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4 **IN THE COMPETITION**

5 **APPEAL TRIBUNAL**

Case No:1567/3/3/22

6
7 Salisbury Square House
8 8 Salisbury Square
9 London EC4Y 8AP

10 Friday 26th May 2023

11
12 Before:

13 THE HONOURABLE MR JUSTICE MORRIS

14 (Chair)

15 JANE BURGESS

16 ANNA WALKER CB

17
18 (Sitting as a Tribunal in England and Wales)

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20
21 BETWEEN:

22
23 **SKY UK LIMITED**

Appellant

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25
26 v

27
28 **OFFICE OF COMMUNICATIONS**

Respondent

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31
32 **A P P E A R A N C E S**

33
34 Meredith Pickford KC and David Gregory (instructed by Herbert Smith Freehills LLP
35 appeared on behalf of the Appellant)

36
37 Josh Holmes KC and Nikolaus Grubeck (instructed by the Office of Communications
38 appeared on behalf of the Respondent)

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(10.00 am)

(Proceedings delayed)

(10.05 am)

Opening submissions by MR PICKFORD (continued)

MR JUSTICE MORRIS: Good morning, Mr Pickford.

MR PICKFORD: Good morning, Mr Chairman, members of the Tribunal.

The Tribunal left us yesterday with some questions --

MR JUSTICE MORRIS: Yes.

MR PICKFORD: -- which we have been giving assiduous thought to overnight. So I will begin my submissions if I may this morning by answering the Tribunal's questions and then I will go back to my submissions to complete my points on purposive interpretation.

MR JUSTICE MORRIS: Fine.

MR PICKFORD: The first of the Tribunal's questions was essentially this: on Sky's approach to construction, in what circumstances will the content exclusion make any difference to the conclusion in respect of any service? That is how I understood the essence of the question.

MR JUSTICE MORRIS: Yes.

MR PICKFORD: It depends on whether content is or is not the principal feature of the service. So let me give a few examples to explain how our approach to the legislation works. If content is the principal feature of the service --

MR JUSTICE MORRIS: Yes.

MR PICKFORD: -- then the first part of the test is always going to be failed as regards an ECS, because something other than transmission, by definition, is --

MR JUSTICE MORRIS: And you say that is this case, the present case?

1 MR PICKFORD: I say that is this case, exactly.

2 MR JUSTICE MORRIS: Yes.

3 MR PICKFORD: So in those circumstances, the content exclusion is not going to
4 come into play, and we win at stage one. But there are contexts in which the content
5 exemption will apply, and it is important to understand those.

6 So let's have another example. Let's suppose instead -- and again, I like to think this
7 is in stylised percentage terms; obviously no service is exactly percentages but I think
8 it helps to understand the concepts. So we are going to think of a service that is wholly
9 or mainly transmission. Let's say it is 70 per cent transmission. And then there are
10 a couple of other things in there, so 10 per cent hardware and 20 per cent content. So
11 that is the essence of the nature of the service.

12 What that does is, if you apply our approach, it passes the positive test, the first part
13 of the test of being an ECS, because the principal feature is conveyance of a signal.
14 So so far so good on being an ECS. And then the content part is removed from being
15 an ECS by virtue of the negative part of the test, the requirement to exclude content.

16 MR JUSTICE MORRIS: What I call the content exclusion.

17 MR PICKFORD: The content exclusion, exactly. And the implications of that will
18 depend on the context. So I would like to give you two different examples where the
19 implications may vary.

20 The first one is something that we can pick up from a point that we made in our 2020
21 submissions, which are in the core bundle, tab 5, page 294.

22 MR JUSTICE MORRIS: Yes.

23 MR PICKFORD: This is a point that one has to read the -- the point that one has to
24 read ... sorry, I am --

25 MR JUSTICE MORRIS: 294.

26 MR PICKFORD: 294, yes. And if you want 294, it is (v) and I am going to develop the

1 point, so you don't need to read it again, but just for your reference so that you can
2 mark it. And if you'd like the reference it is also picked up in our notice of appeal at
3 paragraphs 45 to 47.

4 MR JUSTICE MORRIS: Right.

5 MR PICKFORD: The point is this: if I can, having directed you to where you can mark
6 the bundle, if I may now take you to the authorities bundle.

7 MR JUSTICE MORRIS: So we are dealing with a situation where transmission is
8 70 per cent.

9 MR PICKFORD: Yes.

10 MR JUSTICE MORRIS: And content is 20 and other is 10?

11 MR PICKFORD: Exactly.

12 MR JUSTICE MORRIS: Okay.

13 MR PICKFORD: All we really need to know is that the conveyance of signals is -- the
14 service consists wholly or mainly in the conveyance of the signals, but there is some
15 content part. That is the --

16 MR JUSTICE MORRIS: For my part, when I was thinking about all of this I was writing
17 down percentages and different alternatives. So I am happy with that.

18 Are you going to the authorities bundle now?

19 MR PICKFORD: Yes, I am going to the authorities bundle now and I am going to the
20 DCDS Directive, the Digital Content and Digital Services Directive, which is at tab 14.

21 MR JUSTICE MORRIS: Yes, I am on that, thank you.

22 MR PICKFORD: The point I am going to be making --

23 MR JUSTICE MORRIS: Just let me get there. Tab 14 of the authorities bundle.

24 MR PICKFORD: Tab 14 of the authorities bundle, which I think might be in your
25 volume 2.

26 MR JUSTICE MORRIS: No, it is volume 1.

1 MR PICKFORD: Volume 1, sorry.

2 MR JUSTICE MORRIS: Okay. So we have not looked at this directive before.

3 MR PICKFORD: We have not looked at this directive before, no.

4 MR JUSTICE MORRIS: Yes.

5 MR PICKFORD: Now, there is one thing missing from the printout of this directive
6 which the Tribunal may find helpful. It is not essential but I think you probably have it,
7 which is the definitions section. Generally it is helpful for lawyers to have that.
8 We can hand those up. We have copies.

9 MR JUSTICE MORRIS: Okay.

10 MR PICKFORD: So maybe if I do that now --

11 MR JUSTICE MORRIS: I think that would be a good idea, thank you.

12 MR PICKFORD: It is just one page. **(Handed)**.

13 MR JUSTICE MORRIS: Thank you very much.

14 MR PICKFORD: Before I take you through the detail --

15 MR JUSTICE MORRIS: It can be slotted in between 176 and 177.

16 MR PICKFORD: Yes, indeed.

17 MR JUSTICE MORRIS: Article 2.

18 MR PICKFORD: If you have the advantage of single sided, as you very sensibly do
19 up there, that will work beautifully.

20 MR JUSTICE MORRIS: I don't know whether that is my insistence, but it usually is.
21 I drive people mad with that. But yes.

22 MR PICKFORD: I am going to take you through a few provisions but I would just like
23 to outline the essence of the point I am going to be making, which is this:
24 The content exclusion is important and meaningful on our approach because it is
25 necessary to ensure that the regulations that both cover ECSs on the one hand and
26 other things such as content on the other fit together properly and that one doesn't end

1 up creating unintentional lacunae. And one sees that from the way this directive is
2 constructed. So if we could begin, please, at page 175.

3 MR JUSTICE MORRIS: When you say "to ensure that the regulations that cover both
4 ECS and content fit together properly", is this a regulation that covers both or just
5 covers content?

6 MR PICKFORD: This covers certain types of content.

7 MR JUSTICE MORRIS: Right. So what you mean by "to ensure that regulations that
8 both cover ECS and content fit together", you mean regulations that cover ECS and
9 other regulations that cover content fit together?

10 MR PICKFORD: I do. I am sorry. That is put much more precisely.

11 MR JUSTICE MORRIS: All right. Yes, okay.

12 MR PICKFORD: So if we then look at recital 31, please, on page 175, we see:

13 "This directive should not apply to digital content or a digital service that is provided to
14 a public audience as part of an artistic performance or other event."

15 And then the 'however':

16 "However, this directive should apply if digital content or a digital service is provided
17 to a public audience by signal transmission ..."

18 And then:

19 "... such as digital television services."

20 So we are within the domain of digital television services within this Act.

21 MR JUSTICE MORRIS: Okay.

22 MR PICKFORD: We then go on to 33 and we see:

23 "Digital content or digital services are often combined with the provision of goods or
24 other services and offered to the consumer within the same contract, comprising
25 a bundle of different elements such as the provision of digital television and the
26 purchase of electronic equipment."

1 Just pausing there, that is an example of the kind of thing Sky does when it is both
2 providing you with a digital television service and also providing you with a box.

3 MR JUSTICE MORRIS: Okay. The box being --

4 MR PICKFORD: The box being the electronic equipment.

5 MR JUSTICE MORRIS: Okay.

6 MR PICKFORD: "In such cases the contract between the consumer and the trader
7 includes elements of a contract for the supply of digital content [and] digital service
8 [ie the television part] but also elements of other contract types such as sale of goods
9 or services contracts. This directive should apply only to the elements of the overall
10 contract that consist in the supply of digital content or digital services."

11 MR JUSTICE MORRIS: Okay.

12 MR PICKFORD: Then if I can ask the Tribunal to read to the end of recital 33. That
13 is dealing with bundle contracts. **(Pause)**.

14 MR JUSTICE MORRIS: Yes. I am not sure I have taken all that on board.

15 MR PICKFORD: The only thing to take from that is it is essentially saying: when we
16 are in the bundle contracts domain, look back to the provision about bundle contracts
17 that we find in the EEC Directive.

18 That is the essence of what those parts of the recital are saying.

19 MR JUSTICE MORRIS: Okay.

20 MR PICKFORD: Then it is probably helpful to go to article 2, which I have handed up.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: So we see that digital content means data produced and supplied in
23 digital form. And digital service means a service that allows the consumer to create,
24 process, store or access data in digital form or a service that allows the sharing of or
25 any other interaction with data in digital form, uploaded or created by the consumer or
26 other users of that service.

1 We have seen from recital 31 that it is contemplated that digital television services are
2 part of that.

3 So let us then go, please, to article 3.

4 MR JUSTICE MORRIS: Right.

5 MR PICKFORD: Which deals with the scope of the directive.

6 The directive, by paragraph 1:

7 "... shall apply to any contract where the trader supplies or undertakes to supply digital
8 content or a digital service to the consumer and the consumer pays or undertakes to
9 pay a price."

10 Then the core part for my purposes is paragraph 5, subsection (a):

11 "This directive shall not apply to contracts regarding electronic communications
12 services, as defined in point (4) of article 2 of directive (EU) 2018."

13 MR JUSTICE MORRIS: Right.

14 MR PICKFORD: Being the EEC Directive.

15 MR JUSTICE MORRIS: Yes.

16 MR PICKFORD: So --

17 MR JUSTICE MORRIS: Just give me a moment, please. **(Pause)**.

18 Yes. Sorry, just for my clarification, recital 31, digital content, which is defined as data,
19 okay. Going down, digital television services is not the same as electronic
20 communication services.

21 MR PICKFORD: That's correct, it is not the same as electronic communication
22 services.

23 The whole idea here --

24 MR JUSTICE MORRIS: Sorry, up until now I have been distinguishing between on
25 the one hand transmission and on the other hand content. I am not finding this at the
26 moment particularly -- what is the word -- clear, as to where these concepts -- insofar

1 as it applies for example to Sky or anything else, or a television service, where, in the
2 scheme of this division between ECS, transmission, content and rump, where do these
3 concepts of digital content and digital television services fit?

4 MR PICKFORD: In my submission, digital content and digital transmission services --

5 MR JUSTICE MORRIS: Digital television services?

6 MR PICKFORD: Digital television services, digital television services are examples of
7 a digital service and/or digital content and --

8 MR JUSTICE MORRIS: Sorry, say that again.

9 Is a digital television service part of ECS? No. Is it part of content service? I don't
10 know.

11 MR PICKFORD: Yes, well, my argument is going to be that it is.

12 MR JUSTICE MORRIS: So this is all content?

13 MR PICKFORD: This is concerned with content, yes. This is concerned with digital
14 content, but it is ultimately about content.

15 MR JUSTICE MORRIS: That is what I am trying to understand, these concepts of
16 digital television services. You say that is a content service, do you?

17 MR PICKFORD: I do say that is a content service. I say -- if one were to go back to
18 the definitions that we were looking at yesterday, I would say that is a content service.

19 MR JUSTICE MORRIS: That is fine. I am just trying to -- because these are concepts
20 which, to date, we haven't seen and that is why I am trying to understand the
21 terminology.

22 MR PICKFORD: So you are entirely correct that these directives -- if there were one
23 draughtsman who sat on all of this, draughtsperson, and drafted everything,
24 sometimes the linkages may have been clearer and the terminology may have been
25 slightly clearer, but there are attempts, we say, to make sure that there is
26 an understanding of where one divides certain lines. And that is what I am going to

1 | come to in article 3 on scope, in particular the exemptions.

2 | MR JUSTICE MORRIS: Okay. Carry on.

3 | MR PICKFORD: Perhaps going back to recital 33, whilst we are back on the recitals,
4 | the final sentence, it is perhaps worth emphasis of the point that I made myself, about
5 | halfway down, where it says:
6 | "This directive shall only apply to the elements of the overall contract --"

7 | MR JUSTICE MORRIS: I have lost you, I am afraid. I thought you said 33.

8 | MR PICKFORD: Yes, it is 33, and five lines down.

9 | MR JUSTICE MORRIS: Yes.

10 | MR PICKFORD: We have, towards the end --

11 | MR JUSTICE MORRIS: I have that sentence.

12 | MR PICKFORD: "This directive should only apply to the elements of the overall
13 | contract that consist of the supply of digital content or digital services."
14 | So what it is envisaging is that you may well have a contract with a number of
15 | elements, and the directive only applies to the digital content, digital service elements.
16 | They don't want this service to apply to the other elements, for instance the ECS
17 | element.

18 | MR JUSTICE MORRIS: Right, okay.

19 | MR PICKFORD: Where that then takes us is, when we go back to article 3(5), the first
20 | thing is, as we are reading from the beginning:
21 | "This directive shall not apply to contracts regarding ..."

22 | Then there is a list of things that they are regarding. And by virtue of the sentence
23 | that I just emphasised, what that must mean is, insofar as the contract covers the
24 | excluded service, and those exclusions. What it cannot mean is that the directive is
25 | intended not to apply to any contract that has any part of those exclusions, because
26 | that would be inconsistent with the whole idea that I have just shown you, that what

1 we are trying to do is segment the service and then apply this directive to a bit of it.
2 That helps us understand what "regarding" means. And then if we look at (b), it doesn't
3 apply to ECSs, as you find in point (4) of article 2 of the directive.
4 MR JUSTICE MORRIS: Yes.
5 MR PICKFORD: So that is crucial, because what that provision shows us is that it
6 was important in the context of the provisions for the -- what, Sir, you called the content
7 exclusion, to apply it when we are working out what the ECS is, because we don't want
8 the ECS to be over-broad.
9 If the ECS were over-broad and we didn't apply the content exclusion -- I'll explain why
10 the content exclusion means something and is relevant -- what we would find is we
11 had over-defined what an ECS was because we wouldn't have accounted for the fact
12 that we have to take out the content bit at the end of our definitional process.
13 And the reason why we have to take out the content bit is to make sure that other
14 directives, such as this one, that apply to contents -- this one applying to digital
15 content -- are able properly to apply, because otherwise they would exclude -- if
16 everything were an ECS and we didn't have the content exclusion, 5(b) would operate
17 to exclude all of the service.
18 So in my hypothetical, the hypothetical that is 70 per cent transmission and
19 20 per cent content and a bit something else, our content exclusion has the effect of
20 making sure that it is only the transmission part, together with any electronics or
21 hardware that is concerned with that, that is caught as an ECS.
22 And then that preserves the ability in this directive to regulate the content under
23 a content directive.
24 And if it were broader and it encompassed everything, then it wouldn't work. And the
25 latter directive wouldn't work properly.
26 Do you have my point?

1 MR JUSTICE MORRIS: I think so. I am just digesting.
2 So on the first scenario, where it is 70 per cent content --
3 MR PICKFORD: Yes.
4 MR JUSTICE MORRIS: -- none of it is an ECS.
5 MR PICKFORD: Yes. So we just never get --
6 MR JUSTICE MORRIS: Right.
7 MR PICKFORD: -- into the exclusion.
8 MR JUSTICE MORRIS: On the second scenario, the 70 per cent, it is an ECS. And
9 of course on a very simplistic analysis, if you take out -- on your example -- the
10 20 per cent content, it is even more wholly or mainly an ECS.
11 MR PICKFORD: Yes, that is certainly true.
12 MR JUSTICE MORRIS: So it doesn't make any difference as to whether the service
13 is an ECS or not.
14 But you say that if that content, if that exclusion was not there, yes, then the whole of
15 the service would be an ECS, and 5(b) would dis-apply the content regulation. I think
16 that is the short point.
17 MR PICKFORD: That's right. That is the short point.
18 And the reason why I have made that point is to illustrate one context where it clearly
19 makes a big difference to apply that content exemption, because my understanding of
20 one of the Tribunal's concerns -- and I think this is what I was inferring, was that: on
21 your approach, Mr Pickford, does it make any difference?
22 MR JUSTICE MORRIS: Absolutely, that is my concern. On your approach, it doesn't
23 affect the result one way or the other. That has been my concern.
24 MR PICKFORD: Yes. And I am saying, here is an example where it does affect the
25 result.
26 MR JUSTICE MORRIS: Okay.

1 MR PICKFORD: I am now going to deal with a different example where it doesn't
2 affect the result but I want to make some submission about how we and Ofcom differ.
3 I am now going to come back to --

4 MR JUSTICE MORRIS: Can I just make a note of the point. **(Pause)**.
5 Okay, yes, thank you.

6 MR PICKFORD: I am now going to come back to the home ground of the EOCNs. It
7 is important, in my submission, to remember that although the EOCNs are the context
8 for this particular case, they are only one example of an implication of what happens
9 to you when you are an ECS.

10 MR JUSTICE MORRIS: Yes, of course.

11 MR PICKFORD: So when one is construing the meaning of ECS and how the regime
12 fits together, it is important to remember that there are all sorts of other implications
13 for being an ECS.

14 MR JUSTICE MORRIS: Of course.

15 MR PICKFORD: So when we are back in the territory of EOCNs, it is the case that,
16 on our approach to the definition, the content exclusion may not make a lot of practical
17 difference in terms of effect, because either, say, on our approach you have something
18 that is mainly content, well, then it is not going to be mainly transmission and therefore
19 it is not an ECS and the whole EOCN regime doesn't apply.

20 MR JUSTICE MORRIS: Yes.

21 MR PICKFORD: Alternatively, let's consider something that is mainly about
22 transmission. And then it is going to be an ECS at least to that extent. And taking
23 content out, at that point, whilst important for preserving other aspects of legislation
24 that I have shown you, it is probably not going to have a lot of practical effect as
25 regards what you are going to do when sending a letter.

26 Of course, if it is a single service and you have to send it in respect of the main part of

1 the service, inevitably that is going to affect other bits of the service. There is no real
2 getting away from that.

3 So I accept that in relation to EOCNs, but that is just one example. And there are two
4 further points to make in relation to that. One is that that is okay and appropriate within
5 the framework, the regime, because I showed you recital 5 of the Framework Directive
6 and recital 7 of the EEC Directive, which requires the taking account of the linkages
7 between content and services -- and indeed the Tribunal referred to it -- between
8 content services and ECSs.

9 And my point is that it is okay to do that when effectively you cannot avoid it. But you
10 have to do it in a sensible way. And my approach does it in a sensible way because
11 what it says is, let's let the principal feature of this service dominate. So if the principal
12 feature is about conveyance of signals, then fine. But it may be the case that other
13 ancillary aspects of the service get swept up in the treatment of that, depending on
14 what the particular obligation is. And the EOCN obligation is an example of where
15 an ancillary element will get swept up.

16 MR JUSTICE MORRIS: But at the same time, in this example your content ancillary
17 element is still also regulated by the content regulation.

18 MR PICKFORD: It is, yes.

19 MR JUSTICE MORRIS: Okay.

20 MR PICKFORD: And that again gives effect to those recitals.

21 MR JUSTICE MORRIS: I understand.

22 MR PICKFORD: Which are very clear about that. So, you know, keep on making sure
23 that content is really the regulator's content, and don't let content slip out of the content
24 regulator's regime by virtue of it being mixed up with an ECS.

25 MR JUSTICE MORRIS: But on that analysis, where you have a service which is 70
26 transmission and 30 content, say, that service is regulated under both regimes.

1 MR PICKFORD: That's right.

2 MR JUSTICE MORRIS: But where you have a contract which is 30-70, I think on your
3 case it is only regulated by the content regime.

4 MR PICKFORD: That's right. And that is a function of the way in which the primary,
5 the positive part of the --

6 MR JUSTICE MORRIS: It is a function of the wholly and mainly definition.

7 MR PICKFORD: It is a function of the wholly or mainly test, yes. And what that is
8 seeking to do is recognise that many services may have a number of parts -- a number
9 of elements, I beg your pardon, that is a better word.

10 MR JUSTICE MORRIS: Okay.

11 MR PICKFORD: And it is the pragmatic and practical approach that the legislature
12 has adopted.

13 MR JUSTICE MORRIS: Sorry, you were on another point and I diverted you, possibly.
14 I don't want to take you off your train, but I was just bouncing back my thought.

15 MR PICKFORD: Yes. So what I'd like to do is finally contrast my approach to the
16 difficult question that the Tribunal posed, with what the answer would be under
17 Ofcom's analysis, because Ofcom, as I understand it, also says, well, look, it is okay
18 for other things to get caught up with the ECS, if you can't differentiate. If you can only
19 send a letter in respect of what we say is the ECS, setting out certain terms, then so
20 be it.

21 The difference between me and Ofcom is really critical here. On my approach, that
22 only ever happens when transmission, conveyance of signals, is the principal feature.

23 MR JUSTICE MORRIS: Yes, when it is 70-30.

24 MR PICKFORD: Exactly. On Ofcom's approach, it can happen when the conveyance
25 of signals is 3 per cent. And that makes no sense. That is the point.

26 So whilst both of our approaches have the effect of sometimes, in effect, causing some

1 other element to be regulated as an ECS, on Ofcom's approach it can happen in
2 totally --

3 MR JUSTICE MORRIS: If you had a 1-99, you say regulated by content only, and
4 Ofcom says regulated by both.

5 MR PICKFORD: Yes, but --

6 MR JUSTICE MORRIS: By "regulated by both", that is shorthand for having to send
7 out EOCN notices and the like.

8 MR PICKFORD: Yes. Because Ofcom says, step one, forget about the 99 per cent.
9 Right. Oh, all we have left is transmission. Right, it is an ECS. And you have to send
10 out your end of contract notification.

11 And that is effectively the tail wagging the --

12 MR JUSTICE MORRIS: All right. That is a clear distinction you make. Yes.
13 And it is not just EOCNs, it is any other obligations.

14 MR PICKFORD: That's right.

15 MR JUSTICE MORRIS: Any other obligations that attach to being an ECS.

16 MR PICKFORD: Yes.

17 MR JUSTICE MORRIS: Fine.

18 MR PICKFORD: But some are more divisible than others.

19 MR JUSTICE MORRIS: Okay, yes, I have it.

20 MR PICKFORD: So I am not going to take you through it in any detail, but just to give
21 an illustration of something that might be divisible: fees.

22 So Ofcom charges fees for those that it regulates as ECSs, based on their relevant
23 turnover as an ECS. And one can see there that there may well be scope for arguing,
24 well, if you are doing content and you are doing transmission, well --

25 MR JUSTICE MORRIS: You can allocate turnover to one or the other.

26 MR PICKFORD: You engage in some kind of allocation exercise, exactly.

1 So that is an example of where -- another one where the content exemption, on my
2 approach, does matter because it affects the fees that you pay.

3 MR JUSTICE MORRIS: Okay.

4 MR PICKFORD: So the next question was --

5 MR JUSTICE MORRIS: Yes.

6 MR PICKFORD: -- if Ofcom -- by the way, the rest of them are going to be much
7 shorter.

8 MR JUSTICE MORRIS: That's all right. Obviously I am keeping my eye on the clock
9 today generally. We do have to finish today and I don't really -- I think we would be
10 prepared to sit a little bit beyond 4.30 but not very much. Yes, so just bear that in
11 mind.

12 I understand also that our questions don't assist, in the sense that you have had extra
13 work to do.

14 Yes, you were going to the second question.

15 MR PICKFORD: The second question is, if Ofcom failed to analyse the relative
16 proportion of the overall service as between the transmission and other non-content
17 elements, the rump, and assuming that Ofcom's construction is correct, what is the
18 remedy?

19 MR JUSTICE MORRIS: No, assuming -- yes, sorry, you are right.

20 MR PICKFORD: In my submission, section 194A(3) of the Communications Act
21 provides the Tribunal with a discretion to quash or remit. This is an appeal on judicial
22 review principles. And we say that in this case quashing the submission would be the
23 appropriate remedy. It would then be up to Ofcom to decide whether it thinks that in
24 terms of its own priorities at this point in time -- given the legislation that I am going to
25 take the Tribunal to, to show you that it is coming down the pipeline anyway -- whether
26 it is worth going back and considering their case again on their construction.

1 MR JUSTICE MORRIS: Fine.

2 MR PICKFORD: Then question three is, considering services provided by Virgin and
3 BT are regarded as ECSs and do provide EOCNs, if Sky is right, is there a prospect
4 that as they increase the volume of their content they would no longer be an ECS?

5 There are four short points to make in response.

6 First, we don't accept that these providers have any volume of content provision in the
7 sense required by Hilversum, the case I took you to yesterday that talks about editorial
8 control being at the heart of it.

9 Secondly, we agree and we say it is self-evident that if over time their services
10 changed such that they no longer predominantly provided a transmission service, then
11 potentially those services would then fall outside an ECS. And that is just inevitable.

12 Thirdly, because BT and Virgin in their particular cases bundle their offering of TV with
13 Internet service provision, it is an add-on to their core businesses, and they would be
14 caught by the bundle provisions in any event.

15 MR JUSTICE MORRIS: All right.

16 MR PICKFORD: Then fourthly, as I said before, changes in business model affecting
17 classification is unsurprising. So where something goes from being a principal feature
18 of business to only a minor part, it is potentially right that differences should follow in
19 the regime. Contrast Ofcom's -- if you remember, I showed you those two pie charts.

20 MR JUSTICE MORRIS: Yes.

21 MR PICKFORD: And on Ofcom's approach you can potentially have very slight
22 changes in the business model, when you have one business model that is all about
23 content and another business model that is all about content, but the thing that
24 changes is that the subsidiary element, transmission, goes from being in third place to
25 being in second place, effectively.

26 MR JUSTICE MORRIS: Yes.

1 MR PICKFORD: And that relatively trivial change has a profound effect on the
2 classification, under Ofcom's approach. And we say that is nonsensical.
3 The fourth question was, for providers such as BT and Virgin who provide transmission
4 and content, is the end of contract notification in respect of all their services or part
5 only?
6 And my answer follows from the earlier point I made, that we don't believe that they
7 provide their own content, so the question shouldn't really arise, I think.
8 MR JUSTICE MORRIS: Okay.
9 MR PICKFORD: But in any event --
10 MR JUSTICE MORRIS: It is a matter for Ofcom, isn't it?
11 MR PICKFORD: -- it is a matter for Ofcom. So I will let Mr Holmes deal with that.
12 Question five, is there any indication of the relative importance of a Sky customer with
13 a dish of, on the one hand, Sky linear channels, third party channels and on demand
14 content?
15 MR JUSTICE MORRIS: Yes.
16 MR PICKFORD: The answer is, there is some information on the relative importance
17 of Sky versus third party channels and --
18 MR JUSTICE MORRIS: Isn't that in one of the annexes?
19 MR PICKFORD: It is.
20 MR JUSTICE MORRIS: Annexes 7 and 8 or something?
21 MR PICKFORD: Yes, and also for reference there is actually some material in the
22 core bundle and some sections of our submissions that I didn't take you to, which, if
23 you want to mark it up, it is the core bundle, and it is tab 5, it is page 289, and it is
24 paragraphs 70 to 77.
25 MR JUSTICE MORRIS: 70 to 77?
26 MR PICKFORD: Yes. So that range of eight paragraphs.

1 Now, given I am quite pushed for time, I would like to draw that to your attention but
2 I don't really want to develop points on that now.

3 MR JUSTICE MORRIS: Fine.

4 MR PICKFORD: What we don't have, in the materials before the Tribunal, is any very
5 clear assessment of the relative importance of on demand versus linear.

6 MR JUSTICE MORRIS: Okay.

7 MR PICKFORD: I am afraid we can't provide that.

8 MR JUSTICE MORRIS: Okay.

9 MR PICKFORD: Obviously the Tribunal will have well understood that, given the
10 nature of this appeal and the principles on which it takes place. It wouldn't be
11 appropriate to start providing new facts and have decisions based on new facts.

12 MR JUSTICE MORRIS: That is fine.

13 MR PICKFORD: The sixth is --

14 MR JUSTICE MORRIS: Just remind me, this is -- I shouldn't be asking this question,
15 but third party linear is or is not provided through the satellite? I can't remember.

16 MR PICKFORD: It is.

17 MR JUSTICE MORRIS: So it is the on demand that is not provided through the
18 satellite?

19 MR PICKFORD: Yes. My understanding is that there are some exceptions but the
20 basic scheme is that linear is satellite and on demand is OTT.

21 MR JUSTICE MORRIS: That is fine, yes.

22 MR PICKFORD: In broad terms.

23 MR JUSTICE MORRIS: I am sure it was made clear yesterday. I am just reminding
24 myself.

25 MR PICKFORD: The final question, your sixth question, was:
26 Does either party contend that the Sky service is a unique model compared with other

1 methods of TV production?

2 And my answer to that is, Sky is not particularly unique. Its core business is providing
3 content. And that is just like the core business of Netflix, Amazon Prime and
4 Disney Plus, to name three competitors. And we say, further, the fact that it has
5 a modest role in the transmission of content doesn't make it particularly unique either,
6 because so will in fact Netflix be responsible for ensuring that their signals, the signals
7 that make up their programmes, are going to be transmitted to servers so that they
8 can be downloaded by viewers.

9 It is almost inconceivable that anyone that ever has any interaction with the Internet
10 doesn't involve themselves in some sense in some degree of transmission.

11 MR JUSTICE MORRIS: As far as I can see, in this array of providers of content, you
12 are the only one that combines, as you say, substantially content but with a satellite
13 transmission service.

14 MR PICKFORD: That is right. So we are unique in that sense.

15 MR JUSTICE MORRIS: And in some ways you might be saying, well, it is because of
16 that that you are caught in this difficult position.

17 MR PICKFORD: Well, I am going to develop some submissions --

18 MR JUSTICE MORRIS: Okay. Thank you for doing that.

19 MR PICKFORD: I have sought to answer the Tribunal's questions. I still think we
20 should be good for time. I am not going to be able to do my one hour in 15 minutes,
21 which is what I had --

22 MR HOLMES: I am concerned about time. It was agreed that Mr Pickford would finish
23 at 11.00 am, having had yesterday in the overwhelming proportion. And I would be
24 concerned if it went much beyond 11.00.

25 I do have submissions to make for my client and there will not be time to do that unless
26 he respects the division of time that was agreed, more or less.

1 MR PICKFORD: The division was agreed prior to the Tribunal's questions.

2 MR JUSTICE MORRIS: I understand that with the questions that were asked it has
3 caused an issue.

4 Can you just tell me, first of all, in summary, in other words within a minute, what are
5 the areas that you feel you need to cover?

6 MR PICKFORD: Yes.

7 So the first of the areas is, I am going to look at identifying the purpose of the
8 provisions of the legislation with which we are concerned, by looking at the provision
9 and the underlying EU legislation. It is drawing together a number of strands that I had
10 made already, but it is important.

11 MR JUSTICE MORRIS: I am wondering how many of these points are already made
12 and are already in your skeleton.

13 MR PICKFORD: This one is not particularly in our skeleton because it is responding
14 to the greater emphasis on the purposive construction.

15 MR JUSTICE MORRIS: Okay. That is the first point. Let's just have the list first.

16 MR PICKFORD: Then the second one --

17 MR JUSTICE MORRIS: Something about the new legislation, which is, as far as I am
18 aware, a completely new point.

19 MR PICKFORD: That is, yes, and it is very new legislation, and it didn't exist at the
20 time of our --

21 MR JUSTICE MORRIS: Anyway, yes, go on. You have the new legislation. What
22 are the other areas?

23 MR PICKFORD: The other area is the bundling provisions that, again, we have --

24 MR JUSTICE MORRIS: Can any of these areas be dealt with in reply?

25 MR HOLMES: With respect, I would suggest that they can helpfully be dealt with in
26 that way, not least because the purposive submissions are something that is a tiny

1 part of my case.

2 The new legislation is irrelevant to interpreting current legislation. It is the bill before
3 Parliament, as I understand it, and it can't inform the interpretation of this legislation.
4 He can obviously make any points he wants to in reply about it.

5 And then the bundling provisions equally are not part of my positive case.

6 MR PICKFORD: If they are not part of Mr Holmes' case, then I do need to address
7 those now, because presumably he will stand up and say I am not replying to
8 something.

9 MR JUSTICE MORRIS: Okay.

10 I think we will rise for a few moments and discuss where we are going to go on timing.

11 MR PICKFORD: In my estimation, Sir, with a fair wind, I could get through what I need
12 to get through within half an hour, possibly less. But I think 15 minutes would be --

13 MR JUSTICE MORRIS: If you can do it in half an hour, then maybe we are all right.
14 Let's press on and let's keep that as a rough time limit. In other words, I shall be
15 concerned if we go longer than half an hour. And do bear in mind -- I mean,
16 I personally might be interested in addressing the bundles issue because I am not sure
17 I fully understand its relevance. I am not sure about the new legislation. But carry on,
18 Mr Pickford.

19 MR PICKFORD: Thank you.

20 MR JUSTICE MORRIS: Can I just add that of course I do recognise that our questions
21 have added to the burden and put pressure on the time limit. It is not a criticism of
22 either of you.

23 Yes.

24 MR PICKFORD: So I am going to go very quickly because this is drawing together
25 things that have already been said but in the context of the purposive construction
26 point.

1 MR JUSTICE MORRIS: Yes.

2 MR PICKFORD: We say that the place where you identify the purpose of the
3 legislation is not going off to look at other recitals in a later regime that have nothing
4 to do with the particular provision. You start with the provision itself and you look at
5 the relevant terms of the underlying EU legislation.

6 MR JUSTICE MORRIS: Yes.

7 MR PICKFORD: And that shows two things: in relation to the positive element of the
8 test, the wholly or mainly, what the legislature was seeking to achieve was to regulate
9 like with like, bring together types of service that broadly shared the same sorts of
10 attributes.

11 And that is why it is a wholly or mainly test, recognising that there may well be mixed
12 services. And that is all there is to it, on that positive part.

13 Then as regards the negative part, the exclusion of content services, again that is to
14 give effect to what I showed you in this morning's submissions. Namely making sure
15 that the regime still works as a coherent whole and ensuring that content and ECSs
16 don't trample on each other in a way that was never intended.

17 There is a further point to make on that, which is that it is unclear on Ofcom's approach
18 why it necessarily stops at Sky TV at all for its definition of an ECS.

19 Let's give an example of a blog that someone produces. It might be Monckton
20 Chambers' blog about public law. It is basically all about the content, but somewhere
21 the blogger will almost certainly be involved in transmitting their content up to the open
22 Internet so that it can be downloaded by others. So they can do that perhaps on their
23 own wi-fi network, or it is by Ethernet, but they will have some role in transmission.

24 Now, on the Ofcom approach, the first thing you do whenever you consider any service
25 is you always ignore all of the content, and then you look at the residual and then you
26 say, well, what have we got left? Well, in my example of the blogger, what may be left

1 is just a tiny bit of transmission. It may be trivial, and it may be nothing to do with what
2 they really thought they were doing. But if you exclude what they really thought they
3 were doing, and you then bring in just the transmission element, then on the Ofcom
4 approach you might say, okay, just looking at everything else apart from content, what
5 have we got left? It looks like this is mainly a transmission service. Oh, right, so they
6 are an ECS.

7 And you could drag anything, on their approach, into being an ECS, pretty well. It
8 could be someone who is an influencer and posts to Instagram or TikTok and that is
9 the service they are effectively providing to the world, and they get advertising revenue
10 from it. They would be an ECS. A newspaper that provides content online, they are
11 an ECS. On their approach, it is very hard to see where you draw the line.

12 Indeed, for companies such as Netflix, which Ofcom say are not ECSs, would also be
13 ECSs because if you ignore all of the content you are going to maybe find,
14 potentially -- for something like Netflix, it would depend on perhaps the relative balance
15 of, say, their software to their involvement in transmission. But you can see that it
16 potentially massively broadens the scope of ECS. And there is no warrant for that in
17 the legislation.

18 So it is a very dangerous purposive path that they are advocating.

19 The final point is this. Just because content services are subject to a different
20 regulatory regime from ECSs doesn't mean that they cannot be subject to the same
21 obligations.

22 And there are two points to make here. One is the bundling point. And Chairman, you
23 suggested that that was something you might want to hear submissions on, so if
24 I could just very briefly develop that.

25 MR JUSTICE MORRIS: I would just like to understand the relevance of the bundling
26 provisions to this case. At the moment I am not clear. I am not saying they are not

1 relevant. I just -- yes.

2 MR PICKFORD: Of course.

3 The difference between us is, Ofcom say there is a problem -- one of their purposive
4 points is that there is a problem with your approach, Sky, because even if you were to
5 bundle Sky TV with a telephone line, you are not caught, and that is problematic. That
6 was in paragraph 85 of their defence.

7 And we say they have misunderstood or haven't had regard to the bundles regulations,
8 and they are --

9 MR JUSTICE MORRIS: Can I just -- in my own mind, the distinction is between
10 a single contract which supplies A, B and C, and three separate contracts, is it, for A,
11 B and C?

12 What is the difference?

13 MR PICKFORD: In my submission the distinction is actually between a single service
14 and multiple services bundled together in a single contract.

15 MR JUSTICE MORRIS: Okay. So as a single service ...

16 MR PICKFORD: And I am to take you if I may to the legislation.

17 MR JUSTICE MORRIS: Single service, one contract, yes? Number of elements.

18 Sorry, I am just making a note.

19 Versus multiple services, yes? Also in one contract but bundled together.

20 MR PICKFORD: That's right. Or in closely related contracts. It would help, Sir, if
21 I take you to the provision.

22 MR JUSTICE MORRIS: Take me where you want to take me.

23 MR PICKFORD: So we are back in the authorities bundle, tab 1, and if we go, please,
24 to page 15.

25 MR JUSTICE MORRIS: Yes. This is the section 51 bit.

26 MR PICKFORD: This is section 51. Subject to other sections, the only conditions

1 under section 45 are ones (Inaudible) paragraphs.
2 51(1)(a), there have to be conditions appropriate for protecting the interests of end-
3 users. Subsection (2), the power under subsection (1)(a) to set conditions protecting
4 the interests of end-users. Includes the power to set conditions for that purpose
5 which -- and then at the bottom of the page: relates to any of the elements of a bundled
6 contract.

7 And then over the page, one of the things you can do in respect of a bundled contract
8 (d) is require the provision free of charge of specified information or information of
9 a specified kind to end-users.

10 So if it is a bundled contract you could require that end of contract notifications are
11 sent.

12 The critical provision is over the page on 17.

13 "In this chapter, bundled contract means a contract or two or more closely related or
14 linked contracts between the provider of a public electronic communications service
15 and a qualifying end user which relates or together relate to the provision of at least
16 one of the following:

17 An Internet access service and a number-based interpersonal communications
18 service, and also relates, or together also relate, to the provision of at least one of the
19 following: another service, falling within paragraphs (a)(i) or (ii), another public
20 electronic communications service, an information society service or (iv), critically,
21 a content service.

22 MR JUSTICE MORRIS: Let me just digest for a moment, please.

23 So a bundle has to have something from (a) and something from (b).

24 MR PICKFORD: That's right, it has to have something from (a) and, if you have
25 something from (a), you can also have something --

26 MR JUSTICE MORRIS: So if you have a contract which provides -- it provides

1 an electronic communications service and a content service, okay, that is not
2 a bundled contract.

3 MR PICKFORD: Unless --

4 MR JUSTICE MORRIS: No, no, because it hasn't got an (a)(i) or (ii).

5 MR PICKFORD: That is not quite right, because of course (a)(i) or (ii) are themselves
6 types of electronic communications service, unless I misheard.

7 MR JUSTICE MORRIS: Sorry, I expressed myself wrongly. What I meant was
8 a transmission service. What I meant was the thing that is in issue in this case, if you
9 have -- you wouldn't qualify.

10 MR PICKFORD: That's correct --

11 MR JUSTICE MORRIS: -- because all your things are in (b) and not in (a).

12 MR PICKFORD: That's correct.

13 MR JUSTICE MORRIS: So that is not a bundled contract, by the definition.

14 MR PICKFORD: Not a bundled contract. And what is very clear from the bundled
15 contract here is that it envisages at least two types of service. There is the Internet
16 access service or the number-based interpersonal communications service,
17 ie basically a phone line, a calling service. And then another service in (b). Those are
18 separate services --

19 MR JUSTICE MORRIS: Okay.

20 MR PICKFORD: -- but within a bundled contract. They are not one service with
21 a number of elements. That is what we are concerned with, is one service with
22 a number of elements. So there is more than one reason why we are not within the
23 scope of these --

24 MR JUSTICE MORRIS: And where does that lead us?

25 MR PICKFORD: So where that leads us is that Parliament has already turned its mind
26 in a relatively precise way to certain situations where it wants to make sure that, where

1 | you are providing content, the end of contract notification will apply to that content
2 | service, it provided for it in subsection (8)(b)(iv), as long as you meet the tests of this
3 | provision.

4 | MR JUSTICE MORRIS: Okay.

5 | MR PICKFORD: It has turned its mind, in other words, to limit and to define
6 | circumstances in which it is appropriate to regulate in this particular way.

7 | What Ofcom is effectively doing, we say, is seeking to trespass into an area that has
8 | already been effectively addressed.

9 | MR JUSTICE MORRIS: Okay. Can you illustrate that by a comparison of your
10 | situation and -- never mind about unified service -- where you have a contract which
11 | provides (2)(a)(c) transmission and content, yes, which is your case, with the situation
12 | of somebody who provides a combination of an Internet access service and content.
13 | And you are saying, what is the distinction there insofar as it relates ultimately to the
14 | provision of a EOCN notice?

15 | MR PICKFORD: What I say is -- so the distinction there is that the former is basically
16 | Sky's business model.

17 | MR JUSTICE MORRIS: Yes.

18 | MR PICKFORD: And it is all one service. And we have gone through all the reasons
19 | why I say that is not an ECS.

20 | MR JUSTICE MORRIS: Okay.

21 | MR PICKFORD: The second example is, I would suggest, Virgin's or BT's business,
22 | where they provide broadband, and they say, as part of your contract for broadband,
23 | you can have content.

24 | MR JUSTICE MORRIS: Okay. That is a bundle of contracts. Can you just then
25 | explain. That is a bundled contract, so just walk me through why an EOCN applies to
26 | that in terms of this legislation.

1 MR PICKFORD: Yes, of course.

2 So we start with the --

3 MR JUSTICE MORRIS: Because the general condition comes under 51(2)(ba).

4 MR PICKFORD: Yes. The steps are: firstly we have to identify whether we are in

5 bundled contract territory. And we know that we are because we combine (8)(a) --

6 MR JUSTICE MORRIS: Yes, I have that. Sorry, I am hurrying you along because of

7 time.

8 MR PICKFORD: Then we go back to the power to set conditions for protecting the

9 interests of public electronic communications services, which -- sorry, yes, so users of.

10 And that was back on page 15. And you see, starting with the first provision that I took

11 you to, 51(1), you can set general conditions.

12 MR JUSTICE MORRIS: Yes, yes.

13 MR PICKFORD: And Ofcom can set general conditions and Parliament has given it

14 the power to do so, to protect the users of bundle services in these circumstances.

15 MR JUSTICE MORRIS: Yes, that relate to any of the elements of a bundled contract.

16 MR PICKFORD: Yes.

17 MR JUSTICE MORRIS: Okay.

18 MR PICKFORD: It is important to understand -- and I think it is probably somewhere

19 in the materials that the Tribunal has. But Sky's contracts are always separate, in that

20 although Sky is also an ECS, because it provides broadband services and it quite

21 accepts when it --

22 MR JUSTICE MORRIS: The contract that we are talking about here is a single

23 contract, a separate contract. That I understand. And that contract comprises the

24 provision of a transmission service and content and bits and pieces.

25 MR PICKFORD: Yes. But the point I am making is that we don't bundle. We only

26 ever provide TV, Sky TV, as its own service under its own contract.

1 We don't say: here, have a contractual bundle which is some broadband provision,
2 plus a pay TV service.

3 MR JUSTICE MORRIS: Right. I am not sure I understand that. I am not sure
4 I understand the words "contractual bundle". Are you talking about the customers are
5 given the option of more than one contract?

6 MR PICKFORD: What I am seeking to distinguish between is -- so someone like BT
7 or Virgin will say: here, you can have one contract and one price. And it is one contract
8 with one price, and it has two services in it. We have bundled two together. You are
9 getting your broadband and also we are going to transmit some TV. We are going to
10 give you Sky's channels.

11 MR JUSTICE MORRIS: Yes.

12 MR PICKFORD: So that is one scenario.

13 MR JUSTICE MORRIS: Yes.

14 MR PICKFORD: Sky does offer broadband and it does --

15 MR JUSTICE MORRIS: Forget the broadband bit because we are not talking about
16 Sky's broadband.

17 MR PICKFORD: My only point is, it never puts them together.

18 MR JUSTICE MORRIS: Sorry. Go ahead.

19 MS WALKER: I think I am right in saying that you are arguing that it is a unified
20 service. But as I understand it from the factual information that we have, that that
21 unified service may be provided in part over satellite and in part over broadband.

22 MR PICKFORD: That is true.

23 MS WALKER: That was the information that you helpfully provided overnight.

24 MR PICKFORD: That's right.

25 MS WALKER: That was the point I wanted to make.

26 MR JUSTICE MORRIS: Yes, but anyway I am trying to get beyond this notion of

1 bundled contract.

2 BT offer a contract where they say: you can have broadband and content. You offer
3 a contract which says: here is content and you are going to get some transmission.
4 In both cases there is a single contract with different elements, services, call it what
5 you will.

6 I don't understand the distinction why you describe the BT contract in that
7 circumstance as a bundled contract and your contract as a non-bundled contract,
8 particularly given the definition of bundled contract which says: "means a contract
9 which ..."

10 So a bundled contract in 8 contemplates a single contract.

11 MR PICKFORD: The reasons why we don't offer a bundled contract are twofold: one,
12 within the meaning of the legislation, on my explanation of what the Sky service is, it
13 is a single service, made up of elements.

14 MR JUSTICE MORRIS: Right.

15 MR PICKFORD: Because the transmission element is not a service in its own right.

16 MR JUSTICE MORRIS: Right.

17 MR PICKFORD: It is unlike a broadband service --

18 MR JUSTICE MORRIS: I totally understand why you don't fall within the definition
19 of bundled contract.

20 That I understand, because you have nothing in (a), but that turns on the definition of
21 bundled contract in the legislation. I get that completely.

22 MR PICKFORD: Okay.

23 So there is another possibly very simple factual point -- and I do apologise I am not
24 conveying it effectively -- which is that there is in the market an idea that people
25 provide things like Triple Play, which is where you say, okay, we are going to give you
26 broadband, we are going to give you a phone service, and we are going to give you

1 a TV service, all under one contract. All related contracts, but all under one contract.

2 MR JUSTICE MORRIS: Let's call it one contract, just for --

3 MR PICKFORD: It is all part of one commercial deal.

4 MR JUSTICE MORRIS: Providing three services.

5 MR PICKFORD: Providing three separate services.

6 And putting aside all of the other points we have just been making about ECSs, just

7 for a moment. I am making just a very simple factual point, just so the Tribunal has it.

8 Sky doesn't do that. Sky never says, "Here is your single contract, under which we

9 are going to give you broadband and TV and phone services."

10 So unlike BT who does that, and TalkTalk who do that, and all those other providers

11 who do that, who provide bundled services, Sky does not bundle its TV service with

12 any other service. Factually. That is the point that I am ...

13 Now, the Tribunal may say, well, I don't really care; that doesn't necessarily influence

14 my understanding of how the legislation works. But I thought it was important to get

15 clear because sometimes it is a point of potential confusion, and it is also a distinction

16 when I was trying to explain why the provisions might well apply to BT because it does

17 bundle services, but they are not going to apply --

18 MR JUSTICE MORRIS: Bundle services here you are talking about, has a -- I can't

19 think of the word, has a specific statutory meaning. That is the point which I think

20 I haven't cottoned on to. It means in particular bundling effectively Internet access

21 with something else. But it doesn't mean -- I mean, on a more general term of putting

22 things together.

23 Carry on. Everybody is watching the clock, quite rightly. So let's move on.

24 We will digest the point and we will see the extent to which we can consider it is

25 important.

26 MR PICKFORD: So the final point, before I conclude, is this:

1 In our notice of appeal, we said that if Parliament thinks there is a problem here and it
2 wants to cure what Ofcom has called a lacuna, the right way to do it is that Parliament
3 does it because, for all the reasons I have explained, Ofcom's approach, which is to
4 bring Sky in through the back door by the scruff of its neck, doesn't work.

5 It doesn't work, for a host of reasons, and I am not going to repeat those reasons, but
6 it leads to all sorts of problems and absurdities and it doesn't reflect properly the
7 language.

8 Therefore it is not for Ofcom to say, well, this would be desirable and therefore we are
9 going to mangle this legislation to bring Sky ... It is for Parliament to do that. And
10 obviously it is not law yet, but Parliament is proposing to do just that in the Digital
11 Markets Competition and Consumers Bill. I will just give you the reference to it.

12 MR JUSTICE MORRIS: Is this in the materials?

13 MR PICKFORD: It is in the materials. I think I am still within time.

14 MR JUSTICE MORRIS: You have five minutes, I think, at least. 2A?

15 MR PICKFORD: It is in your 2A, that's right.

16 MR JUSTICE MORRIS: 34?

17 MR PICKFORD: The page is page 619.

18 MR JUSTICE MORRIS: Yes.

19 MR PICKFORD: So what is proposed under chapter 2, Subscription Contracts,
20 245(1), is:

21 "This chapter imposes duties on traders in relation to subscription contracts". A trader
22 is defined, as you might expect, to mean anyone acting for the purposes of their
23 business.

24 If one goes to 246, we see the meaning of a subscription contract. That has the sort
25 of meaning that you would imagine it did.

26 MR JUSTICE MORRIS: Yes.

1 MR PICKFORD: Then we have excluded contracts in 247. So it is excluded from the
2 scope of the Act if it is of a description set out in Schedule 19. And then, surprise,
3 surprise, we go to Schedule 19, which is on page 630.

4 MR JUSTICE MORRIS: Yes.

5 MR PICKFORD: And we discover, I think it is 630, unless I might have made
6 a mistake -- sorry, 632, I beg your pardon, it is now updated, and that is why I have no
7 markings, because I lost my markings. It is fine. Just give me two seconds.

8 Right, I am back there. Contracts regulated by Ofcom is at paragraph 5. That is a
9 (inaudible) excluded contract. A contract for the supply of goods, services or digital
10 content by a person who is bound in relation to that supply by a general condition set
11 by Ofcom under section 45 of the Communications Act.

12 And we know that is the power to set conditions on providers of ECSs. So the way in
13 which the government is proposing to effect legislation, which is going to be put before
14 Parliament, to bring people like Sky within the scope of the provisions that relate to
15 recurring contracts -- and they have similar provisions in relation to notification about
16 termination -- is by applying them to the same regime that applies to all traders apart
17 from people who are already regulated by Ofcom if they are providing an ECS.

18 MR JUSTICE MORRIS: Okay. Sorry, where do I get the proposition -- sorry, so on
19 your construction you don't fall within 5, you are not excluded --

20 MR PICKFORD: We are not excluded, yes.

21 MR JUSTICE MORRIS: And then where do we see that you are going to be regulated
22 because -- regulated in the way you say they are going to be regulated?

23 MR PICKFORD: Because we are back in 245, and we are a trader providing
24 a subscription contract, because the whole idea of this is that it is about contracts that
25 automatically recur.

26 MR JUSTICE MORRIS: Okay. We didn't get that notion from --

1 MR PICKFORD: And 250.

2 MR JUSTICE MORRIS: Isn't it 246(2)?

3 MR PICKFORD: Yes, I'm sorry, it is the problem of trying to go at top speed.

4 MR JUSTICE MORRIS: No, I know, I know. And then you are providing digital
5 content.

6 MR PICKFORD: Then 250 and 251 are the substantive content. It is the reminder
7 notice.

8 MR JUSTICE MORRIS: Okay.

9 MR PICKFORD: The point is simply this: we are not going to be -- if the Tribunal
10 agrees with my construction, it is not that Sky is forever let off the hook.

11 MR JUSTICE MORRIS: When it comes into force, you will be subject to the same
12 thing.

13 MR PICKFORD: Exactly.

14 MR JUSTICE MORRIS: Okay. Yes.

15 MR PICKFORD: And I am not going to take the Tribunal to the detail of it now but, for
16 instance, Lord Diplock in the Duport Steels case, which is in the authorities bundle at
17 tab 35, 636, refers to the well-understood notion of separation of powers, that it is not
18 for the judiciary to effectively, however well meaning --

19 MR JUSTICE MORRIS: Do you have the reference for that, please? And the
20 passage, please.

21 MR PICKFORD: Yes, it is internal page 157(c) to (d).

22 MR JUSTICE MORRIS: Let me just --

23 MR PICKFORD: And that is on page 651.

24 MR JUSTICE MORRIS: I am just marking it, Mr Pickford.

25 MR PICKFORD: I will just read it:

26 "The role of the judiciary is confined to ascertaining from the words that Parliament

1 has approved as expressing its intention what that intention was, and giving effect to
2 it. Where the meaning of statutory words is plain and unambiguous, it is not for judges
3 to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning
4 because they themselves consider that the consequences of doing so would be
5 inexpedient or even unjust or immoral."

6 MR JUSTICE MORRIS: Yes. Okay.

7 MR PICKFORD: So Mr Chairman, panel, for the reasons I have submitted, we say
8 that this decision is fatally flawed and we ask the Tribunal to quash it.

9 MR JUSTICE MORRIS: Thank you very much, Mr Pickford.

10 A sterling effort if I may say so, under pressure. Thank you.

11 Yes, Mr Holmes. I'm just wondering whether we should take a break. I am
12 looking -- I don't want to slow things down.

13 We need to take a break before 12.00.

14 So please start, yes.

15

16 **Opening submissions by MR HOLMES**

17 MR HOLMES: I am grateful, Sir.

18 So if I could just pick up on the final point that Mr Pickford made in his final flourish.

19 This case is about the interpretation of existing legislation. We are not inviting you,
20 Sir, to legislate or to alter the scope of legislation. We say that the decision correctly
21 interprets section 32. So there is no question of inviting you to go beyond the scope
22 of the statute. It is a debate about what the statute means. And we say the decision
23 has that right.

24 By the same token, the interpretation of the existing legislation cannot be affected,
25 cannot turn on the fact that there is currently a bill before Parliament that will legislate
26 to apply regulation to a wide range of contracts, including pure digital content services

1 such as those, as we see it, that are provided by Netflix and other providers.

2 Again, that is utterly irrelevant. The question for the Tribunal is just whether Ofcom is
3 right to say that, on existing law, Sky falls within the definition of an electronic
4 communications service.

5 I will develop my submissions today in three stages. I will begin with the factual
6 context and just briefly make some submissions on that.

7 I will then address you on that core question of statutory construction, and set out
8 Ofcom's positive case on the meaning of section 32.

9 And finally I will respond to Mr Pickford's allegations of error in relation to Ofcom's
10 decision. And it is under that head that I will pick up this question of the rump, which
11 is one that the Tribunal asked the question about yesterday.

12 MR JUSTICE MORRIS: Yes.

13 MR HOLMES: So beginning, then, with the facts. I think the following points are
14 uncontentious, following yesterday's proceedings.

15 The first point is that the product to which Ofcom's decision applies is that which is
16 described in Sky's March 2020 submission as Sky TV. Sky TV includes the provision
17 of linear channels which can be accessed via satellite. As Mr Pickford stated
18 yesterday, the vast majority of Sky's linear channels will be distributed via satellite.
19 And that is transcript page 28, lines 8 to 9.

20 As Mr Pickford explained, Sky TV is accessed on the television via a set-top box. And
21 the current generation of set-top box used with Sky TV is known as Sky Q. It is always
22 connected to a satellite dish, as well as to the Internet. As Mr Pickford put it, if you
23 don't receive by satellite, you don't have a Sky Q box.

24 That is at transcript, page 13, line 12.

25 Similarly, the legacy set-top boxes, called Sky +, are always connected to a satellite
26 dish. That is at transcript page 20, lines 22 to 23.

1 The second point: Sky TV customers receive their pay TV service under a single
2 contract which covers the provision of content and its delivery via satellite and via any
3 other means.

4 The third point is that as Ofcom found in the decision at paragraph 6.22, and as
5 Mr Pickford accepted, Sky is responsible for getting its linear channels to Sky TV
6 subscribers via its satellite network. That is transcript line 23, line 26.

7 The fourth point is, as Mr Pickford explained, Sky has other services that do not involve
8 a satellite element. They include Sky Glass, Sky Stream and NOW TV and they are
9 referred to by their names at the time in the decision at paragraph 2.3. But those
10 services are not within the scope of the decision.

11 And just briefly to show you that --

12 MR JUSTICE MORRIS: Yes, please.

13 MR HOLMES: -- it is at core bundle 1, tab 3. And I will take you if I may to the decision
14 itself. So not the explanatory statement that accompanies it but the operative part, if
15 I can call it that, which is at the back.

16 Picking it up on page 130, you see that at A1.18:

17 "Sky must take all necessary steps to comply with the end of contract notification
18 requirements in the relevant conditions in relation to subscribers to its relevant pay TV
19 services."

20 MR JUSTICE MORRIS: Yes.

21 MR PICKFORD: Then looking down at A1.19, the meaning of relevant pay TV
22 services is then supplied, and it is:

23 "For these purposes, any of Sky's pay TV services which rely in whole or in part on
24 a digital satellite transmission service."

25 MR JUSTICE MORRIS: Yes. Thank you.

26 MR HOLMES: Can I now pick up some of the Tribunal's factual questions yesterday.

1 The Tribunal asked during the course of the hearing about numbers of subscribers to
2 Sky TV as compared to Sky's purely Internet based services.

3 MR JUSTICE MORRIS: Yes. I think we have been provided with -- anyway, carry on.

4 MR HOLMES: You have, Sir.

5 The position at the time of the decision is set out -- so staying in the decision -- it is at
6 paragraph 2.4 on page 75.

7 MR JUSTICE MORRIS: Yes.

8 MR HOLMES: You see there some figures are given which are non-confidential.

9 MR JUSTICE MORRIS: That's 2.4.

10 MR HOLMES: That's 2.4:
11 "As an indication of relative proportions ..."
12 Sorry, starting from the beginning:
13 "Services which rely at least in part on satellite transmission remain the largest part of
14 Sky's pay TV business. As an indication of the relevant proportions, Ampere Analysis
15 recently estimated in evidence submitted to a parliamentary committee that Sky had
16 over 9 million subscribers as compared to 1.5 million NOW subscribers."

17 MR JUSTICE MORRIS: Yes.

18 MR HOLMES: There were up to date -- Mr Pickford stated on instruction that
19 subscribers had declined since the decision, and Sky's note provides up to date
20 figures. If we could just look at that, please, Sir, you may have it loose.

21 MR JUSTICE MORRIS: Yes, I have. I've got it in front of my bundle. This is the
22 document provided overnight? I can see the figures there.

23 MR HOLMES: Yes, they are confidential but you need, I think, Sir, to take the first two
24 lines.

25 MR JUSTICE MORRIS: The first two lines, add them together.

26 MR HOLMES: And then you compare that with the other Internet only services.

1 So while you can see that the numbers have declined somewhat, I think without
2 breaching confidentiality, they are still a substantial number.

3 So this case raises a matter of material consequence, as we say. The Tribunal will
4 have well in mind, as Sky's base of satellite subscribers gradually declines, for
5 example by switching to its purely Internet based services, so the burden of regulation
6 on Sky will also reduce. The end of contract notification requirement only bites in
7 cases where Sky acts as an electronic communications service, as a result of the
8 conveyance element of its service. So once subscribers cease to take the satellite
9 component, they are not covered by the regulation and they therefore fall away.

10 The Tribunal asked a related question at the end of the day about the relative
11 importance of video on demand and linear channels for Sky's customers and Sky's
12 factual note updating the Tribunal didn't supply an answer to that question.

13 MR JUSTICE MORRIS: I think Mr Pickford this morning said he wasn't able to do so,
14 or along those lines.

15 MR HOLMES: I think he perhaps felt it wasn't appropriate, if I understood correctly.

16 MR JUSTICE MORRIS: It was about on demand.

17 MR HOLMES: Relative proportions of on demand and satellite.

18 MR JUSTICE MORRIS: Usage, I think, or some way of measuring?

19 MR PICKFORD: Yes, so the position is we don't have that material certainly in the
20 bundles and my first point is we should really just be looking at the bundles. We have
21 actually sought -- I believe those behind me have sought information to see whether
22 there is anything we could add that is not in the bundles and the initial response of that
23 is, no, we can't break it down in that way. At least that was not possible in the time
24 that we have had to try to respond to that answer but in my submission, we shouldn't --

25 MR JUSTICE MORRIS: You don't want to expand the factual basis of the case, that
26 was your other point.

1 MR HOLMES: Exactly right, Sir.

2 So just for the Tribunal's interest, we do have some information on the extent to which

3 consumers generally, not confined to Sky, still make use of linear television.

4 MR JUSTICE MORRIS: As opposed to on demand.

5 MR HOLMES: As opposed to on demand. I think it would help, perhaps very briefly,

6 to consider that. It is in Ofcom's media -- sorry, if I could hand them up, hard copies

7 for the Tribunal.

8 This is a kind of state of the nation document that Ofcom publishes annually in relation

9 to the media sector. There are just two excerpts which shed light on it, on the question

10 of TV and video consumption trends.

11 So you see at page 4 the heading "Introduction: audiences continue to shift their

12 viewing from linear TV to on demand". I think that was a point the Tribunal had well

13 in mind based on --

14 MR JUSTICE MORRIS: Sorry, I need to find this. The heading, okay.

15 MR HOLMES: This was a point the Tribunal had in mind based on its own experience

16 of consuming television.

17 MR JUSTICE MORRIS: Yes -- no, I think it was Mr Pickford's experience.

18 MR HOLMES: Perhaps it was.

19 MR JUSTICE MORRIS: I think he is the person who is leading the charge to on

20 demand.

21 MR HOLMES: Yes.

22 Then at the foot of the page, you see the average amount of time people spent

23 watching TV and video content in 2021 across all devices, and that is five hours, 16

24 minutes per person per day -- an impressive tally, but there we are.

25 MR JUSTICE MORRIS: Yes.

26 MR HOLMES: Then, over the page, figure 1 shows how that breaks down between

1 video on demand and live TV.

2 MR JUSTICE MORRIS: Yes.

3 MR HOLMES: Live TV, you see, accounts for the largest proportion of that average
4 total -- 144 minutes. You see you have got subscription video on demand and
5 broadcast video on demand.

6 MR JUSTICE MORRIS: Broadcast video on demand being things like iPlayer?

7 MR HOLMES: Exactly, exactly so, and you see they are comparatively small.

8 Of course this is just a snapshot but it is to give you an idea. It is only to make the
9 point that linear content remains a very significant source of television content for UK
10 consumers. The other point --

11 MR JUSTICE MORRIS: I am just trying to work out, this is the breakdown of the figure
12 of five hours and 16 minutes, I am guessing? So that is 316 minutes total, is that right?

13 MR HOLMES: Yes.

14 MR JUSTICE MORRIS: I can see it there, fine.

15 MR HOLMES: The final point on page 42, do you see the heading that premium sport
16 remains a cornerstone of pay TV offerings and just looking at what is then said:
17 "The rise of subscription video on demand put pressure on both linear TV viewing and
18 pay TV subscriptions. Dedicated sports channels, which have long been a key
19 component of pay TV, have proved more resilient than TV overall to declines in
20 audiences. Between 2011 and 2021 average reach for total broadcast TV declined
21 from 95 to 86 per cent, while sports channels' reach stayed flat at 19 per cent",
22 although it fell for 16 to 34-year-olds.

23 The average reach figure here -- that, I should say, is the proportion of the population
24 watching three-plus consecutive minutes per week of a relevant service, and that is
25 set out in the graph.

26 And below the graph, the text explains that for many audiences, marquee sporting

1 events are still appointment viewing. So in other words live sporting events, which of
2 course are a very important part of Sky's offer, lend themselves to linear TV channel
3 viewing.

4 MR JUSTICE MORRIS: I am assuming, when it says "premium sport remains
5 a cornerstone", what it really means is premium sport viewed linearly. There is no
6 suggestion that people are watching sports events on demand -- I am sure some
7 people do, if they are late and they come home from the pub and they don't know the
8 result.

9 MR HOLMES: Indeed, Sir, but I think --

10 MR JUSTICE MORRIS: Sorry, I am speaking for -- yes, go on.

11 MR HOLMES: The point made in the penultimate paragraph is that live sporting
12 events lend themselves to linear TV channel viewing. There are events that customers
13 like to watch as they happen at a scheduled time and they can do that using the linear
14 service provided by Sky's satellite offer.

15 MR JUSTICE MORRIS: Okay, thank you.

16 MR HOLMES: The Tribunal asked whether Sky is a unique model by comparison with
17 other methods of pay TV provision and, perhaps in a rare moment of consensus,
18 I think Sky and Ofcom -- in this case anyway -- Sky and Ofcom are pretty much on the
19 same page. Each of the players in this marketplace is somewhat differentiated with
20 its own specific circumstances. A differentiating factor for Sky is that it produces
21 a comparatively large volume of content by comparison with the other traditional pay
22 TV companies but there are certainly other pay TV companies that both provide
23 content and take responsibility for transmission, such as Virgin Media.

24 This is a constantly evolving industry in which players combine and de-merge content
25 and conveyance operations all the time. Ultimately Sky's specific features don't affect
26 the nature of the exercise. Sky has many subscribers to its service which includes

1 satellite conveyance and Ofcom had to decide in this case whether its business is
2 subject to regulation as an electronic communications service --

3 MR JUSTICE MORRIS: So in a way they could all be said to be unique because it is
4 a shifting picture, and there is no sort of category A, category B, and Sky doesn't fit
5 into either. It is a sort of a spectrum.

6 MR HOLMES: It is a spectrum. And what Ofcom had to do, as the Tribunal does, is
7 consider how the law applies to Sky's specific facts.

8 Finally, as regards the facts, the Tribunal asked whether BT and Virgin serve
9 end-of-contract notices in respect of all their services or part only. As Mr Pickford
10 observed, those operators overwhelmingly bundle their TV with other electronic
11 communications services --

12 MR JUSTICE MORRIS: Okay.

13 MR HOLMES: -- such as Internet access services and telephone --

14 MR JUSTICE MORRIS: So truly bundled under the legislation?

15 MR HOLMES: Exactly so, Sir.

16 MR JUSTICE MORRIS: And therefore?

17 MR HOLMES: The end-of-contract therefore applies to the bundle.

18 MR JUSTICE MORRIS: To the whole contract?

19 MR HOLMES: The whole of the contract -- I think it is not only the contract but it is
20 connected contracts or some language of that nature.

21 MR JUSTICE MORRIS: It applies to all of it?

22 MR HOLMES: It applies to all of it, Sir.

23 MR JUSTICE MORRIS: So even to the extent that it includes content, you cannot say
24 here is a notice and it only relates to the bit that is transmission -- I use "transmission"
25 in the wider sense.

26 MR HOLMES: I will come back to this question of whether you can cut out --

1 MR JUSTICE MORRIS: Yes, I don't think -- all right.

2 MR HOLMES: On the other hand, the Tribunal asked whether if BT or Virgin increased
3 their content provision, that would potentially mean on Sky's case that they were no
4 longer an electronic communications service and the answer is I think they must
5 necessarily cease to be so.

6 MR JUSTICE MORRIS: If Sky is right?

7 MR HOLMES: Yes.

8 So Ofcom's posited case, if I may.

9 MR JUSTICE MORRIS: Sorry, are we now turning to statutory construction?

10 MR HOLMES: Any other questions on the facts, first?

11 MR JUSTICE MORRIS: Not at the moment. I think we are going to need to delve into
12 the statutory wording, I think, and the directives.

13 I am just thinking we will need to have break at some time. We have been going
14 an hour and a half, haven't we?

15 MR HOLMES: Yes.

16 MR JUSTICE MORRIS: Would now be a convenient moment?

17 MR HOLMES: Indeed, Sir.

18 MR JUSTICE MORRIS: I would normally give 15 minutes. Is that all right for you as
19 far as timing is concerned?

20 MR HOLMES: I think so, Sir.

21 MR JUSTICE MORRIS: We will rise for 15 minutes. Thank you very much.

22 **(11.35 am)**

23 **(A short break)**

24 **(11.50 am)**

25 MR JUSTICE MORRIS: Just give me a moment, Mr Holmes.

26 Yes.

1 MR HOLMES: Sir, where I propose to take it is to begin with the statutory language,
2 then address you on the context and purpose of the provisions by reference to
3 European Union law, which they are intended to implement. I think it is common
4 ground that section 32 is to be interpreted consistently with EU law, and equally I don't
5 think it is contentious that legislation is to be interpreted in the light of its context and
6 purpose. And we have set out the relevant authorities in our skeleton argument.

7 MR JUSTICE MORRIS: Yes.

8 MR HOLMES: I will then briefly consider the relevance of the European cases. And
9 just to foreshadow the submission, we agree with you that they are actually of limited
10 assistance.

11 MR JUSTICE MORRIS: I had not reached a final conclusion. I was questioning
12 whether they were or not. You submit that they are.

13 MR HOLMES: My submission is that they each apply to their own particular facts as
14 they are described in the order for reference, and none of them is exactly on point with
15 the situation which Ofcom is grappling with and which is now before the Tribunal.

16 MR JUSTICE MORRIS: Okay.

17 MR HOLMES: The text of section 32, you have seen it but it is one of these cases
18 where I think it helps to look at it a few times. If we could go back to the authorities
19 bundle, volume 1, tab A1, starting on page 6.

20 MR JUSTICE MORRIS: Yes.

21 MR HOLMES: The key definition is in section 32(2) and (2A).

22 Subsection (2) provides:

23 "An electronic communications service means a service of any of the types specified
24 in (2A) provided by means of an electronic communications network, except insofar
25 as it is a content service."

26 So breaking that down, the definition consists of two conditions and an exception. The

1 two conditions are what the Court of Justice referred to as the positive part and the
2 exception is what it referred to as the negative part.

3 The conditions are, first, that the service must be provided by means of an electronic
4 communications network, and secondly that the service falls within one of the specified
5 types in subsection (2A), and the exception is that the service does not constitute an
6 electronic communications service insofar as it is a content service.

7 MR JUSTICE MORRIS: Can I pause and make a very pedantic observation.

8 MR HOLMES: Yes, Sir.

9 MR JUSTICE MORRIS: I have noticed that section 32(2) as it currently is says,
10 "except so far as", whereas in the original it says "except insofar as".

11 I don't think it makes any difference in the end but it did trouble me in a way because
12 of that question which Mr Pickford now agrees, that if you look at a service and it is
13 even in part a content service, it is out altogether, which I think was something that
14 was left open in his skeleton.

15 In other words, let's say you can't -- if you find that there is some element of content,
16 none of it -- if it is 30 content and 70 transmission, the 30 doesn't take you out of
17 an ECS altogether. You just carve out the content, but you are left with an ECS. Okay.
18 I did ask Mr Pickford about that and it is common ground, I think, that you just carve
19 out the "insofar as".

20 MR HOLMES: Yes.

21 MR JUSTICE MORRIS: Okay. Yes.

22 MR HOLMES: Yes, indeed. So in my submission, that part of the service that is
23 a content service is expressly excluded from the definition. That is the correct
24 interpretation of the exception.

25 Now, the application of the first condition in this case is straightforward and isn't in
26 dispute. And just to show why, if you look up at the definition of electronic

1 | communications networks which is given in 32(1), exactly, it means a transmission
2 | system for the conveyance by the use of electrical, magnetic or electromagnetic
3 | energy, of signals of any description.

4 | And that is clearly broad enough to include the satellite network which Sky uses in
5 | transmitting linear television channels.

6 | MR JUSTICE MORRIS: Okay.

7 | MR HOLMES: The difference between the parties concerns the application of the
8 | second condition and the exception.

9 | Now, as regards the second condition, Ofcom says that Sky's service falls within
10 | subsection (2A)(c), which refers to any other service consisting in or having as its
11 | principal feature the conveyance of signals such as a transmission service used for
12 | broadcasting.

13 | Sky says that, notwithstanding the specific reference to a transmission service used
14 | for broadcasting, its service does not consist in or have as its principal feature the
15 | conveyance of signals, because it is primarily a content service.

16 | But we say that that is to ignore the exception in subsection (2). That exception
17 | specifically excludes a service from the definition so far as it is a content service.

18 | The proper focus when applying the definition in subsection (2) and (2A) is on that part
19 | of the service which is not a content service. One leaves out of account the content
20 | service elements. And that is pretty much how we say the provision is to
21 | be interpreted.

22 | MR JUSTICE MORRIS: You say, I think, before you get to (2A)(c) you leave out that
23 | bit that is a content service.

24 | MR HOLMES: Yes, exactly.

25 | MR JUSTICE MORRIS: And they say you don't do that first, you go straight to (2A)
26 | first.

1 MR HOLMES: Yes. In a nutshell, that is correct.

2 MR JUSTICE MORRIS: Yes.

3 MR HOLMES: Now, content services is defined over the page in subsection (7).

4 It means:

5 "So much of any service as consists in one or both of the following:

6 "The provision of material with a view to its being comprised in signals conveyed by
7 means of an electronic communications network, and the exercise of editorial control
8 over the content of signals conveyed by means of such a network."

9 So in other words, so much of any service as consists in the provision of content or
10 the editorial control of content. And taking that definition together with the definition in
11 section 32(2), an electronic communications service is so much of any service as is
12 not a content service and which meets the two specified conditions.

13 That is how we say the provision applies.

14 MR JUSTICE MORRIS: Okay.

15 MR HOLMES: And to anticipate the submission that I will be making subsequently,
16 once the content element of a pay television service is left to one side, the focus is
17 squarely upon transmission. And one can readily see, given the exception, how it is
18 that subsection (2A) specifies a transmission service for broadcasting as one of the
19 specified instances of a service consisting in or having as its principal feature the
20 conveyance of signals.

21 MR JUSTICE MORRIS: Okay.

22 MR HOLMES: The text of section 32 therefore accords with Ofcom's conclusions in
23 the decision. And we say it is inconsistent with Sky's central argument. Sky says that
24 its service is a unified service and that content and transmission are indissociable, but
25 the legislation requires one to disassociate content from transmission.

26 MR JUSTICE MORRIS: Yes.

1 MR HOLMES: A service is an electronic communications service except insofar as it
2 is a content service.

3 Now, the "it" there, to go back to a question you raised yesterday, in our submission
4 can only be a reference to the service as a whole, which is excepted only partially to
5 the extent that it is a content service.

6 That is confirmed --

7 MR JUSTICE MORRIS: I just need to digest this, sorry.

8 MR HOLMES: Yes.

9 MR JUSTICE MORRIS: Yes, carry on.

10 MR HOLMES: And that is confirmed by the definition of a content service, which is
11 "so much of any service" -- that is the service as a whole --

12 MR JUSTICE MORRIS: Yes.

13 MR HOLMES: -- "as consists in content provision or editorial control".
14 So much of the service. So again, a definition which requires one to break the service
15 down, to dissolve it into its constituent parts and to take out the content element.

16 MR JUSTICE MORRIS: Can I just make an observation there?

17 MR HOLMES: Yes.

18 MR JUSTICE MORRIS: One of the thoughts that occurred to me in reading this case,
19 and I think it is probably -- and I ought to have it up on screen but I don't -- I think that
20 there is a reference in Sky's skeleton to a complaint about disaggregation. I think it is
21 said that Ofcom is wrongly disaggregating.

22 My observation or thought in relation to that is that the disaggregation is effectively
23 inherent in section 32.

24 MR HOLMES: That is exactly my submission. You have hit the nail on the head.

25 MR JUSTICE MORRIS: I mean, you can deal with it in reply by all means. But I can't
26 remember exactly the context in which there is -- I could dig up the skeleton, but there

1 is definitely reference in Sky's skeleton to the concept of disaggregation. If I had a soft
2 version up on the screen I would be able to find it more quickly. But it derives --

3 MR HOLMES: It may be paragraph 50 of Sky's skeleton.

4 MR JUSTICE MORRIS: I don't have it to hand.

5 MR HOLMES: Just to turn that up.

6 MR JUSTICE MORRIS: Maybe I will just turn it up.

7 Yes. "Seeks to disaggregate into separate hypothetical services."

8 My observation is, it is not Ofcom that seeks to disaggregate it, hypothetically. It is
9 inherent in the concept of section 32. And it also links into the observation I made
10 yesterday, not very clearly, which we will get to in a moment when we get to the
11 directives, which seem to suggest that the content service is something different from
12 the electronic communications service, because it is something that is sent over
13 the service.

14 MR HOLMES: Yes.

15 MR JUSTICE MORRIS: That was my A and B point.

16 MR HOLMES: Yes, Sir, that is a point I will come to. We heard what you said and it
17 gave us cause for reflection overnight. It seemed to us a helpful point.

18 MR JUSTICE MORRIS: It is all linked into this thing about -- I completely understand
19 why Mr Pickford puts this case on the basis of a single service with different elements.
20 But I think in some ways the legislation actually is talking about some form of
21 breakdown of the services into elements of different bits of service. So I am not sure
22 that this distinction between three elements and three services, for the purposes of the
23 legislation, is that significant.

24 MR HOLMES: I am sure that is helpful to all counsel.

25 MR JUSTICE MORRIS: For the moment, anyway.

26 MR HOLMES: And my submission is precisely that one needs to disaggregate. That

1 is what the legislation envisages. And I hope to show the Tribunal --

2 MR JUSTICE MORRIS: Go on.

3 MR HOLMES: -- that that is inherent in the purpose that is being pursued here, which
4 I shall come back to.

5 MR JUSTICE MORRIS: If you are right that you need to disaggregate, does it matter
6 whether you call the disaggregated bits services, sub-services or elements? It maybe
7 doesn't matter. I don't know.

8 MR HOLMES: Yes, for my part anyway I don't think anything turns on that. But we
9 will reflect further.

10 MR JUSTICE MORRIS: Okay. Carry on. You were making the point by reference to
11 32(7) and emphasising there is so much of any service -- and you said the words "any
12 service" in 32(7) must be (inaudible).

13 MR HOLMES: Exactly. And it is the "so much service" that is the key point here, and
14 that shows again that one has to break it down and look at that portion of it that is
15 content and take that separately.

16 And it is further confirmed -- and my next point is exactly the one, Sir, that you just
17 came back to, the fact that a content service is defined as content provided or
18 produced for conveyance on an electronic communications network. And I think your
19 first reaction to that, Sir, was that it might be, if you like, either bootstrapping or otiose.
20 Why do you need that in the definition of content?

21 But actually once you understand that the aim here is to break down a combined
22 service into its content constituents and its conveyance constituents, it makes perfect
23 sense, because you are looking at the content component of a service which is then
24 going to be conveyed via the electronic communications service element.

25 MR JUSTICE MORRIS: Yes.

26 MR HOLMES: And the whole point of the exclusion is to break out the conveyance

1 element from media operators that provide the content and transmit it. And I will show
2 that by reference to the recitals in a moment.

3 But for now the key point is that the positive elements in section 32(2) are applied to
4 a service with the exception of so much of that service as consists in the provision or
5 production of content.

6 And that is of course how Ofcom approached Sky's service in the decision. Indeed,
7 Sky's submissions of this morning about the purpose of the content exception really
8 confirm the need for disaggregation in this legislation, because what they say is -- their
9 case now boils down to a case about order, because they say that if you get through
10 the mainly or wholly gateway, which they say has to be approached first --

11 MR JUSTICE MORRIS: When you say "get through", meaning if it is 70 per cent?

12 MR HOLMES: Exactly right.

13 MR JUSTICE MORRIS: Yes.

14 MR HOLMES: So it is 70 per cent transmission, yes.

15 MR JUSTICE MORRIS: Yes.

16 MR HOLMES: Afterwards, you still then, when applying the exclusion, need to
17 breakdown this unified service as a whole.

18 So I think they accept that one does need to disaggregate the service. That is inherent
19 in the operation of the Act.

20 Now, so that is all I wanted to say about the text of section 32, subject to any questions
21 that the Tribunal have. And we say that Ofcom's interpretation is confirmed by
22 consideration of the legislative context and purpose. Section 32 in its present form
23 was enacted in order to implement the European Electronic Communications Code,
24 the EECC. And an appropriate place to start is with the text of the currently applicable
25 provisions of EU law that the section is intended to implement.

26 MR JUSTICE MORRIS: Tab 13.

1 MR HOLMES: Indeed. I am grateful, Sir. At page 158.

2 MR JUSTICE MORRIS: Authorities bundle, volume 1, tab 13, page 158.

3 Just whilst I remember -- it is a peripheral point -- there is a disputed point between
4 you as to the meaning of content service, as to whether it is confined to editorial control
5 or not.

6 I don't know whether anything turns on it really. It was all in the context of the argument
7 that the other people, TalkTalk and the like, don't provide content because they don't
8 have editorial control.

9 MR HOLMES: I am not sure how much in fact turns on it, because we are looking at
10 Sky's services and there is no dispute that Sky --

11 MR JUSTICE MORRIS: Your submission is that 32(7) covers both your own channels
12 and other people's channels.

13 MR HOLMES: Yes, exactly. If you buy in someone else's content and you then
14 provide that to the public, that falls squarely within the first bit of 32(7)(a).

15 MR JUSTICE MORRIS: All right. I am at page 158.

16 MR HOLMES: I am grateful. Just starting at the top of the page, "Electronic
17 communications network". Just for your note, Sir, you will see that that gives a slightly
18 fuller definition than the one you see in the domestic legislation, and it refers to satellite
19 networks as a specific example of an ECN, and it refers to networks used for radio
20 and television broadcasting.

21 MR JUSTICE MORRIS: Yes.

22 MR HOLMES: And this shows, if there were any doubt, that the legislation is directed
23 at the regulation of television transmission networks such as the satellite service Sky
24 uses to distribute its channels.

25 MR JUSTICE MORRIS: Yes.

26 MR HOLMES: Moving down the page to article 2, paragraph 4, you see the definition

1 of electronic communications service which section 32 in its current form is intended
2 to implement:

3 "Electronic communications service means a service, normally provided for
4 remuneration, which encompasses - via a electronic communications network - which
5 encompasses, with the exception of services providing or exercising editorial control
6 over content transmitted using electronic communications networks and services, the
7 following types of service."

8 And at (c):

9 "Services consisting wholly or mainly in the conveyance of signals such as
10 transmission signals used amongst other things for broadcasting."

11 So taking this in stages, an electronic communications service is defined here as
12 a service which encompasses, with the exception of content services, the specified
13 types of service, including services consisting wholly or mainly in the conveyance of
14 signals.

15 Now, the structure and language of the provision, in my submission, is important. It
16 instructs the relevant authority applying this definition to consider what a service, the
17 overall service, encompasses, what it is made up of.

18 MR JUSTICE MORRIS: Yes.

19 MR HOLMES: So again, the focus is on disaggregating the service, breaking it down
20 into its constituent elements. And the authority must see what it encompasses with
21 the exception of content services. I don't think the text could be clearer that you take
22 out the content services first.

23 MR JUSTICE MORRIS: Yes.

24 MR HOLMES: You see whether the service encompasses, with the exception of
25 content, the following types of services.

26 MR JUSTICE MORRIS: Yes, it is interesting, isn't it, that you start with a service,

1 singular, but then you are looking at what it is made up of, and it is made up of services,
2 plural.

3 MR HOLMES: Yes.

4 MR JUSTICE MORRIS: Either both the ones that are included, the following types of
5 services, not service, although (a) and (b) are both singular, (c) is plural. And what
6 you exclude is services -- by definition, it envisages -- I am going to call them
7 sub-services --

8 MR HOLMES: Yes.

9 MR JUSTICE MORRIS: -- within the service as a whole.

10 MR HOLMES: Yes. Obviously from a competition law perspective we are well familiar
11 with vertically integrated providers that do a number of different stages within a value
12 chain. And Sky is really in that position. It produces content and it transmits content.
13 And it is not problematic, I think, from a competition perspective, which is closely
14 related to this regulatory framework, that you would look at the different bits that the
15 overall service is made up of and label them services but I think the only coherent
16 interpretation of this provision is that the singular service at the beginning is the entirety
17 of the service.

18 You see what it encompasses, ie what it is made up of, and you take out the services
19 that are content services, in order to see whether, with the exception of those services,
20 the following types of service are included. Do you see?

21 MR JUSTICE MORRIS: Yes.

22 Then there is what I call my bootstraps point, which I don't think appears in the UK
23 legislation, which defines the content services not only as services providing or
24 exercising a degree of control over content -- pause there for a moment -- but that it is
25 transmitted using electronic communication services.

26 MR HOLMES: That is in the domestic legislation. And I perhaps should show you

1 that.

2 MR JUSTICE MORRIS: Is it.

3 MR HOLMES: If I have understood the point correctly, if you go back to section 32 --

4 MR JUSTICE MORRIS: It is by means of an electronic communications network.

5 MR HOLMES: I see. Yes, Sir, but no reference to the --

6 MR JUSTICE MORRIS: The services.

7 MR HOLMES: Yes.

8 MR JUSTICE MORRIS: So if you disregard the words "Networks and ..." it is
9 transmitted using electronic communications services. And it is a bit odd because it
10 therefore seems to suggest that the content service is something different from the
11 electronic communications service.

12 MR HOLMES: Yes.

13 MR JUSTICE MORRIS: Do you see the point I am --

14 MR HOLMES: I do see what you mean. But I think if you understand the exercise as
15 being to take the service as a whole and to see what it encompasses, I think what it
16 means is you take out content which is going to be conveyed, and electronic
17 communications service is the part about the conveyance element, the transmission,
18 you take that part out and you see whether there is conveyance that is left.

19 MR JUSTICE MORRIS: I see that. But what I am saying is, almost by definition, the
20 content service cannot be an electronic communications service.

21 MR HOLMES: I take your point, Sir. So there is a slight -- yes. Yes.

22 MR JUSTICE MORRIS: All right.

23 MR HOLMES: But I think my basic submission is unaffected by that observation. It is
24 simply that you have to break the service down. You look at the service. You see
25 what it encompasses, you see whether it encompasses, with the exception of content
26 services, the types of service which are described there. And that means that when

1 | you come to look to see whether it is wholly or mainly, whether it is under that type of
2 | service, you have already taken content out of account.

3 | MR JUSTICE MORRIS: I understand that.

4 | I am not sure my point is against you. I don't know. It may be in your favour. I think
5 | it possibly is. But there we are. Yes.

6 | MR HOLMES: Yes, I am grateful. We will reflect on it further, Sir, perhaps after the
7 | short adjournment. If there is anything more to say about it, I will come back.

8 | MR JUSTICE MORRIS: Yes.

9 | MR HOLMES: In short, insofar as there were any ambiguity or doubt in section 32
10 | itself, article 2(4) makes clear the order in which these points are to be approached.
11 | Now, the interpretation also accords with the objectives underlying the legislation as
12 | they emerge from the recitals in the preamble of the directive.

13 | If we could first consider recital 7 on page 148.

14 | MR JUSTICE MORRIS: Yes.

15 | MR HOLMES: I think you have seen a version of this recital that appeared in the prior
16 | suite of directives. I can't remember --

17 | MR JUSTICE MORRIS: I think we have been taken to this one as well, already. I think
18 | Mr Pickford did, according to my marking system.

19 | MR HOLMES: Very good.

20 | So this states:

21 | "The convergence of the telecommunications media and information technology
22 | sectors means that all electronic communications networks and services should be
23 | covered to the extent possible by a single European electronic communications code
24 | established by means of a single directive, with the exception of matters better dealt
25 | with through directly applicable rules established by means of regulations."

26 | Pausing there, the EECC, and indeed the 2002 directives which it consolidates and

1 updates, have as a defining objective to bring communications networks and services
2 that are used in telecoms and media, including broadcasting and IT, under a single
3 statutory framework.

4 Those sectors all involve a communications infrastructure used for the conveyance of
5 information, whether that is in the form of interpersonal communications, like
6 a telephone call or an SMS, or media content. And the legislative intention is to apply
7 one common set of rules to communications networks and services used to convey
8 information of all kinds, whether television, radio, telephone or Internet.

9 I hope the Tribunal will forgive me for drinking a hot drink. I have a sore throat this
10 morning.

11 MR JUSTICE MORRIS: You don't need to explain.

12 MR HOLMES: So the aim is to bring the transmission element of media companies,
13 which have traditionally been regulated for their content, within the framework of
14 legislation applicable to communications providers.

15 The question then arises as to how the regulatory framework applicable to
16 communications or the transmission side of the business relates to the existing
17 regulation applicable to media content.

18 And the answer is supplied in the next sentence in the recital, which states:

19 "It is necessary to separate the regulation of electronic communications networks and
20 services from the regulation of content. Therefore, this directive does not cover the
21 content of services delivered over electronic communications networks using
22 electronic communications services, such as broadcasting content" and some other
23 examples --

24 MR JUSTICE MORRIS: And again, you see, you have my point about the contrast
25 between the content of services delivered (a), over electronic communications -- using
26 an electronic communications services, (b).

1 MR HOLMES: Yes.

2 MR JUSTICE MORRIS: Anyway, all right.

3 MR HOLMES: And some other examples, and it is without prejudice to measures
4 taken at EU and national level in respect of such services.

5 In other words, EU legislation envisages separate and parallel regulatory regimes, one
6 regulating the communications aspect of the relevant industries, and the other
7 regulating content, including broadcast content.

8 And the necessary consequence is that a company that provides content and arranges
9 the communication or transmission of content may find itself subject simultaneously to
10 both kinds of regulation, both content and communications.

11 And turning over the page, you see exactly that point identified in recital 11. "The
12 same undertaking, for example a cable operator, can offer both an electronic
13 communications service such as the conveyance of television signals, and services
14 not covered under this directive, such as the commercialisation of an offer of sound or
15 television broadcasting content services, and therefore additional
16 obligations" -- additional obligations -- "can be imposed on such an undertaking in
17 relation to its activity as a content provider or distributor in accordance with provisions
18 other than those in this directive, without prejudice to the conditions laid down in the
19 annex."

20 So as an overview, the high-level objective of EU legislation is to apply a single
21 framework of regulation to communications network and services used in both media
22 and telecoms, and that framework relating to the conveyance of information applies
23 separately and alongside rules to regulate content.

24 And that design is reflected in the definition of electronic communications services,
25 which excludes content and focuses on the conveyance of content. It isolates that
26 part of the services offered by media, the conveyance element which the EECC is

1 intended to regulate, and it leaves out of account the content element, which is subject
2 to separate and parallel regulation.

3 Conversely, we say --

4 MR JUSTICE MORRIS: Just give me a moment, please.

5 Yes.

6 MR HOLMES: Sky's approach cuts across the broad objective of the legislation. It
7 requires a pay TV service which includes communications and content to be treated
8 as an indissociable whole.

9 If the content element is deemed more important having regard to its cost or
10 significance to subscribers or some other measure of importance, then it eclipses the
11 communications or conveyance element altogether when applying the wholly or mainly
12 test.

13 On Sky's interpretation, the content is to be understood as the principal feature of the
14 service in that case. And instead of parallel regulatory regimes applying
15 simultaneously to communications and content, the communications element of the
16 service is removed from regulation and only the content side is regulated.

17 It comes back, I think, to an observation you made to Mr Pickford this morning.

18 He made the point that -- he referred to the need to avoid content slipping out of
19 content regulation, when he showed you the provisions of the DCDS Directive, I think
20 it is called.

21 MR JUSTICE MORRIS: I would like to come back to that at some stage.

22 MR HOLMES: Yes. But it is equally important that transmission doesn't slip out of the
23 transmission regulation.

24 MR JUSTICE MORRIS: Yes. Other than, he would say, the transmission regulation
25 only applies if you are wholly and mainly, which takes you round to the same question.

26 MR HOLMES: The question is what the regulation is trying to achieve. And we have

1 | seen that the convergence phenomenon which inspired this expansion beyond
2 | telecommunications services and telecommunications networks was intended to
3 | ensure that other types of conveyance in the media sector were caught.

4 | MR JUSTICE MORRIS: Yes.

5 | MR HOLMES: To produce parallel schemes where the rules apply to the same
6 | undertaking, both in relation to conveyance, where it conveys material and in relation
7 | to content, where it provides content.

8 | It is a 'render unto Caesar' argument. For the content stuff you leave it to the content
9 | regulation. For the conveyance part you leave it to the conveyance regulation. And
10 | the regulation seeks to achieve that by breaking down the service.

11 | MR JUSTICE MORRIS: Yes. It is the point I think I made earlier, that on Mr Pickford's
12 | case if it is 70-30 it is regulated by both, or both elements regulate it separately.

13 | MR HOLMES: Transmission.

14 | MR JUSTICE MORRIS: Yes. And if it is 30-70 it is regulated by content only. That is
15 | the result -- you don't disagree -- of his case. And he says the reason for that is that
16 | that is because of the wholly or mainly wording in relation to transmission, and that
17 | transmission regulation only applies if it is wholly or mainly.

18 | MR HOLMES: Yes, and you have my point on the text. It is quite clear you start with
19 | the exclusion. And on the --

20 | MR JUSTICE MORRIS: And that is the purpose of the exclusion.

21 | MR HOLMES: The purpose is to ensure that communications regulation applies to
22 | the conveyance element and content regulation applies to the content.

23 | MR JUSTICE MORRIS: And that is bolstered by the recitals themselves.

24 | MR HOLMES: Exactly. Whereas Mr Pickford's case, we say, amounts to saying that
25 | content regulation should trump communications regulation where content is
26 | sufficiently important.

1 And we say that that is clearly not what was intended.

2 MR JUSTICE MORRIS: Okay.

3 MR HOLMES: Now, as well as the EECC, we have set out in our skeleton argument
4 the relevant recitals and provisions of the preceding EU legislation. That is the 2002
5 package of directives. I don't think we need to spend long on that because we say the
6 same picture emerges. The key provision was article 2(c) of the Framework Directive.

7 MR JUSTICE MORRIS: Which is?

8 MR HOLMES: D9, page 140.
9 Electronic communications service.

10 MR JUSTICE MORRIS: Page 140, yes.

11 MR HOLMES: Do you have it?

12 MR JUSTICE MORRIS: I do, yes.

13 MR HOLMES: It is (c), first column:
14 "An ECS means a service, normally provided for remuneration, which consists wholly
15 or mainly in conveyance of signals on electronic communications networks, including
16 telecoms services and transmission used for broadcasting, but exclude -- [that slightly
17 tricky error] -- services providing or exercising editorial control over content transmitted
18 using electronic communications networks and services."

19 MR JUSTICE MORRIS: That puts it slightly in a different order, but --

20 MR HOLMES: It does. But we say that the significance of the EECC is that it makes
21 clear, without regard to order, how one goes about conducting this exercise. It
22 encompasses, with the exception of content services, the following types of service.
23 And we say that that interpretation is also consistent with this text here, albeit that it is
24 not as clearly broken out. The "exclude" we say means "but which excludes". And
25 we say that follows for example from the French text but is consistent with what the
26 EECC shows.

1 MR JUSTICE MORRIS: So therefore the word "exclude" goes with a service normally
2 provided for remuneration which excludes services --

3 MR HOLMES: Yes.

4 MR JUSTICE MORRIS: -- rather than including but excluding.

5 MR HOLMES: Yes. The including but excluding --

6 MR JUSTICE MORRIS: Hold on a minute. Okay. Carry on.
7 Maybe it doesn't matter. But go on.

8 MR HOLMES: The same basic idea is there.

9 MR JUSTICE MORRIS: I am not sure much turns on it.

10 MR HOLMES: You have a service at the beginning, which is a service as a whole.
11 And you have then references to services subsequently. And I think you have to break
12 the service down to see what it is made up of.
13 That is my submission.

14 MR JUSTICE MORRIS: Yes.

15 MR HOLMES: And you see the two-limbed definition of content services was apparent
16 even at this stage. They include services providing content and also services
17 exercising editorial control over content, insofar as anything turns on that point.
18 And the recitals make very similar statements to those in the EEC preamble about
19 convergence, the need to separate communications and content regulation, and the
20 potential for rules from each to apply to the same undertaking.
21 I am not sure if you were taken there, but one further recital which --

22 MR JUSTICE MORRIS: I was taken to 5, I think, recital 5.

23 MR HOLMES: Yes. I was just going to show you -- yes, recital 5 basically makes the
24 convergence point.
25 You see it perhaps even more clearly expressed at tab 10 in the Competition Directive,
26 another part of the same suite of directives at recital 7, at page 141.

1 MR JUSTICE MORRIS: Yes.

2 MR HOLMES: So:

3 "This directive makes reference to electronic communications services and electronic
4 communications networks rather than the previously used terms, telecoms services
5 and telecoms networks. These new definitions are indispensable in order to take
6 account of the convergence phenomenon, by bringing together under one single
7 definition all electronic communications services and/or networks which are concerned
8 with the conveyance of signals by wire, radio, optical or other electromagnetic means,
9 ie fixed, wireless, cable television and satellite networks. Thus the transmission and
10 broadcasting of radio and television programmes should be recognised as
11 an electronic communications service, and networks used for such transmission and
12 broadcasting should likewise be recognised as electronic communications networks."
13 So this is the convergence phenomenon again.

14 MR JUSTICE MORRIS: Yes.

15 MR HOLMES: You need now to look at the underlying networks without regard to
16 what industry they fall in, whether it is media or whether it is telecommunications,
17 classically understood, and you need to apply a common set of rules to them. And
18 that means that transmission and broadcasting of radio and television programmes
19 should be recognised --

20 MR JUSTICE MORRIS: That is quite an important sentence, possibly, the
21 transmission and broadcasting of radio and television programmes should be
22 recognised as an electronic communications service.

23 MR HOLMES: Yes.

24 MR JUSTICE MORRIS: Well, if Sky is right, their transmission is not an electronic
25 communications service.

26 MR HOLMES: That's right, Sir.

1 MR JUSTICE MORRIS: Yes. There is not a similar recital to that effect in the EECC?

2 MR HOLMES: We say it is implicit, inherent in the general reference --

3 MR JUSTICE MORRIS: The EECC brought under one roof the various directives in

4 2002?

5 MR HOLMES: Yes.

6 MR JUSTICE MORRIS: Right. And the competition --

7 MR HOLMES: With some elements --

8 MR JUSTICE MORRIS: The competition one was part of the package in 2002.

9 MR HOLMES: Yes. It was a commission directive, I should note, rather than

10 a (inaudible) directive. But it was enacted as part of the same (inaudible).

11 MR JUSTICE MORRIS: Okay. Yes, carry on.

12 MR HOLMES: I think you have my submission that this is again consistent with

13 an interpretation that the communications element of a combined communications

14 and content service like Sky's is intended to be subject to communications regulation

15 as well as content regulation. And the 'consists wholly or mainly' test is applied after

16 excluding the content element, so that the content element doesn't eclipse or exclude

17 the service from communications regulation.

18 MR JUSTICE MORRIS: Yes, okay.

19 MR HOLMES: Just the case law now, Sir.

20 MR JUSTICE MORRIS: Fine.

21 MR HOLMES: Very briefly. I think we are doing very well for time.

22 MR JUSTICE MORRIS: We were going to suggest a shorter lunch break, but it may

23 not be necessary.

24 MR HOLMES: Well, I am in Mr Pickford's hands, but I am steaming through my

25 material. You must tell me if I am going too fast.

26 MR JUSTICE MORRIS: I will tell you if you are. It is all right. I am taking it all on

1 board. I am not making many notes because I will find it on the transcript. Normally
2 I slow everybody down when I don't have a transcript because I take everything down.
3 But that is very helpful.
4 Where are we going now, the case law?
5 MR HOLMES: The case law, yes.
6 MR JUSTICE MORRIS: Volume 2.
7 MR HOLMES: Yes, Sir.
8 I will take you only to one for now, but there are a number of cases, none of them
9 exactly on point. In each the court was focused on a particular constellation of facts
10 raised by the referring court.
11 In that regard, we say Gmail and Skype are of very limited if any relevance because
12 they don't concern content provision. So they don't engage this question of how one
13 deals with the content element of the service.
14 MR JUSTICE MORRIS: Okay.
15 MR HOLMES: Now, equally, the UPC cases, they do concern a pay TV provider, but
16 they concern a provider -- neither of them concern a provider like Sky which makes
17 some of its own content.
18 So that wasn't something that was before the Court of Justice and it wasn't something
19 they had in their sights when deciding how to interpret these provisions.
20 So if we could pick up the UPC Hilversum case.
21 MR JUSTICE MORRIS: Just give me a minute. Tab? Remind me.
22 MR HOLMES: D23, I think.
23 MR JUSTICE MORRIS: Yes.
24 MR HOLMES: Just to give you the context briefly, the case arose out of a request for
25 a preliminary ruling by a Dutch court, the Dutch High Court in Amsterdam. And in brief
26 summary, UPC had bought a cable network from the local authority of the City of

1 Hilversum. And a condition of the sale was that UPC offer a basic cable package of
2 television and radio channels at a capped price.

3 MR JUSTICE MORRIS: Okay.

4 MR HOLMES: UPC tried to increase the price above the cap, and that led to litigation.
5 One of the issues was whether UPC was offering an electronic communications
6 service. UPC argued that it was, and that therefore price regulation had to be done
7 under the particular provisions laid down in the common regulatory framework, and
8 you had to find --

9 MR JUSTICE MORRIS: They were arguing it was an ECS.

10 MR HOLMES: Yes. Hilversum and the Dutch government argued that it was not, on
11 the basis that it was offering a service for the supply of content. The Dutch
12 court referred --

13 MR JUSTICE MORRIS: Pause a moment.

14 MR HOLMES: You can see that for your notes, Sir, in the advocate general's opinion.

15 MR JUSTICE MORRIS: At?

16 MR HOLMES: Tab D22, page 424.

17 MR JUSTICE MORRIS: Paragraphs 23 and 24, was that? Paragraph 23.

18 MR HOLMES: Yes.

19 MR JUSTICE MORRIS: Just so that I understand it, it is a provision by cable of third
20 party content.

21 MR HOLMES: That's right, content which had been bought by - UPC, licensed in and
22 on which they paid royalties, and that was reflected in the price that they then charged
23 to end users.

24 MR JUSTICE MORRIS: So end users were paying for content.

25 MR HOLMES: They were.

26 MR JUSTICE MORRIS: But third party content.

1 MR HOLMES: Exactly right. And that was the point of distinction I referred to. Unlike
2 Sky, they didn't make quite a lot of their content.

3 MR JUSTICE MORRIS: Yes.

4 MR HOLMES: And the court refers to that.

5 So the Dutch court's question is at 440. I think you saw it. Question 1:
6 "Does a service consisting of the supply of a basic cable [channel] for the delivery of
7 which both transmission costs and an amount relating to charges for payments made
8 to broadcasters and copyright collecting societies, in connection with the transmission
9 of programme content charged, fall within the scope of the new regulatory framework."
10 So that is a reference to the point we were just discussing. There was a proportion of
11 the price that the consumers paid that reflected the purchase of the content.

12 MR JUSTICE MORRIS: Yes.

13 MR HOLMES: The court addresses the question, beginning at page 443.

14 MR JUSTICE MORRIS: Yes.

15 MR HOLMES: At paragraph 35 it identifies article 2(c) of the Framework Directive as
16 the relevant provision. And it is reproduced at paragraph 36. And then at
17 paragraph 38 there is a reference to the recitals in the Framework Directive I showed
18 you. And they also considered, you will see, paragraph 39, recital 7, in the preamble
19 to the competition directive, to which I referred you.

20 And you see at the end of that paragraph:
21 "The same recital states that the transmission and broadcasting of radio and television
22 programmes should be recognised as an electronic communications service."
23 So that was a point the court saw as important.

24 MR JUSTICE MORRIS: Yes.

25 MR HOLMES: At 41 you see the conclusions drawn from the recitals about
26 convergence and the need to separate the regulation of transmission and regulation

1 of content:

2 "It follows from the foregoing that, as the Advocate General observed, the relevant
3 directives make a clear distinction between the production of content, which involves
4 editorial responsibility, and the transmission of content, which does not entail any
5 editorial responsibility. Content and transmission are covered by different measures
6 which pursue their own specific objectives without referring to the customers of the
7 services supplied or to the structure of the transmission costs charged to them."

8 A reference to -- the Dutch court's reference to the transmission costs. So pausing
9 there. The court approached the question on the basis that content regulation and
10 transmission regulation were pursued under separate and parallel regulatory regimes
11 with regulation of transmission now extending to the media as well as the telecoms
12 sectors.

13 Then at paragraph 42 the court considers the factual situation of UPC, and it notes
14 that UPC was not involved in the production of content in the sense of exercising
15 editorial control.

16 And from paragraph 43, it proceeds to consider the significance of the fact that UPC
17 was nonetheless involved in the provision of content.

18 The Tribunal will recall that the definition of content services had two independent
19 limbs.

20 MR JUSTICE MORRIS: Yes, provide or editorial control.

21 MR HOLMES: Exactly.

22 MR JUSTICE MORRIS: Let me just read back, sorry.

23 Yes. 36 sets it out, "Excluding services providing or exercising editorial control". Okay.

24 MR HOLMES: Then it comes to consider what the significance is of the fact that UPC's
25 customers got content.

26 MR JUSTICE MORRIS: Yes.

1 MR HOLMES: And paid for content.

2 And at 43 it states:

3 "Although UPC's customers take out a subscription for the purpose of gaining access
4 to the content offered by that company, that does not mean that UPC's business, which
5 consists in broadcasting programmes produced by content editors by transmitting
6 those programmes to the connection point to its cable network in its subscribers'
7 homes must be excluded from the definition of ECS. On the contrary, it follows from
8 the observations made in paragraphs 36 to 41 above that the provision of that package
9 falls within the definition of ECS and therefore the substantive scope of the NRF,
10 insofar as that service includes the conveyance of signals on a broadcasting network."

11 Now, the paragraphs --

12 MR JUSTICE MORRIS: That is a controversial sentence, isn't it? Or it is a sentence
13 that we are perhaps struggling with.

14 Mr Pickford says that that is (a) wrong and (b) doesn't accord with the dispositive part.
15 You are going to tell me something else, maybe?

16 MR HOLMES: No, Sir. We accept that the court here is proceeding somewhat by
17 way of shorthand and that there is still a need to show that the wholly or mainly test is
18 met.

19 But we do say that this effectively takes the content, the provision of content element,
20 the channels, out of account.

21 MR JUSTICE MORRIS: Okay. Just pause a minute, please. **(Pause)**.

22 Okay, carry on.

23 MR HOLMES: You see it perhaps most clearly at the conclusion of paragraph 45:

24 "Any other interpretation would considerably reduce the scope of the NRF, undermine
25 the effectiveness of its provisions and therefore compromise the achievement of its
26 objectives. Since the purpose of the NRF is to establish a genuine internal market for

1 | electronic communications in which those communications must eventually be
2 | governed solely by competition law, the exclusion of the activities of an undertaking
3 | such as UPC from its scope, on the pretext that it does not restrict itself to conveying
4 | signals, would deprive the NRF of all meaning."

5 | So in my submission they have effectively taken the content element, the provision of
6 | content, out of account. And they have included the conveyance of signals
7 | notwithstanding that there was also this element – the provision of content – to
8 | subscribers.

9 | MR JUSTICE MORRIS: I think what you are saying is 44 and 45 support the view that
10 | you take out the content element first.

11 | MR HOLMES : Yes

12 | MR JUSTICE MORRIS: I think you are saying that. I have to say – trying to understand
13 | the language – I do not find the last sentence in 45 particularly easy as a matter of
14 | grammar. I have read it now probably about a dozen times - "the exclusion of the
15 | activities ... [the whole activities from the] ... on the pretext that it does not restrict itself
16 | [because it is not just conveying] ... would deprive it...". Or... Yes, okay. I do not know
17 | why but I find it a particularly difficult sentence.

18 | MR HOLMES: These are somewhat Delphic. There is no doubt. They are really
19 | focusing – Standing back, what the court here is doing is it is looking at a particular
20 | fact situation and it is taking an expansive view of the NRF, which brings the activities
21 | of UPC within the scope of ECS. But of course what they say here is shaped by what
22 | UPC happened to be doing. And it is not a particularly clear judgment. It is drafted by
23 | committee.

24 | MR JUSTICE MORRIS: What it is saying is that you cannot – just because there is
25 | some content – you cannot take it out of the application of article 2(c). That is what
26 | that sentence says, I think.

1 MR HOLMES: Yes.

2 MR JUSTICE MORRIS: Does it go on to say that in considering whether or not it
3 applies, you disregard the content? I am not sure it does expressly say that.

4 MR HOLMES: It is not clear, but the result is that despite the provision of content by
5 UPC, the service is -- the court regarded as irrelevant, it set on one side the fact that
6 the customers of the services --

7 MR JUSTICE MORRIS: You would say it then went on to apply the wholly and mainly
8 test in 47; is that right?

9 Carry on anyway.

10 MR HOLMES: Yes, that is right.

11 This is very much a third order point in my submission. The key point is the provisions
12 of the legislation themselves.

13 MR JUSTICE MORRIS: Yes, okay.

14 MR HOLMES: So, standing back, we say that section 32(2) properly construed
15 requires a consideration of Sky's service with the exception of its content service.

16 MR JUSTICE MORRIS: You don't need to take me to the other UPC case, do you?

17 MR HOLMES: I will later if I may, but in relation to the rump. I will do it when I am
18 responding to Mr Pickford's case, if that is convenient?

19 MR JUSTICE MORRIS: Fine, yes.

20 But are you saying that, although this case deals with the content exclusion, it doesn't
21 one way or the other have -- or does it have any bearing on the dispute between you,
22 which is what do you do first?

23 MR HOLMES: I am not sure that that clearly emerges because I am not sure it is
24 something that the court turned its mind to in this case.

25 MR JUSTICE MORRIS: That is what I am saying, because there is no doubt, between
26 you, the content exclusion on its face applies -- the dispute between you is which do

1 | you take -- do you apply the content exclusion first or second?

2 | MR HOLMES: Yes, I agree.

3 | MR JUSTICE MORRIS: I am not sure this casts light on that issue.

4 | MR HOLMES: I am not sure any of the cases do.

5 | MR JUSTICE MORRIS: That is what I thought.

6 | MR HOLMES: So I think really it is a question that you just have to cold-towel by
7 | reference to the statutory provisions.

8 | MR JUSTICE MORRIS: Where are we going next?

9 | MR HOLMES: In relation to the statutory provisions, just to summarise if I may, we
10 | say section 32(2) properly construed, requires a consideration of Sky's service with
11 | the exception of its content service to see whether the two conditions in that
12 | subsection are met. We say that is the most natural reading of the statutory provisions
13 | and it accords with the text of the EEC which section 32(2) in its current form is
14 | intended to implement. It also accords with the underlying objective, which is to bring
15 | the communications or transmission elements of the media sector within a single
16 | regulatory framework alongside classic telecommunications services while leaving
17 | content to be dealt with under separate regulatory arrangements.

18 | Insofar as we need to consider it at all, it accords with the outcome in the UPC v
19 | Hilversum case, which held that a cable company constituted an electronic
20 | communications service notwithstanding its provision of content, insofar as its service
21 | involved the conveyance of signals.

22 | Finally, it accords with the wider consumer protection objective, pursued by Parliament
23 | in enacting the Communications Act in its current form. I can deal with this very briefly,
24 | Sir.

25 | MR JUSTICE MORRIS: This is the purposive point?

26 | MR HOLMES: Well, in my submission I have already given you a purposive

1 interpretation of the gateway, section 32, by reference to convergence and the need
2 to produce a coherent scheme of communications regulation applicable in the media
3 as well as the communications sector and that is the real purpose behind the gateway
4 provision but we do say that, when you are looking at a gateway provision, in an overall
5 piece of legislation, which decides whether regulation applies or it doesn't apply, it is
6 perfectly legitimate to look at the purposes pursued by the regulation which is triggered
7 by the gateway.

8 MR JUSTICE MORRIS: Yes.

9 MR HOLMES: The legislation is to be read as a whole, it is to be construed as a whole.
10 The fact that bits of it are amended and bits of it aren't makes no difference. You stand
11 back and look at the legislation as a whole, you say, bearing in mind the statutory
12 purposes pursued by bits of the legislation which are brought into effect by the
13 jurisdictional clause, what light does that shed on the interpretation of that provision?
14 That is what we say and we think that is absolutely orthodox. It doesn't offend against
15 any principle of doubtful penalisation. You have an Act as a whole, it is amended, it
16 includes consumer protection provisions. Consumer protection by the way was always
17 a defining feature of the Communications Act but it has a particular focus upon that.
18 The amendments that were made to the Act were precisely intended to implement the
19 EECC, including its consumer protection purpose, and when you are looking at the
20 provision which decides the applicability of those consumer protection provisions, it is
21 legitimate to construe that partly by reference to how it furthers those consumer
22 protection objectives.

23 MR JUSTICE MORRIS: Okay.

24 MR HOLMES: You have seen from our skeleton argument --

25 MR JUSTICE MORRIS: Let me just do that and just let me just remind myself of the
26 point.

1 MR HOLMES: Yes.

2 MR JUSTICE MORRIS: Just remind me of where in your skeleton it is?

3 MR HOLMES: So it is in paragraphs 47 to 50. I have an unnumbered version.

4 MR JUSTICE MORRIS: Can I just ...

5 MR HOLMES: I think the page is the eleventh and twelfth pages.

6 MR JUSTICE MORRIS: It wasn't paginated, I noticed that. I have it here, can I just

7 read that?

8 MR HOLMES: Yes, of course. **(Pause)**.

9 MR JUSTICE MORRIS: One can see all that on its face but of course the argument

10 that Mr Pickford has made is that you can't -- because this legislation is exactly the

11 same as the earlier version -- you are shaking your head. You know the point. I would

12 like --

13 MR HOLMES: I understand the point but it is not the same piece of legislation.

14 MR JUSTICE MORRIS: Section 32 is the same.

15 MR HOLMES: Entirely. But, well, it is amended in other respects but, yes, I agree

16 that there is no amendment in respect of --

17 MR JUSTICE MORRIS: The gateway.

18 MR HOLMES: -- the gateway.

19 MR JUSTICE MORRIS: So he says you cannot construe the gateway by reference to

20 something which, when the gateway was enacted, was not part of the statutory

21 purpose.

22 There are nods. Yes, that is the argument.

23 MR HOLMES: My point, Sir, is that the legislation is a whole; it has been amended to

24 incorporate and to strengthen the consumer protection provisions and you need to

25 construe the gateway that determines access to those provisions in the light of those

26 new provisions.

1 MR JUSTICE MORRIS: The gateway as it is now regardless of --

2 MR HOLMES: Yes, you look at the legislation as a whole. You cannot break it down
3 and say this bit hasn't been amended, so you ignore the way in which the overall
4 package of statutory objectives pursued by Parliament. I put it no higher than that,
5 Sir. It is a small point because, in the end, we say that, if you look at the text, our
6 interpretation works and if you look at the purpose by reference to convergence, it
7 also --

8 MR JUSTICE MORRIS: I understand.

9 MR HOLMES: Sir, I am now turning to the rebuttal of Sky's arguments.

10 We could if you like, Sir, break there if it that is convenient, subject to any questions?

11 MR JUSTICE MORRIS: No, that, is fine.

12 Just checking on my next list of questions -- which of course I will restrain myself. Just
13 give me a moment.

14 MR HOLMES: Sir, if it helps, I don't think judicial restraint will be required in fact,
15 because we are doing very well for time.

16 MR JUSTICE MORRIS: That is fine. Sorry, just give me a second.

17 I think for my part, you are going to deal with the transmission rump point, no doubt?

18 MR HOLMES: Yes.

19 MR JUSTICE MORRIS: For my part, I would like you to address the point made by
20 Mr Pickford this morning in answer to question one, which, as I understand it, is as
21 follows: that where you have a 70-30 case -- I think that is right, 70 transmission -- you
22 need the exclusion, or maybe it is the other way round, you need the content exclusion
23 because, if you didn't, the whole of the service would, because of article 2(5) I think it
24 was, of the content regulation, would mean that the whole thing would fall out with
25 content regulation because the whole thing would be regarded as an ECS. I think that
26 was the point.

1 Nodding from behind Mr Pickford, and from Mr Pickford.

2 I would want you to respond so on that point. I am sure you have it in mind but that

3 was I think the nub of his answer to my question one.

4 MR HOLMES: As to why the content exclusion would still have some --

5 MR JUSTICE MORRIS: As to why, yes, on his construction, the content exclusion in

6 certain circumstances has an effect.

7 MR HOLMES: Yes, I will come prepared to address that.

8 MR JUSTICE MORRIS: And my colleagues may have some questions.

9 MS WALKER: The transmission rump, I take it, is going to go back over the primary

10 issues again?

11 MR HOLMES: Exactly right, yes. It is about that -- the bit that I think Mr Pickford

12 described as the other ancillary elements or the hardware.

13 MS WALKER: Thank you, and the other issue that I am concerned to tease through

14 a bit more is the point that Sky makes about the distortion of competition.

15 MR HOLMES: As between Sky and the over the top providers?

16 MS WALKER: Yes, generally, because of the way they have set their services up; is

17 there an unfair, inappropriate distortion of competition?

18 MR HOLMES: Very good.

19 MR JUSTICE MORRIS: Looking to my left? No, okay.

20 I may even start at 2.00 if you're confident, rather than 1.55?

21 MR HOLMES: I am feeling --

22 MR JUSTICE MORRIS: You are feeling confident that you will finish?

23 MR HOLMES: Yes.

24 MR JUSTICE MORRIS: Fine, very good. Thank you all very much. 2.00.

25 **(12.57 pm)**

26 **(The lunch break)**

1 (2.00 pm)

2 MR JUSTICE MORRIS: Yes, thank you, Mr Holmes.

3 MR HOLMES: I was going to turn now to rebut Sky's allegations of error.

4 MR JUSTICE MORRIS: Okay.

5 MR HOLMES: First and foremost is the claim that Ofcom was wrong to disaggregate
6 Sky's unified service. That is the one they put front and centre stage.

7 They say:

8 "The service represents an indissociable whole. The transmission is pointless without
9 the content, and the content is pointless without the transmission."

10 I think the Tribunal now has my response to that submission. The legislative
11 framework requires the dissociation of content and transmission. Each is subject
12 to separate and parallel regulation. The presence of content, however valuable or
13 significant to end users, does not mean that the transmission element should avoid
14 regulation."

15 MR JUSTICE MORRIS: Okay.

16 MR HOLMES: The result would be, if that were the case, that different regulatory
17 regimes applied to vertically integrated providers which provided or produced content
18 as well as transmitted it than applied to stand-alone transmission companies. And we
19 say that that runs counter to the objectives of European legislation which the
20 Communications Act was intended to implement.

21 Sky relies on the Gmail and Skype cases which are said to show the need to consider
22 its service as a unified whole. But neither of those cases concerned content services
23 and they therefore did not engage the exception of such services in section 32(2).
24 They are therefore irrelevant to the issues in this case.

25 MR JUSTICE MORRIS: Okay.

26 MR HOLMES: Secondly, Sky contends that there is an inconsistency between the

1 case that Ofcom has advanced on the construction of section 32(2) in the appeal and
2 that which is set out in the decision.

3 MR JUSTICE MORRIS: Yes.

4 MR HOLMES: Now, you observed, Sir, that it is not clear what the consequences of
5 that would be, even if it were correct.

6 MR JUSTICE MORRIS: Yes.

7 MR HOLMES: And in my submission, your task is to consider whether there is
8 a material error in the decision. And if you were satisfied that the statutory construction
9 I have advanced today is correct, that would be a sufficient basis for upholding the
10 decision.

11 But in any event --

12 MR JUSTICE MORRIS: Sorry, okay. I mean, this is a point that may be one that we
13 need to address.

14 Please carry on with your submission.

15 MR HOLMES: Yes.

16 MR JUSTICE MORRIS: The submission that is made is that it was not said in the
17 decision, either at all or clearly, that you first carve out the content and then apply the
18 test, and that paragraph 63 of the defence is effectively a different way of approaching
19 it.

20 That is the case that is made.

21 MR HOLMES: Yes.

22 MR PICKFORD: And also that that test was not then applied.

23 MR JUSTICE MORRIS: Oh, no, we will come to that in a moment. That is the rump
24 versus transmission issue.

25 MR HOLMES: That is my next point, not the one I am on at the moment.

26 MR JUSTICE MORRIS: Yes.

1 MR HOLMES: So the point I am on at the moment is just whether the analysis has
2 changed as between the decision --

3 MR JUSTICE MORRIS: Yes, has the Ofcom analysis changed.

4 MR HOLMES: Before coming, then, perhaps to the question of whether it should make
5 any difference, let me say that we don't accept the analysis has changed. And let me
6 show you the reasoning for the decision that is the basis for that.

7 MR JUSTICE MORRIS: Yes. Volume 1, tab 3.

8 MR HOLMES: Yes, thank you, Sir.

9 If we could pick it up at page 100, which is where Ofcom applies the General
10 Conditions to Sky's pay TV services. Section 6.

11 You see that paragraph 6.3 sets out the road map of Ofcom's reasoning. First, at (a):
12 "Pay TV services fall within the definition of ECS insofar as they include a transmission
13 element which meets the definition set out in the Act and the General Conditions."
14 Second, at (b):
15 "A pay TV service may include both content and transmission services. The relevant
16 legislation carves out content services as an exception from the types of service which
17 fall within the definition of an ECS. Where a package of services includes both
18 elements of content and transmission, the correct approach is to apply content
19 regulation to the content part and transmission regulation to the transmission part."
20 And (c):
21 Ofcom applies the legal framework to Sky's pay TV services.

22 And fourth, at (d):
23 Ofcom responds to Sky's arguments.
24 The first point in that list is, I think, uncontentious.
25 "A transmission service for pay TV will be regulated insofar as it falls with the definition
26 of an ECS."

1 MR JUSTICE MORRIS: Sorry, are you going back to (a) or to (b)?

2 MR HOLMES: To (a), Sir:

3 "A transmission service for pay TV will be regulated insofar as it falls within the

4 definition of ECS."

5 MR JUSTICE MORRIS: Sorry, 6.3(a) says:

6 "... insofar as far as they include ..."

7 MR HOLMES: Sorry, yes. It is not --

8 MR PICKFORD: It is not common ground.

9 MR HOLMES: It is not common ground. I think Mr Pickford attacks --

10 MR JUSTICE MORRIS: Sorry, let's just get the wording correct.

11 I think you were -- "insofar as they include a transmission element --"

12 MR HOLMES: "... which meets the definition set out in the Act."

13 So this is not saying that the mere presence of a transmission element is sufficient.

14 The definition set out in the Act still needs to be met.

15 MR JUSTICE MORRIS: Okay. Can I just read that again to myself. (Pause).

16 Right, okay. All right.

17 MR HOLMES: It is the second point that we took to be at the nub of the interpretive

18 dispute raised by this case. So it is worth seeing how the point is developed, the

19 carve-out point.

20 MR JUSTICE MORRIS: Okay. Sorry, I am just still trying to understand 6.3(a). Let

21 me just read it.

22 Where it says "which meets the definition set out in the Act", what do you say that

23 means? Which definition?

24 MR HOLMES: It means you need to apply the definition set out in the Act to the

25 service --

26 MR JUSTICE MORRIS: The problem is that you apply the definition to the whole

1 service, don't you? You don't apply the definition to the transmission service?

2 MR HOLMES: Yes.

3 MR JUSTICE MORRIS: So are you referring there to a transmission element in
4 section 32(2A)? Or are you referring to the whole -- anyway.

5 MR HOLMES: It is not entirely clear there, Sir. I accept that.
6 But the point is that there is this qualifier of a need to meet the definition in the Act.

7 MR JUSTICE MORRIS: Yes, okay.

8 MR HOLMES: So it is not simply assuming that insofar as a pay TV service includes
9 a transmission element, it will for that reason be caught.

10 MR JUSTICE MORRIS: That bit I get.

11 MR HOLMES: Then turning to the second one.

12 MR JUSTICE MORRIS: Yes, the second one.

13 MR HOLMES: Ofcom expands on the point at page 102.

14 MR JUSTICE MORRIS: Paragraph?

15 MR HOLMES: Paragraph 6.11.

16 MR JUSTICE MORRIS: Yes.

17 MR HOLMES: If I could just ask to you review that, please.

18 MR JUSTICE MORRIS: Of course. **(Pause)**.

19 "... content services were not defined in the Framework Directive or EEC Directive."
20 But they sort of were, weren't they? There wasn't a separate sub-definition, but they
21 did have the provision for editorial control of content within the wording of the definition.

22 MR HOLMES: That is -- I think that is not really a key point in Ofcom's -- it is simply
23 to note that they were not separately defined in a sub-definition.

24 MR JUSTICE MORRIS: Yes, it is not separately defined. Okay. I have read
25 paragraph 6.11.

26 MR HOLMES: Then turning on to page 111.

1 MR JUSTICE MORRIS: Yes.

2 MR HOLMES: If I could ask you, Sir, to review paragraph 6.46 to 6.50 over the page.

3 MR JUSTICE MORRIS: Okay. **(Pause)**.

4 You have recital 7 again there.

5 MR HOLMES: Yes. **(Pause)**.

6 MR JUSTICE MORRIS: Right. I am assuming that the key sentence in that section

7 is the sentence at the top of 112:

8 "However, that test is not applied, expressly, to a cable operator's service insofar as it

9 falls within the definition of a content service."

10 MR HOLMES: Yes.

11 MR JUSTICE MORRIS: That is the clearest of statement of the exception, I think.

12 MR HOLMES: Yes.

13 MR JUSTICE MORRIS: Okay.

14 MR HOLMES: Indeed so.

15 MR JUSTICE MORRIS: Is that right? I mean, I have read it all quite quickly.

16 MR HOLMES: No, indeed, you are quite correct. And the passage I particularly draw

17 your attention to begins at the foot of 111:

18 "The tests "consisting of" or "principal feature" or "wholly or mainly" or "principally" can

19 be used to determine whether a service is of a certain type provided by an ECN.

20 An operator may provide multiple services. However, that test ... "

21 MR JUSTICE MORRIS: "That test".

22 MR HOLMES: "... is not applied [that's the wholly or mainly test] to a cable operator's

23 service insofar as it falls within the definition of a content service."

24 MR JUSTICE MORRIS: Okay.

25 MR HOLMES: So one considers whether the two conditions are met by so much of

26 the service that is not content service. That is the interpretation that Ofcom is

1 | advancing today. And in my submission --

2 | MR JUSTICE MORRIS: Ah, interesting also, 6.50.

3 | MR HOLMES: Yes.

4 | MR JUSTICE MORRIS: Isn't 6.50 pretty important? Maybe I am misreading it:

5 | "None of the relevant provisions state that the test [the wholly or mainly test] applies

6 | in the way Sky advocates for, namely that an assessment must be done on the totality

7 | of the cable operator's ..."

8 | I don't know why it keeps referring to cable operators. But there we are:

9 | "... services, including particularly its transmission and content services, and

10 | a judgment made of what the totality ..."

11 | Isn't that effectively rejecting the argument now made? I don't know.

12 | MR HOLMES: Yes, in my submission it is, Sir, yes.

13 | MR JUSTICE MORRIS: All right.

14 | MR HOLMES: Now, if we could just look at Sky's notice of appeal. This is before

15 | Ofcom's alleged change of case.

16 | We say that it contains elements which suggest that this aspect of Ofcom's reasoning

17 | was appreciated by Sky at the time of the notice of appeal.

18 | MR JUSTICE MORRIS: Okay. Can I just -- yes, that is in the same bundle, tab 1.

19 | MR HOLMES: Yes, tab 1, page 27 of the rolling bundle.

20 | MR JUSTICE MORRIS: Sorry to do this but I just need to catch up with my notes.

21 | Page, sorry?

22 | MR HOLMES: Page 27 of the rolling bundle and 25 of the internal numbering. You

23 | see the heading at the top:

24 | "Ofcom wrongly deconstructs Sky's unified service into its constituent elements,

25 | applying the ECS test to each element rather than the whole service."

26 | And just look at what is said in 88(d). **(Pause)**.

1 MR JUSTICE MORRIS: Yes.

2 So you say that Sky recognised that in the decision Ofcom had put aside the content
3 aspect.

4 MR HOLMES: And applied the wholly or mainly test to the remaining element of the
5 service.

6 MR JUSTICE MORRIS: The remaining element, yes. Okay.

7 MR HOLMES: I was going to turn now, Sir, to the rump, which is the other aspect.

8 MR JUSTICE MORRIS: So your submission is that because of that there hasn't been
9 a change of case?

10 MR HOLMES: Yes.

11 MR JUSTICE MORRIS: Fine, okay.

12 MR HOLMES: Sky's third allegation of error is to contend that Ofcom did not apply
13 the wholly or mainly test to the balance of Sky's service.

14 MR JUSTICE MORRIS: Yes. That is the point made -- I keep going back to it -- in the
15 skeleton.

16 MR HOLMES: It comes in the skeleton for the first time.

17 MR JUSTICE MORRIS: At paragraph 7(ii).

18 MR HOLMES: Yes. I'm not sure that is correct.

19 MR JUSTICE MORRIS: It is somewhere else as well. 7(ii) and somewhere else.
20 I can't remember. It is later on.

21 MR HOLMES: That's not something which Ofcom has ever turned to.

22 MR JUSTICE MORRIS: No, there was something later. I would quite like to try(?) in
23 my own mind.

24 Perhaps Mr Pickford can assist.

25 MR HOLMES: Paragraph 54, I am grateful to Mr Grubeck.

26 MR JUSTICE MORRIS: Yes, predominates over other non-content aspects.

1 MR HOLMES: Yes. And this again requires a consideration of the decision. Let me
2 just find my pages.

3 Yes, if we could start, please, back in tab B3.

4 MR JUSTICE MORRIS: I am there.

5 MR HOLMES: Bundle 1, on page 75.

6 MR JUSTICE MORRIS: Yes.

7 MR HOLMES: Paragraph 2.5.

8 MR JUSTICE MORRIS: Yes.

9 MR HOLMES: You will see there that Ofcom identifies the various elements of the
10 service. You have the linear and on demand television channels. That is the content.
11 Then hardware in the form of set-top boxes which are either loaned or become the
12 property of the customer. And satellite dishes which become the property of the
13 customer upon installation.

14 Then you have at (c):
15 "Software such as the user interface and the electronic programme guide."
16 This is how you navigate the content service, and decide which content to access.

17 MR JUSTICE MORRIS: Yes.

18 MR HOLMES: At (d) you have conditional access, including the provision to
19 subscribers of viewing cards, and how the signal received is decrypted in order to
20 render it in a form that the television can show as a picture.

21 MR JUSTICE MORRIS: Yes.

22 MR HOLMES: Then you have, over the page at page 76, customer service, call
23 centres, online facilities, the website. Installation and repair services, which relates to
24 the apparatus for receiving the signal.

25 MR JUSTICE MORRIS: Yes.

26 MR HOLMES: And then the actual conveyance of the content, the transmission of the

1 content.

2 MR JUSTICE MORRIS: Yes.

3 MR HOLMES: So Ofcom considered the various elements of the service.

4 And turning on to paragraph 6.20, you see Ofcom sums it up. Sorry, this is on
5 page 105.

6 MR JUSTICE MORRIS: Yes.

7 MR HOLMES: "A service consisting of the provision of TV content on a subscription
8 basis, including Sky's own content, linear channels. The content service also
9 encompasses a range of other elements, including hardware, software, conditional
10 access, customer service, installation and repair services and transmission of
11 content."

12 MR JUSTICE MORRIS: Yes.

13 MR HOLMES: Then over the page at 6.22 Ofcom describes how transmission
14 operates for Sky's wholly owned --

15 MR JUSTICE MORRIS: I am not up with you yet.

16 Carry on. Sorry, 6.22?

17 MR HOLMES: Yes:

18 "For Sky's wholly owned channels, transmission of the content shown on those
19 channels is provided by [confidential] and transmitted over [confidential]. Sky is
20 responsible --

21 MR JUSTICE MORRIS: Is some of this supposedly confidential?

22 MR HOLMES: I am so sorry, forgive me. I will be more cautious.

23 MR JUSTICE MORRIS: That's all right.

24 MR HOLMES: Then in the penultimate sentence:

25 "Specifically the content is transmitted via satellite uplink and downlink to the satellite
26 dish at the subscriber's premises and from there via wiring to Sky's set-top box. In

1 addition, Sky also provides transmission for [blank] third party channels that are
2 carried by Sky."

3 MR JUSTICE MORRIS: Yes.

4 MR HOLMES: So that is the transmission service, broadly understood. You see the
5 reference to the satellite dish and the set-top box in the transmission route in getting
6 the service.

7 MR JUSTICE MORRIS: That links into a question that we have been considering,
8 which we thought of posing, which may now be pertinent, and which I will throw out,
9 which is -- I have framed it as follows. Excuse me a moment.

10 You might want to have the Sky skeleton in front of you but only for reference. You
11 both might want to have that.

12 The question was as follows: could it be said -- I don't know if you both have the Sky
13 skeleton. It is the same stuff we have just been looking at:

14 Could it be said that some of the elements set out at paragraphs 16(a) to (e) of Sky's
15 skeleton are more properly to be regarded as part of the "transmission service"
16 provided by Sky? For example hardware such as set-top boxes, installation and
17 repair, et cetera et cetera.

18 MR HOLMES: We think that is pertinent. And it anticipates the submission that I was
19 about to make.

20 MR JUSTICE MORRIS: Yes. So I mean, the question was, hardware, such as set-top
21 boxes, conditional access, installation and repair, and some software insofar as it
22 relates to transmission and reception.

23 That was the question we were going to ask. But in the light of what you are now
24 about to say it has highlighted the question for us.

25 MR HOLMES: Yes.

26 MR JUSTICE MORRIS: Yes, carry on.

1 MR HOLMES: Ofcom's conclusion is given first at 6.29 and you see that the
2 transmission service provided by Sky to its subscribers constitutes an ECS. That is
3 how it is put there. And "it is a service which has as its principal feature or consists
4 wholly or mainly of the conveyance of signals by means of an ECN. It therefore falls
5 within the definitions applied under the Act, Framework and EEC Directives and the
6 General Conditions."

7 Of course, the Tribunal will have this well in mind that you don't read this as a statute.
8 In my submission this is talking about what is left when you take content out.
9 And I will develop that by reference to these other elements which are said to be
10 discrete from transmission.

11 MR JUSTICE MORRIS: Yes. Sorry, just one minute.

12 So I think you might be saying that the word -- and again it is not a matter of
13 construction -- the words "transmission service" in 6.29, first sentence, is everything
14 but content?

15 MR HOLMES: It is considering everything but content. And --

16 MR JUSTICE MORRIS: It is not -- and again -- those words "the transmission service"
17 are not confined wholly to the act of conveying the signal?

18 MR HOLMES: No.

19 MR JUSTICE MORRIS: So it is everything but content.

20 MR HOLMES: At 6.42, just to confirm the need for caution about applying this as
21 though it were a statute, you see there that Ofcom confirms, for the avoidance of any
22 doubt, that it is satisfied that Sky's pay TV provides a service which consists wholly or
23 mainly or has as its principal feature or is primarily a service involving the conveyance
24 of signals, which is in this case a transmission service.

25 MR JUSTICE MORRIS: One minute.

26 This next sentence.

1 "That test has been applied as far as Sky's pay TV services include a service
2 consisting of the conveyance of signals, recognising that Sky provides other services."

3 What are those other services?

4 MR HOLMES: Well, there are the content services, which are kept out of account.

5 MR JUSTICE MORRIS: All right. Let me have a look. I mean, of course one of the
6 other things one has to take into account, which didn't occur to me, is that this is not
7 just a test of wholly or mainly, ie a preponderance, but it is also a principal feature test.

8 MR HOLMES: Yes. I think there is no (inaudible).

9 MR JUSTICE MORRIS: No, but it might be said that, even if in terms of spend, or if
10 you had some sort of quantitative analysis, that something might not be mainly
11 quantitatively, because there were lots of add-ons which quantitatively -- you have the
12 conveyance of signals and then you have seven other elements, right? And if you
13 could in some way assess those quantitatively, the seven other elements might all be
14 small but when you add them up they might be greater than the quantitative
15 assessment you give to the transmission -- sorry, the conveyance of signals. But that
16 might still lead you to conclude that the conveyance of signals is still the principal
17 feature.

18 MR HOLMES: Yes.

19 MR JUSTICE MORRIS: I am thinking as I go along here.

20 MR HOLMES: Yes. Certainly I think I would counsel against interpreting this test as
21 one that turns on a single quantitative measure in pounds sterling of the investment
22 involved in some element of service. That is really not what this test, in my submission,
23 is getting at.

24 MR JUSTICE MORRIS: No, but all I am doing is identifying the fact that the test is not
25 just wholly or mainly but there is an alternative of principal feature.

26 MR HOLMES: Yes. I think it is common ground that you interpret the UK legislation

1 consistently with the EU legislation, which is the wholly and mainly formulation. So
2 you have in the English statute "consists in or has as its principal feature" as their gloss
3 if you like, or their description of the wholly or mainly test. But I think your point --
4 MR JUSTICE MORRIS: Okay, then it might be that -- sorry, I don't have section 32
5 and article 2 the precise wording, in my mind. Just remind me without my having to
6 turn it up, section 32 is wholly or mainly?
7 MR HOLMES: No, section 32 is "consists in or has as its principal feature".
8 MR JUSTICE MORRIS: And article 2 is?
9 MR HOLMES: Consists wholly or mainly -- well, I want to get this right.
10 MR JUSTICE MORRIS: It is 2(4), isn't it?
11 MR HOLMES: Yes.
12 MR JUSTICE MORRIS: I am being lazy in not getting the bundle out.
13 MR HOLMES: Take it from the EECC, which is the current form.
14 MR JUSTICE MORRIS: Yes, it is 2(4).
15 MR HOLMES: Yes, 2(4):
16 "Consisting wholly or mainly in the conveyance of signals."
17 MR JUSTICE MORRIS: Right. So the principal feature thing, I've got to construe
18 principal feature by reference to -- so wholly or mainly is the test. Fine.
19 MR HOLMES: I think it is safer to treat that as the --
20 MR JUSTICE MORRIS: Okay, but you say "mainly" shouldn't be quantitative, in
21 pounds, shillings and pence.
22 MR HOLMES: Yes.
23 MR JUSTICE MORRIS: So where were we? 6.42.
24 MR HOLMES: We were in the provisions and I showed you the provisions which I say
25 show Ofcom applying the wholly or mainly test to the balance of Sky's services,
26 broadly understood as involving transmission.

1 MR JUSTICE MORRIS: Right, yes.

2 MR HOLMES: Now, I say that that conclusion is unsurprising when one looks at the
3 other elements relied on by Sky, so the set-top box --

4 MR JUSTICE MORRIS: Can we go back to those elements in the right place, please.
5 I don't mind where you take me to but I would like to have them --

6 MR HOLMES: Well, why don't we take it from the decision, because the facts are not
7 challenged as they are found in the decision. Paragraph 2.5 on page 75 I think is the
8 fullest account of them.

9 MR JUSTICE MORRIS: If you will just take me there. Yes, go on.

10 MR HOLMES: You have at (b) hardware such as set-top boxes --

11 MR JUSTICE MORRIS: Yes.

12 MR HOLMES: -- and satellite dishes.

13 MR JUSTICE MORRIS: Yes.

14 MR HOLMES: You have software, including the electronic programme guide and the
15 user interface.

16 MR JUSTICE MORRIS: Yes, conditional access, which you described as being how
17 the signal is received and decrypted.

18 MR HOLMES: Yes. You have my submissions, all three of those are ancillary
19 elements to transmission.

20 MR JUSTICE MORRIS: Including software as well?

21 MR HOLMES: Yes. I will show you why in a moment. The installation and repair
22 service, insofar as we understand it, relates to the satellite dish and the set-top box.
23 Over the page.

24 Customer service, at (e), I mean, it is obviously ancillary to something. It is either
25 ancillary to the content service, which is excluded, or it is ancillary to the transmission
26 service.

1 You know, if you want the tail wagging the dog, you say that the customer service
2 somehow outweighs --

3 MR JUSTICE MORRIS: Anyway, you say (b), (c), (d) and (f) are plainly all ancillary to
4 transmission?

5 MR HOLMES: Yes. And (e) is ancillary either(?) to transmission.
6 And then (g) is the transmission.

7 MR JUSTICE MORRIS: Yes. It's unfortunate they used the word "transmission" there
8 in a way, rather than conveyance of signals.

9 MR HOLMES: Yes.

10 MR JUSTICE MORRIS: All right.

11 MR HOLMES: So if authority were needed as to how one should deal with these
12 ancillary elements, we say that it can be found in the UPC DTH case, which was
13 decided soon after the UPC Hilversum case, and it is at authorities bundle 2, D24.

14 MR JUSTICE MORRIS: So your submission is that rump is part of -- is ancillary to
15 conveyance of signals. Conveyance of signals, ie plus the rump, equals the
16 transmission service, effectively?

17 MR HOLMES: Yes.

18 MR JUSTICE MORRIS: And you are taking us now to the authorities bundle volume 2.

19 MR HOLMES: Yes, tab D24.

20 MS BURGESS: What page is that, sorry?

21 MR HOLMES: 449 is where it starts.

22 MR JUSTICE MORRIS: Okay.

23 MR HOLMES: So a reference from a Hungarian court concerning another UPC
24 service. This time the content provided by UPC to subscribers was transmitted, at
25 least to Hungarian consumers, via a satellite network. And the Hungarian court
26 wanted to know whether a UPC service constituted an electronic communications

1 service, and that affected the question whether the service fell within the territorial
2 competence of the Hungarian communications regulator when supplied to
3 Hungarian citizens.

4 And the relevant question is at page 455, and it is question one:

5 "... the Framework Directive can be interpreted as meaning that the service by which
6 a service provider supplies, for consideration, conditional access to a package of
7 programmes which contains radio and television broadcast services and is
8 retransmitted by satellite is to be classified as an electronic communications service."

9 And it addresses that question starting on page 456.

10 MR JUSTICE MORRIS: Okay. Can I just understand --

11 MR HOLMES: Of course.

12 MR JUSTICE MORRIS: Who is doing the transmitting here?

13 MR HOLMES: It is a satellite operator which UPC contracts and assumes
14 responsibility.

15 MR JUSTICE MORRIS: So UPC, as far as the customer is concerned, is providing
16 the conveyance of the signal --

17 MR HOLMES: Yes.

18 MR JUSTICE MORRIS: -- plus conditional access?

19 MR HOLMES: Yes, and you see that at paragraph 43.

20 MR JUSTICE MORRIS: Okay. Right, I have 43, yes.

21 MR HOLMES: So turning back a page to 456, at paragraph 34 you see the court first
22 recalls its UPC judgment --

23 MR JUSTICE MORRIS: Yes.

24 MR HOLMES: -- which I showed to you earlier.

25 At paragraph 38, it sets out the conclusion in the Hilversum case that the provision of
26 a pay TV service falls within the definition of an electronic communications service,

1 and therefore the substantive scope of the communications regulatory framework.
2 Then at 41 the court notes that the fact that the signal was conveyed by satellite
3 doesn't affect the conclusion.
4 At 42, the point we have just seen, the court rejected the argument that UPC uses
5 third party satellite infrastructure. UPC was responsible for the transmission. That is
6 what matters.
7 At paragraph 43, yes, we have that point, 43.
8 Then it turns to consider the relevance of the fact that UPC uses a conditional access
9 system. And you saw that this was raised because of the way that the question was
10 posed, by the referring --
11 MR JUSTICE MORRIS: Does that start at 45 or -- where does the conditional
12 access --
13 MR HOLMES: It begins at 46, I think.
14 MR JUSTICE MORRIS: It's 45, isn't it?
15 "It must nevertheless be noted that that service is subject to conditional access."
16 MR HOLMES: Yes.
17 MR JUSTICE MORRIS: That caused the court to query.
18 MR HOLMES: Yes. Because of the national court's query, it is interested in this.
19 At paragraph 47 you see that the premise of the referring court's question appears to
20 be that it is an either/or. You are either an ECS or you are a conditional access
21 system, as though those were two alternative services.
22 MR JUSTICE MORRIS: Yes.
23 MR HOLMES: And it explains at paragraph 48 that that is wrong. The court then
24 notes the definition of conditional access system:
25 "Any technical measure and/or arrangement whereby access to a protected radio or
26 television broadcasting service in intelligible form is made conditional upon

1 subscription or other form of prior individual authorisation."

2 And at paragraph 50:

3 The court observes that "a conditional access system constitutes a means of access
4 to a radio or television service and presupposes that a technical system is put in place,
5 the purpose of which is to limit access to that service to persons who have
6 a subscription. However, a conditional access system does not by itself enable
7 access to be given to the radio or television service. Such access still depends on the
8 transmission of signals by the electronic communications network."

9 Then at paragraph 51:

10 "The operation of a conditional access system is therefore directly linked to the
11 provision of a protected service. In any situation in which the operator of the
12 conditional access system is simultaneously the provider of the broadcasting service,
13 which appears to be the case in the main proceedings, the service is a unified service
14 in which the supply of the radio or television service is the core element of the activity,
15 the conditional access system being the ancillary element."

16 MR JUSTICE MORRIS: And the words "supply of the radio or television service" in
17 this context means the conveyance of signals, does it?

18 MR HOLMES: I think it does, Sir, because they have decided already that this is
19 an ECS, subject to the conditional access point, on the basis of UPC Hilversum.

20 MR JUSTICE MORRIS: Right. Okay.

21 MR HOLMES: So in other words, the fact that the provision of content here is taken
22 out of account.

23 MR JUSTICE MORRIS: Yes, okay.

24 MR HOLMES: Then at 52:

25 "In view of its ancillary nature, a conditional access system may be attached to the
26 electronic communications service for the broadcast of radio or television programmes

1 without that service losing the status of an ECS."

2 MR JUSTICE MORRIS: Okay. So that seems to support an analysis, (a) that the test
3 is not really quantitative but is ancillary versus core.

4 MR HOLMES: You have it, Sir, yes.

5 MR JUSTICE MORRIS: And secondly that, certainly in relation to the conditional
6 access element in our case, the Tribunal can at least say that that bit is ancillary.

7 MR HOLMES: I think it goes broader than that, Sir.

8 MR JUSTICE MORRIS: Okay. You are going to make your submissions in a moment.

9 MR HOLMES: Turning to the other ancillary elements.

10 So if you look at paragraph 51, the test they consider -- or the words they use are that
11 the operation of a conditional access system is directly linked to the provision of a
12 protected service in any situation in which -- ie the protected service being the
13 conveyance of the television and radio programmes. The service protected by the
14 conditional access system.

15 So where you have something that is directly linked to conveyance, we say that it falls
16 within the transmission element, and it doesn't, if you like, serve as a separate element
17 from the conveyancing signals.

18 Just taking it a little further as well, to paragraph 53 on page 458.

19 MR JUSTICE MORRIS: Yes.

20 MR HOLMES: You see there the conclusion is reinforced by article 2(ea), as it then
21 was, of the Framework Directive, according to which conditional access services are
22 services associated with an electronic communications network and/or an electronic
23 communications service which enable the provision of the service via that network
24 and/or service."

25 And I will take to you that provision, Sir, but you see what they are saying is that this
26 is specifically defined as an ancillary service to the provision of an electronic

1 | communications service.

2 | And if we could just go now, Sir, to the EECC to look at the equivalent provision to the

3 | one referred to there. Article 2, paragraph 11. It is (d) --

4 | MR JUSTICE MORRIS: Let me just make a note of this. So 2(ea) of the Framework

5 | Directive is now 2(11) of the EECC.

6 | MR HOLMES: Yes.

7 | MR JUSTICE MORRIS: That is at tab 13 of the volume 1. Can I put this volume away

8 | or not?

9 | MR HOLMES: You may, Sir.

10 | MR JUSTICE MORRIS: You are not going back to it?

11 | MR HOLMES: I am not going back to it.

12 | MR JUSTICE MORRIS: If you will just let my note catch up.

13 | Okay, article 2(11), page 159.

14 | MR HOLMES: Yes.

15 | MR JUSTICE MORRIS: Okay.

16 | MR HOLMES: "Associated service means a service associated with an electronic

17 | communications network or an electronic communications service which enables or

18 | supports the provision, self-provision or automated provision of services by that

19 | network or service, or has the potential to do so, and includes number translation or

20 | systems operating equivalent functionality, conditional access systems and electronic

21 | programme guides, as well as other services, such as identity, location and presence

22 | service."

23 | So Sir, we note conditional access service, but it is a broader definition than that, and

24 | we say that this provision, just as it was relied upon by the court in UPC DTH in relation

25 | to the conditional access system, is equally relevant in relation to electronic

26 | programme guides --

1 MR JUSTICE MORRIS: Yes, okay.

2 MR HOLMES: -- and software."

3 MR JUSTICE MORRIS: Yes. Just give me a minute. You might want to tell me what
4 an electronic programme guide is.

5 MR HOLMES: I think there is a definition, unless I am mistaken.

6 MR JUSTICE MORRIS: I am sure there is. Certainly the electronic programme guide
7 is expressly included within the rump. Is it defined somewhere?

8 MR HOLMES: It is defined in the statute, but I don't know if it is in ...

9 MR JUSTICE MORRIS: It might not matter, but --

10 MR HOLMES: I was going to say, you can find the definition, Sir, in the
11 Communications Act, at page 41 of bundle 1, section 2 --

12 MR JUSTICE MORRIS: I have it, yes. Section 232(6), is that right? It looks like it.

13 MR HOLMES: Yes.

14 MR JUSTICE MORRIS: Okay.

15 MR HOLMES: That's correct.

16 MR JUSTICE MORRIS: Anyway, if electronic programme guide is defined for the
17 purposes of this directive, then let me know.

18 But all I would point out is that amongst the things listed in paragraph 2.5 of the
19 decision, as to the rump elements, it includes electronic programme guides.

20 MR HOLMES: Yes.

21 MR JUSTICE MORRIS: All right.

22 MR HOLMES: It is basically how you get access to the programmes. You can
23 navigate it, see what there is, and click on it. It is just the software that you use when
24 you are navigating the content.

25 But it is also there, identified as an associated service. And just as the court attached
26 significance to the inclusion of conditional access systems in this list, as a reason why

1 they were ancillary, so we do to the inclusion of electronic programme guides. They
2 are clearly ancillary.

3 MR JUSTICE MORRIS: Okay.

4 MR HOLMES: Then looking up the page, just to note, there is also a category of
5 associated facilities.

6 MR JUSTICE MORRIS: I was just looking at that.

7 MR HOLMES: Which includes associated services, physical infrastructures and other
8 facilities or elements associated with a network or a service.

9 MR JUSTICE MORRIS: It lists everything but a dish and a box. Antenna towers, other
10 supporting constructions, ducts, conduits, masts and cabinets. But you presumably
11 would say it would include a dish and a box, maybe, even.

12 MR HOLMES: Sir, I would, but in any event these are clearly broad definitions, on any
13 view, very expansive. And the underlying logic of UPC DTH reflected in these
14 provisions is to encapsulate within the service, considered after the exclusion of
15 content, ancillary elements to conveyance when deciding whether there is an ECS or
16 not.

17 MR JUSTICE MORRIS: Okay. I see that. But doesn't that lead into Mr Pickford's
18 submission -- I am thinking aloud -- that once you take content out, the wholly or
19 mainly test will necessarily be satisfied in every case?

20 I think that is his submission, that it is unsurprising answer that, once you take content
21 out, Ofcom finds that this, what is left, is wholly or mainly. In other words, it devoids
22 the wholly or mainly aspect.

23 In what circumstances, once you have taken content out, would the wholly or mainly
24 not be satisfied? You could probably give me some examples, I don't know.

25 MR HOLMES: There may be services that one can imagine that contain other
26 elements that are not to do with transmission at all. They may provide some other

1 significant service which takes you out. One could imagine -- I mean I am not going
2 to speculate about examples but not everything will be ancillary to transmission that
3 may be included in the service offered. You may, once you have taken out content
4 and you have looked at transmission --

5 MR JUSTICE MORRIS: On the facts of this case, it necessarily follows -- but I am
6 thinking aloud: could you have -- I was going to use apples and pears, I don't know
7 why everybody uses apples and pears -- but you take out content, but you have not
8 only got a transmission service with all its bits and bobs but you have also got in the
9 service something else which is unrelated.

10 MR HOLMES: How about Gmail, that is an example perhaps. So once you have
11 taken out -- so you have the mail, which is a service enabling people to communicate
12 by email and you have got a little element, a tiny element of transmission as you saw,
13 and Mr Pickford showed you that, which is just where Google connects into
14 the Internet, its servers, and it is accepted there was some conveyance of signals over
15 that element, but there is clearly a big block of stuff that Google is doing which is not
16 a content service and is not there to do with the conveyance of signals or ancillary to
17 the conveyance of signals and that might be an example, but to some extent I am not
18 sure that I need to speculate about such examples.

19 The question is, in this case, is the definition met? I don't think it should be a surprising
20 conclusion that in the great majority of cases, where you are dealing with a vertically
21 integrated provider of television services, once you have taken the content out, what
22 is left will fall to be regulated as a transmission service. I think the specific reference
23 as an example of -- let's go for a moment perhaps to the Framework Directive --

24 MR JUSTICE MORRIS: The Framework Directive rather than the EECC -- tab?

25 MR HOLMES: Yes, tab -- sorry, no, the EECC, forgive me, EECC, tab 13, where we
26 are page 158.

1 It is, we say significant and telling that in article 2(4)(c), one of the two paradigmatic
2 examples of a service consisting wholly or mainly in the conveyance of services is
3 transmission services for broadcasting. That ties in with recital 7 which states in very
4 stark terms, recital 7 of the Competition Directive --

5 MR JUSTICE MORRIS: The old --

6 MR HOLMES: Was it the Framework or --

7 MR JUSTICE MORRIS: No, it is recital 7 of the Competition Directive back in 2002,
8 isn't it?

9 MR HOLMES: Yes, it is recital 7.

10 MR JUSTICE MORRIS: I hadn't until now cottoned on to the significance of your
11 reliance upon the "such as transmission services used for broadcasting". I think I now
12 see the point. It is giving as an example of a service which consists of wholly or mainly
13 the conveyance of signals, a transmission service for broadcasting.

14 MR HOLMES: Yes, Sir.

15 MR JUSTICE MORRIS: The "such as" means -- it could be in brackets
16 "including" -- no "eg".

17 MR HOLMES: Yes, I am not saying that the wholly or mainly test doesn't need to be
18 met.

19 MR JUSTICE MORRIS: No, but it is giving a steer that a transmission service used
20 for broadcasting is likely to be a wholly or mainly.

21 MR HOLMES: Yes, including in a vertically integrated undertaking, once you have
22 taken content out of account.

23 MR JUSTICE MORRIS: Okay, just remind me -- do I need to look at recital 7?

24 MR HOLMES: Just briefly, if we could go back, page 141 at tab 10 is the Competition
25 Directive.

26 Do you remember, Sir, there was a phrase which you found striking, and I did as well,

1 and it starts at the foot of page 141:
2 "Thus, the transmission and broadcasting of radio and television programmes should
3 be recognised as an electronic communications service."
4 This is all of a piece, we say, with the underlying objective of dealing with convergence,
5 bringing media sector within telecoms regulation.
6 MR JUSTICE MORRIS: Okay, all right.
7 MR HOLMES: I think you have my point.
8 MR JUSTICE MORRIS: I think I have this point, yes.
9 MR HOLMES: Just to go back to that list, to absolutely nail this point, page 75, back
10 in the decision --
11 MR JUSTICE MORRIS: I am going to have to change bundles.
12 MR HOLMES: Forgive me, I have finished with the authorities bundle.
13 MR JUSTICE MORRIS: Okay.
14 MR HOLMES: So working down the list, the first is the content and the last is the
15 transmission of the content.
16 MR JUSTICE MORRIS: Let's call it the conveyance.
17 MR HOLMES: Yes, and the things in between are the rump or the hardware. We say
18 that those are all ancillary. They are either ancillary to content or they are ancillary to
19 transmission, but they do not constitute an unaccounted for third element.
20 MR JUSTICE MORRIS: Fine.
21 MR HOLMES: Yes, and just working down then, hardware is the set-top box.
22 MR JUSTICE MORRIS: Yes.
23 MR HOLMES: And the satellite dish. Those are associated facilities. They are clearly
24 ancillary to conveyance. The software, the user interface and the electronic
25 programme guide, you saw EPG specifically referred to, conditional access, that is
26 covered by UPC DTH. Customer services by definition, that is inherently ancillary.

1 MR JUSTICE MORRIS: A bit of both.

2 MR HOLMES: Yes. Installation and repair is all about getting your satellite dish and
3 your set-top box working. So that is, we say, all there is to this new point and it takes
4 them nowhere.

5 MR JUSTICE MORRIS: Okay, yes.

6 MR HOLMES: I am very nearly there, now, Sir.

7 MR JUSTICE MORRIS: All right, I think we are ...

8 MR HOLMES: Sir, the fourth argument advanced by Sky is that Ofcom's policy
9 argumentation is inappropriate. Now, we say that is wrong and we do rely on Ofcom's
10 observation that Sky's interpretation would produce the odd result that the same
11 transmission service would be regulated as such if supplied on a stand-alone basis
12 but might not be if it were supplied by a vertically integrated company that both made
13 the content and distributed it. We say that outcome cannot be reconciled with the
14 underlying statutory purpose of applying common regulatory rules to communication
15 services whether supplied within the media sector or the communications sector with
16 content regulated separately.

17 A fifth argument advanced by Sky is the competitive distortions point, which was raised
18 immediately before the break. We say that this is a bad point. I might take it from
19 here because I had cause to revisit it over the lunch adjournment.

20 The crux of the point is that Sky is regulated but other purely Internet-based content
21 providers like Netflix and Amazon Prime Video are not regulated, as I understand the
22 point.

23 Now, the short answer to this is that, insofar as Sky supplies a purely Internet-based
24 service, as it does with Sky Glass, Sky Stream and NOW, it is not regulated either. So
25 the services which are similarly situated, where the conveyance is done by the Internet
26 provider, are all treated in the same way; no breach of equal treatment. You treat the

1 same cases in the same way and different cases differently and no competitive
2 distortion resulting.

3 Sky's interpretation by contrast does risk, in my submission, a distortion in the other
4 direction. It would mean that Sky escaped regulation while other traditional pay TV
5 providers who also convey signals, but whose content service element is less
6 important, are still bound by the General Conditions. I understand from my client that
7 this is not something -- you know, they receive representations on this from other
8 providers.

9 MR JUSTICE MORRIS: Okay.

10 MR HOLMES: So it is a matter of concern.

11 A sixth argument is the one that Sky's counsel developed this morning. So he alleged
12 that Ofcom was wrong to apply the legislation as it did because an overly broad
13 definition of electronic communications services would risk taking those services out
14 of the scope of other regulation directed at content. I think that was the point.

15 MR JUSTICE MORRIS: This is the question 1 answer that Mr Pickford gave?

16 MR HOLMES: Yes, exactly.

17 MR JUSTICE MORRIS: I have a difficulty in expressing but I think I understand -- all
18 to do with that exception in article 2(5), I think it is of a directive, the number and name
19 of which I can't remember.

20 MR HOLMES: We will go back to that, the Digital Content and Digital Services
21 Directive -- yes. To be clear, the specific pieces of legislation to which he is referring
22 are not apt to raise a problem in this country because the Digital Content and Digital
23 Services Directive is not implemented, we are not bound by it, the implementation
24 I think was after we had left the European Union. So it may not matter but that
25 particular piece of legislation is not applicable in the UK.

26 I think it was offered as a broader example of a point.

1 MR JUSTICE MORRIS: Well, it was except I thought it depended very firmly on
2 the -- can somebody turn up this regulation or directive because --

3 MR HOLMES: Yes, it is bundle 1, tab B, 14 at page 177.

4 MR JUSTICE MORRIS: I was struggling with these concepts but it was article 3(5)(b)
5 was the point that it centred on.

6 MR HOLMES: I think that is right, yes.

7 MR JUSTICE MORRIS: Just because I can read back the analysis, the analysis is
8 that if you have a 70-30, by which I mean a mainly conveyance transmission service,
9 if you did not have the content exclusion, the whole of that service, the 100 of it, would
10 comprise an electronic communications service and, as a result, because of 5(b), this
11 directive which regulates content would not apply to that 70-30 service and therefore
12 the 30 would escape content regulation.

13 MR HOLMES: Yes.

14 MR JUSTICE MORRIS: That is the argument.

15 MR HOLMES: Yes, I think so, but in my submission that misunderstands how the
16 definition of ECS works --

17 MR JUSTICE MORRIS: Okay.

18 MR HOLMES: -- on Ofcom's case.

19 MR PICKFORD: I can possibly assist because my answer was to give a reason for
20 the exclusion on my case; it was not to say that it all falls down on Mr Holmes' case.
21 He is obviously going to say it is excluded on his case too.

22 MR HOLMES: Yes.

23 MR JUSTICE MORRIS: No, but the point I -- yes -- that I am trying to get at to test
24 your analysis of section 32 is, what is the point of the content exclusion at all?

25 MR PICKFORD: Yes, and that is what my point is in answer to.

26 MR JUSTICE MORRIS: So what I need from you, in the sense of your response,

1 I think must be working on the hypothesis that his approach is right.

2 MR HOLMES: Yes.

3 MR JUSTICE MORRIS: Are you with me?

4 MR HOLMES: I think so.

5 MR JUSTICE MORRIS: I might anticipate a response from you which is, if he were
6 right, the content exclusion would have no meaning or effect.

7 MR HOLMES: Yes.

8 MR JUSTICE MORRIS: Maybe you can't say that but that was the purpose of the
9 question, to test Mr Pickford's approach as to, on his submission, what is the point of
10 the content exclusion.

11 MR HOLMES: Yes.

12 So it may very well be the case that, if one adopted -- if one arrived at Mr Pickford's
13 interpretation as the correct one, one could find a residual role for the exclusion. So
14 we don't pray in aid the proposition that the content exclusion on Mr Pickford's
15 interpretation is meaningless, or a fifth wheel to the coach, or otiose. It is quite hard
16 to reach that level of speculation because we say that his argument fails at a prior
17 stage because it doesn't conform with the text or with the --

18 MR JUSTICE MORRIS: Of course.

19 MR HOLMES: But I don't think I advance an argument independently of that but if you
20 are persuaded, contrary to my submissions, that Mr Pickford's construction is correct,
21 that would render -- or he is prima facie correct --

22 MR JUSTICE MORRIS: It is not an argument in your favour that -- you do not argue
23 in your favour that Mr Pickford's construction would lead to a conclusion that the
24 content exclusion was meaningless?

25 MR HOLMES: One might find a continued role, if one casts around long enough, one
26 might find examples where it would, but this very specific one is of no application in

1 the UK but there might be others -- we wouldn't exclude it but it has already reached
2 quite the wrong conclusion on the construction of the statute. So I hope that assists.

3 MR JUSTICE MORRIS: Fine, as Mr Pickford rightly said, there is no point you going
4 back in response to this point to say we don't accept the premise of the question.

5 MR HOLMES: Yes, indeed, and I think he fairly accepts that, on my construction, the
6 problem that he identifies wouldn't arise because the content element would be
7 excluded in any event.

8 MR JUSTICE MORRIS: Okay, yes.

9 MR HOLMES: So I think the final argument, let me just check my note -- yes, the final
10 allegation of error -- there is the bundled service point, which I should address.

11 So we say that this is a red herring. The submission, as I understood it, was that
12 section 51 had already provided for a situation in which a content service could
13 engage end-of-contract notices when it formed part of a bundle --

14 MR JUSTICE MORRIS: As defined.

15 MR HOLMES: -- as defined with Internet access services or with interpersonal
16 number-based communications. Mr Pickford will correct me if I've got the wrong end
17 of the stick, but that I understood was the submission.

18 But the provision --

19 MR PICKFORD: I won't -- I can't correct you but ...

20 MR HOLMES: The question is whether, before one gets to section 51, on a correct
21 interpretation of section 32, it is apt to cover Sky's service as an ECS. Insofar as it is,
22 then it will trigger the application of the end of contract notification requirement.

23 What section 51 permits is for stand-alone content services, if they are bundled with
24 Internet access content (sic) or with interpersonal number communication services to
25 trigger a notification requirement or to fall within the notification requirement, insofar
26 as they are part of a bundled contract, but that is irrelevant in my submission to the

1 question of statutory construction on the scope of an electronic communications
2 service.

3 MR JUSTICE MORRIS: On any view, this case is not a bundled contract, as defined.

4 MR HOLMES: And we don't suggest it is and --

5 MR JUSTICE MORRIS: I imagine your submission is, just because end of contract
6 notification provisions apply to a bundled service in the narrow technical sense, does
7 not mean that it cannot apply to our service?

8 MR HOLMES: Yes.

9 MR JUSTICE MORRIS: "Our" being the one before us.

10 MR HOLMES: Yes, exactly.

11 MR JUSTICE MORRIS: Okay.

12 MR HOLMES: There is a related point which was made during oral submissions which
13 was to the effect that -- sorry, was that the effect of Ofcom's interpretation is that
14 a service that is predominantly content based would be subject to regulation as
15 a whole in the present context, insofar as the obligation applies to the level of the
16 contract, the level of the contract, and the constituent services are provided under
17 a single contract. This is the tail wags the dog point.

18 So you have a small transmission element provided under a single contract together
19 with a content element, and that was said to be a perverse consequence, if you like,
20 of Ofcom's interpretation, which would be avoided if you applied the wholly or mainly
21 test to the service as a whole.

22 MR JUSTICE MORRIS: This is the 1 per cent or 99 per cent point, is it?

23 MR HOLMES: Yes.

24 Now, it is true that where Sky chooses to provide conveyance and content under
25 a single contract, the end-of-contract notification requirements will necessarily bite on
26 the lot because there is a single contract and they apply in relation to contracts.

1 MR JUSTICE MORRIS: Yes.

2 MR HOLMES: But there is no requirement on Sky to contract in that way. Moreover,
3 Sky's interpretation carries the risk that other obligations specific to conveyance would
4 no longer apply to the transmission operations of vertically integrated operators in its
5 position, so the General Conditions include a range of obligations focusing specifically
6 on conveyance, must-carry obligations applicable to electronic communications
7 network providers whose networks are used to provide electronic communications
8 services and obligations to respect international technical standards in relation to the
9 transmission of content, and Sky's interpretation would dis-apply those provisions,
10 which is precisely what, in my submission, the common regulatory framework and the
11 EECC seek to avoid by bringing these all under a single framework of regulation.

12 The final point simply concerns the scope of the remedy. The allegation is that
13 Ofcom's remedy --

14 MR JUSTICE MORRIS: Just give me a moment, please, sorry. Sorry, I am just
15 looking at something on my screen.

16 Sorry. Yes?

17 MR HOLMES: The allegation that there is a failure for the remedy to align with
18 Ofcom's findings. We think there is nothing to this. I have shown you the scope of
19 Ofcom's remedy at the start of my submissions. It requires Sky to take all necessary
20 steps to comply with the notification requirements in relation to subscribers to its
21 relevant pay TV services and at A1.19, the relevant pay TV services for those
22 purposes are any of its pay TV services which rely in whole or in part on a digital
23 satellite transmission service and, after the exception of the content element of the
24 service, Ofcom has explained why Sky's pay TV service, when distributed by
25 a satellite, constitutes an electronic communications service and the contracts under
26 which the service is supplied are then subject to the obligation and we say there is

1 nothing out of the ordinary with that.

2 MR JUSTICE MORRIS: Is that not the same point really about whether you could
3 have a notice -- the notice has got to cover everything under the contract?

4 MR HOLMES: I think it collapses into the same point. Sorry, I am running on gas
5 slightly now.

6 MR JUSTICE MORRIS: No, that is all right.

7 MR HOLMES: In my submission, Ofcom faithfully applied section 32(2) and, subject
8 any questions from the Tribunal, those are my submissions.

9 MR JUSTICE MORRIS: Yes.

10 I am assuming that you do not dispute that, if we were to conclude that, despite your
11 submissions this afternoon, Ofcom did not address its mind to the rump versus
12 transmission issue, that even if we were with you as to the approach to construction,
13 the decision would still have to be quashed.

14 MR HOLMES: Quashed but in my submission appropriately remitted because it would
15 leave a matter --

16 MR JUSTICE MORRIS: You say quash and remit?

17 MR HOLMES: Yes, which is within your discretion under the provision that you have
18 shown -- and the conclusion would be on the basis that there was a matter that
19 required further consideration and it wouldn't be appropriate to --

20 MR JUSTICE MORRIS: What is the difference technically between quashing and
21 remitting -- that is a direction for Ofcom to reconsider it effectively, isn't it? I don't
22 know, as opposed to quashing and leaving it for you to take -- I don't know, is there
23 any difference? I don't know, think about that one.

24 MR HOLMES: We will reflect on that, Sir.

25 MR JUSTICE MORRIS: I think what we are going to do, given the time -- I don't know
26 how long Mr Pickford is going to be in reply. I would really like to finish by 4.30 if we

1 can, if not a bit earlier, but given that we have been going since 2.00 I would have
2 thought we might take a break, which might in itself give Mr Pickford a little bit of
3 time -- he is probably ready to go straight away.

4 MR PICKFORD: I would be very happy to have a moment to collect my thoughts.

5 MR JUSTICE MORRIS: If we could finish even before 4.30, that would be wonderful.

6 MR PICKFORD: There is quite a lot for me to reply to. There is one very new theme
7 which I am going to have to tackle but --

8 MR JUSTICE MORRIS: Can we break until 3.30, is that sufficient for the shorthand
9 writers?

10 Thank you very much.

11 **(3.20 pm)**

12 **(A short break)**

13 **(3.30 pm)**

14 MR JUSTICE MORRIS: Yes, Mr Pickford.

15

16 **Submissions in reply by MR PICKFORD**

17 MR PICKFORD: Chairman, Tribunal, thank you.

18 Mr Holmes began his submissions by misstating our case. He said that we say we
19 are not within 2(c) because we are a content service. That is not our case. Our case
20 is that we are not within 2(c), we are not an ECS, because the pay TV service that we
21 supply that is in issue in these proceedings does not consist wholly or mainly in
22 transmission. That is for the reasons that we have explained. It is not just that we
23 provide content, it is also all the other elements of the service -- the hardware, the
24 software, the conditional access, consumer services, et cetera. I will come back to
25 that point because it is obviously relevant to the analysis of the decision, where there
26 was a development of what Ofcom say is what they decided. That is the opening

1 point.

2 Secondly, Hilversum. This an important case and it becomes more important I think
3 as we go through because Mr Holmes has, with respect, not fully or properly explained
4 its implications to the Tribunal.

5 MR JUSTICE MORRIS: Okay.

6 MR PICKFORD: If we could go back, please, to the authorities bundle, tab 22,
7 Hilversum, and I am looking at page 424. I beg your pardon, that is a wrong reference.
8 It is 423. I was going to go to the Advocate General but it is quicker just to go straight
9 to the case.

10 MR JUSTICE MORRIS: Tab?

11 MR PICKFORD: So we are in tab 23, I beg your pardon.

12 MR JUSTICE MORRIS: That is all right.

13 MR PICKFORD: Tab 23, and I am on page 444.

14 MR JUSTICE MORRIS: Okay.

15 MR PICKFORD: We have been here a few times but it really is important to get this
16 right.

17 MR JUSTICE MORRIS: That is all right.

18 MR PICKFORD: So it was suggested to you -- I have five points on Hilversum and
19 the first is that the court did not find, contrary to Mr Holmes' submissions, that UPC
20 was providing a content service within the meaning of article 2(c) of the Framework
21 Directive.

22 So if we look again at paragraph 41:

23 "It follows from the foregoing that, as the Advocate General observed in point 33 of his
24 Opinion, the relevant directives, in particular the [directives that we are becoming very
25 familiar with], make a clear distinction between the production of content, which
26 involves editorial responsibility [production of content] and transmission of content,

1 | which does not entail any editorial responsibility. Content and transmission are
2 | covered by different measures which pursue their own specific objectives, without
3 | referring to customers of the services supplied or the structure of the transmission
4 | costs."

5 | "In the present case, it is apparent from the order for reference and the written and
6 | oral submissions made before the Court that UPC's principal business is the
7 | transmission of radio and television programmes via cable to its subscribers, its
8 | customers. UPC confirmed at the hearing before the court that it does not produce
9 | those programmes itself and it does not exercise any editorial responsibility over their
10 | content."

11 | MR JUSTICE MORRIS: Can you just pause for a moment, please. **(Pause)**.

12 | Yes. I absolutely see what it says.

13 | MR PICKFORD: Yes.

14 | MR JUSTICE MORRIS: It doesn't faithfully follow the definition as it then stood, does
15 | it, just as an observation? It talks about production of content, right, with -- production
16 | of content which involves editorial responsibility, yes?

17 | MR PICKFORD: Yes.

18 | MR JUSTICE MORRIS: But in fact the article 2(c) definition at page 140 of bundle 1,
19 | actually, is wider because it includes providing content or exercising -- it doesn't say
20 | "producing", it says "providing", so I mean this is your point, I am not sure it goes very
21 | far, that you say content is only the stuff when people make the programmes, which
22 | in my mind raises a whole host of questions about how you then say that the content
23 | element of yours, which is third party, is then content within that definition but it may
24 | not matter.

25 | You say content is where you make a programme or you schedule -- you schedule
26 | and make a programme -- and you say that the definition does not include providing

1 | third party content.

2 | MR PICKFORD: Yes.

3 | MR JUSTICE MORRIS: Okay. But -- and you seemed to suggest yesterday that the
4 | section 32(7) definition was out of sync with the directives.

5 | MR PICKFORD: No, I didn't mean to suggest that. No, my submission is that the
6 | section 32(7) definition is to be read consistently with the directives.

7 | MR JUSTICE MORRIS: But do you say section 32(7) includes providing third party
8 | linear channels?

9 | MR PICKFORD: No.

10 | MR JUSTICE MORRIS: Right, so then there is an element of yours which you have
11 | consistently told everybody is content which is not content on your definition.

12 | MR PICKFORD: Well, it is not content -- it doesn't fall within the content exemption.

13 | MR JUSTICE MORRIS: Right, okay.

14 | I don't think that point matters. The point I was pointing out was that I am not sure
15 | that, if paragraph 41 is said to be a reflection of the directives, that I am not sure that
16 | it is right because I think there is a distinction between providing content and producing
17 | content.

18 | MR PICKFORD: Well, my submission is that it is clear -- this is interpreting what the
19 | directives mean and there is a clear distinction that is drawn between production,
20 | which I say is the same as providing, and its transmission. There are differences
21 | between do you create it or do you transmit it -- that is the distinction that is drawn in
22 | paragraph 41 and I say that is also the distinction that one sees reflected in the
23 | directives when one goes back to the --

24 | MR JUSTICE MORRIS: So you say provide means produce?

25 | MR PICKFORD: Yes, in essence.

26 | MR JUSTICE MORRIS: Okay, carry on.

1 MR PICKFORD: So we then have paragraph 43, that:

2 "Although the customers take out a subscription for the purpose of gaining access to
3 the cable package, it doesn't mean that UPC's business which consists in
4 broadcasting programmes produced by content editors ..."

5 MR JUSTICE MORRIS: Third party?

6 MR PICKFORD: Third party, exactly:

7 "... by transmitting programmes to the connection point of its cable network, must be
8 excluded from the definition of electronic communications service."

9 So what it is seeking to assess is are they within the content exclusion because it is
10 talking about an exclusion from the definition of electronic communications service,
11 and the conclusion that the court comes to is that they are not excluded from the
12 definition, they are not content services, and the reason for that it gives is that they are
13 not UPC's content services, they are someone else's content services.

14 MR JUSTICE MORRIS: So where do I get that? You say they are not excluded from
15 the definition because the content element is not produced by them?

16 MR PICKFORD: That's right.

17 MR JUSTICE MORRIS: I am not saying you are wrong; I have probably looked at
18 these paragraphs too many times. Where do you say I get that from?

19 MR PICKFORD: 42 in particular, read together with 41 and 43.

20 MR JUSTICE MORRIS: Okay. Okay, it does not produce the programmes itself, so
21 it is not content at all?

22 MR PICKFORD: That's right.

23 MR JUSTICE MORRIS: Okay. All right.

24 MR PICKFORD: I say it is unequivocal that it is quite clear that the analysis of the
25 court is that they don't produce their own content, they don't exercise any control over
26 it and therefore it is not content. That is important because there are a number of

1 | implications that flow from that.

2 | MR JUSTICE MORRIS: That is fine.

3 | You say this is an ECS not because the content is excluded by the exclusion; you say
4 | there is just no content at all?

5 | MR PICKFORD: Exactly. That is an important point because it is a distinction
6 | between me and Mr Holmes, which then goes on to have a number of ramifications.

7 | MR JUSTICE MORRIS: Carry on.

8 | MR PICKFORD: We say it then follows from the analysis that I have just taken you to
9 | that the court was able to determine two things. Firstly -- and they can come in either
10 | order -- the content exemption didn't apply and, also, that the business of UPC must
11 | be wholly or mainly something else. It wasn't content because I have just told you it
12 | was not a content business, because they don't have editorial responsibility, and
13 | therefore they look to the only other thing they consider doing and it is transmission.
14 | So they decide that the wholly or mainly test is satisfied. Equally, the content
15 | exemption test is not satisfied.

16 | So both the positive and the negative bits of the test on my approach are satisfied to
17 | lead to the conclusion that it is an ECS.

18 | MR JUSTICE MORRIS: Okay.

19 | MR PICKFORD: Third point, and which follows from my first point and second point,
20 | is that the court didn't do what Ofcom says, which is then exclude the content from its
21 | analysis and go on and conduct an analysis by reference to the residual because there
22 | was no content falling within the exemption at all. The exemption just didn't apply.

23 | Fourth --

24 | MR JUSTICE MORRIS: One minute. Okay.

25 | MR PICKFORD: Fourth on Ofcom's view of the world, the court's analysis of editorial
26 | responsibility which it conducts in paragraphs 42 and 43 was otiose because, on their

1 approach, it doesn't matter who produces the content. You must surely always ignore
2 it and then apply the wholly and mainly test.

3 What they cannot be saying is you ignore it if it is your content but you include it if it is
4 someone else's -- that would obviously be ludicrous.

5 MR JUSTICE MORRIS: I am not sure I follow that point. I thought you are saying that
6 you do -- I thought you were saying the very opposite.

7 MR PICKFORD: I am talking about what Ofcom say.

8 MR JUSTICE MORRIS: Your case is -- your case now is, under the legislation, the
9 exclusion only applies to things that are subject to editorial control?

10 MR PICKFORD: Correct, roughly speaking, yes.

11 MR JUSTICE MORRIS: So if it is produced by the company, it is within the exclusion
12 and if it is not, it is not.

13 MR PICKFORD: And now I am saying let's look at Ofcom's view of the world -- not
14 mine, Ofcom's -- and I am saying that, if one was to apply Ofcom's approach, it doesn't
15 matter about whether there is editorial responsibility, because Ofcom simply says --

16 MR JUSTICE MORRIS: It is all out.

17 MR PICKFORD: -- if it is content you ignore it.

18 MR JUSTICE MORRIS: Well, you exclude it.

19 MR PICKFORD: Well, for the analysis, the first thing you do is you do not take it into
20 account in your analysis of wholly or mainly.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: My submission --

23 MR JUSTICE MORRIS: You say, if that is right, why is the European Court bothered
24 about whether it is subject to editorial responsibility or not?

25 MR PICKFORD: Yes, it renders this core part of the analysis otiose.

26 MR JUSTICE MORRIS: Okay.

1 MR PICKFORD: The fifth related point is that Mr Holmes suggested it was common
2 ground between me and him that Virgin Media provides a content service. We don't
3 accept that. We don't actually know precisely what Virgin Media does but it is certainly
4 not common ground. As far as we know --

5 MR JUSTICE MORRIS: I am going to come back to this point that is troubling me,
6 I am afraid, Mr Pickford; this point on section 32(7).

7 MR PICKFORD: Yes.

8 MR JUSTICE MORRIS: Which I am going to dig up.
9 I now understand your case to be -- it is at page 7 of the authorities bundle,
10 volume 1 -- I now understand your case to be that the provision of material is limited
11 to material that is produced by the service provider and excludes third party linear
12 material; is that right?

13 MR PICKFORD: Yes, but I think editorial control somewhat widens the definition.

14 MR JUSTICE MORRIS: Well, sorry, no, (b) is editorial control.

15 MR PICKFORD: Yes.

16 MR JUSTICE MORRIS: What does section 32(7)(a) mean?

17 MR PICKFORD: Yes, that the provision of material which is in a sense produced by
18 the company in question.

19 MR JUSTICE MORRIS: Right. Okay. And therefore linear material is not, on that
20 definition, content service?
21 Sorry, not linear, third party -- third party linear channels.

22 MR PICKFORD: Third party linear channels are not a content service. I believe that
23 is right.

24 MR JUSTICE MORRIS: That comes as a bit of a surprise in circumstances where
25 you, Sky, go to great lengths to explain what your content is and you identify it as
26 having three parts.

1 MR PICKFORD: Well, I am very sorry but it was certainly not my intention to --

2 MR JUSTICE MORRIS: Where has this point ever been made before,
3 that your -- I don't want to go through your skeleton but wherever you describe the
4 facts, that your third party linear material is not part of the content service?

5 I have been under the impression that, throughout this process, your content -- and
6 I am assuming when you refer to content, you are talking about content that falls within
7 the definition -- sorry, you were going to say?

8 MR PICKFORD: It is important to distinguish between a few things here. The reason
9 why we refer to those various channels is because they are not necessarily
10 transmission, because if we are providing a service where we say, okay, here is
11 National Geographic, and here is the National Geographic channel, which we
12 have -- which you can subscribe to if you have got Sky's box.

13 MR JUSTICE MORRIS: Yes.

14 MR PICKFORD: That doesn't mean that we are providing a transmission service
15 merely because we are providing National Geographic. Let's take the example of
16 NOW TV. NOW TV is an example where we are providing all of the same channels
17 as we provide for the DTH service, which includes our own produced content and it
18 includes third party content.

19 In that case, because we are not responsible for the end-to-end transmission, none of
20 that is transmission. The point of referring to all of those channels is to explain all of
21 the things that Sky does which don't involve the conveyance of signals. That is the
22 point of it, because the case -- sorry, the case that we understood that was put against
23 us was that we were primarily involved in the conveyance of signals and so we say,
24 "Look, here are all the things that are not the conveyance of signals".

25 MR JUSTICE MORRIS: That is not quite how you put it, to be fair. Paragraph 15 of
26 your skeleton, as I read it, makes clear that content includes 1, 2 and 3.

1 MR PICKFORD: Well, Sir, it is content but it is also true that we have always been
2 focused on --

3 MR JUSTICE MORRIS: All right.

4 MR PICKFORD: If we could, please, to page 302 of the bundle -- this is not the
5 authorities bundle, this is the main bundle for the hearing.

6 MR JUSTICE MORRIS: It may be that nothing turns on this but I am a bit baffled by
7 something that I had never understood before, that for some reason the third party
8 linear channels are not content and it may be -- because I am conscious of time -- it
9 may be it doesn't take the matter any further and I don't want to divert you from what
10 I suspect are more significant points that you wish it make but it occurs to me, in the
11 light of what you say about this authority, that it is a distinction which you seek to make.
12 What are you looking at?

13 MR PICKFORD: Sir, I am just going take you very briefly to page 302 of the bundle.

14 MR JUSTICE MORRIS: Which volume?

15 MR PICKFORD: It is tab (iii) of (5), which is possibly your volume 2.

16 MR JUSTICE MORRIS: Page 302?

17 MR PICKFORD: Yes.

18 MR JUSTICE MORRIS: Tab?

19 MR PICKFORD: 5.

20 MR JUSTICE MORRIS: No, sub tab?

21 MR PICKFORD: Sub tab 3.

22 MR JUSTICE MORRIS: Thank you very much. We have been there before. No, we
23 haven't. 302?

24 MR PICKFORD: 302.

25 MR JUSTICE MORRIS: Yes.

26 MR PICKFORD: This is just showing the relative extent of expenditure on our own

1 content versus third party content, and therefore the focus of what we are really talking
2 about -- it is our own content, it happens that we have listed out comprehensively that
3 there is other third party content involved as well in the service but we are not seeking
4 to pull the wool over anyone's eyes.

5 So if I could come back then to the submissions that I was making in reply, it
6 was -- there was a question about whether we face up to the fact that the legislation
7 requires a disaggregation of the service and we agree that there is some degree of
8 disaggregation that is required in the analysis of an ECS. The question is what gets
9 disaggregated and where does it take effect in the analysis?

10 If we could go back to what we say is the legislative cornerstone, which is the first
11 instrument to introduce the test, that is at the Framework Directive, 2(c), page 140.

12 MR JUSTICE MORRIS: Right, thank you.

13 Framework Directive, 2(c), tab 9 --

14 MR PICKFORD: Tab 9, page 140.

15 We say, when you read that provision at 2(c), the wholly or mainly test manifestly
16 applies to the service in the front first line and not part of the service, not a hypothetical
17 service.

18 MR JUSTICE MORRIS: Right.

19 MR PICKFORD: Always, despite the elegance with which it was presented, Ofcom's
20 analysis boils down to treating that reference to a service in the first line of that
21 provision as a hypothetical service which has been shorn of the content part.

22 MR JUSTICE MORRIS: Okay, right.

23 MR PICKFORD: We say there is no legislative instruction to disregard content
24 services in applying the test of whether a service consists wholly or mainly in the
25 conveyance of signals. Were it to say that, for a start, to do it properly it would really
26 need to be in the conditional tense, it would need to say "Would the service wholly or

1 | mainly consist in the conveyance of signals were it not to include the content part?"
2 | But that is not how it is phrased. The words, properly read, don't bring you to Ofcom's
3 | answer either.
4 | Indeed, we say it is such a counterintuitive idea that when you are considering what
5 | a service wholly or mainly consists in, that you potentially disregard what it wholly or
6 | mainly consists in if that happens to be content, that there would need to be much
7 | clearer words to signal that that is what you were required to do.
8 | Next point is the next tab in the bundle, which is page 141, tab 10.
9 | MR JUSTICE MORRIS: Yes.
10 | MR PICKFORD: Mr Chairman, you referred to the words at the bottom of the page,
11 | that "The transmission and broadcasting of radio programmes should be recognised
12 | as an electronic communications service".
13 | MR JUSTICE MORRIS: Yes.
14 | MR PICKFORD: My answer in relation to how that is reconciled with our approach is,
15 | yes, of course they are to be recognised as ECSs but within the way in which the
16 | Framework Directive approaches that issue. The Framework Directive, we know,
17 | approaches that issue by using a wholly or mainly test.
18 | So what this recital means -- 7 means -- it certainly cannot mean that every single time
19 | there is any transmission or broadcasting it must be an ECS, because that would not
20 | be the test that is applied in the Framework Directive. So it doesn't, we say, actually
21 | take on any further. It simply recognises that those types of services may --
22 | MR JUSTICE MORRIS: It simply recognises electronic communications service,
23 | where it consists wholly or mainly in the provision of signals, conveyance of signals.
24 | MR PICKFORD: Yes. Ultimately, it doesn't take us any further, other than pointing
25 | up that it is obviously contemplated that broadcasting is an area where ECSs may
26 | arise and of course it is, and I gave examples to the Tribunal -- there is the Arqiva, the

1 | example of Arqiva, which is the company that is responsible for transmission and owns
2 | all of the broadcast towers. I think I gave the references in my earlier submissions.
3 | My junior is nodding at me, so hopefully I did.
4 | There is also the example of Virgin, which we say if it is not producing its own content,
5 | will still be transmitting content.
6 | MR JUSTICE MORRIS: Yes, okay. That takes us back to the content issue --
7 | MR PICKFORD: Yes.
8 | MR JUSTICE MORRIS: -- which I won't go back to.
9 | MR PICKFORD: The next issue is what analysis, what factual analysis, did Ofcom
10 | actually carry out in the decision.
11 | MR JUSTICE MORRIS: Yes.
12 | MR PICKFORD: So if we could go back to the decision, please, which is --
13 | MR JUSTICE MORRIS: I am interested in this point.
14 | MR PICKFORD: -- page 100. Sorry, page 100 of the core bundle, not the authorities
15 | bundle. It would help if I had the right bundle.
16 | MR JUSTICE MORRIS: Yes.
17 | MR PICKFORD: If we go -- Mr Holmes took you to 6.22 on page 106 for the analysis
18 | that Ofcom carried out. What he didn't do was then take you to the conclusion that
19 | Ofcom drew from its analysis, which was that in Ofcom's view the transmission
20 | services which delivered Sky's pay TV services constitutes an ECS. So they were
21 | focused just on the transmission services. They were not focused on everything but
22 | content, which is the new analysis.
23 | Now, obviously I was aware there was, in my submission, an imaginative attempt to
24 | see whether in fact one could read transmission as everything else. In my
25 | submission --
26 | MR JUSTICE MORRIS: I think I flushed out of Mr Holmes that, at paragraph 6.29, the

1 word "transmission service" is intended to, or does, mean everything but content.

2 MR PICKFORD: Well, in my submission, that is --

3 MR JUSTICE MORRIS: That is right, isn't it?

4 That is his submission. I didn't say I accepted it.

5 MR HOLMES: That's correct.

6 MR JUSTICE MORRIS: Therefore, presumably, the same applies to 6.23.

7 MR PICKFORD: Well, that may be his submission but we say, (a), that is new, it was

8 not in submission before this afternoon, as we understood it.

9 MR JUSTICE MORRIS: Yes.

10 MR PICKFORD: It is not one that can be tenably extracted from the decision because

11 what it requires one to find is that everything else -- it would require an analysis of all

12 the things that Sky does and that we told Ofcom that we did and essentially that they

13 were all conveyance of signals, because transmission we are using as a shorthand for

14 conveyance of signals.

15 MR JUSTICE MORRIS: Yes. Yes, we have been so far but I think in --

16 MR PICKFORD: Well, that is ultimately what matters. That is the test. The test is --

17 MR JUSTICE MORRIS: I agree, the test in sub (2)(c) is the conveyance of signals,

18 I get that.

19 MR PICKFORD: Exactly, so if Ofcom is not using transmission as a shorthand for

20 transmission of signals, then they don't get home, because that is what the analysis

21 requires and there is, in my submission, no finding in this decision anywhere that the

22 provision of hardware is the conveyance of signals, or that the provision of a user's

23 interface is the conveyance of signals, or that installation and repair is the conveyance

24 of signals, or that customer service is the conveyance of signals. There are no findings

25 of those types. There shouldn't be any findings of those types because they wouldn't

26 make sense.

1 So, although there was an inventive approach conducted by Mr Holmes to say, "Well,
2 you could look at those other things and they might be ancillary services if you look at
3 those authorities over here", again, that analysis is not in the decision.

4 So --

5 MR JUSTICE MORRIS: Yes.

6 MR PICKFORD: -- with respect, it is not possible on a fair reading of this decision to
7 conclude that all of the many things that we referred to that were not transmission but
8 were not content have suddenly all become transmission because of course we were
9 referring to them as -- we distinguish between content, transmission and all these other
10 things.

11 MR JUSTICE MORRIS: Yes.

12 MR PICKFORD: It would be quite odd if Ofcom in response decided to kind of redefine
13 what transmission meant but never explained that and it doesn't explain that because
14 it is not what it was doing. In my submission it is quite clear they just hadn't really
15 turned their mind to all the other elements. The reason for that is because the analysis
16 that they were carrying out at the time is not the analysis that Mr Holmes now
17 advances at this Tribunal; it was a different analysis. On a fair reading of the --

18 MR JUSTICE MORRIS: Can you demonstrate to me, or remind me, of what you say
19 that a true representation of the analysis in the decision was?

20 MR PICKFORD: Yes. The true representation of the analysis in the decision is that
21 Ofcom thought that what it needed to do was assess whether the transmission -- it
22 could just look at transmission and it could say, "Is transmission wholly or mainly the
23 conveyance of signals?"

24 MR JUSTICE MORRIS: What do you mean by the word "transmission" there?

25 MR PICKFORD: I mean -- it was not saying "dis-apply content, now look at everything
26 else together", it was basically saying "insofar as there is transmission as part of this

1 service, if it includes transmission, then we are home and dry". You get a hint of
2 that but --

3 MR JUSTICE MORRIS: I think you are saying that Ofcom's approach was to ignore
4 wholly or mainly, was to look at the overall Sky pay TV service and, if it includes
5 conveyance of signals, or transmission, depending on what the words transmission
6 means in this sentence, then that is enough to get them home.

7 MR PICKFORD: Not quite but nearly. Their initial approach in the --

8 MR JUSTICE MORRIS: I know what you are going to say, in section 96A?

9 MR PICKFORD: Yes. It helps to explain -- I am not going to go back to it but just
10 a sentence. The initial approach was basically to apply the including test.

11 MR JUSTICE MORRIS: As long as there is some bit of transmission, that is enough?

12 MR PICKFORD: Yes, and then we said in response to that, that is not right, it is not
13 an including test and they said -- and then in the decision what one sees is analysis
14 which says, "Okay, we are going to apply wholly or mainly", but the thing is they apply
15 wholly or mainly to this thing called transmission and they don't conduct any analysis
16 that is comparing the conveyance of signals to other things.

17 MR JUSTICE MORRIS: One minute.

18 The Ofcom decision is to apply the wholly or mainly test to the concept of
19 transmission?

20 MR PICKFORD: Yes, and one sees --

21 MR JUSTICE MORRIS: Where does one see that most clearly?

22 MR PICKFORD: It comes out on a number of occasions but I say it is a slightly
23 confused analysis because, ultimately, it is wrong. So 6.3(a) we start by saying by
24 reference to the relevant legislation --

25 MR JUSTICE MORRIS: Yes.

26 MR PICKFORD: -- that pay TV services, "fall within the definition of ECS insofar as

1 they include a transmission element". So we have the beginnings.

2 MR JUSTICE MORRIS: And "which meets the definition".

3 MR PICKFORD: Yes but it doesn't say "and which", it says "which".

4 MR JUSTICE MORRIS: "Which meets the definition", yes.

5 MR PICKFORD: And elements, as I think, Mr Chairman, you pointed out to
6 Mr Holmes, the definition doesn't apply to elements, it applies to services.

7 MR JUSTICE MORRIS: Okay.

8 MR PICKFORD: So it doesn't particularly help them to refer to that further clause.

9 MR JUSTICE MORRIS: Carry on.

10 MR PICKFORD: It is included.

11 If we go over to 6.7, 6.6:

12 "The 2002 regulatory framework introduced new terminology to reflect convergence
13 between telecommunications and media sectors. The intention was to separate
14 regulation of transmission from regulation of content and create a single regime which
15 applied all transmission and services including ..."

16 MR JUSTICE MORRIS: Yes.

17 MR PICKFORD: "We address ..."

18 Next section:

19 "Insofar as a pay TV service includes a means of transmitting the content to the end
20 user over an ECN that transmission service is susceptible to regulation as an ECS."

21 MR JUSTICE MORRIS: Right. So is the word "transmission service" there -- does it
22 mean conveyance of signals alone? That is how you take it to mean, do you?

23 MR PICKFORD: It must be because they haven't done some -- on their new approach,
24 you don't just take the rump and say, okay, let's look at the rump, and if there is
25 transmission in the rump, then we get home. They say if there is -- if the conveyance
26 of signals predominates within everything that isn't content, then it's an ECS.

1 Then we go over to 6.19(a). We have a summary of Ofcom's position in principle:
2 "A broadcasting transmission service is the means by which content is delivered to the
3 consumer. The overall service or package of services provided to the consumer may
4 include both a content service and a transmission service. These are not mutually
5 exclusive categories and that the overall service or package of services need not be
6 classified as either one or the other but can encompass both elements. The relevant
7 elements are susceptible to the content regulation insofar as they comprise a content
8 service, and to regulation as an ECS insofar as they are a transmission service."

9 So again --

10 MR JUSTICE MORRIS: One minute. I lost you there, I am afraid.

11 MR PICKFORD: Penultimate line. "Regulation ...", "the relevant elements are
12 susceptible to ..." and then after the content regulation bit:

13 "... regulation as an ECS, insofar as they are a transmission service."

14 MR JUSTICE MORRIS: Yes. Now, pausing there for a moment, it appears on that
15 paragraph that there are only two elements, according to Ofcom. There is content
16 service and transmission service and Mr Holmes would say that transmission service
17 there is everything but content. He would say that. I am not saying he is right but that
18 is what he would say. But the next paragraph is -- the next subparagraph is not
19 particularly helpful to him, perhaps. "A power to ... insofar as there is a service which
20 consists wholly or mainly or primarily in the conveyance of signals", so suddenly, we
21 have now changed from transmission to conveyance of signals.

22 MR PICKFORD: Yes.

23 MR JUSTICE MORRIS: So is a fair reading of (a) and (b) indicate that when he is
24 talking about transmission service in (a), he is talking about conveyance of signals,
25 I don't know? You would say yes presumably and Mr Holmes would say no.

26 MR PICKFORD: Yes, that is what he would say. We would say that is reinforced by

1 the other paragraphs I took you to, it is reinforced by 6.23 that I took you to.
2 We see here, before the 6.25, "Sky provides inter alia ECS ..."
3 MR JUSTICE MORRIS: One minute. 6.25, sorry, where are you?
4 MR PICKFORD: The title above 6.25. The heading:
5 "Sky provides, inter alia, ECS and content services", amongst other things.
6 So, again, implicit, we say that "transmission services" isn't an all embracing term for
7 everything that isn't content. Their analysis is simply that you can focus in on the
8 transmission service and then apply the wholly or mainly test to the transmission
9 service. Now, Mr Holmes says otherwise but my submission is that that is ultimately --
10 MR JUSTICE MORRIS: If transmission service properly read means conveyance plus
11 rump, then he is right. Or his analysis -- or, sorry, Ofcom's decision makes sense.
12 If transmission service in this document, I think that is right.
13 MR PICKFORD: Save that there is no analysis to support that.
14 MR JUSTICE MORRIS: I understand that -- well, there is a little bit but I understand
15 what you are saying. There is a paragraph I just looked at a moment ago, I can't
16 remember, probably at 3 -- I cannot remember where it is now, I have slightly lost
17 it -- where there is a paragraph that refers to set-top boxes and the like -- yes, 6.22.
18 If, as I say, if in this document, transmission service is properly to be regarded as
19 meaning everything but content or, put another way, conveyance by signals plus rump,
20 then this is right, because then you apply, you have got that, everything but content -- it
21 is not right but it is a cogent argument -- and you then apply the wholly or mainly test
22 to that bit, transmission service as so described, and you find that, within transmission
23 service, it is wholly or mainly conveyance of signals.
24 MR PICKFORD: What I agree with is that, if you define transmission services as
25 everything that is not content, then it is consistent as a matter of law with what Ofcom
26 now says the correct test is in law. The two points where I obviously diverge is, one,

1 that is obviously not the right analysis, I say.

2 MR JUSTICE MORRIS: And the second is --

3 MR PICKFORD: But more importantly here, they did not conduct anything near what
4 could be said to be a cogent analysis that would have enabled them to conclude that
5 the conveyance of signals part of that rump --

6 MR JUSTICE MORRIS: Not the rump.

7 MR PICKFORD: Sorry, the 'conveyance of signals' part of everything that is not
8 content predominates.

9 MR JUSTICE MORRIS: Well, that is two points you make. Three points in fact. First
10 of all they are applying the wrong -- secondly you don't agree that 'transmission
11 service' in this document is intended to refer to everything but content.

12 MR PICKFORD: That's correct.

13 MR JUSTICE MORRIS: Because it either means conveyance of signals or they are
14 all over the place about it.

15 And number three, even if it were, if it did mean -- there is no analysis from which they
16 could conclude that within that 'everything but content' conveyance of signals is
17 predominant.

18 MR PICKFORD: Yes. Can I take you to page 289?

19 MR JUSTICE MORRIS: No, I understand what you are taking us to.

20 MR PICKFORD: Page 289 in the bundle.

21 MR JUSTICE MORRIS: Yes, you took to us this earlier but didn't read it.

22 MR PICKFORD: I would like to remind the Tribunal of it in this context, because
23 although we agree --

24 MR JUSTICE MORRIS: Take me to the passage. I am watching the clock. Take me
25 to the passage you want me to read.

26 MR PICKFORD: It is paragraph 69. In 2019, Sky spent over --

1 MR JUSTICE MORRIS: Sorry, I think everybody needs to slow down a bit.

2 MS WALKER: Page 289?

3 MR JUSTICE MORRIS: Yes. We have been here before.

4 MR PICKFORD: We have, but it is important in the context of this discussion.

5 MR JUSTICE MORRIS: Yes.

6 MR PICKFORD: I am not saying that the only consideration in determining what would
7 be wholly or mainly is the amounts that are spent. I am saying it is a pertinent
8 consideration that you would obviously want to have regard to, amongst other things.
9 And had Ofcom really conducted the analysis that they are required to have done to
10 make sense of their analysis now, their legal analysis now, and applied it to the facts,
11 they would at least have had to consider things like paragraph 69 --

12 MR JUSTICE MORRIS: There is no reference to that, presumably?

13 MR PICKFORD: -- and how that fitted with the analysis. And we simply don't see that.

14 MR JUSTICE MORRIS: You would say you might have expected for them to say: we
15 note what Sky says at paragraph 69; we don't think this a quantitative issue; we think
16 that all these aspects of conditional access et cetera et cetera are in any event
17 ancillary to the conveyance of signals. But they don't even address that point.

18 MR PICKFORD: Yes. And indeed if we go back to the previous volume, and the
19 decision -- and this hopefully is the final paragraph we need to look at in the decision.
20 That is at paragraph 6.42, at the top of the page.

21 MR JUSTICE MORRIS: Can I just read it to myself again.

22 MR PICKFORD: Yes. It is the final statement.

23 MR JUSTICE MORRIS: Just let me read it again, please. We are looking at page 109,
24 bundle 1. (Pause).

25 Yes. I have read it. Tell me --

26 MR PICKFORD: So it is particularly -- the final sentence, they say that test, their test,

1 has been applied insofar as Sky's pay TV services include a service consisting of the
2 conveyance of signals, recognising that Sky provides other services.

3 So again we say that is inconsistent --

4 MR JUSTICE MORRIS: Conveyance of services mean there --

5 MR PICKFORD: I say that at this point, although this decision is actually somewhat
6 confused, they are recognising that "other services" there means things like the --

7 MR JUSTICE MORRIS: The rump. Sorry, you say other services rump. And I asked
8 Mr Holmes that question and he said it meant content, I think. I asked about that
9 this morning.

10 MR PICKFORD: Right. Well, as I said, I think the core point here is that whilst one
11 can seek to engage in games of essentially trying to redefine things in different ways,
12 you do have to stand back and engage in a fair reading of the decision and in particular
13 the types of things that Ofcom would have needed to consider. And particularly, as
14 I said, paragraph 69 of our submission, which would bear heavily on the analysis that
15 they purport to have undertaken.

16 MR JUSTICE MORRIS: Okay.

17 Yes, I mean, the previous sentence is pretty confusing. A service involving the
18 conveyance of signals which is in this case a transmission service. So there it seems
19 to suggest that transmission service means the conveyance of signals and not --

20 MR PICKFORD: Yes, indeed. Indeed.

21 It was said --

22 MR JUSTICE MORRIS: Well, "Involving". I don't know. All right. I have to think about
23 it.

24 MR PICKFORD: I don't know how much time the Tribunal would like me to devote to
25 this, because ultimately --

26 MR JUSTICE MORRIS: We need to finish at a decent time.

1 MR PICKFORD: That is --

2 MR JUSTICE MORRIS: You have a lot of ground to cover, I suspect. So make sure
3 that you cover the main points that you want to cover.

4 MR PICKFORD: So the next point is related to this, but it may be that I can go quite
5 quickly through it. Mr Holmes took you to our skeleton argument -- to our notice of
6 appeal, and said, well, it is clear that we understood that they had conducted the
7 analysis that they say they have, from our own notice of appeal.

8 MR JUSTICE MORRIS: 88(d).

9 MR PICKFORD: Exactly, 88(d). And he took that out of context, because if one in
10 fact looks at 87 it is clear what we are accusing Ofcom of. And we are accusing them,
11 in this part of their decision, from having simply homed in on transmission services
12 and applied the wholly or mainly test just to transmission services.

13 And it is in that context that we are saying that they are effectively making the content
14 exemption meaningless, because, by definition, if all you need to do is find some
15 transmission services and look at whether they are wholly or mainly the conveyance
16 of signals, you are always going to get an ECS. It doesn't matter whether there is
17 content there or not.

18 That was the point we were making. It may not have been expressed quite as
19 precisely as we would like now, given the construction that Mr Holmes tries to put on
20 it. But when you read it together with 87, it is quite clear what we are referring to and
21 what we understood Ofcom to have been doing at that part of its decision.

22 MR JUSTICE MORRIS: Carry on.

23 MR PICKFORD: Bear with me just a moment.

24 MR JUSTICE MORRIS: That is fine.

25 MR PICKFORD: Yes. So Mr Holmes' response to what we say is one of the core
26 problems with his approach, which is that it has the effect of applying ECS regulation

1 intended to apply to a service which wholly or mainly consists in the conveyance of
2 signals, in fact to a service which may wholly or mainly consist in the production of
3 content, a service where the conveyance of signals may be utterly trivial, but in relation
4 to for instance the end of contract notification notices, as soon as you have a tiny bit
5 of transmission, and it is combined with content, you are caught, and you have
6 to comply.

7 And we say that shows clearly why his construction is not a sensible one. His
8 response to that is to say it is Sky's fault for allegedly combining the services.

9 And my response to that is that this is falling back on something that Ofcom often falls
10 back on, but is not a legitimate avenue for them, which is to stop remembering that we
11 are in fact providing a service here which comprises of elements, because the
12 consumer wants the content and essentially is fairly lacking in interest in exactly how
13 it gets to them.

14 And there is absolutely no point in our providing them with a 'transmission service' just
15 on its own. So we are dealing with a unified service. And it doesn't make any sense
16 therefore to talk in terms of combining -- sorry, it doesn't make any sense to talk in
17 terms of it being Sky's fault for combining two services. There aren't two services
18 here. There is a single service. And the problem with Ofcom's approach is, whenever
19 there is a single service that has a tiny element of transmission associated with
20 a content service, the content service is magically turned into, in effect, an ECS,
21 because they say, ah, well, no, don't worry about it, we are not calling it an ECS, we
22 are only calling it an ECS insofar as it is a transmission service.

23 When you apply that approach to something that is a single unified service, the effect
24 of your approach is to make the whole service susceptible to the same regulation, as
25 we can see from what would be the effect of EOCNs in this case. And one can imagine
26 a more extreme case where it is on the kind of facts that I have given.

1 So in my submission, Ofcom doesn't have a cogent answer to that essential problem
2 with its case, and indeed it didn't have any answer that I heard to the associated
3 problem.

4 MR JUSTICE MORRIS: A cogent answer to the fact that in a 1/99 case -- sorry to use
5 quantitative; I know it is not allowed -- in a 1-99 case, why should the 100 be subject
6 to regulation as an ECS?

7 MR PICKFORD: Yes.

8 MR JUSTICE MORRIS: But on a 55-45 that is all right, but on a 45-55, similarly it
9 shouldn't be.

10 MR PICKFORD: Yes. I mean, as you know, my submission is -- my analysis doesn't
11 do that, because my analysis does not have the consequences that Ofcom's does,
12 because always the dominant part of the service is what dominates its treatment,
13 whereas in Ofcom's the dominant part of the service, it can be 99 per cent -- sorry, the
14 part of the service that dictates how it is treated, which may be tiny, is simply
15 immaterial.

16 And his only answer to that I say is insufficient, because he says, oh, well, don't worry,
17 we haven't really classified that bit of the service as an ECS, he says, because we
18 stripped out content, and so it is not really, you know, we are not telling you that it is
19 the content part. It is not the content's fault, it is the ECS's fault.

20 And that is inadequate, we say, when what they are dealing with is a single service.

21 MR JUSTICE MORRIS: Yes. Well, we go round in circles about the single service
22 notion, because I totally understand why in the real world of what you are providing to
23 the customer and in the contractual world it is a single contract and it is a single thing
24 that the customer is receiving.

25 I don't think that necessarily rules out the proposition that the legislation involves,
26 requires, you to treat, for the purposes of the legislation, the service as having been

1 made up of different services.

2 MR PICKFORD: I agree with that.

3 MR JUSTICE MORRIS: That is the disaggregation by reference to the legislation
4 point.

5 MR PICKFORD: I agree with that, Sir. I am not fighting against that. But my
6 submission is that you need to be very careful about how it is you divide up the service,
7 because the way in which the legislation is structured is that there is a division and the
8 division is: take out the service insofar as it is content.

9 MR JUSTICE MORRIS: Yes.

10 MR PICKFORD: And that only has, in my submission, one sensible interpretation,
11 which is the one that I have given it, which allows the dominant service always to
12 dominate in terms of the legislative treatment.

13 MR JUSTICE MORRIS: Hold on a minute.

14 MR PICKFORD: So I am not denying that you sometimes have to analyse how the
15 service is comprised.

16 MR JUSTICE MORRIS: But it is not right, is it, that you say in all circumstances the
17 dominant service predominates, because your case is, where the dominant service is
18 content you are subject only to content regulation, but where the dominant service is
19 conveyance you are subject to both regulations.

20 MR PICKFORD: Yes, sorry, I beg your pardon, in the context of the ECS regime. I am
21 saying the ECS regime is designed to ensure that you are only ever subject to ECS
22 regulation if what you mainly do is the conveyance of signals.

23 MR JUSTICE MORRIS: All right. Okay.

24 MR PICKFORD: And there isn't a warrant, either on the face of the legislation when
25 you read it --

26 MR JUSTICE MORRIS: All right. I think we are covering ground we have already

1 covered. And that is not being dismissive. I am just looking at the clock.

2 MR PICKFORD: I understand. I see what the time is. I am just going to --

3 MR JUSTICE MORRIS: I am happy to sit on for another five minutes or so. I don't
4 want you to feel super-rushed.

5 MR PICKFORD: Thank you. I understand the level of rush, if I may.

6 MR JUSTICE MORRIS: Medium rush.

7 MR PICKFORD: I am just going to take instructions.

8 MR JUSTICE MORRIS: That is fine.

9 MR PICKFORD: Sir, members of the Tribunal, I have no further submissions, unless
10 I can be of any further assistance.

11 MR JUSTICE MORRIS: Thank you.

12 I see Mr Holmes rising to his feet.

13

14 **Further submissions by MR HOLMES**

15 MR HOLMES: Sir, I have two missing references, if I may.

16 MR JUSTICE MORRIS: You may. And obviously Mr Pickford can have the last word
17 if needs be.

18 MR HOLMES: Of course.

19 The first related to Mr Pickford's submission that Ofcom had left out of account the
20 quantitative element as set out in Sky's March 2020 selection. I would simply refer
21 you to footnote 85 to Ofcom's decision.

22 MR JUSTICE MORRIS: Okay. Pause a minute, please.

23 MR HOLMES: On page 97.

24 MR JUSTICE MORRIS: Page?

25 MR HOLMES: 97.

26 MR JUSTICE MORRIS: Footnote number?

1 MR HOLMES: 85.

2 MR JUSTICE MORRIS: Okay, I can see that.

3 MR HOLMES: That is in relation to the costs -- you see that Ofcom is talking about
4 the transmission costs, and it discusses in that context the costs of equipment,
5 software, conditional access, customer services, installation, repair and so forth. That
6 is the one --

7 MR JUSTICE MORRIS: Okay. I just want to digest the paragraph.

8 MR HOLMES: Yes.

9 MR JUSTICE MORRIS: I don't want to hear submissions. I will digest what is there.

10 MR HOLMES: And then the second point was simply in relation to Sky's position on
11 the meaning of content services.

12 MR JUSTICE MORRIS: Sorry, I have just -- (Pause).

13 And the next point was what?

14 MR HOLMES: In relation to Sky's submissions to Ofcom on the meaning of content
15 services. It was the point that you were canvassing with Mr Pickford.

16 I just draw the Tribunal's attention to the following passages. Core bundle 2, tab 5,
17 the discussion on pages 271, 285.

18 MR JUSTICE MORRIS: One minute, one minute. You know I like to mark things up.

19 MR HOLMES: Yes, of course.

20 MR JUSTICE MORRIS: Sorry, yes, go on. 271?

21 MR HOLMES: 271, 285 and 295, where the meaning of content services is (inaudible).
22 That was all, Sir.

23 MR JUSTICE MORRIS: 285 and?

24 MR HOLMES: 295.

25 MR JUSTICE MORRIS: Yes. I am not totally sure about how much turns on that
26 issue.

1 Mr Pickford, of course you are entitled to --

2

3 **Further submissions by MR PICKFORD**

4 MR PICKFORD: Two very quick points. Firstly, the reference to 5.11 of the decision
5 is simply recording our submissions. It is not an analysis to support what Ofcom says
6 it supports.

7 MR JUSTICE MORRIS: Okay.

8 MR PICKFORD: And then, if I may beg the indulgence of the Tribunal for 15 seconds.
9 I had actually forgotten what my final point was going to be before I sat down before.
10 But it was to make concrete the 1 per cent point. And it was to say that one of the
11 problems of Ofcom's approach which Mr Holmes didn't have an answer to is that the
12 definition of ECS becomes so broad, because all you need to do is engage in a tiny
13 bit of transmission when you are involved in content, that it would, in my submission,
14 embrace a whole host of activities that no one has ever considered to be ECSs before,
15 because if you are, for instance, a newspaper, and you provide content and you
16 transmit your content to a server somewhere from where people are then able to
17 download it, if you have totally put out of your mind all of the content aspect of what
18 you do, all that is left, pretty well, is that you have transmitted some content.

19 MR JUSTICE MORRIS: Just explain to me in another 15 seconds why the newspaper
20 sending something electronically or whatever, why is that the conveyance of signals,
21 et cetera et cetera? Are they actually conveying the signal? Are they using somebody
22 else's network?

23 MR PICKFORD: Insofar as they ever use their own network, for instance if they have
24 their own Ethernet cables or they have their own wi-fi system at any point, they are
25 involved in conveying signals.

26 MR JUSTICE MORRIS: I will hear what you say but I am not sure I can comprehend

1 that at this stage, how -- I mean, I do get the Times Online but why the Times Online
2 would involve -- or what would involve (2A)(c), I don't know.

3 MR PICKFORD: In my submission, it would be conveyance of signals.

4 MR JUSTICE MORRIS: This would be a whole new point.

5 I understand the point you are trying to make. I am not sure I can be satisfied that that
6 would be the case. And given the time --

7 MR PICKFORD: I understand, my Lord.

8 MR JUSTICE MORRIS: Okay. Very well.

9 Can I just ask the panel. Any further questions?

10 MS WALKER: No.

11 MS BURGESS: No.

12 MR JUSTICE MORRIS: Very well.

13 Thank you all very much. Obviously judgment is reserved and we will think long and
14 hard about the submissions that have been put before us with great clarity and
15 patience, and we appreciate it.

16 Thank you very much.

17 **(4.35 pm)**

18 **(The hearing concluded)**

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