Neutral Citation Number: [2015] EWCA Civ 326

Case No: A2/2015/0264

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM High Court, Queen's Bench Division
Mrs Justice Andrews DBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2015

Before :

LORD JUSTICE ETHERTON
(Chancellor of the High Court)
LORD JUSTICE UNDERHILL
and
LADY JUSTICE KING

- -

Between :

EDENRED (UK GROUP) LIMITED	**Appellant**
- and -	
HER MAJESTY'S TREASURY AND OTHERS	**Respondents**

- -
- -

Jason Coppel QC, Joseph Barrett and Rupert Paines (instructed by **Pinsent Masons LLP**) for the **Appellant**
Philip Moser QC, Ewan West and Anneliese Blackwood (instructed by **Treasury Solicitor**) for the **Respondents**

Hearing dates: 11 & 12 March 2015

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Approved Judgment

The Chancellor of the High Court (Sir Terence Etherton):

1. This is an appeal by Edenred UK Group Limited ("Edenred") against the decision of Andrews J dated 22 January 2015 dismissing part of the claim and refusing to lift the stay on linked judicial review proceedings.

2. The issue before Andrews J and on this appeal is whether the way in which it has been decided to deliver the new government policy of Tax-Free Childcare ("TFC") - with a value of approximately £160 million over five years - is lawful under domestic and EU public procurement legislation.

3. The Government's intention is that Her Majesty's Revenue and Customs ("HMRC") will have the overall responsibility for the delivery of TFC, and that HMRC will utilise the services of the third respondent, National Savings & Investments ("NS&I"), who will provide TFC by amendments to its outsourcing contract with Atos IT Services UK Limited ("Atos"). The Government has not invited any competitive tenders for the delivery of TFC. Andrews J dismissed Edenred's claim that those proposed arrangements are in breach of the Public Contracts Regulations 2006 (SI 2006/5) ("the 2006 Regulations") and in breach of Article 56 of the Treaty on the Functioning of the European Union ("Article 56 TFEU").

Background

4. A comprehensive account of the relevant background may be found in the judgment of Andrews J. The following is sufficient for the purpose of this appeal.

The parties

5. Edenred is one of the largest commercial childcare voucher providers (CVPs) in the UK. CVPs play a role in the existing government childcare support scheme - Employer Supported Childcare ("ESC"). ESC is provided through employers, who give employees, as part of their remuneration packages, money to pay for childcare, funded by a tax break. The employers have usually opted to provide the money in the form of vouchers which parents can redeem with childcare providers. CVPs are not a necessary element of ESC, but many employers engage them to administer the schemes and issue vouchers on their behalf. CVPs receive the money from the employer, allocate the correct amount to each relevant employee, issue vouchers in that amount to the parents and make payments to the childcare providers against production of the vouchers. Since 2005, when the ESC tax break was introduced, a thriving CVP market has developed.

6. Edenred runs its ESC business through its subsidiary, Childcare Vouchers Ltd, which has 15,600 employer customers and provides childcare vouchers for about 170,000 parents each month. Edenred is a founder member of the Childcare Voucher Providers Association ("CVPA"), a trade association set up in 2011 to represent the interests of CVPs in the UK.

7. Edenred is part of the multinational Edenred Group, which has a presence in 41 countries worldwide. Edenred's French parent has a market capitalisation of about €5.3 billion and is listed on the NYSE Euronext Paris. The Edenred Group had a total

revenue of €1 billion with a net profit of €171 million in the year ending 31 December 2013. Edenred itself had a profit of almost £10 million in the same year.

8. The three respondents are all parts of the executive for which the Chancellor of the Exchequer ultimately has responsibility to Parliament. The first respondent, Her Majesty's Treasury ("HMT"), is the government's economic and finance ministry.

9. The second respondents, the Commissioners for Her Majesty's Revenue and Customs, are appointed by the Queen and oversee the day to day running of HMRC, which is a non-ministerial department. In the exercise of their functions the Commissioners must comply with any directions of a general nature given to them by HMT.

10. NS&I is also a non-ministerial department and became an executive agency of the Chancellor of the Exchequer on 1 July 1996. Its parent department is HMT. Its chief executive is the Director of Savings, whose functions and powers are derived from statute.

11. NS&I is one of the largest savings organisations in the UK. It is the Government's retail debt financing arm, providing financing by issuing and selling retail savings and investment products to the public, with the overall aim of helping to reduce the cost to the taxpayer of government borrowing. NS&I has a broad power to provide services to any public body under section 113 of the Financial Services Act 2012. This enables other government departments to benefit from NS&I's existing expertise in taking, holding and transferring money securely to large numbers of people, as well as from the efficiencies associated with NS&I's operational activities. NS&I refers to this type of arrangement as "business to business" ("B2B") services. NS&I's B2B work has included Courts Funds Office ("CFO") services for the Ministry of Justice and the Equitable Life Payment Scheme ("ELPS") for HMT. The arrangements between NS&I and each of those other departments in relation to such services is governed by a memorandum of understanding as is usual practice between government departments. NS&I also competes for customers with other banks in the open market.

12. Following a public tender procedure, NS&I outsourced all its back office operations to Siemens IT Solutions and Services ("SIS") in 1999. Towards the end of that contract Atos purchased SIS. In 2011, the outsourcing contract was advertised in the Official Journal of the European Union ("the OJEU") and a tender was organised, from which Atos emerged as the winning bidder."

13. The OJEU notice, published on 22 November 2011 ("the Contract Notice"), stated that the contract would be for business process outsourcing services and application services and would be for an initial period of eight years. It indicated that the total value of the outsourcing contract would be between £1.25 billion and £2 billion and described the nature of the contract as follows:

> "NS&I outsourced its operational services in 1999 and is now seeking to retender these operational services, including all processing of customer interactions and servicing (eg sales, after sales management and payments including via telephone, internet and mail); service management; IT management and implementation; and other services (eg. complaint handling,

> channel management, customer management, print and document management, customer market research and analysis, campaign management, compliance, management information etc) and other related ancillary services that support the business operation of NS&I. In addition NS&I now delivers similar operational services (called B2B services) to other public sector organisations. We intend to expand this B2B service during the lifetime of the contract to deliver to other organisations, potentially resulting in significant growth of the outsourced operational services. NS&I intends to structure the contract so that it may be used by other central government departments (including their executive agencies and other non-departmental public bodies) and by local authorities"

14. The Contract Notice set out, by reference to "Common Procurement Vocabulary", all the operations to be outsourced.

15. The new outsourcing contract was procured on the basis that a single provider would act as prime contractor, which, with any necessary assistance from sub-contractors, had to be able to support the full scope of NS&I's services, including future B2B services, and therefore not only had to be able to provide the back office functions relating to NS&I's core savings and investment business but also the necessary resources to support the roll-out of B2B services to other government departments. One of the pre-qualifying conditions to bid for the outsourcing contract was an annual turnover of at least £1 billion.

16. The outsourcing contract with Atos was signed on 20 May 2013, with a commencement date of 1 April 2014 ("the Atos contract") and an expected charge for the core retail service of £660 million. Atos became responsible for delivering all of NS&I's operational services, including transaction management, customer service, printing, accounting, IT development and management. NS&I has retained a core body of 170 civil servants who, together with the Director of Savings, have responsibility for strategy, branding, pricing and policy decisions (subject to Ministerial approval).

17. The Atos contract award notice stated:

> "In addition NS&I now delivers similar operational services (so called B2B services) to other public sector organisations. We intend to expand this B2B service during the lifetime of the contract to deliver to other organisations, resulting in significant growth of the outsourced operational services."

18. The Atos contract further provided in clause 2.1 of the "B2B General Obligations" schedule, schedule 2.11:

> "Throughout the Term, the Parties shall actively seek and identify potential opportunities ("B2B Opportunities") beyond delivery of the Services by the Provider to the Director and to Existing Service Recipients, and to extend the Services to further Service Recipients for the purposes of increasing the utilisation of the assets and exploiting the capacity, capability

> and know-how used to deliver the Services, subject to the limitations set out in the OJEU notice issued by the Director referred to in Recital A of this Agreement".

19. Clause 3.3 states: "The incorporation of a new B2B Service into this agreement shall be subject to the Change Control Procedure."

TFC

20. TFC is a scheme aimed at supporting working families with the costs of childcare. It was first announced on 19 March 2013. The scheme offers the opportunity to eligible parents to open childcare accounts (one account per child) into which they, and possibly other members of the family, will be able to pay money to be used for childcare costs. The money paid by parents and relatives into the accounts will make up 80 per cent of the relevant childcare costs, with the remaining 20 per cent to be topped up by HMRC. The parents can then use the total funds for payments to the registered childcare providers of their choice.

21. Both TFC and ESC involve processing inbound and outbound payments, the maintenance of a record of registered childcare providers, the use of a web-based platform and the provision of customer support. ESC is, however, much less complex as it only involves payments going one way, from the employer to the childcare providers. CVPs do not administer bank accounts and are not regulated by the Financial Conduct Authority. Unlike TFC, ESC makes no provision for refunding overpayments of money.

22. The Government engaged with Edenred and the other members of CVPA extensively during the two consultation procedures it carried out in 2013 and 2014 (the second consultation being conducted in response to a judicial review challenge brought by one of the CVPA members to the validity of the first consultation) in respect of the design and delivery of future childcare accounts. The Government considered several options for the provision of TFC: by NS&I, by HMRC, by a single private sector provider, by a limited number of multiple private sector providers and an open market option (with multiple providers competing for customers on the basis of price). Understandably, Edenred and the other members of the CVPA forcefully advocated for the preservation of the ESC system or, in the alternative, for organising TFC in a similar way to ESC.

23. Section 16(1) of the Childcare Payments Act 2014 provided that childcare accounts may be provided by any of HMRC, a person or body with whom HMRC have entered into arrangements for the provision of childcare accounts, and, if HMT so determines, the Director of Savings (in effect NS&I). Section 16(2) provided that, if the Director of Savings provides childcare accounts, the Director must in doing so act in accordance with any arrangements made between the Director and HMRC with respect to the provision of childcare accounts

24. The Government eventually decided to keep the matter in-house and to use NS&I to provide and administer childcare accounts and supporting services. HMT has allocated money to HMRC to administer TFC as the main budget holder with primary responsibility for its delivery. The intention is that NS&I will deliver TFC for HMRC, as part of the B2B services NS&I offers. A memorandum of understanding is

in the course of being agreed between HMRC and NS&I, which will set out their respective roles and responsibilities in the delivery of the TFC policy and will deal with the flows of money between HMRC and NS&I to cover NS&I's costs ("the MoU"). At the same time, amendments to the Atos contract, which are also in the course of being agreed, will cover what Atos must do to deliver the required operational services for TFC, as part of its obligation to support NS&I in delivering B2B services to government departments. Those amendments are to be made pursuant to the change control provisions in the Atos Contract. An additional amount of £132.8 million is to be paid to Atos for the cost of the childcare-related services.

25. It is intended that TFC will be introduced in the autumn of 2015 and will eventually replace ESC, which will be gradually phased out.

The legal framework

26. Edenred claims that the proposed arrangements for the delivery of TFC infringe the 2006 Regulations, which were intended to implement Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the 2004 Directive"). The purpose of that legislation is to develop effective competition in the field of public contracts. Recital (2) to the 2004 Directive states that:

> "The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency."

27. I do not propose to set out here the various provisions of the 2004 Directive and the 2006 Regulations which are relevant to the present dispute. I shall refer them in subsequent sections of this judgment in the context of the judgment of Andrews J and the submissions made on this appeal.

28. The most current EU legislation is to be found in Directive 2014/24/EU on public procurement ("the 2014 Directive"). The Public Contract Regulations 2015 are intended to implement the 2014 Directive and to replace the 2006 Regulations but they do not govern the present dispute because they do not apply to procurement procedures begun before 26 February 2015.

29. Edenred says that the MoU and the proposed amendments to the Atos contract also infringe Article 56 TFEU, which is as follows so far as relevant:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States

> who are established in a Member State other than that of the person for whom the services are intended."

The proceedings

30. These are consolidated Part 7 proceedings and judicial review proceedings.

31. In the Part 7 proceedings Edenred claims, among other things, declarations that the decisions of the respondents regarding the delivery of TFC are unlawful, orders setting aside those decisions and damages. In addition to its claims under the 2006 Regulations and Article 56 TFEU Edenred has alleged in its Particulars of Claim that the proposed arrangements for delivery of TFC are unlawful because they involve improper state aid in favour of NS&I or Atos and an abuse of dominant position in the market by NS&I. In exchange for directions for a speedy trial, Edenred agreed that, if it lost on its claims under the 2006 Regulations and Article 56, it would be confined to a remedy in damages in respect of the balance of its claims and in respect of its judicial review proceedings.

32. The judicial review proceedings were brought by Edenred and the CVPA. Permission was refused by Elisabeth Laing J on the papers on 2 October 2014 on the basis that the CVPA did not have standing and the Part 7 claim canvassed substantially the same issues. Following a case management hearing before Leggatt J on 6 October 2014, the judicial review proceedings were stayed.

33. The Part 7 proceedings were listed for a speedy trial. The trial was conducted before Andrews J between 25 and 30 November 2014 and she handed down a detailed and lengthy judgment on 22 January 2015.

Andrews J's judgment

34. Andrews J held that the MoU between HMRC and NS&I is not a "public services contract" within the 2006 Regulations. She said (at [78]) that intra-government arrangements are not about competition with the private sector but about government organising itself in an efficient manner to ensure that public money is well spent.

35. She said (at [80]) that a memorandum of understanding which specifies in detail the services to be provided when one department procures the services of another department is not a contract but sets out what services those who are accountable to Parliament for the expenditure of public money can expect to receive in return for the charges levied on them by the provider of the services and what those charges are. Her analysis was that, even if NS&I and HMRC could contract with each other, a matter on which she said she need express no final view, it is clear that in the light of paragraph 3.1 of the MoU, specifying that the MoU is not legally binding on the parties and does not contain representations on which either party may rely, they have not done so. She said (at [84]) that, although in many respects the MoU resembles a detailed commercial contract, that is not what it is: it is a document that reflects the internal arrangements, including the charging arrangements, made between the government departments working together to deliver a policy set by HMT.

36. Andrews J rejected Edenred's submission that the proposed amendments to the Atos contract and the MoU should be treated as one economic transaction so there is in

substance a public contract by reason of the fact that the obligations that will be contained in the amendments to the Atos contract are repeated and reflected in the schedules to the MoU. She rejected (at [89]) Edenred's suggestion that NS&I is just a front for Atos either legally or as a matter of fact.

37. She rejected Edenred's argument that section 16(2) of the Childcare Payments Act 2014 gave rise to a legally binding obligation on the Director of Savings to comply with the terms of the MoU and that was good enough to transform the MoU into a "contract" for the purposes of the 2006 Regulations. She said that section 16 merely sets out who may provide childcare accounts.

38. Andrews J said (at [98]) that, given the MoU is not a contract as a matter of domestic or EU law or in substance, the 2006 regulations do not apply to it nor does Article 56 TFEU. She said (at [100]) that in substance and in reality what has happened is that the Government has decided to deliver TFC itself, internally, rather than through an external provider.

39. She held (at [104]) that the contract changes to be made to the Atos contract for the delivery of the necessary outsourcing services supporting the TFC childcare accounts are not tantamount to the award of a separate, second contract to Atos. She said that those services fall within the scope of the services described in the outsourcing contract opportunity that was advertised for tender and awarded to Atos at the end of a fair and transparent competitive process. She said that the scope of the contract was not being extended to encompass new and different services. She said that the Contract Notice made express reference to B2B services and made it clear that NS&I intended to expand the B2B service during the lifetime of the contract to deliver to other organisations. Andrews J said (at [112]) that the proposed amendments will not vary the services that were put out to tender by the NS&I by introducing new and different services. The nature of the operational services that Atos will be providing to support the delivery of childcare accounts is essentially the same as the nature of the services which are supplied by NS&I for existing banking, accounting, and payment products and which would have to be supplied for any new products delivered by NS&I, whether or not it was a new type of savings account to raise money for HMT or a bank account utilised by another government department – or a payment service offered to another government department akin to the ELPS. She said (at [114]) that, on reading the Contract Notice, it was plainly envisaged that the successful bidder would be required to provide all the specifically described types of "back office" services that NS&I were offering to outsource, not only to support the delivery of NS&I's core retail business but also in order to support NS&I to provide bank accounts and payment services to other government departments under existing and future B2B contracts up to the envisaged financial ceiling of £2 billion.

40. Andrews J said that, even if, contrary to those findings, there has been a variation of the services to be provided from those that were advertised, the variation is not material. The services are not new or different in any material respect. The proposed amendments do not not introduce conditions in the Atos contract which, had they been part of the initial procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. She said that they would not have widened the range of potential bidders beyond those who expressed an interest in the first place. She said (at [120]) that it would not have had any bearing on the tender

process at all. She said that Edenred would not have bid by itself as it had insufficient financial resources, and she was not satisfied that any other economic operator who could deliver the services in which Edenred was not interested and who would have met the £1 billion annual turnover precondition would have wished to join forces with Edenred to make a bid. She rejected the suggestion that other potential CVPA bidders would have qualified or would have wanted to bid. She also said ([133]) that the proposed amendments did not change the economic balance of the contract in favour of Atos. She said (at [139]) that Atos did not stand to gain any greater financial advantage from providing the supporting services for childcare accounts under the proposed amendments than it does under the main outsource contract.

41. Andrews J went on to consider whether, in the event that contrary to her findings, there was a breach of 2006 regulations or Article 56 TFEU, Edenred can establish that the breach has caused it loss. She said (at [142]) that the parties were agreed that that had to be assessed as a loss of a chance and that Edenred had to satisfy the court that there was a real, as opposed to fanciful, prospect that, if it had bid for a contract to deliver childcare accounts, it would have been awarded the contract. She said (at [151]) that she considered, on the basis of all the evidence that she had seen or heard, that the option of tendering for multiple providers would not have commended itself to the ministers making a decision in HMT/HMRC. She said (at [157]), in the light of the evidence, that she was not persuaded that, if the tender for TFC had been for a single provider, which was the only realistic course that would have been taken if delivering TFC in-house through HMRC had been ruled out, Edenred would have made a bid. She said she did not accept that it could have scaled up its operation to deliver TFC all by itself. She said that she treated the evidence of Edenred's witness, Mr Patrick Langlois, Edenred's managing director, on this aspect with a degree of caution. She said (at [158]) that there was no, or no reliable, evidence that anyone else would have teamed up with Edenred.

42. She concluded (at [160]), therefore, that even if there had been a breach of the 2006 Regulations or Article 56 TFEU Edenred had failed to discharge the burden upon it of establishing that the breach caused it to suffer any loss. She said that, in those circumstances, she would not have exercised her discretion to grant declaratory relief or to set aside a decision to award the contract to NS&I under Regulation 47I of the 2006 Regulations.

43. Andrews J circulated her judgment in advance in the usual way to enable the parties to draw attention to any grammatical errors, to agree an order and to be able to make any application for permission to appeal on the hand down. Edenred responded with written submissions and its intended grounds of appeal. At the hand down hearing, an approved version of the judgment was provided by the Judge. She indicated that she had made some substantive alterations and stated that they did not change or alter the judgment. Counsel had no opportunity to review the revised judgment before the hearing commenced. Upon returning to chambers after the hand down, Edenred's counsel noted the amendments made by Andrews J to the earlier draft judgment. Edenred contends that the Judge substantially rewrote and expanded sections of the draft judgment in order to rebut Edenred's grounds of appeal, particularly the section dealing with causation and loss.

44. Edenred submits that this was a misuse of the draft judgment procedure laid down by CPR PD40 E and amounted to a serious error of law, which renders the judgment unsafe.

The appeal

45. Edenred criticises the analysis and decision of Andrews J on all the above matters. It also claims that, in view of the extensive re-writing by the Judge of the circulated draft judgment, this court should ignore, for the purpose of the appeal, the final version of the judgment as handed down or at the least that part dealing with causation and loss and should take the circulated draft as the operative judgment.

46. Rather than set out here all the arguments and submissions of Edenred on the appeal, I shall refer to them in the discussion below.

Discussion

47. I do not accept Edenred's submission that this court should consider the merits of the appeal on the basis of the draft judgment circulated to counsel before hand-down. Edenred relies on the "provisional" view of the Court of Appeal in *Brewer v Mann* [2012] EWCA Civ 246 at [31] that it would be most unwise for a judge, who has received grounds of appeal and an application for permission to appeal on the basis of the alleged inadequacies of his judgment, to re-write his or her judgment (other than purely editorially). That was a case where the judge had altered the judgment after it had been handed down whereas the alterations by Andrews J in the present case, which are the subject of criticism, were made to her draft judgment prior to hand down. Mr Coppel referred to *Saunders v Chief Constable of Sussex* [2012] EWCA Civ 1197 where Toulson LJ expressed his "provisional" agreement with the "provisional" view in *Brewer* in the context of a case where the first instance judge changed his judgment before hand down. Toulson LJ concluded that, on the facts, there was no impropriety in the judge's conduct.

48. The Supreme Court has confirmed in *Re L (Children)* [2013] UKSC 8, [2013] 1 WLR 637 that there is power for a judge to change his or her mind up until the order is drawn up and perfected and that there is no principle that such power can only be exercised in exceptional circumstances. The guiding principle in the exercise of that power is that the court must deal with the case justly.

49. In principle, it would seem right that there should be greater latitude to a judge to alter the judgment while it remains in draft as distinct from after it has been formally handed down although inevitably each case will turn on its own particular facts. It certainly seems an unusual proposition that, as contended by Edenred in the present case, an appeal should be conducted on the basis that the judge's reasoning is to be confined to a draft judgment that was never handed down rather than the reasoning in the judgment that was handed down.

50. In *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, Lord Phillips observed (at [24]) that, while the court was not greatly attracted by the suggestion that a judge who has given inadequate reasons should have a second bite at the cherry, the court was much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. He said that, where the judge

who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in the judgment adequate reasons for the decision. It seems to me that the alterations made by Andrews J were entirely legitimate additions to her judgment which either clarified her analysis or stated her conclusions on the evidence.

51. In any event, the principal criticism of Edenred relates to the amendments made by the Judge to the section of her draft judgment addressing the issues of causation and loss. For the reasons which I give below, I would dismiss this appeal without the need to consider that section of the judgment. Mr Coppel did not argue with any conviction the Judge's alterations to the rest of her draft judgment were so extensive or of such significance as to warrant ignoring them on this appeal.

52. I turn to the other issue on the appeal.

53. I agree with Andrews J that the MoU is not a public contract within the 2006 Regulations. It is certainly not a contract under domestic law. That is clear enough from clause 3.1 of the MoU, which states that it is not legally binding on the parties to it.

54. That is not the end of the matter, however, because, as Mr Coppel submitted, "public services contract" has an autonomous meaning under EU law and denotes a binding and legally enforceable obligation on the service provider to the contracting authority: C-220/06 *Correos* [2007] ECR I-12175**,** para 50, *R (Midlands Co-Operative Society Ltd) v Birmingham City Council* [2012] EWHC 620 (Admin) at [97], [100].

55. Edenred submits that the MoU will impose legally enforceable obligations on NS&I because that is the consequence of section 16(2) of the CPA 2014. I do not agree. As Mr Philip Moser QC, for the respondents, pointed out, it is the Financial Services Act 2012 section 113 which give the Director of Savings the power to enter into arrangements with a public body for the provision on services to the body. Section 16(1) and (2) of the CPA 2014 do no more than state that HMT may determine that NS&I shall provide childcare accounts, and, in that eventuality, NS&I must work with HMRC. In other words, section 16(2) is a statutory limitation. NS&I cannot decide to provide childcare accounts of its own initiative either on its own or with some other provider. It can only provide for them in an arrangement with HMRC.

56. Edenred also contends that the arrangements between HMRC and NS&I are properly to be characterised as a public contract for the purposes of the 2006 Regulations because of the back-to-back nature of the Atos contract. Mr Coppel emphasised that in this respect the MoU is not like a typical memorandum of understanding between different departments. He said that what is unique is the underpinning of the MoU by a commercial contract and the very close relationship between the Atos contract and the arrangements between NS&I and HMRC. In that connection, Mr Coppel said that NS&I is unlike other government departments in that it provides outsourcing facilities; in that business, he said, NS&I competes with others in the market for outsourcing and it is wholly dependent on the Atos contract. He drew the court's attention to the following statement in the MoU:

> "The Director will provide the TFC Service in accordance with these requirements and service levels via their outsourcing

> agreement with the Provider which underpins this Memorandum. The terms and obligations of the contractual arrangements between the Director and the Provider are not replicated within this Memorandum but form the basis of the overall service provision and will be relied upon for the fulfilment of the obligations contained within this Memorandum."

57. Mr Coppel drew attention to clause 99.1.2 of the Atos contract, which (he said) confers on HMRC certain rights in relation to audit and other matters (although schedule 9.3 to which it refers was not in our papers). He also drew attention to the similarity of the service specification annexed to the MoU and the proposed amendments to the Atos contract. He said that EU jurisprudence is concerned with substance rather than form and the substance is that the MoU and the proposed amendments to the Atos contract are a single transaction imposing obligations on Atos in favour of HMRC. He reinforced that submission with a reference to a provision among the proposed amendments to the Atos contract under which Atos grants HMRC a perpetual licence to use the TFC website. Edenred's case, in short, is that the reality and substance of what is happening is that HMRC is buying services from Atos, with the Director of Savings in the middle taking about £30 million profit. Edenred relies, in support of the proposition that the court must have regard to the arrangements as a whole and their substance, on *R (Midlands Co-Operative Society Ltd) v Birmingham City Council* at [107].

58. Atos' obligations are imposed under a purely commercial contract with NS&I. It is NS&I which has the obligation to pay Atos. Both in form and substance the functions of NS&I under the legally non-binding MoU, on the one hand, and the contractual obligations of Atos under the Atos contract, on the other hand, are legally distinct and cannot properly be treated as a single arrangement between HMRC, on the one hand, and Atos, on the other hand, in which NS&I is reduced to the status of a legally insignificant cipher. There is nothing in the *Midlands Co-op* case, the facts of which bear no useful analogy with those of the present case and where it was held that there was no legally enforceable obligation, which leads to a different conclusion.

59. The substance and reality are the MoU is a classic example of the distribution of public work between different departments or entities within central government. In this case the distribution is pursuant to arrangements between parts of central government that have a particularly close relationship with one another, namely between HMT, HMRC and NS&I, all of which are departments for which the Chancellor of the Exchequer has ultimate responsibility. There is no vice in such arrangements for the delivery of public functions so far as EU procurement rules are concerned: see, for example, 2014 Directive recitals (5) and (31); and compare C-480/06 *Commission v Germany* [2009] ECR I-4747, in which an agreement by four German local authorities with the City of Hamburg to use the refuse collection service of the City of Hamburg for an annual fee, without any competitive tendering, was held not to infringe public procurement law. As Mr Moser observed, if the Atos contract was lawfully procured, the proposed arrangements in the MoU do not distort competition in relation to private providers of services.

60. For the same reasons the arrangements between HMRC and NS&I governed by the MoU do not infringe Article 56 TFEU.

61. I turn next to the application of the 2006 Regulations to the Atos contract in the context of the TFC scheme. The heart of Edenred's criticism is that the proposed amendment of the Atos contract to deal with the TFC scheme without NS&I complying with the advertising and other procedural obligations, especially competitive tendering, specified in the 2006 Regulations is unlawful. Subject to certain specific exceptions, each of those procedures requires the publication of a contract notice in the OJEU.

62. Regulation 14 specifies certain circumstances in which there can be a negotiated procedure without the prior publication of a contract notice. They include, as described in Regulation 14(1)(d), two situations where, in the case of a public works contract or a public services contract, a contracting authority wants an economic operator to carry out additional or new works or services. The first, specified in Regulation 14(1)(d)(i), is where the additional works or services were not included in the project initially considered or in the original contract but which through unforeseen circumstances have become necessary and (a) they cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the contracting authority, or (b) they are a repetition of the works or services carried out under the original contract and are in accordance with the project for the purposes of which the first contract was entered into. It has not been suggested by the respondents that the provisions of Regulation 14(1)(d) apply in the present case.

63. Regulation 19 of the 2006 Regulations addresses the situation where a contracting authority intends to conclude a framework agreement. A framework agreement is defined in Regulation 2(1) as an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies. Regulation 19(5)(a) provides that, where the contracting authority concludes a framework agreement with an economic operator, it shall award any specific contract within the limits of the terms laid down in the framework agreement. Regulation 19(1) provides that a framework agreement cannot exceed a period of 4 years except in exceptional circumstances. Mr Coppel submitted that the Atos contract is, in substance, a framework agreement but it does not comply with Regulation 19 both because it is not limited to four years and because it does not specify with sufficient clarity and precision the nature and limits of the future activities to which the Atos contract could apply or the terms that would apply to the future contracts.

64. Those submissions of Mr Coppel conveniently dovetail into his submissions on the jurisprudence of the CJEU as to when the variation of a subsisting contract will constitute the offering or award of a new public contract for the purposes of the 2006 Regulations. Using graphic language to make his point, Mr Coppel described the unlawful vice of the provisions in the Contract Notice and in the Atos contract dealing with future B2B business, and the change provisions in the Atos contract to accommodate such future business, as permitting "an ongoing roving commission to go around the public sector hoovering up business that would otherwise be competed for".

65. In this part of Edenred's case Mr Coppel relied principally on the judgment of the CJEU in C-454/06 *Pressetext Nachrichtenagentur GmbH v Austria* [2008] ECR1-4401. The court held (para [34]) that amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. The court then set out three situations in which an amendment may be regarded as being material. The first (para [35]) is when an amendment introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. The second (para [36]) is when an amendment extends the scope of the contract considerably to encompass services not initially covered. The third (para [37]) is when an amendment changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

66. Those *Pressetext* principles are now to be found in Article 72(4) of the 2014 Directive. Mr Coppel submitted that the 2014 Directive was intended to give effect to current jurisprudence but, as Mr Moser pointed out, the example in paragraph [35] of *Pressetext* has been extended in Article 72(4)(a) of the 2014 Directive by the words "or would have attracted additional participants in the procurement procedure".

67. Mr Coppel submitted that the proposed amendments to the Atos contract to add the services to be provided by Atos to meet the requirements for the delivery of the TFC scheme fall within the first two of those situations and that the Judge's findings to the contrary were wrong. He said that the proposed amendments would clearly considerably extend the Atos contract. In that connection, Edenred emphasises that the new services to be provided by Atos for the TFC scheme are to meet the needs of a different party, HMRC, and involve a host of operational and commercial changes to adapt to the new and different demands of large-scale provision of childcare accounts. Mr Coppel highlighted the value of the additional services amounting to £132.8 million, generating more profits for Atos, when compared with both the original contract value of £660 million and the current threshold of £111,676 for the application of the 2006 Regulations (see regulation 8). Mr Coppel referred to the respondents' evidence that the provision of the new services for the TFC scheme would require Atos to engage in a 15 month long programme of hardware and software purchase and design, the hiring of additional premises and staff and other steps costing in total almost £23 million. He particularly emphasised, by way of comparison, *Commission v Germany* [2010] ECR I-3713 ("*Uelzen*").

68. Mr Coppel accepted that variations could be made to a public contract without engaging the 2006 Regulations if they were made pursuant to a sufficiently clear, precise, unequivocal review clause in the initial contract. There is no express provision to that effect in the 2004 Directive or the 2006 Regulations but Article 72(1)(a) of the 2014 Directive contains such a provision and is as follows:

> "1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

> (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement."

69. Mr Coppel submitted that the contractual change provisions in the Atos contract are not clear, precise and unequivocal in anticipating such a project as the TFC scheme, which would be a substantial modification of the original contract and, indeed, would alter the overall nature of the original contract. He referred, in that connection, to *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin) (Lang J) and *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264, [2008] QB 737.

70. Mr Coppel submitted that the situation was also one in which advertisement of the TFC services at the time of the original OJEU Contract Notice for the outsourcing contract would have attracted additional participants. Edenred says that the Judge was wrong in law in holding that, in order to succeed on this point, Edenred would have to provide evidence that there was a specific bidder who would have tendered in the procurement and would have been successful at the selection stage. Edenred submits that goes beyond what is legally required, as encapsulated in Article 72 of the 2014 Directive, and is also inconsistent with *R v Portsmouth City Council, ex parte Bonaco Builders Ltd* (unreported, 6 June 1995) (Keene J), *Copymoore Limited v The Commissioner of Public Works in Ireland* [2013] IEHC 230, at para [51], and *Gottlieb* at paras **[**59] and [69].

71. Mr Coppel submitted that that there was no evidential basis for the Judge's conclusion that the addition of the TFC services to the outsourcing contract at the outset would not have added any bidders or even attracted other bidders. Edenred's case is that both the evidence before the Judge and the probabilities were that there would have been more bidders. He referred to the evidence of Mr Langlois that Edenred would have sought to secure an opportunity to bid as part of a consortium and submitted that the Judge's findings that Edenred would not have been able to find a consortium partner and, even if it had, it almost certainly would not have proceeded beyond the qualification stage, were based on nothing more than speculation. Edenred says that it is in any event highly improbable that the addition of services valued at £132.8 million over five years to a contract estimated at £660 million over eight years, relating to an entirely different industry currently characterised by a thriving competitive market of suppliers of children vouchers, would not have altered in any way the pool of actual or potential bidders for the Atos contract. In that regard, Edenred points to the fact that, when the market was alerted on the second consultation to a possible contract for TFC services, a wide range of potential bidders came forward which had not expressed any interest in bidding for the Atos contract.

72. Those are powerful points and were well presented in oral and written submissions. I do not accept, however, that the proposed amendments to the Atos contract for the provision of services relating to the TFC scheme engaged the 2006 Regulations. It is

clear from paragraph [40] of the court's judgment in *Pressetext* that an amendment may not be regarded as constituting a material change, and so amounting to the offer or award of a new contract, for the purposes of the 2004 Directive and the 2006 Regulations if it was provided for in the terms of the initial contract. The court said:

> "As a rule the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting."

73. That will plainly only be the case when the provision in the initial contract permitting the change is sufficiently clear, certain and precise to satisfy the principles in Article 2 of the 2004 Directive and regulation 4(3) of the 2006 Regulations that a contracting authority shall treat economic operators equally and in a non-discriminatory way and shall act in a transparent way. The principle of transparency was described in the following terms by the court in Case C-496/99 P *Commission v CA Succhi di Frutta SpA* [2004] ECR I-3801 at [111]:

> "111. The principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract."

74. At the heart of the present dispute is whether the change provisions in the Atos contract were sufficiently clear, certain and precise in anticipating and embracing the proposed amendments for the TFC scheme that the proposed amendments are not properly to be regarded as constituting the offer or award of a new public contract. I consider that they were.

75. Like all contracts the Atos contract must be interpreted against its factual background. That includes the published Contract Notice and related documents. Read in that context I reach the following conclusions about its purpose and relevant provisions.

76. The purpose of the contract was the outsourcing of all the services supporting the business of NS&I, including in particular all the services identified in the common procurement vocabulary in II.1.6 of the Contract Notice. The contract was to include the provision of operational services for the B2B services that NS&I was providing at the date of the Contract Notice (viz for ELPS and the CFO) and the future B2B services that NS&I would agree to provide to other central government departments (including their executive agencies and non-departmental bodies) and local authorities. Contrary to Mr Coppel's submission, I do not accept that the Contract Notice or the Atos contract, on their proper interpretation, embraced possible B2B

business for private sector entities. Critically, it was precisely the same outsourced services for NS&I which were the subject of the Contract Notice and the Atos contract itself and related documents which Atos was to provide in order to support NS&I in its then and anticipated B2B business. The services to be provided by Atos were not to change – merely their application to a particular type of business taken on by NS&I.

77. Under the change provisions in the contract, Atos is obliged to accept any changes to the services to be provided pursuant to the contract, subject to the restrictions specified in the contract, unless Atos can demonstrate to NS&I's reasonable satisfaction that the proposed change (1) would materially and adversely affect the risks to the health and safety of any person; or (2) would require the services to be performed in a way that infringes any law; or (3) would be technically impossible to implement; or (4) would be a material and adverse departure from industry best practice. On the proper interpretation of the Atos contract against its factual background, NS&I cannot impose on Atos, under the contractual change provisions, changes which fall outside the scope of the outsourced services specified in the Contract Notice. Furthermore, we were told (but not taken to the provision which states) that the Atos contract provides a fixed price formula for future B2B services.

78. The proposed amendments to the Atos contract in respect of the provision of outsourced services for NS&I to fulfil its obligations to HMRC under the MoU fall clearly and squarely within the scope of what was anticipated and intended to fall within the contractual change provisions in the Atos contract. The amendments relate to new B2B services for central government, which will be implemented by the outsourced services which were the very subject of the Contract Notice and the original Atos contract. The proposed amendments are not, therefore, from a *Pressetext* perspective, materially different in character from the original Atos contract and do not extend the scope of the Atos contract considerably to encompass services not initially covered contract such as to demonstrate, in either case, the intention to renegotiate the essential terms of the contract and to offer or award a new contract.

79. I do not accept that the cases relied upon by Mr Coppel are analogous to the present one. C-340/02 *Commission v France* [2004] ECR I-9845 concerned a scheme by the municipality of Le Mans for the improvement of a sewage treatment plant. There were to be three stages: (1) a feasibility study for a water treatment network with a view to bringing the sewage treatment plant into compliance with European environmental laws; (2) a contract (a) to assist the municipality in drawing up a technical specification on the basis of the solution chosen on the first phase, (b) to draw up an environmental impact assessment, and (c) to assist the municipality in appraising offers for the third phase works; and (3) planning of the works and their execution. The published contract notice for the first phase stated that the candidate whose solution was successful in relation to the first phase might be invited to take up a contract to assist the municipality for the first and third parts of the second phase. The court held that the stated "option" for the successful candidate at the first phase to participate in the second stage did not avoid the need for the lawfully required tender procedure at the second stage because the first and second phases differed significantly in their substantive subject matter.

80. In C-299/08 *Commission v France* [2009] ECR I-11587 the CJEU held that French laws which laid down a procedure for the award of marchés de définition (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract), under which it was possible for the contracting authority to award a marché d'éxecution (a public works, supply or service contract) to one of the holders of the initial marchés de définition by limiting competition to those holders infringed the 2004 Directive.

81. Case C-423/07 *Commission v Spain* [2010] ECR I-3429 concerned the Spanish government's decision to construct, maintain and operate certain roads, including sections of motorway. Following a public notice and a tender procedure, a contract was awarded to the successful bidder which included substantial work not specified in the OJEU notice, including work to a different section of the motorway. The court rejected the submission of Spain that the award of the additional work not mentioned in the notice was lawful because it was obvious, in the light of the applicable Spanish law and all the circumstances, that the invitation to tender was calling on the tenderers to employ their initiative and creativity with a view to resolving the essential problem, which was the density of the traffic on the A-6 motorway.

82. *Uelzen* concerned the legality of contracts by several local authorities in Germany granting the right to provide public ambulance services within their areas without complying with the 2004 Directive. Edenred relied on that part of the judgment of the court concerning the grant by the Administrative District of Uelzen of ambulance services in the administrative district. A contract was granted in 1992 to the German Red Cross ("the DRK") by the local authority to provide ambulance services in part of the administrative district. Without following the procedures specified in the 2004 Directive, the contract was extended in 2004 to include the provision of public ambulance services in the area of the Bad Bevensen ambulance station, which accounted for approximately one quarter of the total area of the administrative district. The value of that contractual extension amounted to at least EUR 670,000 per year. The value of the entire contract, as extended, was EUR 4.45 million per year. The court held that the extension was a material amendment of the original contract, as described in *Pressetext*, and infringed the 2004 Directive.

83. The facts in those cases are not remotely similar to the scope of the Contract Notice and the Atos contract in the present case, including in particular, the meaning, purpose and application of the contractual change provisions in the Atos contract as I have analysed them in paragraphs 75 to 77 above.

84. *Gottlieb* was an application for judicial review of the decision of Winchester City Council to authorise variations to a contract to a developer to build a new mixed retail, residential and transport centre in the heart of Winchester. The applicant contended that the decision of the council was unlawful for failing to comply with the 2004 Directive and the 2006 Regulations in respect of the varied terms. Clause 5.1 of the development contract provided for variations to the approved drawings following the grant of planning permission and throughout the course of the development. Lang J held that the variation clause was so broad and unspecific that it did not comply with the principle of transparency. She said (at [124]) that the variation clause did not provide the information which an economic operator would need in order to assess the potential scope for variations when tendering. At best, a potential bidder would only know that applications could be made to the council for variations and that the effect

of any variation on rental income would be a relevant factor. She held that there were material variations to the contract which could not have been anticipated by potential bidders. She also held that there was evidence upon which the court could properly conclude that other potential bidders, with a realistic prospect of success, would have bid for the contract, if the opportunity had arisen.

85. The issue in *R (Law Society) v Legal Services Commission* was whether a provision in contracts between the Legal Services Commission and solicitors for the provision of publicly funded civil work enabling the Commission to amend the contracts was compatible with the 2006 Regulations. The Court of Appeal held that it was not. Under the amendment clause the Commission could amend any of its terms if it considered it necessary or desirable to do so in order to facilitate reform of the legal aid scheme. The Court of Appeal held (at [86]) that it was "an extreme case" where the contracting authority had reserved to itself a virtually unlimited power of amendment, subject to some limited procedural conditions. They said that the power to amend was better characterised as a power to rewrite the contract.

86. *Gottlieb* and the *Law Society* case are examples of the court applying the principle of transparency to particular facts. Those facts are far removed from those of the present case where the contractual change provisions, properly interpreted against their factual background, are limited in scope. In the case of the proposed amendments, the contractual change provisions do no more than what was always anticipated in the Contract Notice and the original Atos contract and related documents, namely enable the same services outsourced by NS&I and addressed in those documents to be applied to new B2B business taken on by NS&I.

87. I do not agree with Edenred that the Judge ought to have found that, if the TFC business had been specifically mentioned in the Contract Notice, this would have added or attracted other bidders. One of the pre-qualifying requirements to bid for the outsourcing contract was a £1 billion annual turnover. Neither Edenred itself nor the Edenred group of companies as a whole could have satisfied that requirement.

88. Further, as stated and analysed by the Judge, there was no cogent evidence that there was someone else that would have satisfied that financial requirement who did not bid but would or might have done if there had been an express reference to the TFC scheme in the Contract Notice. The Judge addressed this issue, the probabilities and the evidence, in paragraphs [120] to [132] of her judgment, and I see no reason to conclude that she was wrong in her conclusions.

89. There was evidence that Edenred and others would or might have sought to join a consortium, presumably as a potential sub-contractor to a bidder. Mr Coppel submitted that is sufficient to bring the case within the second *Pressetext* example of a material variation. The Judge concluded, however, and was entitled to conclude that, even if the Contract Notice had mentioned the TFC scheme, no additional bidder (who would have met the £1 billion annual turnover requirement) would have been attracted to bid merely because Edenred or some other CVPA member was eager to be a sub-contractor. The fact that Edenred or other CVPA members would have been interested in participating in the TFC scheme is of no relevance unless realistically some other bidder would or (or the basis of the test advanced by Edenred, but which does not have to be decided) might have come forward. The Judge concluded and was entitled to conclude that the evidence fell far short of that.

90. For the sake of completeness, I should add at this juncture that I do not accept that the Atos contract was in substance a framework agreement as defined by the 2006 Regulations. The Atos contract was not one which set out the terms under which future contracts would be entered into. Neither the Contract Notice nor the Atos contract itself contemplated one or more future contracts between the NS&I and Atos. The Atos contract was, as I have said, an outsourcing contract under which the same outsourced services would be applied by Atos to the B2B business from time to time entered into by NS&I, the precise nature of that application to be specified in amendments made in accordance with the change provisions in the Atos contract.

91. For those reasons I consider that neither the change provisions in the Atos contract nor the proposed amendments to the Atos contract to accommodate the TFC scheme infringe the 2006 Regulations. In particular, they satisfy the requirements that a contracting authority must treat economic operators equally and in a non-discriminatory way, and must act in a transparent way. I cannot see that there is any scope in the circumstances for an alternative case of Edenred that Article 56 has been infringed.

92. Mr Coppel referred to Case C-221/12 *Belgacom NV v Interkommunale voor Teledistrutie van het Gewest Antwerpen (Integan)* [2014] PTSR 650. That case concerned the transfer, without a call for tenders, of television broadcasting services by Belgian inter-municipal associations to a cable and internet company under agreements which conferred on the transferee company an exclusive right to operate the cable networks for a fixed period and to grant long term leasehold rights on the networks. Those agreements were for service concessions within Article 17 of the 2004 Directive, and so were excluded from the 2004 Directive. The court held that the public authorities were nevertheless required to comply with the fundamental rules of the FEU Treaty, as found in Articles 49 and 56 TFEU, including non-discrimination on grounds of nationality and equal treatment and the obligation of transparency.

93. The principles in that case have no relevance to the facts of the present case. For the reasons I have stated earlier in this judgment Article 56 is not engaged by the arrangements between HMRC, on the one hand, and NS&I, on the other hand, governed by the MoU. As regards the proposed amendments to the Atos contract, the *Belgacom* case concerned a situation in which the 2004 Directive had no application because of the exemption in Article 17 of the Directive. *Belgacom* has no relevance to a case, like the present, in which the proposed amendments to the Atos contract potentially fall within the scope of the 2004 Directive but do not infringe it.

94. That is sufficient to dispose of this appeal. It is not necessary, therefore, to address Edenred's submissions on Regulation 47C of the 2006 Regulations (which provides, among other things, that a breach of the obligation of a contracting authority to comply with certain of the Regulations is actionable by an economic operator which, in consequence, suffers, or risks suffering, loss or damage) and Edenred's criticisms of the Judge's decision on causation and loss and so I shall not do so.

Conclusion

95. For all those reasons, I would dismiss this appeal.

Lord Justice Underhill

96. I agree

Lady Justice King

97. I also agree.