tenders out for goods and services. Nevertheless, one of the findings in response to the regional results for Questions 4 and 5 is that the relationship between the number of judicial review applications pertaining to public contract award decisions, and the location of procurement law specialisms, does warrant further investigation in future studies.

7 FOI REQUEST RESPONSE ANALYSIS: CONTEXT COMMENTARY

Having collated these FOI responses, the findings for Scotland and Northern Ireland are most surprising. There are therefore several contextual observations that should be made of the *high number* of challenges in Scotland; and the *low numbers* coming from Northern Ireland.

---

103 *Supra* 54.

104 The Legal 500, *Public Procurement – Leading Silks* (2016), http://www.legal500.com/c/london-bar/public-procurement (accessed 14 Dec. 2020).

105 Chambers and Partners Guide, *Public Procurement – UK Wide* (2015), http://www.chambersandpartners.com/11805/485/editorial/1/1 (accessed 14 Dec. 2020).

A caveat to the Scotland responses is that there are recently established precedents within the jurisdiction that have reasserted the custom of making public procurement information readily available in response to a FOI request. For example, the recently published work of Maclean discusses legal challenges that have been brought against Scottish Ministries over their failure to provide general information within the statutory twenty day time limit.[106] One of the most recent of these challenges being *Shetland Line (1984) Limited v. The Scottish Ministers,*[107] where information held by Transport Scotland was not readily communicated to an aggrieved economic operator, (specifically, information regarding meetings related to the procurement process had by ministers in the Scottish Government over the tender award). These recent challenges in Scotland may be another indicative reason as to why such detailed and meaningful data was received from the FOI requests in Scotland.

Another surprising difference is the relatively low number of legal challenges reflected in the responses from Councils in Northern Ireland. This is somewhat paradoxical because, within the area of public procurement, traditionally Northern Ireland has had significantly higher numbers of judgments published in law reports than other parts of the UK, particularly in the area of judicial review. There are two possible justifications for this difference between the *reported cases* and data (low number of challenges) emanating from the responses to the FOI requests.

Firstly, in relation to data services, there are prevalent challenges surrounding Council mergers in Northern Ireland. As Gordon Anthony recognizes, in Northern Ireland there is an obvious obligation upon Councils to disclose information pertaining to their public decision making, including public contracts, because the Councils themselves are listed within the Northern Ireland Act 1998 and the Freedom of Information Act 2000 as being subject to public scrutiny and review.[108] However, from 1 April 2015, the twenty-six Northern Irish Councils were merged to just eleven; the biggest programme of reform seen in any single UK region between 2009 and October 2015.[109] Out of the eleven Councils, four of them, or 36%, were only able to provide partial responses to the questions. These problems are highlighted by the response received by Derry City and Strabane District Council, where they stated that 'key appointments … strategic policy … and data being held in multiple legacy centres with different systems and protocols' meant that the Council was only able to answer questions from 2015,

[106] L. Maclean, *Freedom of Information Obligations and Public Procurement: Shetland Line and Transport Scotland*, 4 PPLR NA113-NA114 (2014).

[107] [2014] CSOH 12 (Scotland). For analysis of this recent judgment *see* L. Wilson *Shetland Line (1984) Limited v. The Scottish Ministers*, 23 PPLR 3 at 92–94 (2014).

[108] G. Anthony, *Judicial Review in Northern Ireland* 49 (2d edn, Hart Publishing 2014).

[109] NI Direct, *Local Government Reform* (Government Services 2015), http://www.nidirect.gov.uk/local-government-reform (accessed 14 Dec. 2020).

when it came in to existence. Therefore, within the context of this study Local Government mergers have evidently affected the quality of the data received from Northern Ireland. It is possible that these problems may be applicable to England, where two Councils have merged, for example Chester and Cheshire West in 2014. However, the scale of the mergers in Northern Ireland, where in some instances three of four legacy Councils have been combined, across the whole country at the same time, evidences definitive challenges in requesting information pertaining to public procurement challenges.

Furthermore, in Northern Ireland the traditional position up until 2013, was that procurement legal challenges were nearly exclusively heard by the same judge in the High Court, Mr Justice McCloskey; with a high number of judicial review applications being permitted to proceed to hearing.[110] In his judgments, McCloskey J, frequently held the public interest in adherence to public procurement procedures should prevail over the prompt award and procurement of a public good or service. However, in 2013 McCloskey J, was elevated to President of the Upper Tribunal Immigration and Asylum Chamber. Since then Treacy J, has taken a largely different stance to McCloskey, and for the first time since 2009, there have been reported cases coming from Northern Ireland *dismissing* applications for judicial review.[111]

8 RECOMMENDATIONS AND CONCLUSIONS

This study makes four key recommendations. Three for policy reform and one for law reform. First, there is a need for policy reform requiring contracting authorities to accurately document, retain and retrieve data pertaining to their public procurement legal challenges. It should be recognized that in 2014/15 central government ministries took progressive steps to ring-fence and identify complaints pertaining to tendering activities, through introducing guideline procedures. For example, in 2014 the Ministry of Justice produced a document entitled 'Ministry of Justice Tender & Contractual Complaints Process'.[112] This included reference to how an email copy of all complaints should be sent to the Directorate for Procurement Compliance, via procurement.compliance@hmps.gsi.gov.uk This identifiable method of communicating complaints within a central government ministry should make it easier to

[110] *See* e.g., *Federal Security Services Ltd v. Northern Ireland Court Service (Resource (NI) Ltd intervening)* [2009] NI Ch. 3. Rationalisation of Councils (i.e., mergers) either took place on a relatively minor scale, or as in the case of Wales, not at all. This was despite much fanfare at the time of the launch of the Williams Report. *See* Williams Commission, *The Report of the Commission on Public Service Governance Delivery* (Welsh Government, 20 Jan. 2014).

[111] *See* e.g., *Re Bryson Recycling Limited's Application for Judicial Review* [2014] NIQB 9 and *Re Northern Ireland Public Service Alliance's Application for Judicial Review* [2014] NIQB 16.

[112] Gov.Uk, *Ministry of Justice Tender & Contractual Complaints Process* (Ministry of Justice 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305427/tender-contractual-complaints-process.pdf (accessed 12 Dec. 2020).

audit the number of complaints and challenges received, including pre-litigation correspondence and 'near-misses'.[113] In line with the Law Commission's reform objectives for 2018, this practice could be more widely, and cost efficiently, implemented by contracting authorities in the future, including within local governments. This could enable improved accuracy in data in the future.[114]

Second, policy reform is needed to recognize the benefits of data gathering pertaining to the number of legal challenges in areas of public procurement. Accurate data in this field carries numerous benefits. Internally, it allows local government organizations to consider their internal training, in terms of how they address challenges to their decisions; whilst also facilitating an opportunity to review the efficiency of their internal review mechanisms and policies. Nationally, such data can be combined to facilitate insights as to the UK's performance in public procurement contracting, and thus lead to insights as to national trends; as well as map the consequence, and effectiveness, of any public procurement regulatory reforms.[115] Failure to implement a policy that recognizes the benefits of this data will continue to present a barrier to truly and accurately measuring the scale of public procurement litigation in the UK; as well as the effectiveness of administrative review within local governments, and its consequences for frustrating the vindication of administrative justice.

Third, if recommendations one and two are implemented, the Ministry of Justice should commission more research into understanding the number of, and reasons for, legal challenges in the area of public procurement and judicial review. This is so as to only implement further reforms in this area based on accurate evidence informed approaches.

In terms of recommendation for law reform, of pertinent concern is the increasing number of instances where economic operators, would-be suppliers, or third parties have sought to challenge a public procurement decision in person, rather than through a lawyer. Growth of 600% between 2009 and 2014 warrants concern as to whether these non-specialists understand the complex nature of public procurement remedies; in particular how their claim could potentially be

[113] From discussions with contracting authorities at procurement events, it is apparent that there is a practice of entering into pre-litigation communication with the challenging economic operator, or third party, when a dispute arises. This out of Court correspondence was described by several Procurement Officers as leading to 'near-misses' in terms of Court action, or, on some occasions, the procurement award decision being suspended, with a view to re-starting the procurement process, and putting the contract back out to tender afresh, so as to absolve the challenging party of their concern(s); and limiting the scope for future Court action.

[114] Nevertheless, as of Jan. 2016, the Ministry of Justice refuses to share such information via a FOI request in terms of auditing this compliance email; as they have assessed such as falling outside the scope of an FOI under the Freedom of Information Act 2000 s. 12.

[115] For example, these assessments have been possible in Sweden, owing to the way in which their data is recorded and collated. *Supra* 37.

frustrated if they use the incorrect/inappropriate remedial route (judicial review being just one of four possible routes).[116] More pertinent are concerns as to whether these potential litigants in persons understand the safeguards that prevent negative repercussions for them, should they wish to participate in future tendering activities. Whilst the EU Directive provisions exist to protect those pursuing a claim under the implementing UK Regulations,[117] an express legal provision in UK domestic law which makes it explicitly clear that the challenging party cannot be subject to prejudice (direct or indirect) in future procurement exercises, may have a positive impact on holding contracting authorities to account for their perceived malpractices. This could cover all remedial routes within public procurement law for the benefit of the public good. Whilst legal protection can be found within the EU rules,[118] and public law values enforced by means of judicial review; having the principle expressly, rather than implicitly, enshrined in law would reassure aggrieved parties to see their potentially meritorious claim through to a full application to the court.

In conclusion, the number of legal challenges drastically increased post 2009, with growth of 366% by 2014, and high numbers reported up to October 2015. Nonetheless, comparatively the overall figures remain consistently low, with 47% of local governments claiming to have *never been challenged* over the seven-year reference period. The UK's regions will typically only receive around 6 challenges per year, individually amounting to only 0.2 challenges per local government contracting authority. This study also finds that whilst one in four challenges will allege judicial review action will be sought, only one in two of these will actually lead to an application being made to the High Court.

The findings illustrate that judicial review is not being used exclusively by third parties and non-economic operators as a remedial mechanism. Whilst over the sample period there were 118 instances of pre-action judicial review, and sixty-three full applications made, there were only twenty-nine challenges made by these groups, amounting to 217% more judicial review challenges than there were third parties and non-economic operators seeking litigation. This suggests that the purpose of judicial review in this area is not just as a route for these groups. Rather there must be a high number of economic operators pursuing a public law right or obligation via the High Court or receiving legal advice that judicial review

[116] Such could present a wider policy reform pertaining to the information and support i.e., made available to litigants in person more widely within the UK justice system.

[117] Remedies Directives 89/665/EEC and 92/13/EEC, as modified by Directive 2007/66/EC, Directive 2014/24/EU and Directive 2014/23/EU. Within the UK, transposed and consolidated in the Public Contracts Regulations 2015 (as amended) and the Concession Contracts Regulations 2016.

[118] Remedies Directives 89/665/EEC and 92/13/EEC, as modified by Directive 2007/66/EC, Directive 2014/24/EU and Directive 2014/23/EU.

is the most appropriate course of action in resolving their public procurement dispute.

This study also finds, that over the reference period, there was an increase in the number of legal challenges that were made directly to the local government by the aggrieved party, rather than through a lawyer. Such poses the question of at which stage of the challenge process are these individuals seeking specialist legal advice, if at all. If these individuals are continuing to represent themselves through to making an application to the court this does pose further complexities in public procurement challenges and administrative law/judicial review.[119] Both areas of law utilize unique specialist legal phrases, acronyms and references. For example, those to describe the different methods by which a contract can be put out to tender, as well as the technical references to domestic grounds for judicial review. This specialist language is likely to be unfamiliar to the average person. If the national trend of increases in litigants in persons is transpiring to claims pertaining to public procurement and judicial review,[120] the specialism of these fields presents more barriers and complexities than those initially considered by the Bar Council, Chartered Institute of Legal Executives, and Law Society in their initial guidance documentation.

This research has also identified significant regional differences in the frequency of legal challenges to public procurement decisions. Areas within the UK with a high concentration of legal expertise in the field of public procurement, at least prima-facie, correspondingly have a higher number of challenges. This poses potential complexities in terms of aggrieved parties' access to legal advice in areas where there is an absence of such legal expertise. More widely, in regions with fewer legal experts and a fewer number of challenges, there are issues surrounding whether the objectives of public procurement law and administrative justice are being frustrated because of a lack of specialist legal advice, or unawareness of how to instigate their dispute.[121]

---

[119] In June 2014 the Bar Council, Chartered Institute of Legal Executives, and the Law Society produced guideline advice for lawyers who face litigants in person in the civil courts and tribunals. (*See* the Law Society, 'Litigants in person: new guidelines for lawyers' (4 June 2015)) These guidelines discussed the relationship between the client's interest and the interests of the administration of justice; including advice as to the extent to which a lawyer can properly aid a litigant in person.

[120] For general information relating to the national rise in litigants in person *see* G. Garton Grimwood, *Litigant in Person: The Rise of The Self-Represented Litigant in Civil and Family Cases* (House of Commons, 14 Jan. 2016) Commons Briefing Paper SN07113; C. Arthurs & J. Bond, *LiP Service? Dealing with Litigants in Person* 62 Co.L.J 2 (2015); T. Keys, *Litigants in Person and the Administration of Justice*, 22 Bar Rev. 19 (2017); E. Bell, *Judges, Fairness and Litigants in Person*, 1 J.S. I.J 34 (2010); D. Menashe & E. Gruner, *Litigants in Person and the Risk of Error – a New Perspective on Rabeea Assy's 'Injustice in Person: The Right to Self-Representation*, 35 C.J.Q 237 (2016). In relation to Northern Ireland *see* S. McGahan, *The Rise in Litigants in Person-are We Ready?*, 223 Writ 5 (2014).

[121] Such findings warrant further empirical research with lawyers and potential litigants, to understand the reasons for these regional differences.

Furthermore, there are high numbers of contracting authorities who are unable to identify the relevant documentation relating to their tendering exercises within their data management systems, a problem which local government reorganization also has exacerbated. These poor data retention and retrieval practices pose a danger not only for the authorities themselves, but also will frustrate those seeking administrative justice if authorities are unable to produce records in judicial review proceedings or FOI requests. Consequently, there needs to be an appreciation of the need to document the post-award treatment, and communication pertaining to, public procurement decisions. Sector-wide review is required in order for local governments to understand and appreciate the valuable benefits such information can provide in illustrating the trends and success (or otherwise) of contracting authorities' public procurement practices, as well as having the potential to influence and better inform government policy in the future.

The timely contribution of these findings can be reflected in the Law Commission's *Thirteenth Programme of Law Reform* in 2017,[122] which details proposals for projects in 2018 that will explore the wider efficacy of administrative review systems, i.e., review systems, internal to a public decision maker, by which a decision is reconsidered at the request of the individual, or at the discretion of the decision maker. This article will contribute to this review because it facilitates an improved understanding of *how many* challenges are *in fact* instigated against local governments' procurement award decisions; and *how many* of those move beyond internal review, and progress to litigation within the High Court by means of judicial review. The Law Commission recognizes that effective 'administrative review decisions determine the outcome of at least as many cases as appeals, probably more; yet have received a fraction of the analysis or academic attention given to other aspects of administrative justice'.[123] Nowhere is the need for efficient administrative review systems more pertinent than in matters pertaining to the expenditure of public funds by public bodies. As the Law Commission recognizes, empirical understanding of the effectiveness of internal review procedures have the potential to reduce the number of appeals and promote confidence in administrative decision-making. Observing that, 'recent independent reports have cast doubt on the efficacy of some of the review procedures presently in place',[124] the Commission should welcome the present study through which one is able to observe the relationship between the number of pre-litigation challenges, and how many of those lead to an application to the High Court.

[122] Law Commission, *supra* n. 6, paras 2.5–2.7.
[123] *Ibid.,* para. 2.5.
[124] *Ibid.,* para. 2.6.

Additionally, this study supports the aims of the Law Commission administrative review project by proposing law reform which will aim to promote correct decisions, cheaper correction mechanisms, and confidence in public decision making. The Commission states it will achieve these objectives by considering and assessing the merits of the different procedures that are in place and make recommendations with a view to identifying best practice and generally improving them. For the Law Commission 'this would include considering the frequency of legal challenge and identifying any items of concern from the point of view of the judiciary and legal practitioners'.[125] This article meets this objective by adopting a methodological approach to firstly seeking to authoritatively understand *the number* of legal challenges (beyond general estimates from the Ministry of Justice), and thereafter explores their frequency, and national and regional distribution, in order to propose both legal and policy reforms, so as to allow both interconnecting disciplines of public procurement and administrative law to better achieve their respective objectives.

[125] *Ibid.,* para. 2.7.