



Neutral citation [2023] CAT 70

Case No: 1567/3/3/22

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

15 November 2023

Before:

THE HONOURABLE MR JUSTICE MORRIS  
(Chair)  
JANE BURGESS  
ANNA WALKER CB

Sitting as a Tribunal in England and Wales

BETWEEN:

**SKY UK LIMITED**

Appellant

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

Heard at Salisbury Square House on 25-26 May 2023

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**JUDGMENT  
(NON-CONFIDENTIAL VERSION)**

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## APPEARANCES

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

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

**Note:** Excisions in this Judgment (marked “[...][~~]~~”) relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

## CONTENTS

<b>A.</b>	<b>INTRODUCTION .....</b>	<b>4</b>
<b>B.</b>	<b>BACKGROUND .....</b>	<b>5</b>
	(1) Sky and Sky's pay TV .....	5
	(2) Other suppliers of pay TV .....	8
	(3) Ofcom's new General Conditions requiring end-of-contract notifications .....	8
	(4) Ofcom's investigation.....	10
<b>C.</b>	<b>LEGAL FRAMEWORK .....</b>	<b>12</b>
	(1) The regulation of ECNs and ECSs.....	12
	(a) EU Directives.....	12
	(b) The 2003 Act .....	20
	(c) Case law.....	22
	(2) Powers conferred by the 2003 Act .....	26
	(a) Ofcom's powers to set conditions and to regulate.....	26
	(b) Ofcom's powers of enforcement.....	27
	(c) Appeals to the Tribunal and powers to review and grant remedies .....	29
<b>D.</b>	<b>THE DECISION .....</b>	<b>30</b>
	(1) The Explanatory Statement.....	30
	(a) Factual and policy background .....	30
	(b) Sky's submissions to Ofcom .....	31
	(c) Ofcom's application of the General Conditions to the Sky Pay TV service .....	32
	(2) The Confirmation Decision .....	39
<b>E.</b>	<b>SKY'S GROUNDS OF APPEAL .....</b>	<b>40</b>
<b>F.</b>	<b>THE PARTIES' CASES IN SUMMARY AND THE ISSUES.....</b>	<b>41</b>
<b>G.</b>	<b>ANALYSIS OF ISSUES.....</b>	<b>44</b>
	(1) Issue 1: the construction of section 32(2) and (2A) of the 2003 Act.....	44
	(a) The Parties' submissions .....	44
	(b) The Tribunal's analysis.....	53
	(2) Issue 2: Is the Sky Pay TV service an ECS? .....	62
	(a) The Parties' submissions .....	62
	(a) The Tribunal's analysis.....	64
<b>H.</b>	<b>OVERALL CONCLUSION .....</b>	<b>71</b>

## A. INTRODUCTION

1. This is the Tribunal’s unanimous decision in respect of an appeal made on 18 October 2022 by Sky UK Limited (“Sky”) under section 192 of the Communications Act 2003 (the “2003 Act”).<sup>1</sup> Sky appeals against the Confirmation Decision dated 19 August 2022 entitled ‘*Investigation into Sky’s compliance with the obligation to provide end-of-contract notifications*’ (the “Decision”), which was made by the Office of Communications (“Ofcom”) under section 96C. In the Decision, Ofcom found that Sky’s pay TV services constitute an electronic communications service (“ECS”) within the meaning of that term in section 32(2) and (2A)(c) of the 2003 Act and Sky had breached Condition C1 of the General Conditions of Entitlement as of 15 February 2020 because it had not sent customers of its pay TV services end-of-contract notifications (“EoCNs”).

2. Under the 2003 Act, Ofcom has powers to set conditions applicable to persons providing an electronic communications network (“ECN”) or an ECS. ECS is defined in section 32 as follows:

“(2) In this Act “electronic communications service” means a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, except so far as it is a content service.

(2A) Those types of service are—

(a) ...;

(b) ...; and

(c) any other service consisting in, or having as its principal feature, the conveyance of signals, such as a transmission service used for machine-to-machine services or for broadcasting.” (emphasis added)

We refer to the italicised words in subsection (2) above as “the Content Exclusion”.

3. Condition C1 falls under the consumer protection conditions of the General Conditions of Entitlement, and it applies to providers of public ECSs. In particular, Condition C1 requires certain regulated providers to send an EoCN.

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<sup>1</sup> Unless otherwise stated, all statutory references in this Judgment are to the 2003 Act.

4. In its Notice of Appeal (“NoA”) Sky contends that Ofcom erred in law in its application of section 32. In particular, Sky contends that its pay TV service consists mainly in the provision of content and, on a proper interpretation of section 32, it is not an ECS. Thus, Sky’s pay TV service is not subject to the EoCN requirement under Condition C1.
5. In its Defence filed on 7 December 2022, Ofcom maintains that the Decision was based on a straightforward application of the legislative test under section 32(2) and (2A). As Sky’s pay TV service comprises both a content service and an ECS, it should therefore be regulated as such.

## **B. BACKGROUND**

### **(1) Sky and Sky’s pay TV**

6. Sky provides various services to customers, such as pay TV, broadband and fixed and mobile telephony services. In respect of Sky’s pay TV services:
  - (1) Some rely on a digital satellite transmission service and a set-top box to receive content;
  - (2) Others are delivered using an internet connection and are known as ‘over-the-top’ (“OTT”) services (e.g. Sky Glass, NOW and Sky Stream); and
  - (3) Some rely on a combination of digital satellite transmission and an internet connection (which may or may not be provided by Sky) to deliver content to customers (e.g. Sky+HD and Sky Q).
7. The Decision applies to (and this appeal concerns) any of Sky’s pay TV services which rely in whole or in part on a digital satellite transmission service (i.e. those services described at paragraph 6(1) and 6(3) above). In this judgment, we refer to such services as “the Sky Pay TV service”. Sky’s OTT pay TV services at paragraph 6(2) above are not relevant.

8. Services that rely, at least in part, on satellite transmission remain the largest part of Sky’s pay TV business. At the time of the Decision, it was estimated that Sky had over 9 million satellite subscribers, as compared with 1.5 million NOW subscribers. Updated information provided at the Hearing shows that Sky+HD and Sky Q have [...] subscribers, whilst NOW has [...] subscribers, and Sky Glass and Sky Stream have [...] subscribers.
  
9. According to Sky,<sup>2</sup> the Sky Pay TV service is a subscription service comprising:
  - (1) TV content (which includes Sky’s wholly-owned linear television channels, linear television channels which Sky licenses from third parties, and on-demand content from Sky and third parties);
  - (2) Hardware (such as set-top boxes, satellite dishes and remote controls);
  - (3) Software (including user interface, electronic programme guide and video recording technology);
  - (4) Conditional access services (including viewing cards);
  - (5) Customer service (including call centres and online support);
  - (6) Installation and repair services delivered by Sky’s large engineering workforce which undertakes installation and repairs of viewing equipment in customers’ homes;
  - (7) In some cases, transmission of Sky and non-Sky content (here “transmission” refers to the conveyance of signals).

Hereafter we refer to items (2) to (6) above as “the Other Non-Content” services (or elements).

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<sup>2</sup> Per Sky’s March 2020 Submissions paragraphs 52 and 68 and NoA paragraphs 8 and 9.

10. Sky considers that the Sky Pay TV service is a content service, and the elements set out at paragraph 9(2) to 9(6) above are important elements that support this primary function. It is a unified, indissociable service, of which transmission is an ancillary element. This characterisation of the Sky Pay TV service is disputed by Ofcom.
  
11. As regards TV content, Sky considers that the provision of Sky-created and/or editorially controlled content is central to the Sky Pay TV service. Sky informed Ofcom that it spent over £[...][<] on content provided via Sky TV in each of 2019 and 2020. In 2019, Sky spent around £[...][<] on creating or acquiring content for its wholly owned channels and £[...][<] licensing third-party channels. In past surveys of Sky subscribers the majority ([...][<]%) cited at least one Sky-owned TV channel as their reason for taking Sky TV. Between February 2019 and January 2020, Sky-owned channels (and related on-demand content) accounted for c.[...][<]% of viewing among Sky subscribers. Sky-owned channels are also a significant focus (i.e. [...][<]) of its marketing spend. Customers also identify significant value in the Sky set-top box and their ability to watch Sky content in different ways. In 2019 Sky spent over £[...][<] on conditional access, customer service, installation and repair and transmission of content (paragraph 9(2) to (7) above); within this amount, the cost of transmission was around £[...][<].
  
12. Subscribers to the Sky Pay TV service enter into a contract with Sky for a particular package of television channels and on-demand television services. The contracts include:
  - (1) An obligation for the customer to pay the relevant subscription price for the relevant pay TV service they have selected;
  - (2) A minimum term (typically 12 or 18 months);
  - (3) Automatic continuation of the contract after the expiry of the minimum term; and

- (4) Restrictions on Sky’s ability to increase prices during the commitment period of the minimum term; these limits on price increases do not apply after the minimum term of the relevant contract.

**(2) Other suppliers of pay TV**

13. At the Hearing, the parties accepted that the Sky Pay TV service (as well as Sky’s own OTT service) competed with other unregulated OTT content-only pay TV providers (e.g. Netflix and Amazon), as well as other regulated<sup>3</sup> providers of traditional pay TV over an ECN (e.g. Virgin Media, BT and TalkTalk). According to Ofcom, the latter competitors of Sky have generally been complying with Condition C1 by sending EoCNs to their customers.
14. According to Ofcom, some pay TV companies provide content and take responsibility for transmission, an example of which is Virgin Media. Sky does not accept that Virgin provides its own content, but only third-party content.

**(3) Ofcom’s new General Conditions requiring end-of-contract notifications**

15. In order to ensure customers were informed at an appropriate time that their minimum contract period would be coming to an end and of any changes to price or services that would occur as a result, Ofcom proposed introducing (and eventually introduced) a requirement for providers to send EoCNs to their residential and small business customers.
16. On 31 July 2018, Ofcom published a consultation entitled ‘*Helping consumers to engage in communications markets: Consultation on end-of-contract and out-of-contract notifications*’ (the “July 2018 Consultation”) in which it proposed to introduce new General Conditions that would require providers to send EoCNs to their residential and small business customers. The July 2018 Consultation proposed that such new General Conditions in relation to EoCNs should take effect six months after the publication of Ofcom’s final statement.

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<sup>3</sup> Unless otherwise stated, references in this Judgment to “regulated providers” are to providers who are regulated under Part 2 of the 2003 Act; “unregulated providers” are providers who are not so regulated, although they may be subject to regulation under other Parts of the 2003 Act or other applicable legislation.



17. On 14 December 2018, Ofcom issued a further consultation entitled '*Helping consumers get better deals: Consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband*' (the "December 2018 Consultation") in which it recognised that the purpose, intended scope and objectives of a new EU Directive establishing the European Electronic Communications Code (see paragraphs 38 to 42 below) tied in with Ofcom's proposals for end of contract and out of contract notifications contained in the July 2018 Consultation. Although the UK had until 31 December 2020 to transpose the new EU Directive into national law, Ofcom proposed an earlier transposition and confirmed in the December 2018 Consultation that it considered six months an appropriate time period for the implementation of its proposals for EoCNs.
18. Ofcom received responses to its July 2018 and December 2018 Consultations. In its response Sky submitted that its pay TV services are not ECSs and therefore fell outside the scope of Ofcom's proposed EoCN requirements.
19. After considering those responses, Ofcom published a statement entitled '*Helping customers get better deals: Statement on end-of-contract notifications and annual best tariff information*' on 15 May 2019 (the "May 2019 Statement"). Ofcom remained of the view that it can regulate a pay TV service as an ECS insofar as it includes the conveyance of signals on an ECN and noted that, whether a particular pay TV service falls within that scope will depend on the specific nature of the service in question and the specific circumstances under which it is provided, which should be assessed on a case-by-case basis. The May 2019 Statement imposed the new requirement on providers to send EoCNs to residential and certain business customers. This was in the form of modifications to General Condition C1. The new provisions concerning EoCNs were set out in General Condition C1 at C1.10 to C1.15.
20. General Condition C1.10 required regulated providers to send EoCNs to a subscriber in the manner and form specified by Conditions C1.11 to C1.14 if the subscriber has a contract with the regulated provider for public ECSs other than machine-to-machine transmission services, the contract has a fixed commitment period, and the terms of the contract (or the governing law) provide

for the contract to be automatically prolonged after the expiry of the fixed commitment period.

21. The May 2019 Statement gave providers nine months to implement the changes such that customers would start receiving EoCNs from 15 February 2020.
22. Following a further consultation published on 17 December 2019,<sup>4</sup> a statement and consultation published on 27 October 2020,<sup>5</sup> and a statement published on 17 December 2020,<sup>6</sup> certain modifications were made to General Condition C1, including changes to extend EoCN rules. Following these, the obligations in relation to EoCNs were renumbered such that they are now set out in General Condition C1 at C1.21 to C1.29. Changes were also made to the wording of the requirements on EoCNs and changes were made to some of the defined terms. The changes to EoCNs took effect on 17 December 2021.
23. The renumbered General Condition C1.21 requires regulated providers to comply with Conditions C1.22 and C1.23 if the relevant customer has a contract with the regulated provider for a relevant communications service, the contract has a commitment period, and the terms of the contract (or governing law) provide for the contract to be automatically prolonged after the expiry of the commitment period. General Condition C1.23 provides that, where Condition C1.21 applies, regulated providers must send an EoCN to the relevant customer in the manner and form specified by Conditions C1.24 to C1.28.

#### **(4) Ofcom's investigation**

24. Following the May 2019 Statement, Sky informed Ofcom that it did not intend to implement the new General Conditions in respect of the Sky Pay TV service on the grounds that Sky considered that its pay TV services are not ECSs. Sky also stated that Ofcom was obliged to carry out a detailed assessment of the

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<sup>4</sup> Ofcom consultation entitled '*Fair treatment and easier switching for broadband and mobile customers: Proposals to implement the new European Electronic Communications Code*'.

<sup>5</sup> Ofcom's statement and consultation entitled '*Fair treatment and easier switching for broadband and mobile customers: Implementation of the new European Electronic Communications Code*'.

<sup>6</sup> Ofcom statement entitled '*Implementing the new European Electronic Communications Code: Changes to the General Conditions, Metering and Billing Direction and the National Telephone Numbering Plan*'.

specific nature of Sky’s pay TV services before Ofcom could assess whether it has the power to regulate these services as an ECS.

25. By letter on 11 February 2020, Ofcom responded that it considered that the new General Conditions applied in relation to those subscribers who contract with Sky for a conveyance service, as well as a content service, and Ofcom did not consider it necessary to carry out a further detailed assessment as suggested by Sky. Ofcom indicated that it would proceed to take enforcement action if Sky did not comply with the new General Conditions.
26. Following further correspondence and a meeting between Sky and Ofcom, Sky sent Ofcom a detailed submission on 6 March 2020, setting out why Sky’s pay TV services are not ECSs (the “March 2020 Submissions”).
27. Subsequently, Ofcom opened an investigation on 2 December 2020 to examine whether there were reasonable grounds to believe that Sky failed to comply with the obligation to provide EoCNs. Ofcom sent an information request to Sky under section 135 and Sky responded.
28. Following the investigation, on 14 May 2021 Ofcom issued a section 96A notification to Sky (the “Notification”) provisionally deciding that Sky’s pay TV services fall within the definition of ECSs and there were reasonable grounds for believing that Sky contravened and continued to contravene the General Conditions by failing to send EoCNs to customers of its pay TV services.
29. Sky made written and oral representations to Ofcom in response to the Notification, in July and October 2021 respectively, as summarised in paragraph 73 below.
30. On 19 August 2022 Ofcom issued the Decision. On 18 October 2022 Sky filed its NoA.

## C. LEGAL FRAMEWORK

31. The parties agree that, pursuant to sections 1B, 2 and 6 to 7 of the European Union (Withdrawal) Act 2018, EU instruments and case law remain relevant to the interpretation of certain provisions of the 2003 Act and, in particular, section 32. It is common ground that section 32 must be construed consistently with the meaning, in EU law, of an ECS. Accordingly, we set out first the EU Directives upon which the 2003 Act are based before turning to the substantive provisions of the 2003 Act, which are relevant to this appeal, and then consider relevant EU case law. After that, we shall return to the 2003 Act to outline the powers which it confers on Ofcom, and on the Tribunal as regards this appeal.

### (1) The regulation of ECNs and ECSs

32. ECNs and ECSs are regulated in the UK by Ofcom, pursuant to powers conferred by the 2003 Act. The current legislation reflects the underlying framework that has developed over time at the EU and UK level.

#### (a) *EU Directives*

##### (i) The initial regime: 2002

33. The EU Common Regulatory Framework comprised five specific Directives, which included Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (as amended<sup>7</sup>) (the “Framework Directive”).<sup>8</sup>

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<sup>7</sup> The Framework Directive was amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, which required that such amendments were to be transposed and applied in national law from 26 May 2011.

<sup>8</sup> The other four specific Directives were: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (the “Authorisation Directive”); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (the “Universal Service Directive”); and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

34. Recital (5) to the Framework Directive provided as follows:

“The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: [Authorisation Directive], [Access Directive], [Universal Service Directive], Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, (hereinafter referred to as ‘the Specific Directives’). It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.”

(emphasis added)

35. Article 1(1) of the Framework Directive provided that its scope and aim were to establish a harmonised framework for the regulation of ECSs and ECNs as follows:

“This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services, and certain aspects of terminal equipment to facilitate access for disabled users. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.”

36. Article 2 of the Framework Directive contained the following relevant definitions:

“For the purposes of this Directive:

- (a) ‘electronic communications network’ means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose

of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

...

- (c) ‘electronic communications service’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

...

- (ea) ‘associated services’ means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence service;

...

- (f) ‘conditional access system’ means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation;”

(emphasis added)

37. The approach of using a single definition of all ECSs and ECNs due to the convergence phenomenon, rather than the use of focused regulation of specific sectors such as telephony or telecommunications, is reflected also in Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (the “Competition Directive”), which provides at recital (7) that:

“This Directive makes reference to ‘electronic communications services’ and ‘electronic communications networks’ rather than the previously used terms ‘telecommunications services’ and ‘telecommunications networks’. These new definitions are indispensable in order to take account of the convergence phenomenon by bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks). Thus, the transmission and broadcasting of radio and television programmes should be recognised as

an electronic communication service and networks used for such transmission and broadcasting should likewise be recognised as electronic communications networks. Furthermore, it should be made clear that the new definition of electronic communications networks also covers fibre networks which enable third parties, using their own switching or routing equipment, to convey signals.” (emphasis added)

(ii) The Code: 2018

38. In 2018, the Framework Directive, the Authorisation Directive, the Access Directive and the Universal Service Directive were recast, in the interests of clarity, in Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the “EECC”): see recital (1).

39. Recital (7) (which largely repeats recital (5) to the Framework Directive) and recitals (11), (15) and (283) to the EECC set out important background as follows:

“(7) The convergence of the telecommunications, media and information technology sectors means that all electronic communications networks and services should be covered to the extent possible by a single European electronic communications code established by means of a single Directive, with the exception of matters better dealt with through directly applicable rules established by means of regulations. It is necessary to separate the regulation of electronic communications networks and services from the regulation of content. Therefore, this Directive does not cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is without prejudice to measures taken at Union or national level in respect of such services, in accordance with Union law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. ...

...

(11) The same undertaking, for example a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on such an undertaking in relation to its activity as a content provider or distributor, in accordance with provisions other than those of this Directive, without prejudice to the conditions laid in an annex to this Directive.

...

(15) The services used for communications purposes, and the technical means of their delivery, have evolved considerably. End-users increasingly substitute traditional voice telephony, text messages (SMS) and electronic mail conveyance services by functionally equivalent online services such as Voice over IP, messaging services and web-based e-mail services. In order to ensure that end-users and their rights are effectively and equally protected when using functionally equivalent services, a future-oriented definition of electronic communications services should not be purely based on technical parameters but rather build on a functional approach. The scope of necessary regulation should be appropriate to achieve its public interest objectives. While ‘conveyance of signals’ remains an important parameter for determining the services falling into the scope of this Directive, the definition should cover also other services that enable communication. From an end-user’s perspective it is not relevant whether a provider conveys signals itself or whether the communication is delivered via an internet access service. The definition of electronic communications services should therefore contain three types of services which may partly overlap, that is to say internet access services as defined in point (2) of Article 2 of Regulation (EU) 2015/2120 of the European Parliament and of the Council, interpersonal communications services as defined in this Directive, and services consisting wholly or mainly in the conveyance of signals. The definition of electronic communications service should eliminate ambiguities observed in the implementation of the definition as it existed prior to the adoption of this Directive and allow a calibrated provision-by-provision application of the specific rights and obligations contained in the framework to the different types of services. The processing of personal data by electronic communications services, whether as remuneration or otherwise, should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council.

...

(283) Bundles comprising at least either an internet access service or a publicly available number-based interpersonal communications service, as well as other services, such as publicly available number-independent interpersonal communications services, linear broadcasting and machine-to-machine services, or terminal equipment, have become increasingly widespread and are an important element of competition. For the purposes of this Directive, a bundle should be considered to exist in situations where the elements of the bundle are provided or sold by the same provider under the same or a closely related or linked contract. While bundles often bring about benefits for consumers, they can make switching more difficult or costly and raise risks of contractual ‘lock-in’. Where different services and terminal equipment within a bundle are subject to divergent rules on contract termination and switching or on contractual commitments regarding the acquisition of terminal equipment, consumers are effectively hampered in their rights under this Directive to switch to competitive offers for the entire bundle or parts of it. Certain essential provisions of this Directive regarding contract summary information, transparency, contract duration and termination and switching should, therefore, apply to all elements of a bundle, including terminal equipment, other services such as digital content or digital services, and



electronic communications services which are not directly covered by the scope of those provisions. All end-user obligations applicable under this Directive to a given electronic communications service when provided or sold as a stand-alone service should also be applicable when it is part of a bundle with at least an internet access service or a publicly available number-based interpersonal communications service. Other contractual issues, such as the remedies applicable in the event of non-conformity with the contract, should be governed by the rules applicable to the respective element of the bundle, for instance by the rules of contracts for the sales of goods or for the supply of digital content. However, a right to terminate any element of a bundle comprising at least an internet access service or a publicly available number-based interpersonal communications service before the end of the agreed contract term because of a lack of conformity or a failure to supply should give a consumer the right to terminate all elements of the bundle. Also, in order to maintain their capacity to switch easily providers, consumers should not be locked in with a provider by means of a contractual de facto extension of the initial contract period.”

(emphasis added)

40. Recitals (260), (265), (273) and (277) to the EECC set out a number of consumer protection and pro-competitive objectives of the EECC, and in particular in relation to the provision of information in relation to termination and the ability to switch providers.
41. Article 2 of the EECC contains the following relevant definitions of ECN, ECS and other terms:

“For the purposes of this Directive, the following definitions apply:

- (1) ‘electronic communications network’ means transmission systems, whether or not based on a permanent infrastructure or centralised administration capacity, and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

...

- (4) ‘electronic communications service’ means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:

- (a) ‘internet access service’ as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;
- (b) interpersonal communications service; and
- (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting;

...

(10) ‘associated facilities’ means associated services, physical infrastructures and other facilities or elements associated with an electronic communications network or an electronic communications service which enable or support the provision of services via that network or service, or have the potential to do so, and include buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets;

(11) ‘associated service’ means a service associated with an electronic communications network or an electronic communications service which enables or supports the provision, self-provision or automated-provision of services via that network or service, or has the potential to do so, and includes number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides (EPGs), as well as other services such as identity, location and presence service;

(12) ‘conditional access system’ means any technical measure, authentication system and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or another form of prior individual authorisation;” (emphasis added)

42. Article 105 of the EECC makes provision for end-user rights in respect of contract duration and termination, providing in particular for a right to EoCNs. Article 107 applies those provisions to “bundled offers” in accordance with aims set out in recital (283), i.e. where a bundle of services comprises at least an internet access service or a number-based interpersonal communications service, those provisions apply to all elements of the bundle including those which otherwise would not be covered by the provisions.

43. Further, at the Hearing, Sky referred to Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (the “Digital Directive”), which post-dates the EECC. Recitals (31) and (33) to the Digital Directive state as follows:

- “(31) This Directive should not apply to digital content or a digital service that is provided to a public audience as part of an artistic performance or other event, such as a digital cinematographic projection or an audiovisual theatrical performance. However, this Directive should apply if digital content or a digital service is provided to a public audience by signal transmission such as digital television services.
- (33) Digital content or digital services are often combined with the provision of goods or other services and offered to the consumer within the same contract comprising a bundle of different elements, such as the provision of digital television and the purchase of electronic equipment. In such cases, the contract between the consumer and the trader includes elements of a contract for the supply of digital content or a digital service, but also elements of other contract types, such as sale of goods or services contracts. This Directive should only apply to the elements of the overall contract that consist of the supply of digital content or digital services. The other elements of the contract should be governed by the rules applicable to those contracts under national law or, as applicable, other Union law governing a specific sector or subject matter. Likewise, any effects that the termination of one element of the bundle contract could have on the other elements of that bundle contract should be governed by national law. However, in order to ensure consistency with the sector-specific provisions of [the EECC] regulating bundle contracts, where a trader offers, within the meaning of that Directive, digital content or a digital service in combination with a number-based interpersonal communications service or an internet access service, the provisions of this Directive on the modification of digital content should not apply to the digital content or digital service element of the bundle. The relevant provisions of [the EECC] should instead apply to all elements of the bundle, including the digital content or digital service. (emphasis added)

44. Articles 2(1), 2(2), 3(1) and 3(5)(b) provide the following definitions and scope for the Digital Directive:

“*Article 2*

**Definitions**

For the purposes of this Directive, the following definitions apply:

- (1) ‘digital content’ means data which are produced and supplied in digital form;
- (2) ‘digital service’ means:
  - (a) a service that allows the consumer to create, process, store or access data in digital form; or
  - (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service;

...

*Article 3*

**Scope**

1. This Directive shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.

This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.

...

5. This Directive shall not apply to contracts regarding:

(a) ...

(b) electronic communications services as defined in point (4) of Article 2 of [the EECC], with the exception of number-independent interpersonal communications services as defined in point (7) of Article 2 of that Directive; (emphasis added)

**(b) The 2003 Act**

45. The relevant provisions of the then Framework Directive, and subsequently the EECC, have been given effect in the UK by the 2003 Act. In particular, following the recasting of the Framework Directive and other specific Directives in the EECC, section 32 in Part 2 of the 2003 Act was amended,<sup>9</sup> with effect from 21 December 2020, to read (in so far as relevant to this appeal):

**“Meaning of electronic communications networks and services**

(1) In this Act “electronic communications network” means—

(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—

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<sup>9</sup> Section 32(2) was amended and section 32(2A) was inserted by paragraph 6 of Schedule 1 to the Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020 (S.I. 2020 No. 1419) (“the 2020 Regulations”). The remainder of section 32 was not amended.

- (i) apparatus comprised in the system;
- (ii) apparatus used for the switching or routing of the signals;
- (iii) software and stored data; and
- (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active.

(2) In this Act “electronic communications service” means a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, except so far as it is a content service.

(2A) Those types of service are—

- (a) an internet access service;
- (b) a number-based interpersonal communications service; and
- (c) any other service consisting in, or having as its principal feature, the conveyance of signals, such as a transmission service used for machine-to-machine services or for broadcasting.

...

(7) In subsection (2) “a content service” means so much of any service as consists in one or both of the following—

- (a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;
- (b) the exercise of editorial control over the contents of signals conveyed by means of a such a network.

(8) In this section references to the conveyance of signals include references to the transmission or routing of signals or of parts of signals and to the broadcasting of signals for general reception.

...” (emphasis added)

46. The Explanatory Memorandum to the 2020 Regulations (at paragraph 6.4) referred to, inter alia, the consumer protection objectives of the EECC and (at paragraph 7.28) explained the recast definition of ECS in section 32, noting that it did not alter the class of services included within the scope of the 2003 Act.
47. Prior to the amendment of section 32(2) and insertion of section 32(2A) (i.e. before the implementation of the EECC in domestic law), the pre-21 December 2020 version of section 32(2) read as follows:

“In this Act “electronic communications service” means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.”

48. It is common ground that the section 32(2A) formulation for the definition of an ECS which reads “consisting in or having as *its principal feature*, the conveyance of signals” is to be interpreted consistently with the formulation for the definition of an ECS at Article 2(c) of the Framework Directive and Article 2(4)(c) of the EECC, which respectively read “[consists/consisting] *wholly or mainly* in the conveyance of signals”. It is further common ground that nothing in Sky’s appeal turns on the change of definition of ECS in the amended 2003 Act.

**(c) Case law**

49. We were referred by the parties to a number of judgments of the European Court of Justice (“CJEU”). Of these, Case C-518/11 *UPC Nederland BV v Gemeente Hilversum* (EU:C:2013:709) (“*UPC Nederland*”) and Case C-475/12 *UPC DTH Sàrl v Nemzeti Média- és Hírközlési Hatóság Elnökhelyettese* (EU:C:2014:285) (“*UPC DTH*”) are the most relevant to this appeal.
50. *UPC Nederland* was decided on 7 November 2013 and was a preliminary ruling concerning the interpretation of, amongst other things, the meaning of ECS under Article 2(c) of the Framework Directive. UPC operated a cable television network in the municipality of Hilversum in the Netherlands. When UPC sought to increase the tariff for its basic cable package for all households in Hilversum, the municipality of Hilversum brought an application before the Dutch courts seeking to prohibit UPC from proceeding with the planned tariff increase. Following a series of appeals, a reference was made to the CJEU for a preliminary ruling.
51. One of the questions referred to the CJEU was whether a service consisting of the supply of a basic cable package, for the delivery of which both transmission costs and an amount relating to (charges for) payments made to broadcasters and copyright collecting societies in connection with the transmission of programme content are charged, fell within the scope of the (then) new

regulatory framework (“NRF”) applicable to ECSs,<sup>10</sup> which was established by, *inter alia*, the Framework Directive: see *UPC Nederland* at paragraphs 34 and 35.

52. The CJEU held that, in so far as the supply of a basic package of radio and television programmes via cable entailed primarily the transmission of television content on the cable distribution network to the receiving terminal of the final customer, the supply of such basic packages fell within the definition of an ECS and, consequently, fell within the substantive scope of the Framework Directive and the NRF.
53. In its reasoning at paragraphs 36 to 39 of its judgment, the CJEU reproduced, and effectively adopted, the terms of Article 2(a) and (c) of the Framework Directive, recital (5) to the Framework Directive and recital (7) to the Competition Directive, stating that all transmission networks and services should be covered by a single regulatory framework, that it is necessary to separate the regulation of transmission from the regulation of content, that the NRF did not cover the content of services delivered over ECNs using ECSs and that transmission and broadcasting of radio and television should be recognised as an ECS.
54. In paragraphs 41 to 44, the CJEU set out its reasoning leading to its conclusion (as set out in paragraph 52 above). In the course of doing so, it drew a distinction between the production of content and the transmission of content.

“41 It follows from the foregoing that, as the Advocate General observed in point 33 of his Opinion, the relevant directives, in particular the Framework Directive, the Competition Directive and the Audiovisual Media Services Directive, make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. Content and transmission are covered by different measures which pursue their own specific objectives, without referring to customers of the services supplied or to the structure of the transmission costs charged to them.

42 In the present case, it is apparent from the order for reference and the written and oral submissions made before the Court that UPC’s principal

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<sup>10</sup> The NRF referred to in *UPC Nederland* was the EU Common Regulatory Framework, as described at paragraph 33 and footnotes 7 and 8 above.

business is the transmission of radio and television programmes via cable to its subscriber customers. UPC confirmed at the hearing before the Court that it does not produce those programmes itself and that it does not exercise any editorial responsibility over their content.

- 43 Although UPC’s customers take out a subscription for the purposes of gaining access to the basic cable package offered by that company, that does not mean that UPC’s business, which consists in broadcasting programmes produced by the content editors (in this case radio and television channels) by transmitting those programmes to the connection point of its cable network in its subscribers’ homes, must be excluded from the definition of ‘electronic communications service’ within the meaning of Article 2(c) of the Framework Directive and, consequently, from the scope of the NRF.
- 44 On the contrary, it follows from the observations made in paragraphs 36 to 41 above that the provision of a basic cable package falls within the definition of electronic communications service and, therefore, the substantive scope of the NRF, in so far as that service includes the conveyance of signals on the cable network.” (emphasis added)
55. The CJEU concluded by observing (at paragraph 45) that “the exclusion of the activities of an undertaking such as UPC from its scope, on the pretext that it does not restrict itself to conveying signals, would deprive the NRF of all meaning” and further (at paragraph 46) that the fact that its transmission costs charged to subscribers incorporated payments to broadcasting channels and royalties “cannot preclude the service supplied by UPC from being characterised as an” ECS.
56. In *UPC DTH*, UPC DTH was a company registered in Luxembourg which supplied, from Luxembourg, to subscribers resident in other EU Member States, packages of radio and audio-visual broadcast services that were subject to conditional access and which could be received by satellite. UPC DTH did not own the satellite infrastructure and used the services of third parties. It also did not produce the radio and television programmes it broadcast and did not exercise any editorial control over the content of those programmes. The price which users of the service were charged included not only the broadcasting costs but also fees paid to radio stations and collecting societies in connection with the publication of their content.
57. In a preliminary ruling given on 30 April 2014, the CJEU decided that a service consisting in the supply, for consideration, of conditional access to a package of programmes, which contained radio and television broadcast services and was



retransmitted by satellite, fell within the definition of ECS under Article 2(c) of the Framework Directive. In its reasoning, the CJEU relied at paragraphs 34 to 38 of its judgment on *UPC Nederland*. It then explained at paragraphs 41 to 43 why, even though UPC DTH did not itself transmit the package of programmes, its service was an ECS and, therefore, fell within the scope of the NRF.

“41 ... as is apparent from Article 2(a) and (c) of the Framework Directive, the fact that the conveyance of signals on electronic communications networks is effected by cable or by satellite infrastructure is in no way decisive for the purposes of the interpretation of ‘electronic communications service’ within the meaning of that provision.

42 However, [UPC DTH] argues that it does not supply an electronic communications service within the meaning of Article 2(c) of the Framework Directive, since it does not transmit any signal and does not have an electronic communications network, that is to say, satellite infrastructure. For that purpose it calls on the services of, and systems belonging to, third parties.

43 In that regard, it must be noted that the fact that the transmission of signals is by means of an infrastructure that does not belong to [UPC DTH] is of no relevance to the classification of the nature of the service. All that matters in that regard is that [UPC DTH] is responsible vis-à-vis the end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed.”

58. At paragraphs 45 to 53, the CJEU went on to address the fact that UPC DTH’s service was subject to conditional access. It held that it was nonetheless an ECS and, thus, fell within the scope of the NRF.

“45 While the interpretation given by the Court in *UPC Nederland* enables an answer to be given to the question of the classification, under the NRF, of the service supplied by [UPC DTH], it must nevertheless be noted that that service is subject to conditional access, since [UPC DTH’s] subscribers’ access to programmes broadcast by satellite is subject to prior decryption.

46 That aspect caused the referring court to query whether the service supplied by [UPC DTH] should be regarded as a ‘conditional access system’ within the meaning of Article 2(f) of the Framework Directive, instead of as an electronic communications service within the meaning of Article 2(c) of that directive.

47 As the Advocate General stated in point 43 of her Opinion, that doubt on the part of the referring court seems to be founded on the premiss that an electronic communications service and a conditional access system are mutually exclusive.

48 That premiss is incorrect.

- 49 It should be borne in mind that Article 2(f) of the Framework Directive defines ‘conditional access system’ within the meaning of that provision as ‘any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation’.
- 50 It follows from that provision that a conditional access system constitutes a means of access to a radio or television service and presupposes that a technical system is put in place the purpose of which is to limit access to that service to persons who have a subscription with the service provider. However, a conditional access system does not, by itself, enable access to be given to a radio or television service. Such access still depends on the transmission of signals by the electronic communications network.
- 51 The operation of a conditional access system is therefore directly linked to the provision of the protected service. In any situation in which the operator of the conditional access system is simultaneously the provider of the radio or television programme broadcasting service, which appears to be the case in the main proceedings, the service is a unified service in which the supply of the radio or television service is the core element of the activity carried out by that operator, the conditional access system being the ancillary element.
- 52 In view of its ancillary nature, a conditional access system may be attached to an electronic communications service for the broadcasting of radio or television programmes, without that service losing the status of an electronic communications service.
- 53 That conclusion is reinforced by Article 2(ea) of the Framework Directive, according to which conditional access systems are services associated with an electronic communications network and/or an electronic communications service which enable the provision of services via that network and/or service.”

(emphasis added)

## **(2) Powers conferred by the 2003 Act**

### ***(a) Ofcom’s powers to set conditions and to regulate***

59. Sections 45 and 46 in Part 2 of the 2003 Act confer powers on Ofcom to set general conditions on persons providing an ECN or ECS and require their compliance. Section 45 provides that Ofcom may set general conditions which contain provisions authorised or required by one or more of sections 51, 52, 57, 58 or 64. Under section 51(1)(a), Ofcom may set General Conditions making such provision as it considers appropriate for the purpose of protecting the interests of end-users of public electronic communications services. Section 51(2) sets out a non-exhaustive list of specific types of general

conditions that Ofcom may set in pursuance of this purpose. This includes (at section 51(2)(d)) the ability to require the provision of information, specified by Ofcom, to end-users free of charge and (at section 51(2)(ba) to set conditions relating “to any of the elements of a bundled contract”. Section 51(8) and (9) define “bundled contract” and “content service” as follows.

**“51.— Matters to which general conditions may relate**

...

(8) In this Chapter “bundled contract” means a contract, or two or more closely related or linked contracts, between the provider of a public electronic communications service and a qualifying end-user, which—

(a) relates, or together relate, to the provision of at least one of the following—

(i) an internet access service; and

(ii) a number-based interpersonal communications service; and

(b) also relates, or together also relate, to the provision of at least one of the following—

(i) another service falling within paragraph (a)(i) or (ii);

(ii) any other public electronic communications service;

(iii) an information society service;

(iv) a content service; and

(v) terminal equipment.

(9) In subsection (8)—

“content service” has the meaning given by section 32(7);

...”

60. The new General Conditions that require providers to send EoCNs to residential and business customers, as contained in General Condition C1.21 to C1.29 are summarised at paragraph 23 above.

**(b) Ofcom’s powers of enforcement**

61. Part 2 of the 2003 Act also confers on Ofcom powers of enforcement. Section 96A allows Ofcom to issue a notification where it has determined that

there are reasonable grounds for believing that a person is contravening, or has contravened, a general condition, while section 96C allows Ofcom to enforce such notifications in the form of a confirmation decision, which may require immediate action including the payment of a penalty. Sections 96A and 96C provide, so far as material, as follows:

**“96A.— Notification of contravention of condition other than SMP apparatus condition**

(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition (other than an SMP apparatus condition) set under section 45, they may give that person a notification under this section.

(2) A notification under this section is one which—

- (a) sets out the determination made by OFCOM;
- (b) specifies the condition and contravention in respect of which that determination has been made;
- (c) specifies the period during which the person notified has an opportunity to make representations;
- (d) specifies the steps that OFCOM think should be taken by the person in order to—
  - (i) comply with the condition;
  - (ii) remedy the consequences of the contravention;
- (e) specifies any penalty which OFCOM are minded to impose in accordance with section 96B;

...

...

**96C.— Enforcement of notification under section 96A**

(1) This section applies where—

- (a) a person has been given a notification under section 96A;
- (b) OFCOM have allowed the person an opportunity to make representations about the matters notified; and
- (c) the period allowed for the making of representations has expired.

(2) OFCOM may—

- (a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 96A; or
  - (b) inform the person that they are satisfied with the person's representations and that no further action will be taken.
- (3) OFCOM may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition or commitment specified in the notification under section 96A.
- (4) A confirmation decision—
- (a) must be given to the person without delay;
  - (b) must include reasons for the decision;
  - (c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d), or may specify a period within which the person must comply with those requirements; and
  - (d) may require the person to pay—
    - (i) the penalty specified in the notification under section 96A, or
    - (ii) such lesser penalty as OFCOM consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or commitment or to remedy the consequences of the contravention, and

may specify the period within which the penalty is to be paid.
- (5) It is the duty of the person to comply with any requirement imposed by a confirmation decision.
- ...”

62. The Decision under appeal in these proceedings was made by Ofcom pursuant to its section 96C power.

***(c) Appeals to the Tribunal and powers to review and grant remedies***

63. Pursuant to section 192, a person who is affected by a decision made by Ofcom pursuant to Part 2 of the 2003 Act may appeal against it to the Tribunal. By section 194A, the Tribunal must determine such appeals by reference to the grounds set out in an appellant’s notice of appeal and by applying the same principles as would be applied by a court on an application for judicial review. By section 194A(3) the Tribunal may dismiss the appeal or quash it in whole or

in part. Where the Tribunal quashes the decision, it may remit the matter back to the decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.

#### **D. THE DECISION**

64. The Decision is a 64-page document, including two Annexes. The first 53 pages comprise Ofcom's explanatory statement, itself divided into 8 sections ("the Explanatory Statement"). It includes a factual summary of Sky's pay TV services (Section 2), the legal framework (setting out most of what is set out above) (Section 3), a summary of the submissions made by Sky to Ofcom, prior to and during the investigation, and the latter's engagement with Sky's submissions (Section 5), and Ofcom's application of Condition C1 of the General Conditions to Sky's pay TV services (Section 6). Section 6 contains Ofcom's substantive reasoning for the Decision. Sections 7 and 8 address, respectively, Sky's failure to comply with the obligation to provide EoCNs and remedies. The Explanatory Statement accompanies and is followed by Annex A1, which comprises the section 96C confirmation decision given by Ofcom to Sky ("the Confirmation Decision"). Annex A2 sets out extracts of Sky's pay TV contracts.

65. By paragraph A1.18 the Decision directs that Sky must take all necessary steps to comply with the EoCN requirements in Condition C1.21 to C1.29 in relation to subscribers to the Sky Pay TV service (as defined in paragraph A1.19).

66. In the following paragraphs we refer to those parts of the Decision which are relevant to the determination of this appeal.

##### **(1) The Explanatory Statement**

###### ***(a) Factual and policy background***

67. Paragraph 2.3 of the Decision describes the range of pay TV services provided by Sky, as described in paragraph 6 above, and makes clear that the Decision concerns only the Sky Pay TV service. At paragraph 2.4 the Decision notes that

services which rely at least in part on satellite transmission remain the largest part of Sky's pay TV business. Sky is also by far the largest operator in the traditional pay TV market, and it faces increasing competition in the video-on-demand market from providers of OTT services. At paragraph 2.5, Sky's description of the seven elements of the Sky Pay TV service is set out: see paragraph 9 above. Paragraph 2.6 of the Decision explains the contract which subscribers for the Sky Pay TV service enter into with Sky: see paragraph 12 above.

68. In section 3 of the Decision, Ofcom describes in detail the legal framework, setting out the definitions of ECN and ECS in the 2003 Act, the Framework Directive and the EECC. In particular, at paragraph 3.5, Ofcom states that the definition of ECS in the 2003 Act draws a specific distinction between content services and ECS, relying expressly on the definition of content service in section 32(7). At paragraphs 3.15 and 3.16, Ofcom emphasises the feature of parallel regulation of ECS and content services, citing recital (11) to the EECC. The remainder of section 3 of the Decision describes the rights of end-users in the EECC and under the General Conditions.

***(b) Sky's submissions to Ofcom***

69. The Decision outlines at paragraphs 5.9 to 5.15 and 5.20 the submissions made by Sky in the March 2020 Submissions and in its responses to the Notification: (see also paragraphs 26 to 29 above).
70. In summary, Sky contended (in the March 2020 Submissions) that the Sky Pay TV service is not an ECS because either it is a content service and/or it does not consist wholly or mainly in the conveyance of signals. Therefore, the Sky Pay TV service is outside the scope of application of the new General Conditions contained in Condition C1. (Decision paragraph 5.10.)
71. In particular, Sky submitted that the Sky Pay TV service includes Sky's own content, over which it exercises editorial control, and the Sky Pay TV service cannot properly be described as consisting wholly or mainly in the conveyance of signals. Instead, Sky is a 'unified service' comprising several elements and

transmission is only a relatively minor element of that service. Sky supported this by providing the expenditure figures set out in paragraph 11 above. (Decision paragraph 5.11 and footnote 85.)

72. Further, Sky submitted that treating the Sky Pay TV service as an ECS was likely to lead to a significant distortion of competition between regulated traditional pay TV services and unregulated OTT pay TV services. (Decision paragraph 5.15.)

73. Sky's written and oral representations following the Notification are summarised at paragraph 5.20 of the Decision, as follows:

(1) Ofcom had applied the wrong legal test and Ofcom did not find that Sky TV consists wholly or mainly in the conveyance of signals on an ECN;

(2) Ofcom was wrong to disaggregate Sky's content and transmission services and not look at the Sky Pay TV service as "a unified service";

(3) Ofcom failed to give proper effect to the fact that the Sky Pay TV service is primarily a content service;

(4) It would be unfair and a breach of the principle of equal treatment for Ofcom to regulate the Sky Pay TV service while not regulating Sky's OTT competitors;

(5) Ofcom's proposed remedy in the Notification did not align with the identified breach of the General Conditions; and

(6) The implementation period proposed in the Notification was inadequate, unfair and discriminatory.

(c) *Ofcom's application of the General Conditions to the Sky Pay TV service*

74. Section 6 of the Decision, running to over 16 pages, contains the substantive reasoning of Ofcom for its finding that the Sky Pay TV service is an ECS. It



sets out the services provided by Sky to which Ofcom considers that the obligation to provide EoCNs apply, the basis for Ofcom's conclusion that the obligation applies to the Sky Pay TV service and why Ofcom has rejected Sky's submissions. In particular, paragraph 6.3 (a) and (b) states as follows:

- “(a) We start by explaining, by reference to the relevant legislation and caselaw, that pay TV services fall within the definition of ECS insofar as they include a transmission element which meets the definition set out in the Act and the General Conditions;
- (b) We then go on to explain that a pay TV service may include both content and transmission services. The relevant legislation carves out content services as an exception from the types of services which may fall within the definition of an ECS. Where a package of services includes both elements of content and transmission, the correct approach is to apply content regulation to the content part and transmission regulation to the transmission part;”
- (i) Ofcom's analysis of relevant legislation and case law

75. Under the heading “Pay TV services are ECS insofar as they include a transmission service”, the Decision continues as follows:

- “6.4 Ofcom's position is that pay TV services fall within the definition of ECS insofar as they include a transmission element which meets the definition set out in the Act and the General Conditions.
- 6.5 The terms PECS [i.e. public electronic communications service] and ECS, as defined in the Act and General Conditions, reflect the terms used in the Framework Directive and the EECC Directive. The definition of ECS in the Framework Directive and the EECC Directive, and the recitals to the Directives set out in section 2 above, show that “*transmission services in networks used for broadcasting*” [Article 2(c)] or, in the EECC Directive, “*transmission services used ... for broadcasting*” [Article 2(4)(c)] (“broadcasting transmission services”) and, in particular, “*the transmission and broadcasting of radio and television programmes*” [Recital (7) Competition Directive] in cable television and satellite networks are properly to be considered ECS. This reflects the convergence between the telecommunications, media and information technology sectors and is thus in keeping with the objectives of the regulatory framework, as set out above.
- 6.6 The 2002 regulatory framework introduced new terminology to reflect convergence between the telecommunications and media sectors. The intention was to separate regulation of transmission from regulation of content and create a single regime which applied to all transmission services, including telecommunications and broadcast transmission services. We address the parallel regulation of content in the next section, at paragraphs 6.10 to 6.19 below.

- 6.7 Insofar as a pay TV service includes a means of transmitting the content to the end-user over an ECN, that transmission service is susceptible to regulation as an ECS.”
76. At paragraph 6.8, Ofcom relies also on *UPC Nederland* and *UPC DTH*, which considered the issue of whether pay TV services constituted ECSs as defined in the Framework Directive. According to Ofcom, the CJEU was clear that a pay TV service should be classified as an ECS in so far as it involves the conveyance of signals over an ECN where the provider is responsible vis-à-vis end-users for transmission of the signal, ensuring that they are supplied with the service to which they have subscribed. The fact that the transmission element of the service is classified as an ECS, however, does not exempt the transmitted content from regulation as both frameworks apply in parallel, with ECSs and content governed by the respective rules.
77. The Decision, under the next heading “The services provided by a pay TV provider may include both an ECS and a content service, and each service may be subject to relevant regulation”, continues as follows:
- “6.10 Where a package of services includes both elements of content and transmission, Ofcom considers that the correct approach is to apply content regulation to the content part and transmission regulation to the transmission part. Ofcom does not consider it correct to apply an either/or approach, which proceeds on the assumption that if the service is a content service it cannot be an ECS, and if it is an ECS it cannot be a content service.
- 6.11 As outlined at paragraphs 3.3 to 3.5 above, ‘Content services’ are excluded from the definition of ECS: “...*“electronic communications service” means a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, **except so far as it is a content service***” (emphasis added). A content service, as defined in the Act, is “*so much of any service*” as consists in either “*the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network*” and/or “*the exercise of editorial control over the contents of signals conveyed by means of a such a network*”. Content services were not defined in the Framework Directive or the EECC Directive, but the definitions of ECS incorporated an exclusion in relation to content services along similar lines.” (emphasis in the original)
78. The Decision continues at paragraphs 6.12 and 6.13 that both the Authorisation Directive and the EECC make clear that the same service provider can provide both transmission services and content services simultaneously, alongside one

another. Where that is the case, content regulation applies to the production of content and transmission regulation applies to its transmission. This applies even where the transmission service and content service(s) are provided to the end-user together as part of a package or bundle of services, as confirmed by the CJEU in *UPC Nederland*.

79. Applying the relevant legislation and case law, Ofcom considers that there is no requirement to classify a pay TV provider's service as either an ECS or a content service in its entirety. Both may be elements of a bundle or package of services and, insofar as they are ECSs, they may be governed by the relevant legal and regulatory framework, including the General Conditions. (Decision paragraph 6.18.)

80. Concluding this section of the Decision, paragraph 6.19 states:

“Thus, in summary, Ofcom's position is, in principle, that:

(a) A broadcasting transmission service is the means by which content is delivered to the consumer. The overall service or package of services provided to the consumer may include both a content service and a transmission service. These are not mutually exclusive categories – in that, the overall service or package of services need not be classified as either one or the other, but can encompass both elements. The relevant elements are susceptible to content regulation insofar as they comprise a content service, and to regulation as an ECS insofar as they are a transmission service, with both regulatory frameworks applying in parallel where appropriate.

(b) Ofcom therefore has the power to regulate a pay TV service provided to an end-user as an ECS insofar as there is a service, or an element of a bundled service, which consists wholly or mainly or primarily in the conveyance of signals on an ECN. As noted in the [May] 2019 Statement (and above, at paragraph 5.3), whether a particular pay TV service falls within that scope will depend on the specific nature of the service in question, and the specific circumstances under which it is provided, which should be assessed on a case-by-case basis.”

(ii) Ofcom's assessment of the Sky Pay TV service

81. At paragraphs 6.20 to 6.34 the Decision sets out Ofcom's position on the application of the General Conditions to Sky's services and why it considers that the transmission services which deliver the Sky Pay TV service constitute an ECS.

82. First, under the sub-heading “Pay TV services provided by Sky”, the Decision states as follows:

“6.20 Sky has described Sky TV as a ‘unified’ service consisting of the provision of TV content to consumers on a subscription basis, including Sky’s own content, linear TV channels licensed from third parties, and content provided on-demand. The service also encompasses a range of other elements, including hardware, software, conditional access, customer service, installation and repair services and transmission of content.

6.21 The channels and content available via Sky TV are provided to its customers by a variety of different means. It can be delivered by satellite, broadband and mobile networks. Sky stated that it “*does not transmit, nor is it responsible for the transmission of, all the content delivered to Sky TV subscribers.*” Sky told us it transmits [...] of the third party channels available on Sky TV, with the broadcasters of [...] channels making their own arrangements for transmission. Where content is not delivered by satellite, for example on-demand content downloaded to the set top box over the open internet, the content is transmitted by the customer’s internet access service provider.

6.22 Nevertheless, for Sky’s wholly-owned channels (which Sky itself describes as being “at the heart of Sky TV”), transmission of the content shown on those channels is provided by Sky and transmitted over Sky’s satellite transmission network. Sky is responsible for ensuring that transmission of these channels to the end-users subscribed to them is effective. Specifically, the content is transmitted via a satellite uplink and downlink to the satellite dish at the subscriber’s premises, and from there via wiring to the Sky set-top box. In addition, Sky also provides transmission for many of the third-party channels that are carried on Sky TV, comprising over [...] channels.

6.23 For the reasons explained below, in Ofcom’s view, the transmission services which deliver Sky’s pay TV services (whether via Sky’s own infrastructure or a third party’s) constitute an ECS to which the obligation to provide end-of-contract notifications applies.”

83. Then, after confirming that Sky’s OTT services do not fall within the scope of ECS, the Decision continues as follows:

**“Sky provides, *inter alia*, ECS and content services**

6.25 For the reasons explained at paragraphs 6.10 to 6.18 above, Ofcom is not required to classify Sky’s pay TV services as either an ECS or a content service in its entirety. Both are elements of its bundle of services and, insofar as they are ECS, they are governed by the relevant legal and regulatory framework, including the General Conditions set by Ofcom. As noted at paragraph 6.19 above, insofar as a pay TV service includes a means of transmitting the content to the end-user

over an ECN, that transmission service is susceptible to regulation as an ECS.”

84. At paragraph 6.26, Ofcom considers that Sky’s satellite transmission network constitutes a transmission system for the conveyance of signals by use of electrical, magnetic or electro-magnetic energy and thus constitutes an ECN.

85. Ofcom’s conclusions are then stated at paragraphs 6.28 to 6.31 as follows:

“6.28 Sky is therefore responsible vis-à-vis its subscribers for transmission of the signal which ensures that they are supplied with the Sky pay TV services to which they have subscribed. Even if the transmission of these signals is by means of an infrastructure that does not belong to Sky, *UPC DTH* makes clear that this is of no relevance.

6.29 The transmission service provided by Sky to its subscribers constitutes an ECS: it is a service which has as its principal feature, or it consists wholly or mainly of, the conveyance of signals by means of an ECN. It therefore falls within the definitions applied under the Act, the Framework and EECC Directives and the General Conditions.

6.30 Further, Sky’s pay TV services include the transmission of content to end-users over an ECN, namely Sky’s wholly owned channels and certain third party channels carried on Sky TV. This element of Sky’s pay TV service may be subject to appropriate content regulation. But the fact that Sky is also a provider of content does not preclude its ECS from being subject to appropriate regulation, including obligations imposed on ECS providers to protect the interests of consumers.

6.31 For these reasons, we consider that Sky’s pay TV services are an ECS. Those services are provided to members of the public and, as such, constitute a PECS as defined in the Act and General Conditions.”

(iii) Ofcom’s response to Sky’s written and oral representations

86. In the remainder of section 6, the Decision addresses Sky’s written and oral representations in respect of the Notification (see paragraph 73 above), providing Ofcom’s response to Sky’s four alleged errors.

87. As regards Sky’s contention that Ofcom failed to identify and apply the correct legal test in the Notification, the Decision states at paragraph 6.42:

“6.42 For the avoidance of any doubt, Ofcom has made clear at paragraph 6.19 above that it is satisfied that Sky pay TV provides a service which consists wholly or mainly, or has as its principal feature or is primarily a service involving the conveyance of signals, which is in this case a transmission service. That test has been applied insofar as Sky’s pay

TV services include a service consisting of the conveyance of signals, recognising that Sky provides other services.”

88. As regards Sky’s contention that Ofcom was wrong to disaggregate the Sky Pay TV service, at paragraph 6.46 the Decision states that the recitals to the Framework Directive and the Competition Directive make clear that the new single regulatory framework was intended to cover all transmission networks and services and that that was due to convergence of the telecommunications, media and IT sectors. In support, it then cites recital (7) to the Competition Directive, expressly placing emphasis on the words emphasised in paragraph 37 above. At paragraph 6.47, the Decision states that the single regulatory framework does not ignore the fact that a cable operator may offer other services, citing in support recital (11) to the EECC (see paragraph 39 above). At paragraph 6.48, the Decision goes on to state that this is reflected in the distinction between services that qualify as an ECS and content services under the legislation (and in the General Conditions), citing the full wording of the current version of section 32(2) and (2A) (with emphasis on the wording of the Content Exclusion and the “principal feature” wording).
89. The Decision then states, at paragraphs 6.49 and 6.50, as follows:
- “6.49. As set out [in section 3] above, the previous definition of ECS in the Act, and the definition used in the Directives, contained essentially the same exclusion of content services from its scope of application. The tests of “consisting of” or “principal feature”, or “wholly or mainly” or “principally”, are used to determine whether a service is of a certain type provided by means of an ECN. An operator may provide multiple services of the type falling within the definition. However that test is not applied, expressly, to a cable operator’s service insofar as it falls within the definition of a content service. This is supported by the repeated references to content services and ECS being subject to different regulatory frameworks ... .
- 6.50 None of the relevant provisions of the legislation state that the test applies in the way Sky advocates for, namely that: an assessment must be done of the totality of the cable operator’s service, i.e. including, in particular, its transmission and content services, and a judgment made of what the totality wholly or mainly consists of. Nor does the legislation support the conclusion that once the wholly or mainly test, or the test in its various forms, is applied, only one regulatory framework can apply to govern the operator’s actions vis-à-vis, *inter alia*, its consumers.”

90. Further, paragraph 6.55 of the Decision notes that the fact that Sky has chosen for commercial reasons to combine transmission and content into a single customer package should not prevent its transmission service from being recognised as an ECS.
91. As regards Sky's contention that Ofcom's approach is in breach of the principle of equal treatment, paragraph 6.60 of the Decision points out that OTT services do not include the conveyance of signals; the respective providers of Netflix, Amazon Prime Video and Disney+ are not responsible for the transmission of signals over the internet. Further, other providers of traditional pay TV services such as Virgin Media, BT and TalkTalk are subject to the obligation to send EoCNs and if Sky were not so subject, that would create a competitive distortion between Sky and those others (paragraph 6.61).

**(2) The Confirmation Decision**

92. The section 96C Confirmation Decision is at Annex A1. It records at paragraphs A1.12 and A1.13 that Ofcom gave the Notification to Sky because Ofcom had reasonable grounds for believing that Sky had contravened (and continued to contravene) Condition C1.10 by failing to send EoCNs to subscribers of the Sky Pay TV service whose fixed commitment period ended between 26 March 2020 and the date of the Notification (i.e. 14 May 2021). Nonetheless, in the Explanatory Statement accompanying the Notification, Ofcom had informed Sky that it was not minded to impose a penalty on Sky in respect of the contravention due to the longstanding disagreement over its status in law.
93. At paragraph A1.16 of the Decision Ofcom states that, having considered Sky's representations in response to the Notification, it is satisfied that Sky contravened the relevant requirements by failing to send EoCNs to subscribers of the Sky Pay TV service whose commitment period ended between 26 March 2020 and the date of the Decision (i.e. 19 August 2022). Paragraph A1.17 states that, for the reasons set out in the Explanatory Statement and taking into account its duties under sections 3 and 4, Ofcom has decided to give Sky a confirmation decision confirming the imposition of certain requirements.

94. Those requirements are set out at paragraphs A1.18 to A1.20. In summary they require Sky to:

- (1) take all necessary steps to comply with the EoCN requirements in Conditions C1.21 to C1.29 in relation to subscribers to its relevant pay TV services, starting to send such notifications no later than nine months from the date of the Decision;
- (2) provide Ofcom with a progress report no later than four months following the date of the Decision setting out what Sky has done so far to implement the required remedy and what steps it will take to ensure that the remedy is fully implemented within the nine months.

95. Paragraph A1.21 then provides that, if Sky appeals against the Decision to the Tribunal under section 192, Sky must instead:

- (1) provide Ofcom with a progress report on the implementation of the remedy no later than four months following the date of the Tribunal's Judgment; and
- (2) take all necessary steps to comply with the EoCN requirements in Conditions C1.21 to C1.29 in relation to subscribers to its relevant pay TV services, starting to send such notifications no later than nine months from the date of the Tribunal's Judgment.

## **E. SKY'S GROUNDS OF APPEAL**

96. By its Notice of Appeal, Sky appealed on the primary ground that Ofcom erred in law in its application to Sky TV of the test for an ECS. Ofcom failed properly to ask whether Sky TV consisted "wholly or mainly" in the conveyance of signals. In reality Ofcom applied a different test namely whether Sky TV "included" the conveyance of signals. Ofcom had supported its reasoning by erroneously (and only sometimes) characterising Sky TV as a "bundle" or "package" of content services and transmission services and then applied the test only to the ancillary element of transmission. The issue between the parties



is one of law and not fact. Further Ofcom's erroneous application of the test creates disparities between Sky TV and other competing services which are also mainly content services and gives rise to a remedy which forces Sky to send EoCNs in respect of its content service.

97. Whilst this ground of appeal has remained at the heart of Sky's case, following (and in the light of) service of Ofcom's Defence and then the exchange of skeleton arguments and oral argument at the Hearing, Sky's case (and Ofcom's response) have been refined, as we now explain.

## **F. THE PARTIES' CASES IN SUMMARY AND THE ISSUES**

98. In summary Sky now contends as follows:

- (1) As a matter of construction of section 32(2) and (2A), it is necessary to apply the "principal feature" test (i.e. "wholly or mainly" test) to a single unified service (including the element of content service). In other words, it is necessary to apply section 32(2A)(c) first, and before considering the "Content Exclusion" in section 32(2). Applying that construction to the facts of this case, the Sky Pay TV service is not an ECS, because it is wholly or mainly a content service and the conveyance of signals (by satellite transmission) is, at most, an ancillary part of the Sky Pay TV service. For this reason, Ofcom's finding that the Sky Pay TV service is an ECS was wrong and the Decision should be quashed.
- (2) If contrary to the foregoing, as a matter of construction of section 32(2) it is necessary to exclude the content element of the service before applying the "principal feature" test in section 32(2A)(c) to the Sky Pay TV service, in the Decision Ofcom failed to consider whether, leaving out of account the content element, the transmission by satellite element of the Sky Pay TV service predominates over the Other Non-Content aspects of that service (such as the provision of hardware, software,

customer services, repair etc.).<sup>11</sup> For this alternative reason, the Decision was wrong and should be quashed.

99. In summary, Ofcom contends as follows:

- (1) As a matter of construction of section 32(2) and (2A), it is necessary first to exclude the element of a service which is a “content service” before considering whether the service falls within the definition of section 32(2A)(c) as “consisting in, or having as its principal feature, the conveyance of signals”.
- (2) Applying the foregoing construction of section 32(2) and (2A)(c), and excluding the content element, the Sky Pay TV service falls within the terms of section 32(2A)(c) and is therefore an ECS for the following reasons:<sup>12</sup>
  - (i) In the Decision, fairly read, Ofcom concluded that, leaving out of account the element of content service, the Sky Pay TV service consisted in, or has as its principal feature, the conveyance of signals.
  - (ii) As a matter of construction of the UK and EU legislation, “transmission service” comprises both the conveyance of signals and associated services which are ancillary to the conveyance of signals. On the facts, all (or practically all) of the Other Non-Content aspects of the Sky Pay TV service are ancillary to the service of the conveyance of signals. The Sky Pay TV service is therefore a “transmission service used for broadcasting” falling within the meaning of that term in section 32(2A)(c) and, as such, is a service consisting in or, having as its principal feature, the conveyance of signals.

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<sup>11</sup> This argument was first made, in response to Ofcom’s Defence, in Sky’s skeleton argument at paragraphs 7 and 54, and developed at the Hearing. It does not appear as a ground of appeal in the NoA, nor, strictly, has it been formulated by reference to a ground for judicial review.

<sup>12</sup> These reasons were first advanced in Ofcom’s skeleton argument at paragraphs 55 to 59 (responding to Sky’s skeleton paragraph 54), and developed at the Hearing.

100. In the light of these contentions, we identify the issues as follows:

- (1) What is the proper construction of section 32(2) and (2A)(c)? Does the “Content Exclusion” fall to be applied before, or after, consideration of section 32(2A)(c)?
- (2) Assuming that, as a matter of construction, the Content Exclusion is to be applied before consideration of section 32(2A)(c) and thus, in doing so, the element of content service is left out of account, does the Sky Pay TV service fall within the terms of section 32(2A)(c) and is it therefore an ECS? This raises two sub-issues:
  - (i) Did Ofcom consider whether, and determine that, leaving out of account the content element, and taking account of all remaining elements of the Sky Pay TV service including Other Non-Content aspects, the Sky Pay TV service has as its principal feature the conveyance of signals (i.e. whether the element of conveyance of signals by satellite predominates over Other Non-Content aspects of the Sky Pay TV service)?
  - (ii) In any event, and regardless of whether Ofcom addressed the issue in the Decision, is the Sky Pay TV service an ECS of the type specified in section 32(2A)(c) on the basis that all or virtually all of the Other Non-Content elements of its service are ancillary to the conveyance of signals and thus the Sky Pay TV service is a “transmission service used ... for broadcasting”, the principal feature of which is the conveyance of signals?

## G. ANALYSIS OF ISSUES

### (1) Issue 1: the construction of section 32(2) and (2A) of the 2003 Act

#### (a) *The Parties' submissions*

##### (i) Sky's case

101. Sky submits, first, as regards the facts, that the Sky Pay TV service is a service which comprises a number of elements, falling into three categories: (i) the provision of content (ii) the provision of hardware, software and customer services (the Other Non-Content services); and (iii) in some cases transmission (i.e. the conveyance of signals) by satellite. As regards element (i), the content comprises (1) Sky's own linear television channels (over which it exercises editorial control), (2) third-party linear television channels, and (3) Sky and third-party content provided on an on-demand basis. As regards element (ii) the Other Non-Content services are the five aspects set out at paragraph 9(2) to (6) above. As regards element (iii), of the aspects of content, all of Sky's own linear channels and a [...] of third-party linear channels are transmitted by satellite. Nevertheless the Sky Pay TV service remains a "unified" service; the various elements are directly linked and combine to form a single service. In particular the transmission element is not a distinct or autonomous service. Sky's expenditure on content has been far in excess of its expenditure on elements (ii) and (iii). Within that expenditure on content the [...] is on Sky's own channels. For these reasons, as a matter of fact, the content service is the predominant element of the Sky Pay TV service. Moreover, of its expenditure on the other two elements, expenditure on transmission represents only a small minority part (see paragraph 11 above).

102. Secondly, as a matter of construction, the definition of an ECS has a positive part and a negative part. The positive part is whether the service under consideration (as a whole) falls within "any of the types specified in subsection (2A)", i.e. whether it falls within any of subsections (a), (b) or (c) of section 32(2A). The negative part is the Content Exclusion in section 32(2). The proper construction of section 32(2) and (2A) entails applying the positive part

of the definition first, and then, if necessary, applying the negative part. The Content Exclusion applies only in the event that, on the application of the positive part, the service *does* fall within one of the types of service in section 32(2A). In the present case the relevant category is subsection (c) of section 32(2A). Thus, applying the test in that subsection, the question to ask is whether the actual unified service provided by Sky “consists in, or has as its principal feature, the conveyance of signals”. Given the EU legislative background and context, that test is synonymous with the test in Article 2(4) EECC, namely whether the service consists “wholly or mainly” in the conveyance of signals.

103. Applying the foregoing approach to the facts here, the Sky Pay TV service as a unified service is not a service “consisting in, or having as its principal feature, the conveyance of signals” and thus is not and cannot be an ECS. On the present facts, in the case of the Sky Pay TV service, the Content Exclusion has no application. The Content Exclusion only applies when the service in question *is* principally concerned with conveyance of signals.
104. Sky submits that the core aim of section 32(2) and (2A) is to distinguish between services that are content services and services that are wholly or mainly transmission. To that end it is necessary to apply the “principal feature” (or “wholly or mainly”) test to the actual service. It is clear that that test is to be applied to a service, and not the elements of a service. Whilst the statutory language makes clear that a service might be comprised of multiple elements, those elements are to be considered as a whole. The definition must be applied to the actual service, and not, as Ofcom suggests, to a hypothetical service (in this case the Sky Pay TV unified service without its content element). The unified service cannot be disaggregated, which is effectively what Ofcom has done.
105. Ofcom’s approach does not carve out “content services” from the *definition* of an ECS; rather it carves them out of the *assessment* of an ECS. Its approach is to remove content from what is being assessed, i.e. from that to which the statutory definition is sought to be applied. As a result, the effect of Ofcom’s approach is that the content service then becomes subject to ECS regulation.

106. Sky’s approach to construction reflects the EU legislation which makes clear that it is necessary to distinguish between a content service and an ECS. This is to ensure that the ECS regime does not apply to content services, since the latter have their own regulatory regime. In the present case, the Sky Pay TV service as a single unified service cannot be an ECS because it cannot be said that it consists wholly or mainly in the conveyance of signals.
107. Where, unlike the present case, a service *does* consist “wholly or mainly” in the conveyance of signals, the Content Exclusion is then to be applied. The effect of the Content Exclusion in that situation is to take out from ECS regulation the content element only; it does not mean that the unified service as a whole is not subject to ECS regulation. As regards the content element, then content regulation might also apply to that aspect of the service that is concerned with the provision of content. In response to a question from the Tribunal as to the circumstances in which, in this scenario, the Content Exclusion would have a practical effect, Mr Pickford KC pointed to the provisions of the Digital Directive, and in particular to recital (33) and Article 3(5)(b), as an example of the substantive effect of the application of the Content Exclusion, on Sky’s approach to construction of section 32. He submitted that, in that instance, but for the application of the Content Exclusion, a mixed service which included “digital content” (as a minority element) would escape the application of the Digital Directive to that content element.
108. Whilst in its written case, Sky did not distinguish between its own channels and third-party linear channels comprised within the Sky Pay TV service, in oral argument, Mr Pickford KC submitted that the case of *UPC Nederland* (at paragraphs 41 to 43) clearly establishes that “content service”, as defined in section 32(7) and in the EU legislation, comprises either content *produced* (i.e. programmes made) by the broadcaster or content over which it has exercised editorial control and, thus, does not include content that is produced by a third party and transmitted by the broadcaster. In *UPC Nederland* the CJEU was assessing whether the Content Exclusion applied and concluded that it did not because the content services supplied were only third-party content. In the present case Mr Pickford submitted that that means that the third-party linear

channels broadcast as part of the Sky Pay TV service are not strictly “content service” as defined.

109. Sky submits that Ofcom’s approach leads to absurd results. On its approach a service which consisted of 99% content and only 1% transmission would be an ECS and subject to regulation as an ECS. This would be “the tail wagging the dog”. Sky submits that the position is as follows: if a “mixed” service is mainly an ECS (say, 70% conveyance of signals and 30% content), then it is subject to both ECS and content regulation; on the other hand, if a mixed service is mainly content (say, 30% conveyance of signals and 70% content), then it is subject to content regulation only.
110. Sky goes on to submit that the case law of the CJEU supports Sky’s position. When considering whether a service is an ECS it is necessary to examine what is the “principal business” or what that business “entails primarily”: *UPC Nederland* at paragraphs 42 and 47. Secondly, where a unified service has two or more directly linked elements, the test for an ECS is applied to the unified service as a whole: *UPC DTH* at paragraphs 51 to 52. By contrast where an undertaking provides a “bundle of services” which are distinct and autonomous, the test for an ECS should be applied to each distinct service.
111. Ofcom’s incorrect interpretation introduces competitive distortions as between, on the one hand, the Sky Pay TV service and, on the other hand its rivals, Netflix, Disney+, Amazon Prime Video and Apple TV. Ofcom’s approach offends against the principle of equal treatment, in failing to treat similar services alike. The principal respect in which pay TV service providers compete is through content. The particular mode of delivery of that content (whether it is OTT internet, satellite or cable) is incidental. On Ofcom’s approach, the Sky Pay TV service is subject to a significant amount of new regulation as an ECS, whilst those delivering a competing pay TV service via the internet are not subject to such regulation. As regards Ofcom’s reasoning (Decision, paragraphs 6.59 to 6.61) that Sky is seeking different treatment from other traditional pay TV services such as Virgin Media, BT and TalkTalk), whether those other traditional pay TV service providers have chosen to accept Ofcom’s treatment

of their pay TV services is irrelevant to the issue of whether the Sky Pay TV service is an ECS.

112. Further, Ofcom's reliance on "purposive considerations" (and in particular the purpose of ensuring effective consumer protection through the requirement of EoCNs) is misplaced. First, the consumer protection recitals in the EECC were not in the Framework Directive and it is illegitimate to use recitals from the later directive to interpret a definition set out in the Framework Directive and which has remained fundamentally unchanged since then. Secondly, Ofcom's approach goes beyond the limits of a purposive construction; rather it is an attempt to distort the language to achieve a collateral aim. Thirdly, Ofcom's approach fails to respect the rule against doubtful penalisation because there are potentially severe financial penalties if a company does not comply with the requirements imposed on an ECS. Fourthly, it ignores the purpose of section 32, which is to identify a clear line between who is, and who is not, within the regulation. However Ofcom's approach leads to bizarre results. Finally, there is no need to do damage to the definition of an ECS to capture services which are not within it. Parliament has brought within the scope of ECS regulation content services in certain specific circumstances, i.e. where they are bundled with broadband or phone: see section 51(2)(ba) and (8). It is not for Ofcom to "correct" Parliament's deliberate choice not to treat the combination of a content service with anything other than internet access or a number-based interpersonal communications service as a bundled contract. Moreover, Parliament has the option of legislating by other mechanisms and that is what the government is now proposing to do in the Digital Markets, Competition and Consumers Bill ("the Digital Markets Bill").
113. Finally, Sky submits that Ofcom's incorrect interpretation forces its remedy to be misaligned with its findings. The Decision focuses in on just one element of the Sky Pay TV service, namely the transmission part, and ignores the fact that the main part does not concern transmission at all. The Decision finds that, because the Sky Pay TV service constitutes an ECS, Sky is required to send EoCNs. The Decision further acknowledges that where a customer decides to switch as a result of a notification, that would involve the customer terminating both its agreement for transmission and content services. The fact that both



elements of the Sky Pay TV service would terminate together and that Ofcom has been unable to devise a targeted remedy which would leave the content service unregulated as an ECS, reinforces the view that the elements of content and transmission are unified and not dissociable. Further, if and in so far as Ofcom was saying in the Decision that it was regulating two services that have been bundled together in a single contract, it would be ultra vires section 51 to subject Sky's content service to the requirements in respect of EoCNs.

(ii) Ofcom's case

114. Ofcom submits, first, as regards the facts, that the Decision applies only to the Sky Pay TV service (as defined in paragraph 7 above). The service includes the provision of linear channels which can be accessed via satellite. The vast majority of Sky's linear channels are distributed via satellite. The service is accessed via a set-top box which is always connected to a satellite dish. Customers of the Sky Pay TV service receive their service under a single contract which covers the provision of content and its delivery via satellite and any other means. Sky's other services which do not involve a satellite element are not within the scope of the Decision.
115. As regards the central question of the construction, Ofcom submits that section 32(2) requires consideration of Sky's service, but with the exception of its content service, to see whether the two conditions in that subsection are met. In other words the Content Exclusion falls to be considered first and before going on to consider the provisions of section 32(2A), and in particular section 32(2A)(c). That is the most natural reading of the statutory provisions. Moreover it accords with the text of the EECC and with the underlying objective which is to bring the communications (or transmission) elements of the media sector within a single regulatory framework alongside classic telecommunication services, whilst leaving content to be dealt with under separate regulatory arrangements.
116. The definition of an ECS in section 32(2) and (2A) consists of two conditions and an exception. The conditions are, first, that the service must be provided by means of an ECN and, secondly, that the service falls within one of the specified

types in section 32(2A). The exception is that the service does not constitute an ECS so far as it is a content service. The correct approach is that the part of a service that is a content service is expressly excluded and the proper focus, when applying the provisions, is on that part of the service which is not a content service, i.e. the two positive conditions in section 32(2) are applied to the service with the exception of the content service. In other words the Content Exclusion is applied first. Ofcom applied this approach to construction in the Decision: see paragraphs 6.3(b), 6.49 and 6.50; and Sky appreciated that this was the case: see NoA paragraph 88(d).

117. Ofcom accepts that the Sky Pay TV service is a single unified service. However it is the legislation itself which requires, within that unified service, the disaggregation of the content element from the transmission element. This is plain from the wording of section 32(2) and (2A), which draws a specific distinction between content services and ECS. The word “it” within the terms of the Content Exclusion in section 32(2) can only be a reference to the service as a whole, which is then to be excepted only partially from the definition of an ECS to the extent that the service as a whole is a content service. This need to break down a service and look at its content element and conveyance element separately is confirmed by section 32(7), which defines a content service as “so much of any service” as consists in the provision of content and/or the exercise of editorial control over content.
118. Ofcom disagrees with Sky’s interpretation of the definition of “content service” in section 32(7); “content service” includes the provision of third-party linear channels. The word “provision” in section 32(7)(a) is not limited to “production”. Ofcom submits that, in any event, the disputed meaning is not relevant to any issue in the case.
119. Ofcom submits that its approach to the construction of section 32 is confirmed by consideration of the legislative context and purpose of the provision, and in particular the underlying EU legislation. The high-level objective of the EU legislation is to provide for parallel and separate regulation of, on the one hand, ECS and, on the other hand, content services. The definition of an ECS isolates the part of the service offered comprising the conveyance element, which is

regulated by the EECC, and leaves the content element subject to separate and parallel regulation. This ensures that where a service includes both transmission and content, both elements are regulated and the content element does not eclipse or exclude the service from electronic communications regulation.

120. Ofcom's approach to construction is consistent with this objective. Where there is a service which includes elements of both content and conveyance of signals, each element will be subject to its relevant respective regulation. Thus, if a "mixed" service is mainly an ECS (e.g. 70% conveyance of signals and 30% content), then it is subject to both ECS and content regulation; and similarly, if a mixed service is mainly content (e.g. 30% conveyance of signals and 70% content), it will also be subject to both ECS and content regulation.
121. As regards the EECC, which section 32 in its current form is directly intended to implement, Article 2(4) which defines an ECS focuses on disaggregating the service that is provided via an ECN by looking at what the service "encompasses with the exception of" content services to see whether it encompasses the types of service set out in Article 2(4)(a) to (c). Further support for Ofcom's approach is provided by recitals (7) and (11) to the EECC.
122. Consideration of the predecessor EU legislation (i.e. the Framework Directive and related directives) provides further support for Ofcom's construction. First, the definition of an ECS in Article 2(c) of the Framework Directive, although the Content Exclusion is not as clearly broken out, starts with reference to the service as a whole and then it is necessary to break down the service as a whole to see what it is made up of. Secondly, recital (5) to the Framework Directive and recital (7) to the Competition Directive provide further support.
123. The wording of the definition in Article 2(c) itself supports the conclusion that "content services" are something distinct from, and not part of, "electronic communication services" since "content services" are defined as something transmitted using "electronic communication services". See also recital (5) to the Framework Directive and recital (7) to the EECC.

124. As regards the case law, Ofcom submits that in general it supports the distinction between ECS and content services. *UPC Nederland* confirms that content and other services have to be considered separately for regulatory purposes. However beyond that, the cases do not shed much light on this specific issue, namely whether the Content Exclusion is to be considered before, or after, the application of the “wholly or mainly” test.
125. Contrary to Sky’s case the Digital Directive does not provide any substantial support for its case that the Content Exclusion is to be applied after the application of the “wholly or mainly” test.
126. As to Sky’s suggestion of competitive distortion, given that the Decision excludes Sky’s OTT services, there is no relevant disparity with other OTT service providers (such as Netflix). In so far as Sky supplies a purely internet-based TV service (e.g. Sky Glass and NOW) those services are equally not regulated as an ECS. By contrast, Sky’s approach resulting in not sending EoCNs has resulted in material disparity and competitive imbalance with Sky’s traditional pay TV competitors whose service involves the conveyance of signals (such as Virgin Media). On Sky’s construction of section 32 those providers whose content service element is less important would still be regulated as ECSs whereas the Sky Pay TV service would escape regulation.
127. Ofcom further submits that its construction of the legislation is consistent with the underlying purpose and the consumer protection objective of the relevant provisions. Those objectives are to be found in the Explanatory Memorandum to the 2020 Regulations introducing the amended section 32 (at paragraph 6.4) and in recitals (260), (265), (273) and (277) to the EECC. The legislation is to be read and construed as a whole and consumer protection was always a defining feature of the 2003 Act. The amendments made to the 2003 Act were to implement the EECC, which includes its consumer protection purpose. It is therefore legitimate to construe the provisions in that Act, which determine the applicability of those consumer protection provisions, partly by reference to how they further those consumer protection objectives and in the light of the EECC, which those provisions incorporate into the 2003 Act. To break the legislation down and consider only a part which has not been amended so that

one ignores the overall package of objectives pursued by Parliament (as suggested by Sky (see paragraph 112 above)) is the wrong approach. As regards Sky's submission in relation to a bundled service that section 51 has already provided for a situation in which a content service could engage EoCNs, this is irrelevant to the prior question of construction on the scope of an ECS. Just because EoCN provisions apply to a bundled service as defined in section 51 does not mean that they cannot apply to the single service that is the Sky Pay TV service. Further, the interpretation of section 32 cannot turn on the fact that there is currently a bill before Parliament (the Digital Markets Bill) that will legislate to apply regulation to a wide range of contacts. That is irrelevant. The question for the Tribunal is whether on the existing law the Sky Pay TV service falls within the definition of an ECS.

128. Finally, the remedy imposed by Ofcom is not incompatible with the reasoning supporting it. The fact that Sky has “bundled” its transmission service and its content service together is not of Ofcom's making. It cannot obviate the legal requirements applicable to Sky's transmission service. Where Sky chooses to provide conveyance/transmission and content under a single contract, the EoCN will necessarily bite on both services since there is a single contract. However there is no requirement for Sky to contract in that way.

***(b) The Tribunal's analysis***

***(i) Preliminary observations***

129. First, the Decision applies only to the Sky Pay TV service (and not to Sky's other pay TV services). We accept Sky's contention that the Sky Pay TV service is a unified service, provided under a single contract with the customer. It is not a “bundle of services” (or a bundled contract) either within the technical meaning in section 51, nor more generally. Nevertheless, within that unified service, there are distinct elements: content, conveyance of signals and Other Non-Content aspects (see paragraphs 9 and 101 above).
130. Secondly, the legislation (UK and EU) is not wholly consistent in its use of the terms “service” and “services”. At points in the legislation, there is reference

to “a service” and then, within such “a service”, there is reference to one or more other “services” e.g. the Content Exclusion (“a service ... except in so far as it is a ... service”). In such a case, we take the “service” within the service to be referring to an element (or part) of the overall service. Thus in the present case, the Sky Pay TV service is the overall unified service and within that unified service there is a “content service” (or element) and a “conveyance of signals” service (or element).

131. Thirdly, we consider that the test under section 32(2A)(c) falls to be construed consistently with the test in Article 2(4)(c) EECC; such that “consisting in, or having as its principal feature” is to be regarded as synonymous with “consisting wholly or mainly”. Fourthly, in applying that test, whilst quantitative assessment might properly fall to be taken into account, ultimately we consider that it is a qualitative assessment. Finally, it is common ground that the current amended wording of section 32(2), in so far as it applies to the service covered by subsection (2A)(c), was not intended to effect any change to the test contained in the original section 32(2).
132. The essential issue of construction is whether, when applying section 32(2) to any particular service, the first question is whether, as Sky submits, the service is “of any of the types specified in subsection (2A)” (before applying the Content Exclusion) or rather, as Ofcom submits, the first question is whether the Content Exclusion applies, such that if it does, subsection (2A) is applied only to that part of the service which is not a content service.
133. In our judgment the correct approach is the latter – as a matter of the construction of the language of section 32(2) and (2A), and against the background of the legislative context and purpose. In the following paragraphs, we consider, first, the language of section 32(2); secondly, the EU law background; thirdly, the consequence of Sky’s approach; fourthly, the issue of competitive distortion; and finally, issues as to Parliamentary purpose.

(ii) The construction of section 32

134. As regards the structure of, and order of concepts within, subsections (2) and (2A), before deciding whether the service in question is of a “type specified” in the latter subsection, the former subsection directs that to the extent that it is a content service it is to be left out of account. The “it” in “except so far as *it* is a content service” refers back to “*a service* of any of the types” etc, i.e. the service as a whole. The content service element is then taken out from the service as a whole which is being considered. Before going on to consider whether the service in question meets the definition in section 32(2A) that part which is a content service is left out of account. Such a service constitutes an ECS “except in so far as that service is a content service”.
135. The terms of section 32(2) itself require the element of content and the remaining elements to be disaggregated. Ofcom was thus correct to do so. The Content Exclusion requires the service to be broken down into its constituent elements and that part of the service which is content to be taken out (i.e. excepted).
136. The definition of “content service” itself in section 32(7) supports this. It provides that content service is “*so much of any service*” as consists in the provision of content. “Any service” is the service as a whole. “So much of” is referring, inherently, to a part or parts of that service. Writing that definition of content service back into the wording of the Content Exclusion in section 32(2) leads to the Content Exclusion effectively meaning “except so much of the service as consists in the provision of content”. Despite the Sky Pay TV service being one unified service, the legislation itself breaks that service down into different elements within one and the same composite service.
137. Moreover, the inclusion of a “transmission service used ... for broadcasting” in subsection (2A)(c) supports this approach to construction. There is a distinction between *what* is broadcast (the content) and *how* that content is conveyed. The natural meaning of “transmission service used ... for broadcasting”, is that it is addressing the latter and not the former.

(iii) The EU law context

138. Section 32 (and this Part of the 2003 Act) falls to be construed by reference to the EU legislative background. This involves taking account both of the wording of the EU legislation which section 32 directly implements and the wider EU legislative framework.
139. Two points emerge from the wider legislative framework. First, the purpose of the concept of ECS (and ECN) was to take account of convergence of different types of technology for transmission, all of which were to be covered by the concepts of ECS and ECN and to provide a single regulatory framework for ECSs: see recital (5) to the Framework Directive and recital (7) to the Competition Directive. Secondly, and significantly, the EU legislation draws a clear distinction between content and the transmission of that content and provides that each is to be subject to separate and distinct regulation. The EU regime applicable to transmission however does not apply to the content delivered over the ECN using ECSs. This is stated expressly in recital (7) to the EECC (repeating recital (5) to the Framework Directive). It is necessary to separate the regulation of ECNs and ECSs from the regulation of content, since the EECC does not cover the content of services delivered over ECNs using ECSs, such as broadcasting content. Further, in principle, content regulation and transmission regulation can, where appropriate, apply to the different elements of a single unified service. In particular recital (11) to the EECC expressly recognises that an undertaking can offer both an ECS and services not covered by the EECC such as television broadcasting content services. We refer also to “links existing between them” in recital (5) to the Framework Directive. This analysis was adopted by the CJEU in *UPC Nederland* at paragraphs 38 and 39.
140. Further the EU legislation emphasises or makes clear that “content service” and ECS are two different services. The content service is something which is delivered (or transmitted) by the ECS. Article 2(4) EECC (and Article 2(c) Framework Directive) refer to the content service as a service “transmitted using electronic communications ... services”. Similar wording is found in recital (7) to the EECC (and recital (5) to the Framework Directive). It follows that, by



definition, a “content service” must be something other than an ECS. If content services were part of the ECS, it would make no sense to say that a content service is being transmitted by something which itself is, in part, a content service. This distinction is made clear in *UPC Nederland* at paragraph 41.

141. Further recital (7) to the Competition Directive expressly states that the *transmission* and broadcasting of television programmes should be recognised as an ECS and networks used for such transmission and broadcasting should likewise be recognised as ECNs.
142. The wording of Article 2(4) EEC itself starts by referring to “a service ... which encompasses”, then sets out the equivalent of the Content Exclusion, before identifying the types of services which it encompasses. In other words, the approach is to consider what the service in question encompasses with the exception of (i.e. other than) content services and then to consider whether it is one of the types of service in Article 2(4)(a) to (c).
143. As regards the disputed question as what is comprised within a “content service” within the meaning of section 32(7)(a) and (b), and in particular whether it excludes content *produced* by a third party (in the present case, third-party linear channels), in our view, that dispute has no direct bearing on the questions which arise; Sky did not suggest how it supported its approach to construction on Issue 1. In particular, the question under section 32(2A)(c) is whether a service has as its principal feature *the conveyance of signals*; it is not whether its principal feature is something other than a content service within the meaning of section 32(7). Thus, even if third-party content is not content within the meaning of section 32(7), it does not assist Sky’s case on Issue 1 in general or its case in seeking to distinguish itself from Virgin Media or BT. As a matter of pure construction of those subsections (and similar wording in Article 2(4) EEC), we do not accept that it excludes content *produced* by a third party. The relevant word is “provision” of (or “providing”) content, rather than “producing”. However, on the other hand, we accept that the decision and reasoning of the CJEU in *UPC Nederland* (at paragraphs 41 and 42), in referring to “production” (rather than “provision”), lend some support for the exclusion of third-party produced content from the term as defined in section 32(7).

(iv) Sky's approach

144. By contrast, Sky's approach to construction both gives the Content Exclusion very limited effect and has consequences which are inconsistent with the legislative context. The consequences of applying the Content Exclusion only *after* the application of the "wholly or mainly" test include the following.
145. First, on Sky's approach, if a pay TV service or any service, which has a content service element, nevertheless, even taking account of that element, *does* consist in or have as its principal feature the conveyance of signals, the service as a whole would amount to an ECS. Sky says that, at that point in the analysis, the Content Exclusion is applied. However that exclusion can only have the effect of "increasing" the already existing predominance of the "conveyance of signals" element. The application of the Content Exclusion would not affect the status of the service as an ECS. At most, it might indicate that the content service element would not be subject to regulation as an ECS.
146. In this regard, we do not consider that Sky's reliance (see paragraph 107 above) upon the Digital Directive (and in particular Article 3(5)(b)) establishes any substantial practical effect of the Content Exclusion on Sky's approach. First, it was the only example that Sky was able to give of such practical effect. Secondly, the Digital Directive does not apply in the UK, in circumstances where our task is to construe UK legislation. Thirdly, and more importantly, the Digital Directive postdates the original section 32 and the Framework Directive by many years; it cannot be an aid to construction of that earlier legislation (which construction, it is agreed, the current section 32 also bears).
147. Secondly, Sky's approach leads to unreasonable outcomes. On its approach, if a unified service comprising transmission and content is predominantly transmission (even to a small extent, e.g. 55% transmission / 45% content<sup>13</sup>), then that unified service is subject to parallel dual regulation as an ECS and as a content service; if on the other hand, the content element predominates (but

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<sup>13</sup> We use percentages only by way of a shorthand to illustrate which element predominates; and not as quantitative assessment.

only to a small extent, e.g. 45% transmission / 55% content), then the unified service is not an ECS at all, and it will be subject to content regulation alone. In our judgment, given the EU legislative approach of parallel regulation, there is no warrant for such a skewed outcome.

148. Thirdly, on Sky's approach, it is likely that many, if not all, broadcast TV services would be excluded from regulation as an ECS. Other than services which are pure transmission, it is likely that such broadcast TV services will have as their predominant element a content service (regardless of whether it is own content or third-party content). In that event, on Sky's approach, they would not be an ECS. However, by giving "transmission service[s] used ... for broadcasting" as an example of an ECS, section 32(2A)(c) suggests that, in general, such TV services are intended to be included within the definition of an ECS. The references to "networks used for ... television broadcasting" in the definition of ECN in Article 2(a) Framework Directive and Article 2(1) EECC; "television broadcasting service" in Article 2(12) EECC; and "the transmission and broadcasting of ... television programmes" in recital (7) to the Competition Directive all support the conclusion that section 32(2A)(c) is intended to cover more than a service confined to merely "conveyance of signals".
149. Fourthly, if Sky's approach is applied to subsections (a) and (b) of section 32(2A) (i.e. an internet access service and a number-based interpersonal communications service), this again results in considerable difficulty in the application of the relevant provisions. The Content Exclusion applies, equally, to each of the types of service set out in section 32(2A). Assume a single contract providing a unified service comprising both an internet access service (or element) and a content service (or element). Section 51(8) establishes that those two are distinct services (or elements – see section 51(2)(ba)). Even though certain provisions will apply to the bundled contract as a whole, it is still necessary to identify which element of the service is an ECS. The section 32(7) definition of "content service" applies in this situation (just as it does when section 32(2A)(c) falls for consideration). Applying Ofcom's approach to construction, before considering the application of section 32(2A)(a), the content service element is excluded. What is left is a pure internet access

service, which, applying section 32(2A)(a), is clearly therefore an ECS. On the other hand, on Sky's approach, the question arises whether the whole service (comprising both the internet access and content elements) is an "internet access service". Since section 32(2A)(a) contains no equivalent "principal feature" or "wholly or mainly" test, this admits of no simple answer. Given the terms of section 51(8) it is hard to see how such a combined service could be categorised as an "internet access service", and even if it were so categorised, how then section 51(8) could apply.

(v) Competitive distortion

150. As regards Sky's complaint about competitive distortion, on either approach to construction, there is potential for differential application of regulation as an ECS between different types of TV service. The Sky Pay TV service is not the same type of service as provided by Netflix, Amazon and other OTT service providers. Sky's other services (Sky Glass and NOW) delivered via the internet are closer in type to those services; and they are equally not subject to ECS regulation. On the other hand, Virgin Media, BT and TalkTalk provide pay TV content over an ECN and *are* subject to ECS regulation. Whilst Sky maintains that there is a difference between those services and Sky Pay TV service, the position is that there is a whole range of types of service in this area. Each of the providers is differentiated by its own specific circumstances and the test in section 32(2) and (2A)(c) is to be applied to the specific facts of each provider.

(vi) Parliamentary purpose

151. Ofcom has raised a number of "purposive" considerations in support of its approach to construction. Ultimately we do not consider that these point strongly in the direction of one construction or the other. In any event it is not necessary to take these objectives into account to support Ofcom's case. As regards the relevance of the consumer protection recitals of the EECC, we can see some force in Sky's submissions (paragraph 112 above). Secondly, on the other hand, the presumption against doubtful penalisation does not assist Sky. That principle is that, in the context of legislation, a person should not be penalised *except under clear law*: see *Bennion, Bailey and Norbury on Statutory*

*Interpretation* (8<sup>th</sup> edition) §26.4. We consider that here, for the reasons given above, the correct approach to construction is clear. Further we do not consider that the fact that the Digital Markets Bill will, if enacted in the future, impose similar regulatory obligations on those not currently covered by ECS regulation is relevant to the question whether, under the current legislation, a particular service is, or is not, an ECS. As regards bundling, the Sky Pay TV service does not comprise two or more services bundled together, but rather a single unified service; as Sky itself has emphasised.

152. Finally as regards the remedy, the fact that the EoCNs required by the legislation will apply to the entire contract under which the Sky Pay TV service is provided (and so may lead to termination of the entire contract, including the content element) is the result of the fact that Sky supplies all elements of its service under a single contract. It is not a reason to construe section 32 in the way suggested by Sky. Moreover we accept Ofcom's further submission that Sky's interpretation carries the risk that other obligations specific to conveyance would no longer apply to the transmission operations of vertically integrated operators. Sky's interpretation would disapply those provisions and that is what the common regulatory framework and the EECC, to which the 2003 Act gives effect, seek to avoid by bringing these all under a single framework of regulation.
153. For these reasons we conclude that, as a matter of construction of section 32(2) and (2A), it is necessary first to exclude the element of a service which is a "content service" before considering whether the rest of the service falls within the definition of section 32(2A)(c) as "consisting in, or having as its principal feature, the conveyance of signals".

**(2) Issue 2: Is the Sky Pay TV service an ECS?**

**(a) *The Parties' submissions***

**(i) Sky's case**

154. As to sub-issue (a), Sky submits that, in the Decision, Ofcom failed to consider on the facts whether the Sky Pay TV service, excluding the content element, consists “wholly or mainly” in the conveyance of signals, i.e. whether the “transmission element” specified in paragraph 9(7) above predominates over the Other Non-Content elements set out in paragraph 9(2) to (6) above. The Other Non-Content elements are together a third category (as explained by Sky all along) and are neither content, nor conveyance of signals. It is clear that in the Decision, where Ofcom refers to a “transmission service” it is referring only to the conveyance of signals and is not including within that term the Other Non-Content element. That Ofcom failed to do this is clear from analysis of paragraphs 6.7, 6.19 (a) and (b), 6.23, 6.25, 6.39 and 6.42 of the Decision. The reference, at the end of paragraph 6.42, to providing “other services” is a reference to the Other Non-Content services. Footnote 85 to the Decision (see paragraph 71 above) is no more than a recital of factual information provided by Sky and does not amount to analysis of the comparative importance of conveyance of signals and Other Non-Content services.
155. As to sub-issue (b), Sky submits that “transmission service” in the legislation does not necessarily include not only conveyance of signals but Other Non-Content services such as those set out in paragraph 9(2) to (6) above. Recital (7) to the Competition Directive cannot mean that every single time there is any transmission for broadcasting, the service must be an ECS, because that would not be applying the “wholly or mainly” test in the Framework Directive. Recital (7) simply recognised those types of services which may consist “wholly or mainly” in the conveyance of signals and are thus an ECS. There are examples of services provided by companies responsible for transmission, owning all broadcast towers, but who do not provide content – such as Arqiva. Broadcasting is not synonymous with content. Broadcasting means the transmission part of it. On any view, the “wholly or mainly” test must be

applied to the facts of the case; and Ofcom did not do this in respect of the elements of the service excluding content. If Ofcom's approach were to be accepted, it would follow that, once the content element is excluded, the service will always and necessarily consist "wholly or mainly" in the conveyance of signals. Sky submits that that cannot be correct.

(ii) Ofcom's case

156. As to sub-issue (a), Ofcom submits that it did address this issue in the Decision (at paragraphs 2.5, 6.20, 6.22, 6.29 and 6.42). The Decision is to be read fairly and not as a statute. In the Decision, Ofcom identified the elements of the Sky Pay TV service, including each of the Other Non-Content elements. At paragraph 6.20 the Decision expressly referred to the Other Non-Content elements and then at paragraph 6.22 Ofcom described how transmission operated, referring to the relevant hardware of satellite, satellite dish and set-top box – all of which are Other Non-Content services. The reference in the final words of paragraph 6.42 to "other services" is a reference to content services. Further the Decision (at footnote 85) does make specific reference to, and took account, of the relative expenditure of Sky on transmission itself (i.e. conveyance of signals) and on the Other Non-Content aspects.
157. As to sub-issue (b), Ofcom contends that the Sky Pay TV service falls within the terms of section 32(2A)(c) because it is a "transmission service used ... for broadcasting" and, as such, is a service consisting in or having as its principal feature the conveyance of signals.
158. First, under the UK and EU legislation, there are only two categories: transmission and content; there is no third category. The concept of "transmission services [for broadcasting]" in section 32(2A) (and in Article 2(a) Framework Directive and Article 2(4)(c) EECC) encompasses not just the conveyance of signals, but all other elements ancillary, and directly linked, to the conveyance of signals. In this regard, Ofcom relies both upon the definition of ECN in section 32(1) and in Article 2(a) Framework Directive and Article 2(1) EECC and upon definitions of associated services/matters in section 32(1)(b) and in Article 2(ea) Framework Directive and Article 2(11)

EECC. This analysis is strongly supported by the CJEU's decision in *UPC DTH* at paragraphs 50 to 52. Moreover the CJEU's conclusions there in relation to the ancillary nature of conditional access systems apply equally to electronic programme guides.

159. On this basis, Ofcom submits that each of the elements of the Sky Pay TV service set out in paragraph 9(2) to (4) above (i.e. hardware, software, conditional access services) is ancillary to the conveyance of signals and thus fall within the transmission service used for broadcasting in this case. On the basis that installation and repair services (paragraph 9(6) above) relate to hardware (such as set-top boxes and satellite dishes), this element too is ancillary to the conveyance of signals. As regards customer service (paragraph 9(5) above) this is ancillary in part to the content service and in part to the transmission service. On any view, to the extent that it might relate to content service, it could not be said that this would undermine the overall conclusion that, after leaving out the content service, the Sky Pay TV service is wholly or mainly the conveyance of signals.
160. Ofcom submits that it is highly significant that one of the two examples of a service consisting “wholly or mainly” in the conveyance of signals in both section 32(2A)(c) and Article 2(4)(c) EECC is a “transmission service used ... for broadcasting”. This is supported by recital (7) to the Competition Directive in 2002. On this basis, whilst the “wholly or mainly” test is still required to be applied to the service in question, it is highly likely that such a transmission service will fall within this definition of an ECS. On the facts here the Sky Pay TV service (other than the excluded content service) is such a “transmission service used ... for broadcasting”.

**(a) *The Tribunal's analysis***

161. This issue assumes that (as we have found above), under Issue 1, Ofcom's approach to construction is correct. The question here is whether, leaving out of account the content element, the Sky Pay TV service is a service consisting in or having as its principal feature the conveyance of signals, and whether, in the Decision, Ofcom addressed that question.



162. Sky's case is that Ofcom did not consider the question and further that, based on quantitative measures, the answer to the question is No. In particular, Sky's expenditure on Other Non-Content elements of its service far exceeds its expenditure on conveyance of signals. However, as we have indicated above, we do not consider that this issue depends ultimately on quantitative measures; although they might be indicative of the position.

163. We have concluded that, regardless of whether in the Decision Ofcom did consider this question, in any event, applying the proper construction of the relevant legislation to the facts here, the Sky Pay TV service, leaving out of account the content element, is a service consisting in, or having as its principal feature, the conveyance of signals and is thus an ECS falling within section 32(2) and (2A)(c). Our reasons are as follows.

(i) Issue 2(a): the Decision

164. The language and terminology used in the Decision are not always consistent. On the other hand, it is important to stand back and consider it as a whole.

165. In footnote 85 to the Decision reference is made to the relative expenditure figures presented by Sky. However, in reaching its conclusion that the Sky Pay TV service is an ECS, Ofcom certainly does not carry out a quantitative assessment of the relative importance as between "conveyance of signals" and the Other Non-Content elements. But if in the Decision the term "transmission service" covers both, then it is clear that Ofcom did conclude that conveyance of signals is the principal feature: see Decision paragraph 6.42.

166. Thus in determining whether or not Ofcom did address the question, it is necessary to consider what is meant by the term "transmission" or "transmission service" as used in the Decision, i.e. whether it is a reference to the "conveyance of signals" alone or rather to conveyance of signals and the Other Non-Content elements (set out at paragraph 9(2) to (6) above). As appears from the following, there are contrary indications in this regard:

- (1) At paragraph 2.5, the elements of the Sky Pay TV service are set out in the terms which Sky itself had used to describe them (broadly as in paragraph 9 above). The final element in paragraph 2.5(g), “transmission of content” appears to be a reference to “conveyance of signals”.
- (2) Paragraphs 6.3(a) and (b) distinguish between a “transmission element” and a content element, and refers to a transmission element “which meets the definition in the Act”. It is not clear what this last phrase means.
- (3) Paragraph 6.6 refers to the intended separate regulation of “transmission” and of content, referring to “transmission services” including “broadcast transmission services”.
- (4) Then at paragraph 6.7 “transmission service” refers to the “means of transmitting the content”. We see some force in Ofcom’s submission that the latter phrase extends beyond the mere conveyance of signals and includes elements ancillary to conveyance.
- (5) In the summary of Ofcom’s position, at paragraph 6.19(a) a “broadcasting transmission service” and “transmission service” are described, effectively as the means of delivery of the content, and that such a transmission service is subject to regulation as an ECS. Then in paragraph 6.19(b), Ofcom switches terminology from “transmission” to “conveyance of signals”: that which is subject to regulation as an ECS is described as a service “which consists wholly or mainly or primarily in the conveyance of signals”. There is force in Sky’s submission that in paragraphs 6.19(a) and (b) together, “transmission service” is a reference to the conveyance of signals alone. (If, as Ofcom says, “transmission service” means conveyance of signals plus Other Non-Content element, then paragraph 6.19(b) at most poses the question whether within the transmission service, conveyance of signals predominates.)

- (6) For the first time in the analysis, paragraph 6.20 refers to the Other Non-Content elements (paragraphs 9(2) to (6) above), and then refers to “transmission of content”, which, in this context, means conveyance of signals (paragraph 9(7) above).
- (7) Paragraph 6.22 addresses “the transmission” of Sky linear channels by satellite and explains the technical mechanism by which that transmission takes place, including the satellite dish and the set-top box, i.e. the Other Non-Content element of hardware (paragraph 9(2) above). This suggests that the “transmission service” encompasses more than the pure conveyance of the signals. That conclusion is supported by paragraph 6.23 where Ofcom concludes that “the transmission services” constitute an ECS and “transmission services” are described as that “which deliver ... *via Sky’s own infrastructure or a third party’s*”. The inclusion of the reference to infrastructure seems to be a reference back to the non-content element of hardware in the previous paragraph.
- (8) The heading above paragraph 6.25 suggests that the Sky Pay TV service includes something other than ECS and content. In paragraph 6.25 itself, the “transmission service” is the ECS and is described as “a means of transmitting” (as in paragraph 6.7), but the reference back to paragraph 6.19 seems to align “means of transmitting” with conveyance of signals (on the hypothesis that 6.19(b) supports the conclusion that “transmission” means conveyance of signals only).
- (9) Paragraph 6.28 seems to suggest that “transmission of the signal” is conveyance of the signals.
- (10) In paragraph 6.29 on a fair reading “transmission service” provided by Sky is something more than pure conveyance of signals – an express distinction is made between “transmission service” and “conveyance of signals by means of an ECN” (in circumstances where the definition of ECN in section 32(1)(b) includes associated services). The finding is that it is “the transmission service” which falls within the definitions under the legislation.

(11) Finally as to paragraph 6.42 (set out in paragraph 87 above), on the one hand, this distinguishes between the transmission service and conveyance of signals. As a matter of grammatical construction, and in particular the word “which” at the end of the first sentence, transmission service is a service which has *within it* conveyance of signals. On the other hand, the final words of the second sentence “other services” is ambiguous and could refer either to content services (per Ofcom) or the Other Non-Content elements (per Sky).

167. Whilst the position is somewhat confused, ultimately we are not satisfied that, in the Decision, Ofcom did clearly consider the question whether, leaving out of account its content element, the Sky Pay TV service consisted wholly or mainly in the conveyance of signals. It certainly did not carry out any quantitative comparison between that element and the Other Non-Content elements. Moreover it is not clear that where, in the Decision, it referred to “transmission services” it was referring to something more than the conveyance of signals. To this extent, Ofcom fell into error.

(ii) Issue 2(b): In any event, an ECS?

*The legal context*

168. First, the legislation provides for two relevant categories of service – transmission (or ECS) and content. See Recital (5) to the Framework Directive (and recital (7) to the EECC) and *UPC Nederland* at paragraph 41. There is no third category of service which falls into neither category.

169. Secondly, in the legislation, “transmission service” is not synonymous with “conveyance of signals” and indicates, or is capable of indicating, something more than conveyance of signals. In particular, as a matter of construction in section 32(2A)(c), a “transmission service” (whether used for machine-to-machine services or for broadcasting) is given as an example of a “*service consisting in, or having as its principal feature, the conveyance of signals*”. Such a transmission service may either be simply the conveyance of signals or it may involve more than the conveyance of signals, as long as the latter is the principal feature of the service. Thus “transmission service” may comprise

additional elements to the conveyance of signals. Article 2(4)(c) EECC is to the same effect (save that there it is “transmission services” which are given as an example of “services” falling within that sub-article). The inclusion of a “transmission service used ... for broadcasting” as an example of an ECS falling within section 32(2A)(c) is a strong steer that a satellite transmission service such as the Sky Pay TV service (leaving out its content element) falls within the statutory definition (even if it is not conclusive as a matter of construction). Further substantial support for this conclusion is provided by recital (7) to the Competition Directive: “the transmission and broadcasting of ... television programmes *should be recognised* as an [ECS]”.

170. Thirdly, the legislation, in various places, specifically identifies services which are “ancillary” to, or “associated” with, the conveyance of signals (and which may fall within the term “transmission service”). Section 32(1)(b) includes within the definition of an ECN associated “apparatus” and “software”. (An ECS is something provided by means of, or through, an ECN and that ECN includes those associated elements.) Article 2(ea) of the Framework Directive refers to, and defines, “associated services” as being services which “*enable and/or support* the provision of services via that” ECN and/or ECS. These include specifically (but non-exhaustively) conditional access systems and electronic programme guides – two of the Other Non-Content elements in the Sky Pay TV service (respectively, paragraph 9(4) and (3) above). This approach and definition are repeated in practically identical terms in Article 2(11) EECC. Article 2(10) EECC defines “associated facilities” to include (in addition to “associated services”) any “facilities or elements associated with an [ECN] or an [ECS] which enable or support the provision of services via that [ECN] or [ECS]”.
171. Finally, as regards the legal context, the judgment of the CJEU in *UPC DTH* provides further support for the concept of services which are ancillary to, or associated with, the conveyance of signals (the latter being the “core element” of a transmission service). As set out in paragraph 58 above, the CJEU held, relying *inter alia* on Article 2(ea) Framework Directive, that a conditional access system which supported the provision of a television broadcasting service via an ECN was “directly linked” to the provision of a protected service

(i.e. the service protected by the conditional access, namely the conveyance of the television and radio programmes). The conditional access system was ancillary to, and associated with, that ECS. It did not prevent the overall service being anything other than an ECS: see in particular paragraphs 51 to 53. In this way, conveyance of signals was the “core element” of the ECS, to which the conditional access system was the “ancillary element”. This supports our conclusion that the correct approach to the “principal feature” test is not ultimately quantitative, but one based on a qualitative assessment of which elements are “core” and which are “ancillary”. Further we consider that the CJEU’s analysis in relation to conditional access applies with equal force to electronic programme guides, since both of these elements are included within the terms of Article 2(ea) Framework Directive, and now Article 2(11) EECC.

172. We therefore conclude, as regards the legal framework, that a “transmission service” (including a transmission service used for broadcasting) comprises not necessarily just the core of “conveyance of signals” but may include elements which are linked to, ancillary to and/or associated with the “conveyance of signals”, and that such elements certainly include a conditional access system, an electronic programme guide and, more generally, apparatus and software.

*Application to the facts*

173. We turn to apply this legal framework to the facts of this case and in particular to the Other Non-Content elements set out at paragraph 9(2) to (6) above. We conclude, first, that all of these elements are necessarily ancillary either to the conveyance of signals or to the content service. In fact, in our judgment, with one possible exception, all are ancillary to the conveyance of signals. We accept Ofcom’s arguments (at paragraph 159 above). First, hardware is ancillary to the conveyance of signals. Set-top boxes and satellite dishes are ancillary to the conveyance of signals (as expressly stated in the Decision at paragraph 6.22). Moreover in our view they are associated “apparatus” falling within section 32(1)(b). Secondly, software is also ancillary to, and associated with, the conveyance of signals: see section 32(1)(b)(iii). Within that category, the electronic programme guide is, by definition, an associated service within Article 2(11) EECC and, applying the analysis in *UPC DTH*, ancillary to the

conveyance of signals. Thirdly, conditional access services are ancillary to the conveyance of signals (*UPC DTH*) and are an associated service within Article 2(11) EECC. Fourthly, customer service is necessarily ancillary to the Sky Pay TV service; in some instances, it provides support in relation to the “conveyance of signals” and in others in relation to the content service. Finally, installation and repair services (which are carried out by *Sky’s engineering workforce*) can only relate to the hardware, i.e. the set-top box and the satellite dish. These too are ancillary to the conveyance of signals.

174. We conclude that, with the possible exception of a part of the customer service, all the Other Non-Content elements of the Sky Pay TV service are ancillary to the conveyance of signals and that the latter is the core of the service. Applying a qualitative approach to the “principal feature” test (i.e. the “wholly or mainly” test), we conclude that, regardless of the precise terms of the Decision and leaving out of account the content element, the core of the Sky Pay TV service and thus its principal feature is the conveyance of signals and that the Other Non-Content elements are ancillary to that function and are thus the subsidiary features of the Sky Pay TV service.
175. For these reasons, in our judgment, applying the relevant legal principles to the undisputed facts the Sky Pay TV service is a “transmission service used ... for broadcasting” falling within the meaning of that term in section 32(2A)(c) and, as such is a service consisting in or having its principal feature the conveyance of signals. It is an ECS.

## **H. OVERALL CONCLUSION**

176. On Issue 1, we conclude that Ofcom did not err in law in its construction of section 32(2) and (2A) and to that extent the appeal fails.
177. On Issue 2, we conclude that, first, Ofcom erred in not considering in the Decision whether the element of conveyance of signals predominates over the Other Non-Content aspects of the Sky Pay TV service; but, secondly, that, in any event, it does so predominate and thus the Sky Pay TV service is an ECS. The overall conclusion in the Decision was correct.

178. In these circumstances, the question arises as to what, if any, remedy should be granted. In our judgment, the choice here is between (1) quashing the Decision without more, (2) quashing the Decision with a direction to Ofcom to reconsider and make a new decision in accordance with our ruling, and (3) not granting any remedy and dismissing the appeal in so far as it seeks to quash the Decision. Our provisional view is that the choice lies between the second and third options. In this regard we refer the parties to the terms of section 194A(3) and draw particular attention to the judgment of the Tribunal in *C r lia Group Holding SAS v CMA* [2023] CAT 54 at paragraphs 322 to 342.
179. Accordingly, we invite the parties' post-judgment submissions on the appropriate final order to be made, and will give further procedural directions to this end.

The Hon Mr Justice Morris  
Chair

Jane Burgess

Anna Walker CB

Charles Dhanowa O.B.E., K.C. (*Hon*)  
Registrar

Date: 15 November 2023