

PROCUREMENT PROCEDURES UNDER THE PRIVATE FINANCE INITIATIVE:
THE OPERATION OF THE NEW LEGAL FRAMEWORK

1. INTRODUCTION

The author is in the early stages of qualitative empirical research into the impact of the new competitive dialogue contract award procedure on procurement practice in the United Kingdom. The author is concerned to explore, using semi structured interviews, the way in which the new legal framework for competitive dialogue is applied in practice to complex projects in the UK, and actors' perceptions of that framework. The research project will identify perceived positive aspects of the framework in facilitating best practice; perceived problems, including any legal uncertainty and constraints on best practice; strategies to conduct the process within the constraints; and the factors that influence compliance and the approach to legal risk.

The research is informed by socio legal theories on regulation and compliance. This conference paper will present a selection of the literature on regulatory compliance, using it to help us better understand possible factors which may be found to influence UK contracting authorities in their approach to competitive dialogue. The paper will begin with an introduction to competitive dialogue. It will be explained that there are a number of legal grey areas where it is not clear to what extent past practices for the procurement of complex contracts (notably projects procured under the UK's Private Finance Initiative) in the UK may be continued. The paper will select one of the legal grey areas, namely the requirement for the submission of relatively complete final tenders, and will then proceed to discuss the literature on regulatory compliance with this key issue in mind.

A number of studies have highlighted low levels of compliance with EU public procurement regulation.¹ Despite the considerable amount of empirical research into regulatory compliance, however, there are surprisingly few empirical studies looking into the reasons behind the compliance behaviour of contracting authorities. Quantitative research carried out by Gelderman et al.² is one of the few empirical studies into the factors motivating compliance/non-compliance with the Public Sector Directive 2004/18.³ This study analysed data from questionnaires complete by 147 purchasing professionals in the Dutch Ministry of Defence in order to ascertain which of the following factors were most influential when it came to compliance: (1) authorities' familiarity with the rules, (2) the perceived inefficiency of the rules; (3) internal incentives established by the organisation to comply, and (4) the perceived resistance and readiness of suppliers to take action in cases of non-compliance.⁴ It was found that both familiarity with the rules and organisational incentives could be said to have a positive statistically significant impact on compliance.⁵ No significant impact could be established for the other dimensions. It is hoped that the findings from the qualitative interviews in the main research project will build upon the findings of Gelderman et al. providing an enhanced understanding of compliance with the public procurement rules.

Section Three of the conference paper will outline the classical economic deterrence models of compliance. For many years these were the dominant explanations of

¹ See Cox & Furlong, "European Procurement Rules and National Preference: Explaining the Local Sourcing of Public Works Contracts in the EU in 1993", (1995) 1(2) *Journal of Construction Procurement* 87; de Boer & Telgen, "Purchasing Practice in Dutch Municipalities" (1998) 34(2) *International Journal of Purchasing and Materials Management* 31; Erridge et al., "European Public Procurement Policy and Electronic Commerce: Problems and Opportunities" (1998) 98(5) *European Business* 252; Madsen, P.T., "Re-opening the debate on the lack of impact of EU Tenders on the Openness of Public Procurement" (2002) 5 *Public Procurement Law Review* 265; Nielsen and Hansen, "The EU Public Procurement Regime – Does it Work?", (2001) 36(5) *Intereconomics* 255.

² Gelderman et al., "Public procurement and EU tendering directives – explaining non-compliance", (2006) 19(7) *International Journal of Public Sector Management* 702.

³ DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, L 134/114.

⁴ Gelderman et al. (2006), n.2, pp.705-708.

⁵ Ibid, p.711.

regulatory compliance; however, it is now apparent that compliance behaviour is complex and multi-faceted. Later sections will therefore consider some alternative explanations of compliance, which compliment the classical deterrence models.

2. THE COMPETITIVE DIALOGUE PROCEDURE

The competitive dialogue procedure was introduced by the Public Sector Directive 2004/18 (Arts.1 and 29), and transposed into UK law by the Public Contracts Regulations 2006 (Reg.18).⁶ The new procedure supplements the existing framework of award procedures in the public sector rules, providing a procedure that is intended to be better suited to the needs of complex procurements.

Before January 2006, complex contracts had to be procured using the open or restricted procedures unless the limited grounds justifying use of the competitive negotiated procedure could be satisfied. The open and restricted procedures are highly transparent, but lack flexibility; for example, precise specifications must be drawn up at the outset of the procedure, tenders must be submitted in accordance with these specifications, and there is very little scope for dialogue between parties. Because of this, these procedures will generally not allow for the satisfactory procurement of many complex contracts. In complex procurements it is important if contracting authorities are to maximise value for money that they are able to work with the private sector as much as possible.

Authorities may be unable to precisely determine the best way of meeting their needs without harnessing the skills and expertise of the private sector. For many types of complex contracts authorities want to have the freedom to set out their requirements in terms of outputs to be achieved, leaving it to the private sector bidders to develop innovative and efficient ways of meeting the output requirements.

⁶ The Public Contracts Regulations 2006, S.I. 2006 No.5.

The competitive negotiated procedure is a relatively unstructured procedure, which provides the flexibility sought for complex procurements, but lacks the transparency of the open and restricted procedures. Due to this, it can only be used in a limited set of circumstances. In the UK it became common practice for authorities to procure many complex projects (particularly PFI projects) using the competitive negotiated procedure despite this not in all cases being in compliance with the Commission's strict interpretation of the law.⁷⁸

The competitive dialogue procedure bridges the gap between the open and restricted procedure and the competitive negotiated procedure for complex contracts. According to the preamble to Directive 2004/18 competitive dialogue is "*a flexible procedure ... which preserves not only competition ... but also the need for contracting authorities to discuss all aspects of the contract with each candidate*".⁹ The design of the competitive dialogue is heavily influenced by the UK experience of using the competitive negotiated procedure for PFI procurement.¹⁰ However, it is highlighted by commentators that the new procedure does not correspond in all respects to past UK practice, and that there are several legal grey areas in which it is not clear how far past practice may be continued.¹¹ The present paper will consider one of the more controversial legal grey areas: the requirement for complete final tenders.

2.2. THE REQUIREMENT FOR COMPLETE FINAL TENDERS

⁷ See Braun, P., "Strict compliance versus commercial reality: the practical application of EC public procurement law to the UK's Private Finance Initiative", (2003) 9(5) *European Law Journal* 575.

⁸ See "Tendering Procedures: Commission acts against UK and Germany", (Oct, 2000) Single Market News No.23.

⁹ Recital 31, Directive 2004/18.

¹⁰ See Office of Government Commerce, "Competitive Dialogue Procedure: OGC guidance on the Competitive Dialogue Procedure in the new Procurement Regulations", (January 2006) available at www.ogc.gov.uk, p.3.

¹¹ Arrowsmith, S., "The law of public and utilities procurement", (Sweet & Maxwell, 2nd edn., 2005), para.10.2.

A competitive dialogue procedure formally starts when the contracting authority concerned has the Commission publish a contract notice in the Official Journal of the EU (Reg.18(4)). The contracting authority may select between qualifying firms responding to the notice firms to invite to participate in dialogue (see Regs.18(10)-(18)). During the dialogue, the contracting authority may discuss all aspects of the contract with participants (Reg.18(21)). The dialogue should be continued until the contracting authority can identify the solution/s capable of meeting its needs (Reg.18(24)). At this point the contracting authority must formally declare the dialogue stage closed (Reg.18(25)).

When the dialogue stage is closed the contracting authority is required to hold a formal tendering stage in order to select the most economically advantageous tender (Reg.18(27)). There is no such express requirement for formal tenders in the competitive negotiated procedure, but it had been in the UK for authorities using the procedure to follow negotiations with a best and final offers stage in order to select a provisional winner (a "preferred bidder").

Final tenders in competitive dialogue must contain all elements required and necessary for the performance of the contract (Reg.18(25)(b)). Many consider this to be one of the major changes brought about.¹² Under the competitive negotiated procedure it had been common for authorities to appoint a preferred bidder at a relatively early stage and then engage in substantial contractual negotiations with that one bidder. These negotiations were carried out under little competitive tension; however, it was considered commercially sensible as it meant that only one bidder needed to incur the

¹² See Arrowsmith, S., "An assessment of the new legislative package on public procurement", (2004) 41 *Common Market Law Review* 1277, pp.1286-1290; Brown, A., "The impact of the new Procurement Directive on large infrastructure projects: competitive dialogue or better the devil you know?", (2004) 4 *Public Procurement Law Review* 160, pp.175-176; Charveron, S., "Competitive Dialogue threatens PFI", (2007) 18(7) *Construction Law* 29; Dzakula, P., "Dialogue coach", (2007) 25 *Building*; Kennedy-Loest, C., "What can be done at the preferred bidder stage in competitive dialogue?", (2006) 6 *Public Procurement Law Review* 316;

exceptionally high costs of pulling together the detail of the contract. Under the competitive dialogue, the extent to which such practices remain possible is curtailed. The requirement for complete final tenders will mean that competition is maintained until later in the process. It is intended that this will result in better value offers and speedier completion, but possible negative consequences have been foreseen.¹³ By requiring more than one bidder to prepare a bid up to a point near to financial close, it means that those bidders who are not subsequently successful will incur much higher bid costs than they would have done in the past. Firms may be reluctant to invest their resources into finalising the details of bids when they do not have the certainty of preferred bidder status. It is feared that this may make firms selective about the contracts they bid for and hence may impact negatively on competition. Furthermore, it may be that the competitive tendering phase is resulting in bidders being squeezed to their limits, resulting in problems further down the line.

Detailed due diligence by banks providing the funding for privately financed public contracts generally cannot be carried out until a preferred bidder has been identified. Banks are usually not prepared to incur the cost of this work until their client is the last one left in the process, and it is only at this stage that they will confirm the terms on which they are prepared to lend. The difficulty with this practice is that the detailed due diligence may give rise to issues, as is invariably the case in such complex transactions, that require the winning tender to be modified in certain ways otherwise the bank will not proceed (e.g. banks are often concerned to limit their exposure to risk). In the latter stages of a competitive dialogue banks are generally in a very strong position. Where a project is on the verge of financial close a bank's demands are likely to carry great sway, as having invested considerable time and money an authority is likely to want to avoid

¹³ See, for example, Dzakula (2007), *ibid*.

any further delays, particularly if there is the threat of having to start the procedure from scratch.¹⁴

There is some scope for leaving certain issues to be finalised once a preferred bidder has been selected. According to Reg.18(28) "... the [preferred bidder] may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspect of the tender or the call for tender and does not risk distorting competition or causing discrimination". The provision is not internally consistent. It begins by limiting discussions with a preferred bidder to clarifying and confirming commitments. This gives the impression that there is very little scope for actual changes. The second part of Reg.18(28), however, implies that certain changes are lawful provided they are not substantial. Unfortunately, a substantial modification is not defined.¹⁵

The provision is open to both narrow interpretations (e.g. similar to the limited scope for negotiations in open and restricted procedures) and wide interpretations (e.g. similar to the wide scope for negotiations with preferred bidders in negotiated procedures, as recognised by the Commission in *London Underground*).¹⁶ If the European Court of Justice does get the opportunity to rule upon the scope of Reg.18(28) it will be required to balance the objectives of fair competition and transparency against the commercial necessity in complex procurements for flexibility. It is hoped that the Court will interpret the provision with the complex procurements for which competitive dialogue was designed in mind. This is the approach taken in the Office of Government Commerce and HM Treasury 2008 Joint Guidance, which, although steering away from any definitive

¹⁴ The National Audit Office reports that tendering periods for all PFI deals with a capital value of over £20m that closed between 2004 and 2006 lasted an average of 34 months (National Audit Office, "Improving the PFI tendering process", REPORT BY THE COMPTROLLER AND AUDITOR GENERAL, HC 149 Session 2006-2007 (8 March 2007) available at www.nao.org.uk, p.16.

¹⁵ Arrowsmith (2004), n.12, p.1289.

¹⁶ Commission of the European Communities, Case N 264/2002, *London Underground Public Private Partnership*, Decision of 2 Oct. 2002 (C(2002)3578fin).

interpretation, recognises that it may be valid to resolve some issues when there is only one bidder left in the competition where it would be unduly burdensome to do otherwise.¹⁷ The Guidance also recognises that actual changes to a preferred bidder's bid are inevitable in many complex procurements. It is suggested that where the reasons requiring changes to bids could not have been predicted or anticipated (e.g. changes imposed by banks late on in the process), and provided the situation could not have been avoided by better management, it would not be in anyone's interests for a procurement to fail.

3. COMPLIANCE WITH REGULATION

It would be wrong for the drafters of the Public Sector Directive 2004/18 to assume that compliance with the new legal requirements is an inevitable consequence of their coming into existence.¹⁸ As Robert Baldwin emphasises: "[i]n virtually all fields of regulation and administration there are large numbers of rules that are regularly ignored or disobeyed. In spite of statutes, regulations and codes, rivers continue to be polluted, discrimination still takes place and many workplaces remain unsafe".¹⁹ These claims, which are substantiated by numerous empirical studies,²⁰ have led scholars to consider and

¹⁷ Office of Government Commerce and HM Treasury, "Competitive dialogue in 2008: OGC/HMT joint guidance on using the procedure", (2008) available at www.ogc.gov.uk, p.29.

¹⁸ Amodu, T., "The Determinants of compliance with Laws and Regulations with Special Reference to Health and Safety: A Literature Review", Research Report (RR638) Prepared by the London School of Economics and Political Science for the Health and Safety Executive 2008, p.v; Snellenberg & Peppel, "Perspectives on Compliance: Non-Compliance with Environmental Licences in the Netherlands", (2002) 12 *European Environment* 131, p.131.

¹⁹ Baldwin, R., "Why Rules Don't Work", (1990) 53(3) *Modern Law Review* 321, p.321.

²⁰ See, for instance, Edelman et al., "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma", (1991) 13(1) *Law & Policy* 74; Fairman & Yapp, "Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement", (2005) 27(4) *Law & Policy* 491; Gray & Shadbegian, "When and Why do Plants Comply? Paper Mills in the 1980s", (2005) 27(2) *Law & Policy* 238; Kagan et al., "Explaining Corporate Environmental Performance: How Does Regulation Matter?", (2003) 37(1) *Law & Society Review* 51; May, P., "Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities", (2005) 27(2) *Law & Policy* 317; Thornton et al., "General Deterrence and Corporate Environmental Behaviour" (2005) 27(2) *Law & Policy* 262.

develop ideas as to why in many situations regulatory compliance is far from self evident.

Much of the literature on compliance discusses it from the standpoint of individual members of the public, e.g. compliance with the criminal law, or private corporations, e.g. compliance with environmental, tax, or equal opportunities obligations. For the purposes of this paper we are concerned by what factors motivate and influence UK public authorities to comply with the Public Contracts Regulations 2006. One must be cautious in relating the findings of these studies to the circumstances of public authorities who are not guided by the same profit seeking motives as private sector corporations; however, there remains a lot that can be learned and developed.

3.1 THE CLASSICAL DETERRENCE APPROACH

“Free market” economic explanations have traditionally dominated the literature on regulatory compliance. Under economic deterrence models contracting authorities will comply with the procurement rules where it is in their rational self interest to do so. Under the main deterrence theories, a contracting authority would be expected to base its decision of whether or not to comply with the procedural requirements of the Public Contracts Regulations 2006 in a given situation on the outcome of a cost benefit analysis. They will only comply where the expected detriment from non-compliance (e.g. financial loss from having to pay out damages, the costs involved in defending legal actions, delays to projects, and even negative publicity) exceed the expected benefits deriving from violation (e.g. cost savings).²¹

²¹ Becker, G., “Crime and Punishment: An Economic Approach” (1968) *Journal of Political Economy* 169; Posner, R., “Economic Analysis of Law”, (New York: Aspen Law & Business, 5th ed., 1998); Pyle, D.J., “The Economics of Crime and Law Enforcement” (London: Macmillan, 1983); Stigler, G., “The Optimum Enforcement of Laws”, (1970) 78 *Journal of Political Economy* 526.

Qualitative interviews carried out by Braun in 2001 revealed that public authorities usually weighed the benefits and risks arising from adopting certain procedural decisions in the form of a risk assessment.²² This led Braun to rely upon deterrence theories to understand UK contracting authorities' legally risky PFI procurement practices.²³ For example, Braun argues that the competitive negotiated procedure was often used, even where it was not clear that the derogations for its use were satisfied, because contracting authorities reaped significant benefits from the greater flexibility of the procedure in comparison to the alternative restricted procedure coupled with a perception amongst interviewees of a very low threat of successful legal challenge from either the Commission or aggrieved bidders.²⁴ Braun concluded that, with regard to the essential procedural issue of the availability of the competitive negotiated procedure, the inadequacies of the regime for enforcing the procurement rules had undermined the impact of the law in the PFI context.²⁵

To remedy the above situation, a proponent of deterrence theories would say that in order to secure greater compliance with the procurement rules all that is required is to increase the probability of cases of non-compliance being apprehended and punished and/or increase the severity of punishments so that compliance with Directive 2004/18 becomes the economically rational response. In terms of enhancing our understanding of compliance, the interviews planned in the research project may be quite revealing, as some might argue that the system of remedies in EU procurement law has been strengthened so that this may now be said to have occurred. Firstly, a key change has been brought about by ECJ activism in *Alcatel*.²⁶ The ECJ introduced a 10-day mandatory standstill period between contract award and conclusion. In the UK when a contract has been concluded it can no longer be set aside and therefore a claimant's only remedy are

²² Braun (2003), n.7, p.595.

²³ Ibid, P.595.

²⁴ Ibid, P.596.

²⁵ Ibid, P.597.

²⁶ Case C-81/98, *Alcatel Austria v. Bundesministerium für Wissenschaft und Verkehr*, [1999] ECR I-7671.

damages (notoriously difficult to establish). The standstill period is intended to prevent parties rushing to conclude contracts in order to limit available remedies. Secondly, the Community legislature²⁷ has recently taken steps to strengthen the system of procurement remedies. In addition, the UK Courts are demonstrating an increasingly robust attitude toward the availability of remedies in procurement disputes.²⁸ It is apparent that the courts are placing greater emphasis upon the requirement for procurement remedies to be "effective".^{29,30} Aggrieved bidders may also be more inclined to bring challenges under the competitive dialogue because the procedure is more prescriptive and participation is potentially more expensive for them.

Certain scholars, notably Scholz, have expressed difficulties with understandings of compliance based solely upon economic deterrence models.³¹ This is primarily due to several assumptions upon which it is based, which much empirical research indicate rarely hold true in practice.³² Firstly, economic deterrence models are only valid where those being regulated are fully-informed rational utility maximisers. This free market economic conception is an ideal rarely encountered in reality. A more realistic conception is provided by behavioural economics, which emphasises the limited abilities of economic actors to achieve their desired goals recognising that they suffer from bounded rationality.³³ It is noted that busy managers "have neither the time, capability, knowledge, nor information required to maximise corporate utility, but rather 'satisfice'

²⁷ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335).

²⁸ S. Arrowsmith, "E.C. Procurement Rules in the U.K. Courts: an Analysis of the *Harmon* Case: Part II", (2000) 9(4) *PPLR* 135.

²⁹ Art.1(1) Public Sector Remedies Directive 2007/66/EC.

³⁰ See, for example, *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons*, High Court, judgment of Oct 28 1999 (1999) 67 Con. L.R.1.

³¹ Scholz, J., "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory", (1997) 60 *Law and Contemp. Probs.* 253, p.254.

³² See Gunningham & Kagan, "Regulation and business behaviour", (2005) 27(2) *Law & Policy* 214, p.216.

³³ See generally Simon, H.A., "Models of Bounded Rationality" (Cambridge Mass, MIT Press, 1982).

by choosing familiar alternatives that are good enough for the current situation".³⁴ In the words of Baldwin, rather than compliance being a deliberate financial choice, "[t]hose who are reasonably well disposed to comply with rules tend not to follow them because they do not know about them, because they are unwilling to find out about them or because they cannot or will not process the information necessary for compliance".³⁵ Further assumptions of deterrence models include that legislation unambiguously defines misbehaviour, legal punishment provides the primary incentive for regulatory compliance, and economic deterrence models also assume that enforcement agencies optimally detect and punish behaviour given available resources. How far these assumptions actually hold true in reality will be looked at in later sections.

3.2. REGULATORY DESIGN FAILURE

Economic deterrence theories struggle to explain non-compliance where it is not the result of a deliberate financial decision. It has become clear to scholars that the design of regulations can impact upon compliance levels.³⁶

Public procurement regulation, like many areas of administrative law, tends to be highly complex making it difficult for sometimes even experienced procurement officers in contracting authorities to understand what amounts to compliant behaviour. Arrowsmith states that EU procurement regulation is "difficult to understand and apply, not least because of its complexity, because of the poor drafting of EC legislation, and because of the creative role played by the Court of Justice, whose decisions are not always

³⁴ Scholz (1997), n.31, p.256.

³⁵ Baldwin (1990), n.19, p.329.

³⁶ See Organisation for Economic Co-operation and Development (OECD), "Assuring Environmental Compliance: A Toolkit for Building Better Environmental Inspectors in Eastern European, Caucasus and Central Asia", (2005) available at www.oecd.org/dataoecd/61/62/34499651.pdf.

accessible or easy to understand".³⁷ In the case of complex procurements it can be difficult for procurement officers to build up expertise as the procurements are often one offs. Regardless of the likelihood and severity of punishments for non-compliance, if those applying the law in practice cannot understand what amounts to compliant behaviour compliance may be problematic. In such circumstances it may be that compliance is best achieved through education raising skill levels.

Economic deterrence models rely on the assumption that legislation unambiguously defines misbehaviour. However, this is very often not the case particularly with regard to administrative law which unlike say criminal law is often concerned with the management rather than the absolute prohibition of activity. This leads to an inherent flexibility in the application and enforcement of many administrative provisions.³⁸ In the context of UK procurement law, the situation is not helped by the fact that The Public Contracts Regulations 2006 essentially merely repeat the Directive's rules. As a consequence, "ambiguous European rules have become equally ambiguous national rules".³⁹ Regulation 18(28), for example, is so vague and abstract that lawyers advising authorities on the legality of leaving contractual matters to be agreed after selecting a preferred bidder cannot do so in terms of compliant/non-compliant behaviour. It cannot be said with any certainty what amounts to compliant behaviour and therefore any matters left to be discussed until the preferred bidder has been identified carry an element of risk of legal challenge. Legal advisors can only acquaint authorities with the options open to them and the level of legal risk posed by each option.

Uncertainty over the correct interpretation of procedural requirements may lead to unintentional breaches of the law (e.g. due to authorities not knowing what compliant

³⁷ Arrowsmith, S., "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", (2006) 3 *PPLR* 86, p.88.

³⁸ Amodu (2008), n.18, p.1.

³⁹ Gordon et al., "The economic impact of the European Union regime on public procurement: lessons for the WTO", (1998) 21(2) *The World Economy* 159, p.170.

behaviour is) and also deliberate breaches, where actors interpret the rules so as to comply with the letter but not the spirit of the rules (e.g. creative compliance).⁴⁰ It is further noted that lack of clarity can make effective policing of the rules problematic.⁴¹ For example, aggrieved bidders considering legal action have a similar uncertainty. Also, aggrieved bidders may appreciate the commercial importance of a flexible reading of the rules and so not want to risk having the courts limiting this flexibility, which could be of benefit to them when competing for future contracts. It is important that the qualitative interviews planned in the research project explore the way in which regulated actors respond to uncertainties in the law, and the factors that influence this response.

The complexity and ambiguity of EU public procurement regulation may explain the key role Braun observed UK soft law to play in the development of common practices in PFI procurement before competitive dialogue.⁴² Braun's empirical study revealed that authorities procuring PFI projects came to regard non-binding guidance from UK central government as authoritative interpretations of the law.⁴³ This was found to be the case even where the guidance was not compatible with the Commission's strict interpretation of the law;⁴⁴ for example, guidance encouraged the general practice of using the competitive negotiated procedure for PFI projects. Although in the past offering a more flexible interpretation of the EC procurement rules, UK guidance in relation to PFI procurement is now very much in line with Commission guidance.⁴⁵ Thus, it will be interesting to see from the qualitative interviews in the current study how these changes in circumstances from when Braun conducted his research will impact upon authorities' approach to interpretation and legal risk.

⁴⁰ See Edelman et al., n.20, (1991).

⁴¹ Gordon et al. (1998), n.39, p.170.

⁴² Braun (2003), n.7, p.582.

⁴³ See Treasury Taskforce, "Step by step guide to the PFI procurement process", (London: Treasury, 1999); Treasury Taskforce, "How to follow EC procurement procedure and advertise in the OJEC", (London: Treasury, 1999); Treasury Taskforce, "How to appoint and work with a preferred bidder", (London: Treasury, 1999).

⁴⁴ See the Commission's opinion in the Pimlico schools case (European Commission, (2000) *Single Market News* No.23 (Oct)).

⁴⁵ European Commission, "Explanatory Note – Competitive Dialogue – Classic Directive", CC/2005/04_rev 1 of 5.10.2005.

It is noted that compliance rates are lower when regulation does not fit well with existing market practices or is not supported by cultural norms and civic institutions.⁴⁶ The competitive dialogue procedure is said to correspond closely to the practices adopted by UK contracting authorities for procuring complex projects under the competitive negotiated procedure.⁴⁷ To the extent that this is the case compliance should not be problematic. Compliance is likely to be an issue, however, where major changes are required to existing practices, particularly where the commercial benefits of these changes are disputed. This may, for example, turn out to be the case with respect to the requirement for the submission of relatively complete final tenders in the competitive dialogue procedure. A 2005 Report by the OECD argues: "... sometimes the whole point of introducing regulation is to counter a market or cultural practice. However if regulation cuts across existing cultures and fails to build support through education, market incentives, or linkage with institutions of civil society, then it is unlikely to be effective at eliciting compliance".⁴⁸ It follows therefore that compliance with the competitive dialogue procedure might be best achieved by educating contracting authorities and suppliers, for example, about the advantages of maintaining competitive tension until much later on in the process as they had previously been accustomed to.

It is noted further that competing government policies may be a factor behind poor compliance.⁴⁹ In relation to the conduct of a competitive dialogue procedure, authorities must observe the rules, which promote equal treatment, transparency and competition, but also ensure that they obtain value for money from procurements, which they are under increasing pressure from central government to achieve. It is submitted that a rigid application of the rules may in certain circumstances conflict with an authority's goal of value for money. For example, it is recognised that in complex procurements

⁴⁶ OECD Report (2005), n.36, p.28.

⁴⁷ OGC Guidance (January 2006), n.10, p.3.

⁴⁸ OECD Report (2005), n.36, p.28.

⁴⁹ Ibid, p.28.

extensive negotiations with bidders is often needed in order to get value for money; however, in competitive dialogue once dialogue is closed the opportunity for further negotiation is restricted. It is argued that it is these situations when there is the greatest risk of non-compliant (or at least legally risky) conduct.

3.3. ALTERNATIVE AND COMPLIMENTARY EXPLANATIONS

Deterrence models fail to account for findings in many regulatory contexts of relatively high levels of legal compliance even when the threat of legal enforcement and legal sanctions appears to be remote,⁵⁰ and also situations of over-compliance.⁵¹ For this reason scholars have sought to explain the reasons for regulatory compliance in terms other than fear of sanctioning or punishment. It is apparent from contributions by psychologists and sociologists that, whilst deterrence ideas are an important part of the design of any regulatory system, on their own they do not adequately explain compliance.⁵² According to these contributions, other factors such as an actor's moral and social values and opinions on the legitimacy of regulations will play a part in compliance.

It is argued that a regulated actor's normative values may lead to voluntary compliance with regulations, irrespective of whether it is costly for them to do so.⁵³ The reason for this is that individuals make choices for a wide variety of reasons, and not just because of the economic utility they derive: "they choose to do things out of a sense of duty,

⁵⁰ Thornton et al. (2005), n.20, p.264.

⁵¹ Kagan et al. (2003), n.20, p.52.

⁵² See Amodu (2008), n.18, pp.7-15; Kagan & Scholz, "The 'criminology of the corporation' and regulatory enforcement strategies", in Hawkins & Thomas (eds.) *Enforcing Regulation* (Boston: Kluwer-Nihoff, 1984); Sutinen & Kuperan, "A Socio-Economic Theory of Regulatory Compliance", (1999) 26(1/2/3) *International Journal of Social Economics* 174; Tyler, T., "Why People Obey The Law", (Yale University Press, 1990); van Snellenberg & van de Peppel (2002), n.18.

⁵³ See Cartwright, P., "Consumer protection and the criminal law: law, theory, and policy in the UK" (CUP, 2001), p.216.

altruism, or because they have been taught to do a job in a particular way".⁵⁴ Thornton et al. similarly emphasise the importance of norms on compliance, stating that "... in democratic societies with a strong rule of law tradition, most business managers have 'internalised' (or agree with) the social norms that under-gird many regulatory rules".⁵⁵

Taylor distinguishes between two types of so called "internalised obligation" (i.e. normative factors).⁵⁶ First, regulated actors may comply with the law because they view the legal authority they are dealing with as having a legitimate right to dictate their behaviour.⁵⁷ Certain theories in sociology and psychology argue that legitimacy depends in a large part on the legal authority's ability to provide favourable outcomes.⁵⁸ Sutinen & Kuperan state that "people perceive as legitimate and obey the institutions that produce positive outcomes for them".⁵⁹ One of the difficulties for the EU procurement rules is that the benefits of regulated procurement are predominantly macroeconomic in nature (i.e. the opening up of domestic procurement markets and the re-structuring of national industries), and have no obvious direct benefits for an authority on individual procurements.⁶⁰

The second type of internalised obligation relates to the regulated actor's desire to behave in accordance with personal moral standards. The greater the degree to which personal moral values are interlined with the regulatory requirement, the greater the chance of voluntary compliance. The difficulty for regulators in securing compliance with administrative rules may in part be down to the fact that, unlike criminal law for

⁵⁴ See McCormick B.J., "Introducing Economics", (2nd edn, London, Penguin, 1977), p.176, cited by Cartwright (2001), *ibid*, p.216.

⁵⁵ Thornton et al., n.20, (2005), p.264.

⁵⁶ Tyler (1990), n.52, p.25.

⁵⁷ Perhaps the lack of democratic legitimacy of the EU or even fundamental political disagreement with the EU is a contributing factor to any lack of respect shown by some UK contracting authorities to the procurement rules.

⁵⁸ Sutinen & Kuperan, n.52, p.6 of 14.

⁵⁹ *Ibid*, p.6 of 14.

⁶⁰ See Braun (2001), n.7, pp.325-326.

example, they have no basis in what is usually referred to as “unwritten law”.⁶¹ As Snellenberg & Peppel explain: “[n]orms in administrative law were first established by the law itself. Even worthy ideals and objectives must first become part of the legal consciousness before compliance itself becomes natural”.⁶² Kagan & Scholz add that arbitrary or unreasonable burdens imposed by regulation (such as excessive compliance costs) may lead certain actors who are generally disposed to obey the law to adopt a strategy of selective non-compliance.⁶³

Compliance with the EU procurement rules therefore depends upon contracting authorities accepting them as behavioural norms. Authorities in the UK might be expected to be primarily concerned with getting value for money from procurement. By requiring open and competitive tendering procedures for the award of public contracts the EU procurement rules are likely to contribute to this aim in many situations. However, in complex procurements there is often a need for a flexible approach if value for money is to be achieved. It is in these cases that a rigid EU requirement emphasising transparency and competition can stand in the way of efficient procurement and prevent a contracting authority from obtaining value for money for the benefit of taxpayers. To the extent that the competitive dialogue procedure matches best procurement practice in complex procurements in the long run compliance should be high. Contracting authorities will have no need to take on any legal risk. However, where the legal requirements are perceived by authorities as disproportionate or unfair compliant behaviour is less guaranteed.

Social environmental influences may also have an impact on the internalisation of behavioural norms.⁶⁴ For instance, the opinions of peers (other similar contracting authorities) on the acceptability of legally risky practices are likely to influence

⁶¹ Snellenberg & Peppel (2002), n.18, p.131.

⁶² Ibid, p.131.

⁶³ Kagan & Scholz (1984), n.52, p.75.

⁶⁴ See Sutinen & Kuperan (1999), n.52, p.4 of 14.

behaviour. According to Sutinen & Kuperan, the available evidence indicates that “a given individual is more non-compliant the more his community and peer groups are non-compliant”.⁶⁵

It is noted further that the effectiveness of new regulation can also be down to psychological factors. For example, one of these factors is a dislike of change, i.e. the belief that familiar ways of operating are safe and new ways are risky.⁶⁶ It may be that this is one of the factors behind any negativity towards the competitive dialogue procedure which may be revealed by the qualitative interviews in this study. If so, it is submitted that in time, as authorities get more accustomed to the procedure, it may be found that any teething problems iron themselves out.

4. CONCLUDING REMARKS

The paper has looked into the compliance of contracting authorities with the recently introduced competitive dialogue procedure. It is apparent that compliance behaviour is multifaceted, and, in the context of public procurement, needs to be explored in greater depth. The qualitative interviews planned as part of the research project aim, in part, to shed light on the factors influencing contracting authorities in their approach to compliance and legal risk.

⁶⁵ Sutinen & Kuperan (1999), n.52, p.5 of 14 citing Geerken & Gove, “Deterrence: some theoretical considerations”, (1975) 9 *Law and Society Review* 495; Vogel, J., “Taxation and Public Opinion in Sweden: an interpretation of recent survey data”, (1974) *National Tax Journal* 499; Witte & Woodbury, “The effect of tax laws and tax administration on tax compliance: the case of the US individual income tax”, (1985) *National Tax Journal* 1.

⁶⁶ See OECD Report (2005), n.36, p.31.