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## Edenred – a deceptively narrow decision but with wide reaching consequences

The recent Supreme Court decision *Edenred (UK Group) Ltd and another v HM Treasury [2015] UKSC 45* has already been the subject of a full note in Practical Law (see [Legal update, Supreme Court dismisses appeal against government decision not to tender for administration of new scheme](#)). In this short piece we consider some of the points raised by the decision that may become important in other cases. We refer to the earlier legal update for discussion of the detail of the judgment.

The Supreme Court's decision addresses two key points. First, whether by reference to original tender material or the contract, it could be said that there was no real modification to the contract, and secondly whether any change was covered by a valid review clause. The primary basis for the Supreme Court's judgment (but not in the courts below) was on the former point. In founding the case on the first point, the Court clearly sought to make a rather narrow finding but in doing so it has made observations which might have rather wider effects than intended.

### Direct functional link

In a case such as *Edenred*, in which a contract is being extended to cover scope of provision which was contemplated in the original tender, an obvious question will be whether the extended scope was the subject of any real assessment in the tender or was just referred to "for information". While the latter might have satisfied obligations of transparency, it is not really sensible to accept that such a reference is enough if the outcome of any bid might have been



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materially affected had bidders had to tender for the extended scope.

This is the point of the decision of the CJEU in [Case C-340/02 \[2004\] ECR I-9845 Commission v France](#), in which it was established that there should be a direct functional link between tender procedures and the contracts awarded. Otherwise procurement law risks descending into absurdity in which contracts are won by reference to only part of the overall contract. At that point public procurement becomes little more than a game show.

The Supreme Court distinguished Case C-340/02 on the grounds that it involved a three stage scheme of works in which only the first stage had been the subject matter of the contract. That is true, but it is not a solid basis for distinguishing *Commission v France* and the important principle within it. It may be, although it is not clear from the Court's judgment in *Edenred*, that there was a sufficient functional link between the tender and the extended contract in this case. But that is not clearly explained.

### **Vague or abusive descriptions of scope**

In paragraph 36 of its judgment the Supreme Court comments upon the risk of abuse of the contracting system by vague statements being inserted into a contract as to its future development. Such statements might afford a public authority an unconstrained and inappropriate device for allowing for future provision of unspecified services in addition to the original contract. It is said by the Court that in such cases the primary contract could be challenged as an abuse of right. The Supreme Court noted that no such challenge had been advanced in this case.

We consider that there was insufficient consideration by the Court of the practicality of the proposal made. First, it is very hard to see how any challenge could be made to the original contract unless it were made at the time of its original announcement. Any challenge would surely be bound to engage in some way the relevant procurement regulations and their short limitation period. Even if the point were to be pursued only under general EU law principles (if that is even possible) time would usually have expired. Only if a claim were brought for [Francovich](#) damages (if that is possible) could there be any basis for making this abuse of right claim at the time that the abuse actually occurs. At the time of the abuse the point of challenge is no longer the original contract. Instead it is the change to it. Any such challenge will be met with the contention that it was always contemplated, as it was in *Edenred*, that services would be extended and that if the provisions of the tender or the contract are vague it is far too late to challenge them now.

In reality it will be rare, if ever, for such a challenge to be made at the outset of the tender process for the primary contract. At that point the bidder probably has little indication as to how the scope of the contract might be extended. Its focus will be to get on with winning the contract. The bidder will not be worrying about challenging the ability to get future contracts which may or may not be rolled into the ongoing process.

To some extent this takes one back to the direct functional link point. In a formal sense, the judgment in *Edenred* makes sense in focussing on whether the modified scope was contemplated by the original tender. This was not, however, how the matter was dealt with in the lower courts and in reaching its conclusion the Supreme Court may have sown the seeds for some interesting questions in the future.

## Review clauses and the meaning of “clear precise and unequivocal”

The Supreme Court was clearly less certain of its ground, or perhaps not all agreed, on the proposition that the modification to the contract was being made pursuant to a clear, precise and unequivocal review clause. The correct understanding of the clauses was not thought to be *acte clair*.

It seems, not surprisingly, that the Supreme Court found the examples of review clauses given in Recital 111 of Directive 2014/24 less than helpful when trying to understand what constitutes a valid review clause for the purposes of the Directive or the Regulations. The list is certainly eccentric and gives away nothing about what is intended. Indeed it fails to address the usual sorts of change clauses that one might see in contracts for construction or services and thereby fails to provide any guidance as to what the elements of a clause might be if it were to meet the Regulation 72(1)(a) criterion.

The Court identified the four aspects of a review clause that prevents a modification from being treated as substantial:

- Monetary value is irrelevant.
- Modifications must have been provided for in the initial procurement documents.
- The clause must achieve a required degree of specificity.
- The clauses cannot authorise modifications that would alter the overall nature of the contract.

The third point is particularly “interesting”. The word “required” bears a lot of weight. Perhaps one point is that the clause should be constrained so that there is no significant scope for negotiation or opening up the pricing of the contract. It should to some degree be mechanical. That then raises very important questions about clauses in a range of contracts in which changes are subject to monitoring, pricing and so forth by outside parties such as experts, valuers, certifiers etc. Is that flexibility within the scope of “precise and unequivocal”? A useful recital in the Directive would have given some help on this, but the Supreme Court seems, in a rather understated way, to have indicated that there is scope for debate about whether complex multi-page change control provisions will really ever meet this test.

## Transition between 2006 and 2015 Regulations

Finally, it is important to consider what the Supreme Court said about transitional arrangements given the increasing prevalence of long term contracts and framework arrangements. It is important to see whether the 2006 regime is likely to have a long continued effect through agreements tendered under the old regime. The precise effects of the relevant transitional arrangements in Regulation 118 of the 2015 Regulations may turn out to be the starting point for many problems, and in *Edenred* the Supreme Court made an interesting, if slightly confusing, start.

The point comes up in two places, paragraphs 6 and 30 of the judgment, although in significantly different terms. Regulation 118 of the 2015 Regulations makes clear that they do not apply to procedures started before 26 February 2015, or to the award of a specific contract based on a framework agreement entered into before 26 February 2015, or following an award procedure commenced before that date. The Regulations do not state which regime applies to the consideration of changes to an existing contract tendered or called off under the old regime.

Although the point is not very clearly explained, it seems from paragraph 6 of the Supreme Court's judgment that the new regime applies to this situation because any modification must be judged by the new regime. The logic of Regulation 72(9) is that a modified contract that is not in one of the safe harbours provided by Regulation 72(1)(a)-(f) is a new contract that must be the subject of a fresh procedure and that must be under the 2015 regime.

It would seem, therefore, that it is not just the case, as paragraph 30 might suggest, that Regulation 72 is a useful current description of the body of law that has grown up in this area. Instead it is the binding legal provision that applies to such situations, albeit to be interpreted against the backdrop of earlier case law.

For more information on regulation 72, see [Practice note, Varying public contracts](#).

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