



**Trinity Term
[2015] UKSC 45**

On appeal from: [2015] EWCA Civ 326

JUDGMENT

**Edenred (UK Group) Limited and another
(Appellants) v Her Majesty's Treasury and others
(Respondents)**

before

**Lord Neuberger, President
Lord Mance
Lord Sumption
Lord Carnwath
Lord Hodge**

JUDGMENT GIVEN ON

1 July 2015

Heard on 13 and 14 May 2015

Appellants

Jason Coppel QC
Joseph Barrett
Rupert Paines
(Instructed by Pinsent
Masons LLP)

Respondents

Philip Moser QC
Ewan West
Anneliese Blackwood
(Instructed by Government
Legal Department)

LORD HODGE: (with whom Lord Neuberger, Lord Mance, Lord Sumption and Lord Carnwath agree)

1. This is a challenge to the decision of 29 July 2014 by HM Treasury (“HMT”) to use National Savings and Investments (“NS&I”) to deliver the Government policy of Tax-free Childcare (“TFC”), which I describe below (para 16). TFC is designed to replace the policy of employer-supported childcare (“ESC”) under which the Government gives relief from tax and national insurance contributions to employers which support their employees with the cost of childcare. The challengers are (i) Edenred (UK Group) Ltd (“Edenred”) which provides services to employers who operate the ESC scheme on behalf of their employees and (ii) the Childcare Voucher Providers Association (“CVPA”) which is a trade association for providers of childcare vouchers.

2. NS&I is a non-ministerial Government department and executive agency of the Chancellor of the Exchequer. It is a retail savings and investments organisation which offers its products to United Kingdom customers. Its products are designed to enable the Government to borrow at a reasonable cost and in 2011 it had invested assets of about £105 billion from about 26m customers. Since 2011 it has obtained contributions towards its running costs by using its substantial infrastructure to process payments, manage accounts and provide associated support functions to other public bodies. Section 113 of the Financial Services Act 2012 gave NS&I a general power to enter into arrangements with public bodies to provide such services.

3. NS&I outsourced its operational services and transferred its operational staff to a private sector provider in 1999. Its current outsourcing contract, which it entered into in 2013 and which has operated since April 2014, is with Atos IT Services Ltd (“Atos”). The Director of Savings, who is NS&I’s chief executive, and its other civil servants are policy-makers for the organisation but its operations, both dealing with customers and back office functions, including customer service, transaction management, printing, accounting, IT development and management, are provided by employees of Atos. Those services involve the use of Atos equipment and of premises leased or owned by Atos but those premises and equipment will be transferred to NS&I on termination of the arrangement.

4. To allow NS&I to administer TFC it is necessary to amend the contract between NS&I and Atos. The Atos contract is not subject to this challenge but its proposed modification is. The challenge in summary is (i) that the proposed amendment to the Atos contract would be contrary to European Union procurement

law, and (ii) that as a result the decision to use NS&I to deliver TFC is unlawful. The applicants seek relief in the form of declarations that the respondents' decisions regarding the delivery of TFC are unlawful and an order restraining the respondents from giving effect to the modification of the Atos contract if their challenge is successful. In the meantime, the respondents are prevented by interim order from implementing the provision of services under TFC until further order.

5. The challenge came before this court as an application for permission to appeal. As the matter required a prompt determination, the court heard both the application for permission to appeal and also the substantive appeal at the same time.

6. At the heart of the challenge is the assertion that the proposed amendment of the contract between NS&I and Atos would involve the direct award of a valuable public contract without conducting a tender procedure contrary to the requirements of the EU procurement regime that was implemented by the Public Contracts Regulations 2006 (SI 2006/5) ("the 2006 Regulations") and their successor regulations, the Public Contracts Regulations 2015 (SI 2015/102) ("the 2015 Regulations"), which implemented Directive 2014/24/EU ("the 2014 Directive"). The latter regulations came into force on 26 February 2015 (regulation 1(2)) after the challenged decision had been made and do not affect the validity of the Atos contract itself (regulation 118(5)), but regulation 72 of the 2015 Regulations, which deals with modification of contracts during their term, will govern the amendment of the Atos contract if the respondents proceed with that amendment. The applicants also assert more widely that the use by public bodies of contracts, such as that between NS&I and Atos, which provide both for outsourcing and for the extension of the outsourced services to other public bodies in future, would place the United Kingdom in breach of its obligations under article 56 of the Treaty on the Functioning of the European Union ("the TFEU").

The facts in more detail

(i) The procurement of the contract between NS&I and Atos

7. In July 2011 NS&I commenced procurement of a further contract for the outsourcing of its operational services. On 11 July 2011 HMT and NS&I held an industry day at the Royal Geographical Society at which, among others, Lord Sassoon, commercial secretary at HMT and Jane Platt, NS&I's CEO, presented to interested parties their proposals for the future of NS&I, including the business to business services which I discuss below, and the re-tender of the outsourcing contract.

8. On 22 November 2011 NS&I as contracting authority published a notice in the Official Journal of the European Union (2011) (S 224-363697). The notice advertised “UK-London: banking services” and the contracting authority gave “outsource services” as the title to the contract. It explained that the contracting authority was purchasing on behalf of other contracting authorities and that the nature of the services was “computer and related services”. In its short description of the contract the notice described the role of NS&I and explained that it was now seeking to retender its operational services, which it described as:

“including all processing of customer interactions and servicing (eg sales, after sales management and payments including via telephone, internet and mail); service management; IT development 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.”

The text went on in a passage which is of significance in this appeal to describe NS&I’s business to business services (which it called “B2B services”):

“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, 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 non-departmental public bodies) and by local authorities. NS&I also intends to permit the contractor to make the services provided under the contract available to private sector entities provided that this does not affect the provision of service to NS&I.”

The notice listed 50 entries from the common procurement vocabulary.

9. In section II.2.1 the notice described the quantity or scope of the contract, which was to run for 96 months from the award of the contract and would be extendable for a further 36 months. It described the average estimated annual volumes for its 26m customers (excluding B2B services) as £14-15 billion of receipts and £12 billion of payments, involving 55m transactions and 4m telephone calls. It described the estimated contract range and value in these terms:

“Contract range up to approximately 2,000,000.000 GBP, with a likely contract range of approximately 1,250,000,000 and 150,000,000 GBP, depending upon the uptake of B2B services.

Estimated value excluding VAT:

Range: between 1,250,000,000 and 2,000,000,000 GBP.”

10. As the notice stated, NS&I adopted the competitive dialogue procedure under regulation 18 of the 2006 Regulations and the award criterion was the most economically advantageous tender in terms of the criteria stated in the invitation to tender and other relevant descriptive documents.

11. NS&I issued a prospectus in November 2011 to provide potential bidders with the information they needed to submit a comprehensive electronic pre-qualification questionnaire (“PQQ”). In that document NS&I explained that it had only 140 employed staff and that the workforce of 1,750 who implemented its plans worked for its outsource partner. It flagged up the importance of B2B services as a contributor to its running costs. It stated that its future strategy included implementing product change and developing and delivering new B2B opportunities. It also set out the three stages of the procurement process: (i) the PQQ to identify a maximum of five bidders which had the needed experience, financial strength and capability to deliver the required services, (ii) the invitation to submit an outline proposal to select a maximum of three bidders who would receive a full set of requirements, draft contract and other supporting material, and (iii) the invitation to tender (“ITT”) from which it would select the provider that offered the best solution for the lowest price. It envisaged extensive dialogue with bidders at the second and third stages.

12. Ten organisations responded to the PQQ, which, among other things, required an organisation to have an annual turnover in excess of £1 billion, and, after evaluation, three organisations were shortlisted. On 2 April 2012 NS&I issued an invitation to participate in dialogue and from 1 May 2012 conducted a competitive dialogue with the remaining three bidders, who were given a full draft contract and due diligence material. Proposals to expand B2B services to other public sector bodies were discussed in three rounds of dialogue in May, June and October 2012.

13. The ITT, which was finalised after dialogue with the three bidders and issued on 10 December 2012, contained the final contract and scoring guidance for the bidders. NS&I set out in Schedule 2.11 of the contract its requirements in relation to B2B services and in Schedule 9.4 it laid down the procedures for managing

change which it envisaged would occur during the term of the contract. Schedule 2.11 required the parties to seek new B2B opportunities subject to the limitations set out in the OJEU notice (para 2.1). Paragraph 3.3 of that schedule set out the principles which were to govern the incorporation of a new B2B service into the agreement. Those principles included (i) that the agreement profit margin must not increase unless otherwise agreed by the parties, (ii) that, subject to (i), there must be no alteration of the allocation of risk, (iii) that where a new service was similar to existing services, the associated marginal cost and charges for delivery were to be used as the basis of the costs and charges for the new services, and (iv) that the term of any B2B services should not exceed the term of the agreement. Schedule 9.4 gave NS&I a wide discretion to reject any change and the provider a very limited right to reject such change (para 4). Paragraph 9 of that Schedule set out the procedure for amending the agreement, which provided for the approval or rejection of requests and a dispute resolution procedure. There were further controls over charges and costs within schedule 9.4 (para 7) and in Schedule 7.1. These provisions became part of the Atos contract.

14. On 20 May 2013 NS&I awarded the contract to Atos. The contract provided that services would commence on 1 April 2014. In fulfilment of its obligation to seek new B2B opportunities (Schedule 2.11 para 2.1), Atos undertook to spend more than £21m on developing a B2B sales unit during the period of the contract (Schedule 4.1.11, para B3.4).

15. On 26 June 2013 a notice of the award of the contract was published in the OJEU (2013) (S 124-213489) in which the total final value of the contract was stated as £660,000,000 but it was also stated that NS&I intended to expand the B2B service during the lifetime of the contract to other organisations, resulting in significant growth to the outsourced operational services.

(ii) *The TFC initiative*

16. TFC is a scheme to support working families with the costs of childcare. It gives the opportunity for parents to open a bank account, called a childcare account, for each of their children into which they, and other members of the family or employers, can pay money to be used for childcare costs. Those funds will make up 80% of the relevant childcare costs. The other 20%, which is the equivalent of basic rate tax relief, will be paid by the Government up to a maximum of £2,000 per child per year. The parents will use the funds in the childcare account to pay the registered childcare provider or providers of their choice. TFC, unlike ESC, will not necessarily involve employers in defraying childcare costs and it is envisaged that many more parents will be eligible for support than under ESC, including the self-employed and those on the national minimum wage. NS&I estimates that around 1.9m families are potentially eligible for TFC and forecasts that about 1.2m families

will have registered, giving rise to 1.6m accounts, by the fifth year of the operation of TFC.

17. On 19 March 2013 HMT and HM Revenue and Customs (“HMRC”) announced the introduction of TFC. HMRC, like NS&I, is a non-ministerial government department and, like both HMT and NS&I, is under the control of the Chancellor of the Exchequer. HMT has allocated money to HMRC to administer TFC, which it initially intended would be introduced in the autumn of 2015. HMT and HMRC consulted on the design and operation of TFC between August and October 2013. The applicants participated in that consultation, which proposed that TFC would be delivered through a competitive market in which the accounts were administered by private sector providers and that HMRC would have an active role in registering the parents, processing the 20% top-up to childcare account providers, and checking compliance. In October 2013 NS&I approached HMT and HMRC offering to provide all TFC accounts and also other services, including the registration of parents, using its existing banking infrastructure, including online accounts and services, and its customer support network which Atos now operates.

18. The Government was attracted by the NS&I option in part because it had the potential to enable a speedy implementation of TFC in accordance with the Government’s proposed timetable and also because it offered a better defence against organised criminal activity to defraud TFC through the setting up of bogus account providers and childcare providers.

19. On 17 March 2014 the Government announced that HMT and HMRC would use NS&I to provide and administer childcare accounts and supporting services. After a challenge by judicial review on the ground that the Government had not consulted on that delivery option, there was a further consultation. HMRC issued a further consultation paper on 23 May 2014 and published a prior information notice in the OJEU on 14 June 2014 to alert interested parties to the further consultation. In the consultation paper the Government invited comments on options to deliver TFC accounts in the public sector, either through NS&I or HMRC. It compared those options against three private sector options, namely (i) a single private sector account provider, (ii) a small fixed number of contracts for entities to become account providers, and (iii) an open market for account providers.

20. On 14 July 2014 HMT and HMRC officials submitted their advice to ministers. In that submission they identified the five options for TFC. The officials identified seven criteria: (i) simple, (ii) efficient, (iii) competitive, (iv) secure, (v) responsive, (vi) speed of delivery, and (vii) ease of build. They stated that there was no unambiguously superior option and that ministers’ decision would depend upon how much importance they placed on each criterion. In their recommendations officials noted that NS&I performed well against the simple, efficient, speed of

delivery and ease to build criteria and that the private sector options performed well on many of the criteria but less favourably on speed of delivery and ease to build criteria.

21. On 29 July 2014 the Government announced that NS&I would provide and administer childcare accounts and supporting services in order to deliver TFC for HMRC. In their published response to consultation HMT and HMRC stated that:

“the government considered that the NS&I option had real and particular advantages in terms of simplicity for parents and childcare providers, offering security for parents through a trusted brand with all funds guaranteed by the government, and speed of delivery.”

The response concluded that while some of the other factors might arguably be said to tend in favour of other options, they did not outweigh the advantages of the NS&I option.

22. Section 16(1) of the Childcare Payments Act 2014 (para 46 below) provides statutory authority for NS&I to provide childcare accounts. It is envisaged that most parents will manage their childcare accounts online using a modified version of NS&I’s pre-existing Direct Saver product, in accordance with the Government’s “digital by default” policy.

23. The mechanism by which the Government proposes to introduce TFC involves (i) a memorandum of understanding between HMRC and NS&I which sets out HMRC’s requirements and (ii) a variation of the Atos contract by the inclusion of a new Schedule 2.16 which sets out in some detail what Atos must do to provide services to NS&I in order to meet those requirements. NS&I will be responsible for developing the web portal through which parents will obtain access to TFC, providing childcare accounts to parents, working out how much money is due to parents from HMRC and supporting parents, for example through call centres. The proposed contract variation has an initial term of five years and it is estimated that Atos will earn approximately £132.8m from the provision of its services in implementing TFC over that term.

24. The applicants found on the estimated value of the contractual variation and the extensive amendments to the Atos contract in support of their submission that the Government was required by EU competition law to open the provision of TFC accounts to competition by an advertised procurement process.

The legal proceedings

25. On 27 August 2014 Edenred issued a claim under Part 7 of the Civil Procedure Rules and it and the CPVA also raised judicial review proceedings seeking declarations that the proposed arrangements were unlawful. Edenred claimed a remedy under the 2006 Regulations as an economic operator. The CVPA sought a remedy only in the judicial review. The two claims were consolidated by consent. On 30 September 2014, on Edenred's initiative, Leggatt J ordered (i) an expedited trial of the Part 7 action limited to specified grounds of claim and (ii) that the judicial review and the remaining grounds of the Part 7 action be stayed. As a result, although the applicants' grounds of appeal sought to challenge the refusal to lift the stay on the judicial review, only the grounds which were the subject of the expedited trial are available as the basis of the remedies which the applicants seek. On 27 October 2014 Leggatt J pronounced an interim order that prevented the respondents from implementing the provision of services under the TFC scheme until further order. Subsequent orders have kept that interim relief in force.

26. After an expedited trial which took place between 24 and 28 November 2014, Andrews J issued a judgment dismissing the grounds of claim. She held (i) that the amendment of the Atos contract was not contrary to EU procurement law, (ii) that the proposed arrangements between HMRC and NS&I did not constitute a public services contract under the 2006 Regulations or an arrangement which was subject to article 56 of TFEU, and (iii) that in any event Edenred had not established that it had suffered loss as a result of any breach of the 2006 Regulations or article 56 of TFEU.

27. The applicants appealed. On 31 March 2015 the Court of Appeal (Sir Terence Etherton C, Underhill and King LJ) dismissed the appeal, holding that the amendment of the Atos contract and the memorandum of understanding between HMRC and NS&I would not be unlawful. The Court of Appeal did not rule on the question of remedy if there were an illegality or on whether the stay should be lifted in the judicial review action.

Discussion

28. The principal purpose of EU procurement law, to which this challenge relates, is to develop effective competition in the field of public contracts: *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici* (C-247/02) [2004] ECR I-9215, para 35. Thus if a public body decides to obtain services by a public contract, and the contract exceeds the prescribed threshold (currently €134,000 for public service contracts awarded by central government authorities), the public body must advertise the opportunity and follow fair and transparent procedures ensuring

equality of treatment, to enable potential service providers to compete for the work. The recitals in the latest EU legislation, the 2014 Directive, refer to the goals of improving efficiency in public spending, facilitating the participation of small and medium enterprises, and promoting “smart, sustainable and inclusive” growth, including innovation. Having regard to the importance of this competition policy, the case law of the Court of Justice of the European Union (“CJEU”) has consistently stated that provisions that authorise derogations from the rules intended to ensure the effectiveness of Treaty rights in relation to public contracts must be interpreted narrowly. See, for example, *Commission of the European Communities v Italian Republic* (C-385/02) [2004] ECR I- 8121, para 19; *Commission of the European Communities v Spain* (C-84/03) [2005] ECR I-139, para 58.

29. Amendments to an existing public contract will fall within the procurement regime and be treated in substance as the award of a new contract if they involve a material variation of the contract. Thus the central question in Edenred’s challenge is whether the proposed amendments of the Atos contract amount to a material variation.

30. Although Edenred raised its challenge under the 2006 Regulations, both parties referred the court to the 2014 Directive and the 2015 Regulations as the updated statements of EU procurement law. Recital 2 of the 2014 Directive spoke of the incorporation of “certain aspects of related well-established case-law” of the CJEU. I agree that it is appropriate to test the validity of the proposed amendment of the Atos contract by reference to the 2015 Regulations. See para 6 above. In this judgment I therefore refer principally to the 2015 Regulations but use the case law and the 2014 Directive as aids to their interpretation.

31. Regulation 72 of the 2015 Regulations sets out six circumstances (or “cases”) in which a contracting authority may modify a public contract without a new procurement. Two of those cases are relevant. I will examine, first, the case in which the modifications, irrespective of their value, are not substantial (regulation 72(1)(e) and (4)) before turning, secondly, to the case which found favour with the Court of Appeal, namely that the modifications, irrespective of their monetary value, had been provided for in the initial procurement documents in clear, precise and unequivocal review clauses (regulation 72(1)(a)).

Whether the modifications are “substantial” – extending the scope of the contract

32. Regulation 72(1) provides:

“Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:

... (e) where the modifications, irrespective of their value, are not substantial within the meaning of para (8).”

Regulation 72(8) provides:

“A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:

(a) the modification renders the contract or framework agreement materially different in character from the one initially concluded;

(b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have –

(i) allowed for the admission of other candidates than those initially selected,

(ii) allowed for the acceptance of a tender other than that originally accepted, or

(iii) attracted additional participants in the procurement procedure;

(c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(d) the modification extends the scope of the contract or framework agreement considerably; ...”

Those conditions derive from and codify the jurisprudence of the CJEU in *Presstext Nachrichtenagentur GmbH v Austria* (C-454/06) [2008] ECR I-4401, paras 34-37.

33. At an earlier stage in the proceedings the applicants had argued that the modifications, if part of the initial procurement procedure, would have allowed other candidates to be admitted (condition (b) above) and that the modifications had changed the economic balance of the contract (condition (c) above). The applicants no longer advance those submissions, correctly in my view in the light of the findings of fact of Andrews J, particularly at paras 119-123 and 132 on condition (b) and 133-139 on condition (c). Now, the applicants confine their challenge under this heading to condition (d) above, submitting that the amendments to the Atos agreement amount to a considerable extension of the scope of the contract, in the words of the CJEU in *Presstext* (para 36), “to encompass services not initially covered”.

34. I am not persuaded that this is so. The contract which NS&I entered into with Atos under the procurement which commenced in 2011 was to provide NS&I with the operational services that would enable it both to perform its established retail banking and investment functions and also to expand its B2B services up to the £2 billion maximum envisaged in the OJEU notice (paras 8 and 9 above). That is the contract which the economic operators competed with each other to win. The respondents required bidders to have the financial strength and other capabilities to achieve that role. While the initial value of the contract which was stated in the award of contract notice was £660,000,000 (para 15 above), the procurement process and the contract envisaged the expansion of NS&I’s business and required the outsource partner to provide the operational services to achieve that expansion. That was the object of the contract; it was clearly stated in the OJEU notice. Economic operators can have been in no doubt as to the extent of the services they might have to provide to NS&I, albeit that they would not know the public bodies to whom NS&I would provide B2B services or the public policies which the future B2B services would support.

35. Mr Coppel QC for the applicants relied on the judgment of the CJEU in *Commission of the European Communities v Federal Republic of Germany* (C-160/08) [2010] ECR I-3713 to support his submission that the modification to accommodate TFC extended the scope of the Atos contract because it encompassed services not initially covered. But in my view that case does not assist him because, in contrast with the present case, the initial contracts for the provision of public ambulance services, which the public authorities of the *Länder* entered into, covered defined territories and did not envisage extension of those services into other territories or require at the outset that the bidders had resources to cover such extensions. Similarly, I consider that *Commission of the European Communities v French Republic* (C-340/02) [2004] ECR I-9845 does not assist him as it involved a three-stage scheme of works in which only the first stage had been the subject–

matter of the contract. The court held (paras 34-36) that the contract could not be extended by an option to carry out a separate phase of works because procurement law required both the subject-matter of each contract and the criteria governing its award to be clearly defined. *Commission of the European Communities v Kingdom of Spain* (C-423/07) [2010] ECR I-3429, which concerned the award of additional motorway works that had not been included in the object of the contract described in the OJEU notice, also falls to be distinguished again because in the present case the OJEU notice defined the subject matter of what became the Atos contract so as to include the expansion of banking and accounts services to meet NS&I's aspirations for its B2B business.

36. I do not accept that one should read the prohibition from modifying a contract to encompass services not initially covered as banning the modification of a public contract which extends the contracted services beyond the level of services provided at the time of the initial contract if the advertised initial contract and related procurement documents envisaged such expansion of services, committed the economic operator to undertake them and required it to have the resources to do so. The court must look to the OJEU notice and the other procurement documents, including the contract contained in the ITT, to ascertain the nature, scale and scope of the operational services that the Atos contract was set up to provide. In short, the question is whether the services were covered by the contract resulting from the procurement between 2011 and 2013, including its provisions for amendment of the contract. Were it otherwise, it is difficult to see how a Government department or other public body could outsource services that were essential to support its own operations and accommodate the occurrence of events and the changes of policy that are part of public life. There may be circumstances in which a court could conclude that a public authority had designed a contract as a means of avoiding its obligations under EU law. In such cases the contract might be open to challenge under EU law as an abuse of right. But here there is no challenge to the validity of the Atos contract itself. Edenred goes no further than to suggest that public authorities could use contracts framed in this way as a device for avoiding their public procurement obligations by allowing for the future provision of unspecified services of a much greater value. Whether or not that is so, the focus must be on the particular contract. The scale and nature of NS&I's stated aspirations for the use of its infrastructure and other resources in providing B2B services to public sector bodies as well as its own retail financial services, which the Atos contract was designed to support, appear to be within a reasonable compass.

37. As I have said, this is an outsourcing contract by which NS&I obtains operational services to enable it to provide its retail banking and investment services. NS&I has sought to expand its business and obtain contributions towards its running costs by making variants of such banking services available to public sector bodies. In particular it has offered its banking infrastructure, including its banking software or "banking engine", to provide account management, payment processing, and

ancillary services. It advertised the outsourcing contract with the specified contract range of £1.25 billion to £2 billion. The Atos contract limits the scope of its modification to the terms of the OJEU notice, including the upper limit of that financial range. The essential nature of the operational services that Atos provides is not altered by the proposed modification. Andrews J found as fact (para 112):

“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 it to NS&I for existing banking, accounting and payment products and which would have to be supplied for any new product delivered by NS&I, whether or not it was a new type of savings account to raise money for HMT or a bank account to be utilised by another government department – or a payment service offered to another government department akin to the ELPS [which is the Equitable Life Payment Scheme that NS&I operates for HMT]”.

As I discussed in para 13 above, NS&I also included provisions in the Atos contract that restrict the scope of amendment to ensure that such modification does not alter the economic balance of the contract or increase the profit margin available to Atos.

38. In these circumstances I am satisfied that the proposed amendment of the Atos contract to enable NS&I to provide the TFC services will not considerably extend the scope of that contract in terms of regulation 72(8) of the 2015 Regulations and that it therefore does not involve substantial modifications under regulation 72(1)(e). The applicants’ challenge therefore fails.

Clear, precise and unequivocal review clauses

39. That is sufficient to determine the appeal. But it is appropriate that I also comment on the applicants’ challenge to the conclusion of the Court of Appeal which was based on regulation 72(1)(a). This regulation, which follows the wording of article 72(1)(a) of the 2014 Directive, provides:

“Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part 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, provided that such clauses –

(i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and

(ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement; ...”

The regulation appears to draw on *CAS Succhi di Frutta v Commission of the European Communities* (C-496/99) [2004] ECR I-3801, in particular at paras 111 and 118. But it is not simply a codification of prior CJEU case law.

40. There are four matters in this regulation which merit comment. First, as in regulation 72(1)(e), the monetary value of the modifications is irrelevant. Secondly, the modifications must have been provided for in “the initial procurement documents”. Thirdly, the review clauses which authorise the modifications must achieve a required degree of specificity. Fourthly, the review clauses cannot authorise modifications that would alter the overall nature of the contract.

41. No more need be said about the first matter. In relation to the third matter, it seems to me that where, as in this case, the contracting authority has adopted the competitive dialogue procedure under regulation 18 of the 2006 Regulations (or now regulation 30 of the 2015 Regulations), the initial procurement documents include the documents which were issued to the selected bidders. The definition of “procurement document” in regulation 2 of the 2015 Regulations includes the proposed conditions of contract and the epithet “initial” in regulation 72(1)(a) is in my view simply a reference to the procurement documents which were available in the initial procurement of the contract which is the subject of the modifications. The fourth matter, the requirement that the overall nature of the contract is not altered, which is a formula used also in regulation 72(1)(c) and 72(5), appears as a matter of language to be a more liberal test than the test in regulation 72(8)(d) of extending considerably the scope of the contract. But the two tests could overlap if the extension of scope was of such an extent that it altered the overall nature of the contract.

42. In my view the most significant restriction in this regulation is the degree of specification that it requires in the review clause. The formula, “clear precise and

unequivocal” reflects the jurisprudence of the CJEU on what the principle of transparency requires: *CAS Succhi di Frutta* at para 111.

43. The Court of Appeal held that the contract amendment provisions in the draft contract which NS&I gave the three bidders and which ultimately appeared in the Atos contract were sufficiently clear, precise and unequivocal when construed in their context. The contract envisaged the extension of the operational services which Atos provides to NS&I to enable it to expand its B2B services to other public bodies. The restrictions in Schedule 2.11 of the Atos contract (a) confined the B2B opportunities to those within the scope of the OJEU notice and (b) set out the principles that governed the incorporation of a new B2B service into the agreement, inter alia restricting any increase in Atos’ profit margin and prohibiting the alteration of the allocation of risk. See para 13 above. I incline to the view that these restrictions, in their contractual context were sufficiently defined to meet this regulation 72(1)(a) criterion.

44. But the nature of the review clauses which the regulation covers is open to debate. Recital 111 of the 2014 Directive states:

“Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, for example, communications equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should be possible under sufficiently clear clauses to provide for adaptations of the contract which are rendered necessary by technical difficulties which have appeared during operation or maintenance. It should also be recalled that contracts could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.”

The recital gives as examples of the envisaged review clauses provisions allowing for price indexation, or adjustments for technological change and for maintenance. Those examples are not exclusive but they may indicate the general nature of the modifications that regulation 72(1)(a) envisages. It seems clear from the CJEU’s judgment in *CAS Succhi di Frutta* at para 126 that the regulation would extend to a provision or clause such as for the substitution of fruit which was in issue in that

case. The regulation also requires specification of the scope and nature of possible modifications and the conditions under which they may be used.

45. I am not persuaded that the nature of the review clauses is “acte clair”. But, for the reasons already set out, it is not necessary to decide these matters in order to determine the appeal.

The appellants’ alternative argument

46. I can deal briefly with the applicants’ alternative argument that there was in substance a public service contract between HMRC and Atos. The applicants did not challenge the respondents’ assertion that the proposed memorandum of understanding between HMRC and NS&I is not a contract in domestic law but a means by which public funds passing between two connected public bodies and their use can be accounted for in a transparent way. But they founded on section 16 of the Childcare Payments Act 2014 (“CPA”) which provides:

“(1) Childcare accounts may be provided by any of the following –

(a) the Commissioners for Her Majesty’s Revenue and Customs,”

(b) a person or body with whom the Commissioners have entered into arrangements for the provision of childcare accounts, and

(c) if the Treasury so determine, the Director of Savings (“the Director”).” [ie NS&I]

(2) If the Director provides childcare accounts, the Director must in doing so act in accordance with any arrangements between the Director and the Commissioners with respect to the provision of childcare accounts.”

47. The applicants submitted that what was proposed was in substance a public service contract between HMRC and Atos because (a) most of the provisions of the proposed memorandum of understanding between HMRC and NS&I were repeated in the proposed Atos contract variation, (b) Atos would provide the TFC services through its staff using equipment that it would purchase or develop, (c) HMRC

would be the service recipient of the B2B services and had discussed them directly with Atos and (d) section 16 of the CPA imposed a legal obligation on NS&I to comply with its memorandum of understanding with HMRC.

48. I am satisfied that there is nothing in this alternative argument. First and foremost, it ignores the background that NS&I is an existing public body with an extensive and established remit, which is quite separate from the TFC scheme, and that it is seeking to use its outsourced resources to provide B2B services to other public bodies. That context is part of the substance of the proposed arrangement and there is no legal basis for airbrushing NS&I out of the picture. I agree with the Court of Appeal (para 58) that the memorandum of agreement between HMRC and NS&I and the contract between NS&I and Atos are legally distinct. It is NS&I and not HMRC that can enforce the Atos contract. Secondly, it misinterprets section 16(2) of the CPA, which prevents NS&I from providing childcare accounts except by arrangement with HMRC. That subsection is simply a limitation on NS&I's power so that it cannot provide the accounts independently from HMRC and is not intended to give legal effect to the memorandum of understanding. The purpose of such memoranda of understanding between public bodies, as Andrews J explained in para 80 of her judgment, is to set out the services that those responsible to Parliament for the expenditure of public money can expect to receive in return for the charges levied on them by the public sector provider of the services and what those charges are. As she stated, a memorandum of understanding "has to be capable of being torn up and replaced at a moment's notice with no legal repercussions, in order to respond to changes in policy". Section 16 of the CPA does not change its nature. Thirdly, under any B2B scheme a public body will be the service recipient but it will receive the services from NS&I; the fact that the service recipient discussed those services with Atos as the outsourced provider of operational services to NS&I does not alter the substance of the transaction.

Other matters

49. As I conclude that the respondents are not in breach of EU procurement law, no question of the breach of article 56 of the TFEU arises. Further, having reached the view that the applicants' challenge fails, there is no need to address their arguments about their entitlement to remedies.

Conclusion

50. I would grant the applicants' permission to appeal but would dismiss their appeal. I would also make an order setting aside the interim order which prevents the respondents from implementing the TFC scheme.