**GRANDE-BRETAGNE / UNITED KINGDOM**

**CONTROLS AND LITIGATION OF PUBLIC CONTRACTS: THE UNITED KINGDOM**

By

Richard CRAVEN

1. Introduction

This chapter will report on controls and litigation of public contracts in the United Kingdom (UK). The UK is made up of England, Wales, Scotland and Northern Ireland. Historically, the Westminster Parliament had sole law-making responsibility for the UK. In 1998, this began to change: a process of devolution was commenced[[1]](#footnote-1), whereby powers, previously exclusive to the Westminster Parliament, were devolved to newly established administrations in Wales, Scotland and Northern Ireland. As a consequence, legal requirements for public procurement are different in the separate jurisdictions of the UK[[2]](#footnote-2). The discussion in this report will focus primarily on England, the largest jurisdiction of the UK in terms of size and population. However, because of the overarching framework provided by EU law, despite some differences, there are many similarities in legal requirements across the UK.

The report will begin in section 2 by outlining the system in place for challenging public authority actions in the procurement of a public contract. This section of the report will concentrate on challenges to contracts governed by the EU’s public procurement directives, the main most significant area of public procurement legal challenges in the UK. The next section of the report will consider legal challenges in relation to the performance of public contracts. This section is comparatively short, as, in the UK, public contracts are subject mainly to the same law as private contracts. The final section of the report will look at further controls on public procurement and public contracts in the UK, including the Mystery Shopper Service. This section of the report will also touch upon the rules in place governing anti-competitive behaviour in procurement and corruption and fraud.

1. Actions relating to the procurement phase of the public contract: challenging the public authority’s decisions
	1. *- Background*

The UK became a member of the European Economic Community in 1973[[3]](#footnote-3), and, the EU is a major source of law on public procurement in the UK. For England, Wales and Northern Ireland, the Public Contracts Regulations 2015 (PCR 2015)[[4]](#footnote-4) transpose the recently adopted Directive 2014/24/EU[[5]](#footnote-5). These 2015 Regulations also transpose Directive 89/665/EEC on review and remedies in public procurement[[6]](#footnote-6), as amended by Directive 2007 (the “Remedies Directive”)[[7]](#footnote-7). There are also separate regulations implementing Directive 2004/17/EC on utilities procurement[[8]](#footnote-8) and Directive 2009/81/EC on defence procurement[[9]](#footnote-9). The EU’s new Directive 2014/25/EU on utilities procurement[[10]](#footnote-10) and Directive 2014/23/EU concessions[[11]](#footnote-11) have yet to be transposed into domestic law, the deadline for which is 18 April 2016[[12]](#footnote-12). In Scotland, the Public Contracts (Scotland) Regulations 2012[[13]](#footnote-13) are in place to implement Directive 2004/18/EC, as well as EU rules on review and remedies, the Remedies Directive. The Scottish Government has yet to transpose any of the 2014 procedural directives into law.

The above regulations predominantly adopt a copy-out approach to transposition[[14]](#footnote-14); however, in addition to the domestic legal rules that derive from EU legal requirements, recent times have seen a trend for more extensive legal requirements. For example, the PCR 2015 contains additional rules, e.g. entailing publication of contract information on the government’s Contracts Finder website[[15]](#footnote-15), which do not flow from EU membership[[16]](#footnote-16). In addition to these rules, certain public authorities may be subject to specific legal duties, for example local authority procurement is subject to a duty of best value[[17]](#footnote-17), and the Public Services (Social Value) Act places a social value duty on local authorities[[18]](#footnote-18). There are also procurement rules in place specific to the National Health Service (NHS)[[19]](#footnote-19).

However, despite the various law, the main source of court challenges to public authority decisions in relation to the procurement phase of public contracts are those under the PCR 2015, and its predecessor, the Public Contracts Regulations 2006[[20]](#footnote-20), for breaches of the 2014 and 2004 directives[[21]](#footnote-21). The discussion will focus on these legal challenges, for which a specific review and remedies system is in place to give effect to the Remedies Directive[[22]](#footnote-22). There are however alternative possibilities for challenging public authority decisions in the procurement phase of a public contract, and these may be relevant for contracts which are outside the scope of the EU public procurement directives, such as services concessions, e.g. where there has potentially been a breach of Treaty rules, or for infringement of UK specific rules, as the PCR 2015 review and remedies system does not extend to these situations[[23]](#footnote-23). These alternative possibilities will only be touched upon briefly, however, as such action is not common.

* 1. *- Chapter 5, Public Contracts Regulations 2015*

Chapter 5, PCR 2015 transposes the Remedies Directive into domestic law. The chapter only applies to contracts and framework agreements falling within the scope of Part 2 of the Regulations, i.e. contracts and framework agreements within the scope of the 2014 Directive (regulation 85).

The Remedies Directive is underpinned by a key principle of effectiveness, which sits behind many court rulings. Member States must ensure that decisions taken by authorities under the Directive “may be reviewed effectively and, in particular, as rapidly as possible”[[24]](#footnote-24).

Despite this overarching principle, in comparison to other member states, very few legal challenges in public procurement reach the courts[[25]](#footnote-25). According to empirical research by D. Pachnou, there are various reasons for this, including “extremely high” legal costs, and the unpredictability of the trial outcome and the usually low chances of winning the case[[26]](#footnote-26). D. Pachnou has also identified deterrents to litigations that are specific to the UK: “a non-confrontational national legal culture (meaning that litigation is avoided while out-of-court negotiations are considered to be the natural reaction to a dispute) and … a generalised trust in the integrity of the public sector (meaning that bidders are to a large extent convinced that authorities are fair)”[[27]](#footnote-27). There were also other specific reasons for avoiding litigation: a perception that breaches of the rules which are not discriminatory do not, as a general rule, warrant legal action, a tendency to move on with business and not waste resources suing, bidders' fear of being blacklisted by awarding authorities, and, in some cases, an ignorance of substantive and procedural rights[[28]](#footnote-28).

* 1. *- The forum for review*

The UK, unlike certain other member states, does not have a specialist court or tribunal system for public procurement disputes. A legal challenge will need to be pursued through the general civil court system, and, according to regulation 91(2) PCR 2015, proceedings must be started in the High Court. In recent times, the Technology and Construction Court (TCC), a specialist subdivision of the High Court, Queen’s Bench Division, has dealt with most public procurement legal challenges[[29]](#footnote-29). The TCC is located at the Royal Courts of Justice in London[[30]](#footnote-30), and there are also regional TCC Centers in Birmingham, Bristol, Cardiff, Chester, Exeter/Plymouth, Leeds, Liverpool, Manchester Newcastle and Nottingham[[31]](#footnote-31).

The High Court is an expensive venue, particularly in comparison to tribunal systems in other jurisdictions, and cost is a notable deterrent to legal challenges to procurement decisions in England and Wales[[32]](#footnote-32). The court fee for money claims with a value over £200,000 has recently risen from £ 1,515-1,920 to £10,000, and for money claims between £10,000 and £200,000 the cost is 5% of the claim[[33]](#footnote-33). The cost is much lower for non-money claims, i.e. where the remedy of damage is not sought (£480)[[34]](#footnote-34).

There is the possibility of appealing a High Court judgment to the Court of Appeal (Civil), but this is not automatic: a party must be granted leave to appeal following an application to the High Court or Court of Appeal[[35]](#footnote-35). A case may ultimately be appealed to the Supreme Court[[36]](#footnote-36), subject to permission, but few public procurement disputes progress this far.

In Scotland, under the Regulations, proceedings may be brought in the Sheriff Court or the Court of Session[[37]](#footnote-37). The Court of Session is Scotland's supreme civil court. It sits in Parliament House, and its outer house appears to be where most procurement disputes are brought. The Sheriff Courts are non-specialist courts. There are 39 of these local courts, with each court serving a district within one of Scotland’s six sheriffdoms[[38]](#footnote-38). Following consultation, the Scottish Government recently rejected the idea of creating a specialist public procurement tribunal or ombudsman for Scotland[[39]](#footnote-39).

* 1. *Process*

The PCR 2015 enable the initiation of court proceedings by an “economic operator” (regulation 91), “any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market” (regulation 2). There is no requirement for review to be sought from the public authority concerned before initiating legal proceedings, which is an optional requirement in article 1(5) Directive 89/665/EEC. There is also no longer a requirement to notify the public authority concerned prior to initiating legal action. A “letter before action” was required under the Public Contracts Regulations 2006 (regulation 47(7)), but this was removed during the transposition of Directive 2007/66/EC[[40]](#footnote-40). A “letter before action” is still a requirement for procurement procedures in England, Wales and Northern Ireland however, where these have commenced on or after 20 December 2009, and it also remains a requirement in Scotland[[41]](#footnote-41).

The economic operator must serve the claim form, i.e. in accordance with the rules of court (regulation 94(5)), on the public authority within 7 days after the date of issue (regulation 94(1)). In cases where the economic operator is seeking a declaration of ineffectiveness, or alleging a breach of the standstill period, the automatic suspension or an interim order where the contract has not been fully performed the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the authority, who is a party to the contract in question (regulation 94(3)). The authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with the above regulation 94(3) requirement (regulation 94(4)).

The procedure in the civil courts of England and Wales is governed by the Civil Procedure Rules, and associated Practice Directions[[42]](#footnote-42).

* 1. *- Time limits*

The CJEU has accepted that challenge limitation periods are permitted[[43]](#footnote-43). The PCR 2015 states that “proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen” (regulation 92(2)). For cases where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, proceedings may not be started before the end of 10 days beginning with (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision; or (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons (regulation 92(3)(a)). For cases where proceedings relate to a decision sent to the economic operator by other means the time periods are extended (regulation 92(3)(b))[[44]](#footnote-44). For cases where these limitation periods do not apply, but where the decision is published, the limitation period is 10 days beginning with the day on which the decision is published (regulation 92(3)(c)). The court may extend the time periods imposed under regulation 92 where it considers there is a good reason for doing so (regulation 92(4)), but must not exercise this power so as to permit proceedings to be started more than three months after the date when the economic operator first knew or ought to have known that the grounds for starting proceedings had arisen (regulation 92(5)). Past case law on the exercise of the courts’ discretion to extent the time limit, where previously the court could extend the time limit beyond three months where there was “good reason”[[45]](#footnote-45), will probably remain relevant[[46]](#footnote-46).

For the purposes of the above rules, proceedings are regarded as started when the claim form is issued (regulation 92(6)).

There are special time limits applicable where the ineffectiveness remedy (see below) is sought (regulation 93). The limitation period for an ineffectiveness claim is 30 days for contracts where a contract award notice has been published (regulation 92(2), (3) and (4)) or where the authority has informed the economic operator that it has concluded the contract and provided a summary of relevant reasons (regulation 92(2)(a) and (5)), i.e. reasons akin to those provided to unsuccessful candidates and tenderers (regulation 93(6) and 55(2)); otherwise the limitation period is six months (regulation 92(2)(b)).

* 1. *- Notification and standstill*

In the UK available procurement remedies depend on whether or not the contract has been entered into, with remedies limited to damages and ineffectiveness in relation to the latter (see below). Because of this, the notification and standstill provisions of the Remedies Directive are particularly important in order to counter the “race to signature” problem and preserve pre-contract remedies.

In accordance with regulation 86 PCR 2015, a public authority must send to each candidate and tenderer an award notice, communicating its decision to award the contract or conclude the framework agreement (regulation 86(1)). For tenderers, i.e. economic operators that have submitted a tender and have not been definitely excluded (regulation 2 and 86(7)(b)), the notice must include (a) the award criteria, (b) reasons for the decision, including the characteristics and relative advantages of the successful tenderer, the score (if any) obtained by the tenderer receiving the notice and the winning tenderer, (c) the name of the winning tenderer, and (d) a precise statement of when the standstill period is expected to end or the date before which the authority will not conclude the contract/framework agreement (regulation 6(2)). The notice to be sent to candidates, i.e. an economic operator, other than a tenderer “that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership” (regulation 2 and 86(7)(a)), the notice must set out the reasons why the candidate was not successful and similar information to that set out above which is communicated to tenderers (regulation 86(4)).

There are exemptions from the award notification rules for where the contract or framework agreement is permitted to be awarded or concluded without prior publication of a contract notice, where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement (and there are no other candidates), and where the authority awards a contract under a framework agreement or dynamic purchasing system (regulation 86(5)). In addition, an authority may withhold information that it is required to notify where the release of such information would impede law enforcement or would otherwise be contrary to the public interest; would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or might prejudice fair competition between economic operators (regulation 86(6)).

The notification requirements are to be accompanied by a standstill period: the authority must not enter into the contract or conclude the framework agreement before the end of the standstill period (regulation 87(1)). The standstill period is 10 days where the award notice is sent by facsimile or electronic means (reg.87(2)), and there is a slightly longer period where other means of communication are used: “the standstill period ends at whichever of the following occurs first: (a) midnight at the end of the 15th day after the relevant sending date; (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it” (regulation 87(3)).

* 1. *- Automatic suspension and interim orders*

Following a legal challenge and the authority becoming aware that the claim form has been issued and that it relates to the authority’s decision to award the contract, where the contract has not been entered into, the authority is not allowed to conclude the contract: “the … authority is required to refrain from entering into the contract” (regulation 95(1)). The suspension continues until either the court brings the requirement to an end by interim order; or the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (regulation 95(2)).

The PCR 2015 also provide for interim orders, orders issued before the full court hearing, including orders (a) bringing to an end the automatic suspension; (b) restoring or modifying that requirement; (c) suspending the procedure; and (d) suspending the implementation of any decision or action taken by the public authority in the course of following such a procedure (regulation 96(1)). To determine whether to bring an automatic suspension to an end, the PCR 2015 explains that the court must consider what the situation would be without automatic suspension, whether it would be appropriate to put in place an order requiring the authority to refrain from entering into the contract (i.e. an interim injunction), and only when it would not be appropriate to make such an interim order may the court bring the automatic suspension to an end (regulation 96(2)). If appropriate, the court may impose undertakings or conditions where the automatic suspension is brought to an end (regulation 96(3))).

The approach the courts took to the exercise of the discretion to award interim injunctions prior to the introduction of automatic suspension remains relevant to the decision to continue the automatic suspension[[47]](#footnote-47), despite a rejection of this approach by the courts in the Republic of Ireland[[48]](#footnote-48). The test, as set out in the House of Lord’s *American Cyanamid* judgment[[49]](#footnote-49) entails consideration of the strength of the applicant’s case (there must be “a serious issue to be tried”)[[50]](#footnote-50); the adequacy of damages[[51]](#footnote-51), including the applicant’s cross-undertaking in damages, whereby the applicant must undertake to cover damages incurred by the other side due to the suspension if the applicant is subsequently unsuccessful at full trial (permissible under regulation 96(3) PCR 2015)[[52]](#footnote-52); and the “balance of convenience”, which includes considerations such as the importance of the remedy of review, advantages/disadvantages if the suspension is not lifted, and advantages/disadvantages if the suspension is lifted, and also the strength of the case[[53]](#footnote-53).

* 1. *- Remedies*

The remedies available under the PCR 2015 vary according to whether or not the contract has been entered into. If a contract has not yet been entered into, the court may order the setting aside of the decision or action concerned, order the authority to amend any document, and/or award damages (regulation 97(2)). If a contract has been entered into, the main remedy is damages (regulation 98(2)). The PCR 2015 also provides for the ineffectiveness remedy, and related penalties (see regulation 102), for cases where the contract has been entered into (regulation 98(2)).

According to regulation 97(2), a court may order that a decision or action in violation of the PCR 2015 be set aside, i.e. it will have no legal effect, or may order an authority to amend any document. These remedies are not available where a contact has been concluded (regulation 97). Like interim orders, these remedies are discretionary[[54]](#footnote-54). subject to the general requirement that the remedies system is effective[[55]](#footnote-55).

The remedy of damages is available regardless of whether the contract has been entered into or not (see regulations 97 and 98). The precise availability and measure of damages has been left to the courts to determine, subject to the overarching EU principle of effectiveness, and the CJEU has held that an authority does not need to be at fault for damages liability[[56]](#footnote-56). A breach of the regulations is a tort, breach of statutory duty, and therefore the aim of damages is to put the claimant, economic operator, in the position it would have been in had the tort not been committed. The leading authority on damages in public procurement is the House of Lords judgment, *Harmon CFEM Facades (UK) Limited v The Corporate Officer of The House of Commons*[[57]](#footnote-57)*.* The judgment appears to suggest a hybrid approach to the calculation of damages, entailing the balance of probabilities approach, where only the full amount of any loss may be recoverable, and loss of chance, where damages are awarded to reflect the likelihood of the claimant realising a benefit (e.g winning the contract) had the breach not deprived it of the opportunity. In *Harmon*, it was accepted that full damages for lost profits were recoverable where the claimant can show that it would have won the disputed contract. However, where it is not “almost certain” that the claimant would have won, the loss of chance rule should be applied, meaning that if the claimant had only a 70% chance of success it would be able to recover only 70% of the lost profits[[58]](#footnote-58). In addition, the claimant was entitled to recover bid costs because it had a “real and substantive chance” of being awarded the contract[[59]](#footnote-59).

The PCR 2015 also provides for the remedy of “ineffectiveness” (see regulations 98 and 99-103). In the UK ineffectiveness operates so that a contract is prospectively rather than retrospectively ineffective from the time of the declaration (regulation 101). The courts have yet to use this new remedy in England and Wales[[60]](#footnote-60).

There are three grounds for ineffectiveness (regulation 99(1)). The first is where there has been a failure publish a contract notice (regulation 99(2)). In this situation, the remedy will not apply where this is permitted under the PCR 2015, and ineffectiveness can be avoided if the authority publishes a voluntary transparency notice (regulation 99(4)) expressing its intention to enter into the contract and then waits 10 days before concluding the contract (regulation 99(3)). The second ground is where the contract has been entered into in breach of the standstill requirement, the automatic suspension rules, or an interim order (regulation 99(5)). The violations must also be accompanied by a further procedural infringement of the rules of the PCR 2015 (regulation 99(5)(b)), which affected the chances of the economic operator obtaining the contract (regulation 99(5)(d)), and the failure to comply with the rules on standstill, automatic suspension and/or an interim order/s must have deprived the economic operator of the possibility of starting proceedings in respect of the procedural violations or pursuing them to a proper conclusion, before the contract was entered into (regulation 99(5)(c)). The third ground is where there has been a breach of rules relating to framework agreements and dynamic purchasing systems (regulation 99(6) and (7)).

The court may refuse to grant ineffectiveness under any of the grounds where overriding reasons relating to the general interest require that effects of the contract should be maintained (regulation 100(1)). Here, overriding reasons may include a consideration of economic interests in the effectiveness of the contract, but only in exceptional circumstances (regulation 100(2)), and economic interests directly linked to the contract cannot constitute overriding reasons relating to the general interest (regulation 100(3)).

The PCR 2015 also provides for alternative penalties, in addition to, or instead of, ineffectiveness (regulation 102). A court that makes a declaration of ineffectiveness must also impose a civil financial penalty on the public authority (regulation 102(1)). For cases where ineffectiveness has not been granted, but where grounds for ineffectiveness apply (i.e. under regulation 100 above), or cases where a court does not make a declaration of ineffectiveness (e.g. because it was not sought by the economic operator), but is satisfied that the contract has been entered into in breach of standstill, automatic suspension or an interim order, the court must order one or more[[61]](#footnote-61) of the following penalties: contract shortening and a civil financial penalty (regulation 102(2) and (3)). These civil financial penalties ordered by the High Court under regulation 102 are, according to regulation 102(7), to be payable to the Minister for the Cabinet Office (government department)[[62]](#footnote-62), and following payment by the authority the minister must pay the funds into the Consolidated Fund (regulation 102(7)), i.e. the government’s general bank account at the Bank of England[[63]](#footnote-63). If the authority concerned happens to be Cabinet Office, the payment is to be made directly to the Consolidated Fund (regulation 102(8)), and where the authority is a non-Crown body any civil financial payment owed under regulation 102(7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister (regulation 102(11)). In relation to contract shortening orders under regulation 102(3), the court may make additional orders that it thinks are appropriate for addressing the consequences of shortening the duration of the contract (regulation 102(12)), e.g. to address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances (regulation 102(13)). If the parties to the contract have prepared for the possibility of a contract shortening order and it is addressed in the contract, the court must not make an order inconsistent with the contractual provisions unless and to the extent that the court considers that those provisions are incompatible with the contract shortening order that is being made, or has been made, under regulation 102(3)(a) (regulation 102(14) and (15))[[64]](#footnote-64).

* 1. *- Public contracts not governed by PCR 2015*

The system for review and remedies is different for contracts which fall outside the scope of PCR 2015. There are a number of potential claims open, including in tort for breach of statutory duty (e.g. a breach of the European Communities Act 1972 due to an infringement of Treaty rules), negligence (e.g. lack of care in evaluation); the tort of deceit (e.g. where a public authority had no intention of holding a fair competition); and the tort of misfeasance in public office[[65]](#footnote-65). Here, there are no specific standing requirements, the claimant must establish the ingredients of the tort on a balance of probabilities, and time limits for challenging are governed by the Limitation Act 1980[[66]](#footnote-66). There could also potentially be a claim under the common law for breach of an implied contract, as established in *Blackpool and Flyde Aero Club v BC*[[67]](#footnote-67)*.* For these common law claims the remedies available will be limited to general private law remedies (which are available inside and outside the scope of the PCR 2015), damages, injunction and declaration[[68]](#footnote-68). The Crown Proceedings Act 1947, section 21, establishes a general immunity for the Crown from remedies including injunction[[69]](#footnote-69). This section does not apply under the PCR 2015 (regulation 104), and it is submitted that this must also be the situation in relation to procurement outside the scope of the directives, under the TFEU[[70]](#footnote-70).

There are also potentially public law remedies available, additional to the general private law remedies mentioned above, via a judicial review action. These public law remedies (or “prerogative orders” are (i) a quashing order, (ii) a mandatory order, and (iii) prohibiting order. However, the courts have traditionally viewed public procurement as outside the scope for judicial review, and the courts tend to be reluctant to allow these claims, requiring an additional (uncertain) "public law element"[[71]](#footnote-71). To have standing to bring a judicial review action an individual or organisation must have a “sufficient interest” in the matter to which the judicial review relates, though an economic operator/bidder will need to show that no other appropriate or adequate remedy is available (e.g. under the PCR 2015)[[72]](#footnote-72). The limitation periods in judicial review, which are generous (three months)[[73]](#footnote-73) in comparison to the PCR 2015, have been shortened, for procurements regulated by the PCR, to correspond with PCR time limits (30 days)[[74]](#footnote-74). A judicial review will be heard in the Administrative Court, a subdivision of the Queen’s Bench Division of the High Court in England, Wales and Northern Ireland, and the Court of Session will be the review forum in Scotland.

The remit of the Parliamentary Ombudsman (Parliamentary Commissioner for Administration)[[75]](#footnote-75) and the Local Government Ombudsman (the Commission for Local Administration)[[76]](#footnote-76) in England does not extend to public procurement[[77]](#footnote-77).

* 1. *. - The Freedom of Information Act 2000*

In addition to the transparency rules under the PCR 2015, the Freedom of Information Act 2000[[78]](#footnote-78) provides a general right of access to information held by public authorities (section 1), which is regularly utilised in public procurement litigation, e.g. to obtain information on award procedures and the content of public contracts, and can be used at any stage, during an award procedure or afterwards[[79]](#footnote-79). The Act’s right to information is, however, subject to numerous exemptions, including prejudice to the effective conduct of public affairs (s.36), information provided in confidence (section 41), commercial interests (section 43), and prohibitions on disclosure (s.44). The Information Commissioner’s Office deals with complaints where authorities may have failed to respond correctly to requests for information, and there is an Information Rights Tribunal for appeals from the Commissioner. In addition to the Freedom of Information Act, other relevant disclosure obligations include the Environmental Information Regulations 2004[[80]](#footnote-80), which transposes Directive 2003/4/EC[[81]](#footnote-81) into domestic law.

1. Actions relating to the performance phase of the public contract

The performance phase of a public contract in England and Wales is a matter of private law, the law of obligations[[82]](#footnote-82).

In view of the modern nature of public service provision, e.g. the expansion of privatisation and prevalence of contracting-out, the extent to which economic operators performing public contracts are to be subject to public law, judicial review and human rights law is a controversial matter, and uncertain[[83]](#footnote-83). The Human Rights Act 1998[[84]](#footnote-84), section 6, makes it unlawful for a public authority to act in a way which is incompatible with the rights of the European Convention on Human Rights. The Act extends “public authority” to cover “any person certain of whose functions are functions of a public nature” (s.6(3)9b)), but makes clear that “a person is not a public authority … if the nature of the act is private” (s.6(5))[[85]](#footnote-85).

The duty under the Freedom of Information Act, discussed above, applies, in addition to information held by the authority itself, to information held on its behalf by another (section 3(2)(b), which may include information held by economic operators performing government contracts[[86]](#footnote-86).

1. Actions relating to controls over public contracts
	1. *Mystery Shopper*

In February 2011, the government launched the Mystery Shopper, as part of measures intended to enable better access to public contracts for small and medium sized enterprises[[87]](#footnote-87). The scheme is operated by the Mystery Shopper Service, previously the Supplier Feedback Service, which is part of the Crown Commercial Service, an executive agency and trading fund of Cabinet Office (central government department). The scheme provides an alternative option for suppliers that are aggrieved by the procurement practices and processes of a public authority, putting in place complaints system. The Mystery Shopper Service will investigate complaints that fall within the remit of the scheme, and, the supplier will be given the option of anonymity. The public authority will not be sanctioned; following the identification of poor procurement practice, the Mystery Shopper Service will work with individual authorities “to put them right, and help ensure similar cases do not arise in future”[[88]](#footnote-88). The Mystery Shopper Service is also concerned to “take action to reduce the likelihood of similar issues arising in other authorities” and “identify examples of good practice that we can share with other authorities”, and multiple general guidance documents have resulted from the findings of investigations[[89]](#footnote-89).

In March 2012 the scope and remit of the scheme was extended to include supply chain problems between prime contractors and sub-contractors, and, in February 2014, the scheme was extended again to include spot checks on procurement processes.

In 2015, the service was strengthened by the Small Business Enterprise and Employment Act[[90]](#footnote-90), section 40, which came into force 26 May 2015, providing a statutory footing for mystery shopper investigations: “A Minister may investigate the exercise by a contracting authority of relevant functions relating to procurement” (section 40(2)). These investigations may also include an investigation of preparations for the exercise of a relevant function relating to procurement, and the management of a contract entered into in the exercise of such a function (section 40(6)).

Section 40 applies to “contracting authorities”, which covers the same public authorities as the PCR 2015 (section 39(3)), though there are exceptions, including authorities which have “wholly or mainly devolved functions” (Scotland, Northern Ireland or Wales devolved functions) (s.39(4)); schools and academies (section 39(7)); and functions relating to the procurement of health care services for the purposes of the National Health Service (section 39(7)).[[91]](#footnote-91) Also, section 40 does not apply to a Minister of the Crown or a government department (section 39(5)); however, guidance issued by the Crown Commercial Service provides that “whilst not covered … central government departments, their arms-length bodies and non-departmental public bodies are still expected to comply with Mystery Shopper investigations through normal interdepartmental cooperation”[[92]](#footnote-92). The Act provides that a minister may require “by notice” an authority to provide documents or other information for the purposes of an investigation” (section 40(3)), and authorities have 30 days to comply with such a notice (section 40(4)). The Act also obliges authorities assist with investigations (“as is reasonable in all the circumstances of the case”) (section 40(4)).

The Act also provides that a person conducting an investigation under this section may publish the results of the investigation (section 40(8)). Since the scheme’s launch, the results of cases have been published online[[93]](#footnote-93). There have also been two progress reports,[[94]](#footnote-94) and the government reports positively on the scheme:

By February 2015, the Mystery Shopper service had investigated 818 cases: 4 out of 5 of these resulted in a positive outcome where changes are made to existing procurements or recommendations are accepted for future contracts. These outcomes included government changing current or planned procurements, or the supplier gaining a better understanding of the procurement process. Mystery Shopper also made 511 spot checks of procurement opportunities advertised on Contracts Finder[[95]](#footnote-95).

* 1. *Anti-competitive behaviour*

Anti-competitive activity is regulated under article 101 TFEU and/or chapter one of the Competition Act 1998[[96]](#footnote-96), for anti-competitive agreements and concerted practices, and article 102 and /or chapter two of the Competition Act 1998, for abuse of market power. The EU rules may be enforced by the European Commission under Regulation 1/2003[[97]](#footnote-97), and the Competition and Markets Authority (the UK’s National Competition Authority), and the Competition and Markets Authority may also enforce the Competition Act 1998. In addition to administrative sanctions, cartel behaviour, such as bid rigging, may be prosecuted through the criminal courts[[98]](#footnote-98). In England and Wales, the cartel offence is triable either in the Magistrates’ Court (summary trial), where an offender may receive a maximum sentence of six months’ imprisonment and/or a fine up to the statutory maximum, or before a jury in the Crown Court (trail on indictment), where, an offender may receive a maximum of five years’ imprisonment and/or an unlimited fine (section 190). There is also scope for the disqualification of directors where a company is in breach of competition law, and the courts consider that a person’s conduct as a director makes him/her unfit to be concerned in the management of a company[[99]](#footnote-99).

The competition law rules may also be enforced by private individuals in national courts. In England and Wales action may be brought in the High Court or a special tribunal, the Competition Appeals Tribunal, which has recently been strengthened to make it a more attractive option for litigants[[100]](#footnote-100).

* 1. *Bribery and corruption*

The criminal law may also be engaged under specific legislation, such as the Bribery Act 2010[[101]](#footnote-101), the Fraud Act 2006[[102]](#footnote-102), the Representation of the People Act 1983[[103]](#footnote-103), and the common law offence of misconduct in public office. In particular, the Bribery Act 2010 contains offences for “bribing another person” (“active bribery”) (section 1) and offences “relating to being bribed” (“passive bribery”) (section 2), and there is no need for proof of corruption or dishonesty. There is also an offence for “failure of commercial organisations to prevent bribery” (section 7). There is also legislation in place to protect whistle-blowers: the Public Interest Disclosure Act 1998[[104]](#footnote-104), and for “civil servants” the Civil Service Code has a statutory basis under Part 1 of the Constitutional Reform and Governance Act 2010[[105]](#footnote-105).

The rules on debarment are found in regulation 57 PCR 2015, and these rules implement the rules in the 2014 Directive (article 57). As such, there are mandatory grounds for exclusion where authorities must exclude, discretionary grounds where authorities may choose whether or not to exclude, and there are also legal rules on “self-cleaning” (regulation 57(13)-(17)). There are no central lists of excluded suppliers.

* 1. *Audit*

The National Audit Office, an independent parliamentary body, has the role of scrutinising public spending for UK Parliament[[106]](#footnote-106). The NAO audits the accounts of all government departments and a wide range of other public bodies. The NAO works closely with the Committee of Public Accounts, a parliamentary committee tasked with scrutinising the value for money of public spending and concerned to hold the government and its civil servants to account for the delivery of public services[[107]](#footnote-107).

In March 2015, following the closure of the Audit Commission[[108]](#footnote-108), which had been responsible the auditing of local public authorities in England and Wales, a new local audit framework (processes and procedures) was established[[109]](#footnote-109). The new framework entails a new organisation, the Public Sector Audit Appointments Ltd, which will take on the existing audit contracts until they expire in 2017; the National Audit Office will set the standards for public audit; the Financial Reporting Council and professional accountancy bodies will monitor the quality of audit; and the Cabinet Office will assume responsibility for the National Fraud Initiative. There will also be new, mandatory transparency requirements for the smallest local councils.

1. Scotland Act 1998 (c.46); Northern Ireland Act 1998 (c.47); Government of Wales Act 1998 (c.38); Government of Wales Act 2006 (c.32). [↑](#footnote-ref-1)
2. S. Arrowsmith, *The law of public and utilities procurement: Regulation in the EU and UK,* London, Sweet & Maxwell, 2e ed., 2014, volume 1, 2-04-2-07 ; S. Arrowsmith, “Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance” *Public Procurement Law Review* (*PPLR*) 3, 2006, p.86 ; P. Henderson, “The impact of devolution on public procurement in the United Kingdom” *Public Procurement Law Review* 4, 2003, p.175. [↑](#footnote-ref-2)
3. European Communities Act 1972 (c. 68); Treaty of Accession of Denmark, Ireland and the United Kingdom (1972), OJ L 73, 27.3.1972. [↑](#footnote-ref-3)
4. SI 2015/102. [↑](#footnote-ref-4)
5. Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65. [↑](#footnote-ref-5)
6. Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC), [1989] OJ L395/33. [↑](#footnote-ref-6)
7. Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, [2007] OJ L335/31. [↑](#footnote-ref-7)
8. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L 134/114 ; and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992] OJ L 076/14. The Utilities Contract Regulations 2006 (SI 2015/6) transpose this directive for England, Wales and Northern Ireland. [↑](#footnote-ref-8)
9. Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L 216/76. The Defence and Security Public Contracts Regulations 2011 (SI 2011/1848). [↑](#footnote-ref-9)
10. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L 94/243. [↑](#footnote-ref-10)
11. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, [2014OJ L 94/1. [↑](#footnote-ref-11)
12. Art.51, Directive 2014/23/EU; and Art.106, Directive 2014/25/EU (see also Art.90, Directive 2014/24/EU). [↑](#footnote-ref-12)
13. SI 2012/88. [↑](#footnote-ref-13)
14. See S. Arrowsmith (2015) and S. Arrowsmith (2006), *supra*, note 2. [↑](#footnote-ref-14)
15. <https://www.gov.uk/contracts-finder> (accessed 25 March 2016). [↑](#footnote-ref-15)
16. Chapters 7-9, PCR 2015. [↑](#footnote-ref-16)
17. Local Government Act 1999 (c. 27). See also section 17 of the Local Government Act 1988 (c. 9), which excludes non-commercial considerations in local authority contracting. See S. Arrowsmith (2015), *supra*, note 2, para. 2-15. [↑](#footnote-ref-17)
18. Public Services (Social Value) Act 2012 (c. 3). [↑](#footnote-ref-18)
19. National health Service (Procurement, Patient Choice and Competition) No.2 Regulations 2013 (SI 2013/500). [↑](#footnote-ref-19)
20. SI 2006/5. [↑](#footnote-ref-20)
21. Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114. [↑](#footnote-ref-21)
22. See generally S. Arrowsmith, The law of public and utilities procurement, London, Sweet & Maxwell, 2nd ed., 2005, chapter 21; European Commission, *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts, Final Study Report, MARKT/2013/072/C* (Luxembourg: Publications Office of the EU, April 2015), country fiches, 1.28 UK; M. Trybus, “An overview of the United Kingdom public procurement review and remedies system with an emphasis on England and Wales”, in S. TREUMER and F. LICHERE, *Enforcement of the EU Public Procurement Rules* (Copenhagen: DJØF Publishing, 2011), chapter 6. [↑](#footnote-ref-22)
23. Regulation 85, PCR 2015. [↑](#footnote-ref-23)
24. Article 1(1), Remedies Directive. [↑](#footnote-ref-24)
25. According to S. Arrowsmith and Craven … [↑](#footnote-ref-25)
26. D. Pachnou, “Bidders' use of mechanisms to enforce EC procurement law”) 14 PPLR 256, 2005, p. 258-259. [↑](#footnote-ref-26)
27. *Ibid*, 258 and 259. [↑](#footnote-ref-27)
28. *Ibid*, 258. [↑](#footnote-ref-28)
29. See Commission Remedies Report (2015), *supra*, note 22, country fiches, 1.28 UK; and *Annual Report of the Technology and Construction Court 2013–14* (March 2015), <https://www.judiciary.gov.uk/publications/technology-and-construction-court-annual-report-2013-2014/>(Accessed March, 16 2015). [↑](#footnote-ref-29)
30. The High Court (Northern Ireland) is located at the Royal Courts of Justice in Belfast. [↑](#footnote-ref-30)
31. The TCC reports that between October 2013 and October 2014 these regional centers processed approximately 51 public procurement cases. There are no similar figures given for the London TCC. See TCC Annual Report (2015), supra, note 29, 11. [↑](#footnote-ref-31)
32. D. Pachnou, (2005), *supra*, note 26, 258. [↑](#footnote-ref-32)
33. The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 (SI 2015/576); and HM Courts and Tribunal Service, *Civil and Family Court Fees from 6 April 2015* (EX 50). [↑](#footnote-ref-33)
34. The Civil Proceedings Fees (Amendment) Order 2014 (SI 2014/874 (L17). [↑](#footnote-ref-34)
35. Civil Procedure Rules (SI 1998/3132), Part 52. [↑](#footnote-ref-35)
36. Constitutional Reform Act 2005 (c. 4). [↑](#footnote-ref-36)
37. The Public Contracts (Scotland) Regulations 2012 (SI 2012/88), regulation 47(5). See C. Boch, “The implementation of the Public Procurement Directives in the UK: devolution and divergence?” (2007) 6 PPLR 410 [↑](#footnote-ref-37)
38. See Courts Reform (Scotland) Act 2014 (asp 18) [↑](#footnote-ref-38)
39. The Scottish Government, *Changes to the public procurement rules in Scotland consultation - an analysis of the responses* (August 2015), [*http://www.gov.scot/Publications/2015/08/1618/downloads*](http://www.gov.scot/Publications/2015/08/1618/downloads) (Accessed March 16, 2016), p.71-78 and 82. [↑](#footnote-ref-39)
40. The Public Contracts (Amendment) Regulations 2009 (SI 2009/2992). [↑](#footnote-ref-40)
41. There have been cases on this in Scotland. See *Gillen v Inverclyde Council and Flosshaul Ltd v Inverclyde Council* [2010] CSOH 19. [↑](#footnote-ref-41)
42. CPR, *supra*, note 35; see in relation to the TCC see HM Courts & Tribunal Service, *Technology and Construction Court guide*, 2nd ed., (issued 3rd October 2005, third revision with effect from 3 March 2014). See also Arrowsmith (2015), fn. X above, 13-72 in relation to public procurement law and disclosure obligations in public procurement litigation in England and Wales. [↑](#footnote-ref-42)
43. Case C-406/08, *Uniplex (UK)* [2010] ECR I-00817. [↑](#footnote-ref-43)
44. The limitation period runs until whichever of the following periods ends first: (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision; (ii) 10 days beginning with (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons (regulation 92(3)(b)). [↑](#footnote-ref-44)
45. Public Contracts Regulations 2006, regulation 47(7) (the requirement was removed by the Public Procurement (Miscellaneous Amendments) Regulations 2011 (SI 2011/2053)). [↑](#footnote-ref-45)
46. See S. Arrowsmith (2005), *supra*, note 22, 21.43-21.46, citing *Keymed (Medical and Industrial Equipment) v Forest Healthcare NHS Trust* [1998] *EuLR* 71; *Matra Communications SA v Home Office* [1999] 1 WLR 1646; *Resource Management Services v Westminster City Council* [1999] CMLR 849; *Jobsin Internet Services v Department of Health* [2002] 1 CMLR 44, [2001] EWCA Civ 1241; *Luck (t/a G Luck Aboricultural & Horticultural) v Tower Hamlets LBC* [2002] EWHC 717; *Holleran v Severn Trent Water* [2004] EWHC 2508; [2005] *EuLR* 364. [↑](#footnote-ref-46)
47. See, for example, *Exel Europe v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332. [↑](#footnote-ref-47)
48. *OCS One Complete Solution Limited v Dublin Airport Authority plc and Maybin Support Services (Ireland) Ltd (Notice Party)* [2014] IEHC 306. [↑](#footnote-ref-48)
49. *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 at 407G; and, see also, Laddie J in *Series 5 Software v. Clarke* [1996] 1 All ER 853 at 865. [↑](#footnote-ref-49)
50. See, for instance, *Group M UK Ltd v Cabinet Office* [2014] EWHC 3659, para.18-39. [↑](#footnote-ref-50)
51. See for example *McLaughlin and Harvey v Department of Finance and Personnel* (No.1)[2008] NIQB 25, paras 9-10; *Exel Europe*, *supra*, note 47; *NATS v Gatwick Airport* [2014] EWHC 3133; *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922, paras 39-48; *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876, para. 49-62 [↑](#footnote-ref-51)
52. See *Halo Trust v Secretary of State for International Development* [2011] EWHC 87 [↑](#footnote-ref-52)
53. For illustration of the considerations weighed up at this stage see *Group M, supra*, note 50**;** *Advanced Business Software and Solutions Ltd v The Pirbright Institute* [2014] EWHC 4651; *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 ; *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 ; R v HM Treasury ex parte Edenred [2014] EWHC 3555; *DWF LLP v Secretary of State for Business, Innovation and Skills, acting on behalf of the Insolvency Service* [2014] EWCA Civ 900 ; *Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland* [2009] NICh 3; *Rutledge Recruitment and Training v Department for Employment and Learning* [2011] NIQB 61; *BFS v Secretary of State for Defence* [2006] EWHC 1513; *DeVilbiss Medequip Ltd v NHS Purchasing and Supply Agency* [2005] EWHC 1757. [↑](#footnote-ref-53)
54. *Severn Trent v Dwr Cymru* ([2001] Eu.L.R. 136; *Mears v Leeds City Council* (second judgment) [2011] EWHC 1031. [↑](#footnote-ref-54)
55. Case C-225/97, *Commission v. France Republic* [1999] ECR I-3011. [↑](#footnote-ref-55)
56. Case C-275/03, Commission v Portugal (14 October 2004) (not published in the ECR). [↑](#footnote-ref-56)
57. *Harmon CFEM Facades (UK) Limited v The Corporate Officer of The House of Commons* 67 Con LR 1. See also S. Arrowsmith, ‘EC procurement rules in the UK courts: an analysis of the Harmon case: Part 1’ (2000) 3 *PPLR* 120; S. Arrowsmith, ‘E.C. procurement rules in the U.K. courts: an analysis of the Harmon case: Part 2’ (2000) 4 *PPLR* 135. [↑](#footnote-ref-57)
58. Ibid, para. 266 [↑](#footnote-ref-58)
59. Ibid, para. 307 [↑](#footnote-ref-59)
60. Though, in relation to Scotland, see *Lightways (Contractors) Ltd v Inverclyde Council* [2015] CSOH 169. [↑](#footnote-ref-60)
61. According to regulation 102(4), the overriding consideration is that the penalties must be effective, proportionate and dissuasive, and under regulation 102(5), in determining the appropriate order, the Court must take account of all the relevant factors, including (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 89 or 90; (b) the behaviour of the contracting authority; (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force. [↑](#footnote-ref-61)
62. This is the Department of Finance and Personnel for contracting authorities in Northern Ireland. [↑](#footnote-ref-62)
63. <http://www.parliament.uk/site-information/glossary/consolidated-fund/> (accessed 25 March 2016). [↑](#footnote-ref-63)
64. Regulation 103 is concerned with ineffectiveness and alternative penalties in relation to specific contracts based on framework agreements. [↑](#footnote-ref-64)
65. WVH Rogers, *Winfield & Jolowicz: Tort*, Sweet & Maxwell, 18th ed., 2010. [↑](#footnote-ref-65)
66. Limitation Act 1980 (c. 58). [↑](#footnote-ref-66)
67. [1990] 1 WLR 1195. See S. Arrowsmith (2015), *supra*, note X, 2.162-2.173. [↑](#footnote-ref-67)
68. See S. Arrowsmith (2005), *supra*, note 2, 21.2. [↑](#footnote-ref-68)
69. This may not be the case in relation to a minister who acts under legislative powers conferred upon the minister himself (see S. Arrowsmith (2005), *supra*, note 2 above, 21.2, citing M v Home Office [1994] 1 AC 377 and P Craig, *Administrative law*, London, Sweet & Maxwell, 6th ed., 2008. [↑](#footnote-ref-69)
70. M. Trybus (2011), fn.x above, 206. [↑](#footnote-ref-70)
71. E. Aspey, ‘The search for the true public law element: judicial review of procurement decisions’ (2016) *Public Law* 35; S. Bailey, ‘Judicial review of contracting decisions’ [2007] PL 444; S. Arrowsmith, “Judicial review and the contractual powers of public authorities" *Law Quarterly Review*, 106, 1990, p.277. [↑](#footnote-ref-71)
72. *Cookson and Clegg Ltd v Ministry of Defence* [2005] EWCA Civ 811, para 20. [↑](#footnote-ref-72)
73. CPR, rule 54.5. [↑](#footnote-ref-73)
74. The Civil Procedure (Amendment No. 4) Rules 2013 (SI 2013/ 1412 (L. 14)). [↑](#footnote-ref-74)
75. Parliamentary Commissioner Act 1967 (c. 13). [↑](#footnote-ref-75)
76. Local Government Act 1974 (c. 7). [↑](#footnote-ref-76)
77. See S. Arrowsmith (2005), *supra*, note 2, 2.94; M. McDonagh, “Disclosure of information relating to public procurement: the role of freedom of information law” 3 *PPLR* 172, 2002; Amos & McDonagh, *Freedom of information and procurement: a practical guide for authorities* , the Constitution Unit, Nov. 2004; Office of Government Commerce, *FOI (Civil Procurement) Policy and Guidance* (November 2008); Information Commissioner’s Office, Public Contract Regulation, <https://ico.org.uk/media/for-organisations/documents/1212/public-contract-regulations-foi-eir.pdf> (accessed 25 March 2016). [↑](#footnote-ref-77)
78. (c. 36). [↑](#footnote-ref-78)
79. See S. Arrowsmith (2015), fn.X above, 13-78 [↑](#footnote-ref-79)
80. SI 2004/3391. [↑](#footnote-ref-80)
81. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003] OJ L 41/ 26. [↑](#footnote-ref-81)
82. Harlow & Rawlings, *Law and Administration*, 3e ed., CUP, 2009, p.343. [↑](#footnote-ref-82)
83. See A. Davies, *The public law of government contracts*, Oxford, OUP, 2008. [↑](#footnote-ref-83)
84. (c. 42). [↑](#footnote-ref-84)
85. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228957/7726.pdf> [↑](#footnote-ref-85)
86. See S. Arrowsmith (2015), fn.X above, 13-82 [↑](#footnote-ref-86)
87. Crown Commercial Service, *Scope and remit of the Mystery Shopper Service* (Cabinet Office, 2016). [↑](#footnote-ref-87)
88. <https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit> (accessed 25 March 2016) [↑](#footnote-ref-88)
89. *ibid.* [↑](#footnote-ref-89)
90. (c. 26). [↑](#footnote-ref-90)
91. Services regulated by the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500). [↑](#footnote-ref-91)
92. Crown Commercial Service, *Procurement Policy Note – Requirements for contracting authorities to assist with procurement investigations* (Information Note 09/15) (1 June 2015) [↑](#footnote-ref-92)
93. See https://www.gov.uk/government/collections/mystery-shopper-results (accessed 25 March 2016). From July 2014 onwards results are updated every 2 weeks. [↑](#footnote-ref-93)
94. <https://www.gov.uk/government/publications/mystery-shopper-progress-reports> (accessed 25 March 2016) [↑](#footnote-ref-94)
95. <https://www.gov.uk/guidance/doing-business-with-government-a-guide-for-smes#mystery-shopper-service> (accessed 25 March 2016) [↑](#footnote-ref-95)
96. (c. 41) [↑](#footnote-ref-96)
97. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 [↑](#footnote-ref-97)
98. S.188 The Enterprise Act 2002 (c. 40), amended by the Enterprise and Regulatory Reform Act 2013 (c. 24), provides for a cartel offence. [↑](#footnote-ref-98)
99. Company Directors Disqualification Act 1986 (c. 46), section 9A-9E (inserted by the Enterprise Act 2002) [↑](#footnote-ref-99)
100. Consumer Rights Act 2015 (c. 15). [↑](#footnote-ref-100)
101. (c. 23). [↑](#footnote-ref-101)
102. (c. 35). [↑](#footnote-ref-102)
103. (c. 2). [↑](#footnote-ref-103)
104. (c. 23). [↑](#footnote-ref-104)
105. (c.25). [↑](#footnote-ref-105)
106. <https://www.nao.org.uk/freedom-of-information/publication-scheme/who-we-are-and-what-we-do/> (accessed 25 March 2016). [↑](#footnote-ref-106)
107. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/> (accessed 25 March 2016) [↑](#footnote-ref-107)
108. Local Audit and Accountability Act 2014 (c.2). [↑](#footnote-ref-108)
109. <https://www.gov.uk/government/collections/local-audit-framework-replacing-the-audit-commission> (accessed 25 March 2016). [↑](#footnote-ref-109)