Neutral citation [2008] CAT 33

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1100/3/3/08

Victoria House
Bloomsbury Place
London WC1A 2EB

24 November 2008

Before:

THE HON. MR. JUSTICE WARREN
(Chairman)
MICHAEL BLAIR QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) THE NUMBER (UK) LIMITED
(2) CONDUIT ENTERPRISES LIMITED

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

Heard at Victoria House on 22 and 23 October 2008

JUDGMENT

APPEARANCES

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Olswang) appeared for the Appellant.

Mr. Christopher Vajda QC, Mr. George Peretz and Miss Fiona Banks (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. John O'Flaherty (instructed by BT Legal) appeared for the Intervener.

I INTRODUCTION

The current appeal

1. This is an appeal by The Number (UK) Limited ("The Number") and Conduit Enterprises Limited ("Conduit") (together, "the Appellants") under section 192 of the Communications Act 2003 ("the 2003 Act") against a decision of the Office of Communications ("OFCOM") dated 10 March 2008 in relation to the resolution of price disputes concerning the supply of certain directory information by British Telecommunications plc ("BT") to the Appellants ("the Determinations"). The Appellants individually provide voice and on-line directory enquiry services ("DQ services") to end-users in the United Kingdom, as well as a call connection service.

2. According to the Determinations, the disputes relate to whether the charges paid by the Appellants to BT for the supply of the contents of BT's database known as Operator Services Information System ("OSIS") are consistent with BT's regulatory obligations. OSIS is a comprehensive core database containing aggregate information relating to subscribers provided with publicly available telephone services ("PATS") by BT and other operators. BT pays other communications providers a fee per compiled entry in the database to obtain this information.

3. The Number originally referred a dispute between it and BT to OFCOM under section 185(2) of the 2003 Act on 7 September 2005 as to whether and to what extent BT's charges for the supply of directory information were fair, objective, cost oriented and not unduly discriminatory in compliance with Universal Service Condition 7 ("USC7"). USC7, imposed by one of OFCOM's predecessors, the Director General of Telecommunications ("the Director") at the Office of Telecommunications ("OFTEL"), requires BT to supply its OSIS database at the wholesale level to providers of DQ services, such as those provided by the Appellants. On the other hand, USC7 does not require BT to provide services at the retail level directly to consumers. The Universal Service Conditions are to be found in the Schedule to Annex A of a document dated 22 July 2003 entitled "Designation of BT and Kingston as universal service providers, and the specific universal service conditions" ("the 2003 Designation").

4. Conduit referred a similar dispute between it and BT to OFCOM on 20 December 2005. Both The Number and Conduit subsequently requested OFCOM also to consider the provisions of General Condition 19 ("GC19") in its resolution of the disputes. GC19 requires BT and other communications providers to supply certain directory information for the purposes of the provision of certain services, such as those provided by the Appellants. Both disputes arise from the judgment of the European Court of Justice ("ECJ") in Case C-109/03 *KPN Telecom BV v OPTA* ECR I-11273, which held that charges for making available relevant directory information should not include the costs associated with assembly, compilation and updating of that information.

5. The Determinations conclude that USC7 is unlawful and, as a result, BT is not required to provide access to the OSIS database under USC7 and therefore no issues arise in relation to the charges paid by the Appellants to BT for the supply of the contents of OSIS. The Determinations also conclude that BT has not overcharged the Appellants for the data that it is required to provide under GC19.

Previous related appeals before the Tribunal

6. Earlier in the history of these disputes (on 11 November 2005), The Number lodged an appeal against a decision by OFCOM not to accept the dispute for resolution (Case 1057/3/3/05). On 5 December 2005, OFCOM informed all parties that they had accepted the disputes for resolution and The Number consequently was granted permission to withdraw its appeal (by an Order of the Tribunal dated 26 April 2006).

7. At a later juncture in the consideration of the disputes, BT also lodged appeals with the Tribunal under section 192 of the 2003 Act in May 2006 (Cases 1063/3/3/06 and 1064/3/3/06). The appeals related to the extension by OFCOM of the scope of the disputes to include consideration of the application of GC19. At the time of lodging its appeals, BT stated that it had filed its notices of appeal as a precautionary measure, in order to avoid any risk of it being out of time to challenge the final decision of OFCOM and related findings contained therein. BT also submitted that the most appropriate course to deal with the matter would be for the

Tribunal to defer consideration of its appeals pending OFCOM's final determination, which is now the subject of the separate current appeal brought by the Appellants. A case management conference listed for 12 December 2006 to consider the appeals was vacated by Orders of the Tribunal made on 4 December 2006.

8. At the hearing in this appeal, BT submitted that its pending appeals should remain stayed until the appeal currently before the Tribunal has been determined. According to BT, the most likely outcome is that it will subsequently seek the permission of the Tribunal to withdraw its pending appeals under rule 12 of the Competition Appeal Tribunal Rules 2003 (SI 2003, No. 1372).

II LEGISLATIVE FRAMEWORK

9. The current regulatory position, known as the common regulatory framework ("CRF"), in force throughout the European Union ("EU") from which the issues in dispute arise took effect from 24 April 2003 when a package of directives aimed at establishing a harmonised framework for the regulation of electronic communications services, networks and associated facilities and services came into force. The four directives that are particularly relevant in the present proceedings are:

(a) Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("the Framework Directive");

(b) Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services ("the Authorisation Directive");

(c) Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive"); and

(d) Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ("the Universal Service Directive" or "USD").

10. Under the previous Community regulatory framework, Member States could require telecommunications providers to be individually licensed and could also attach various conditions to those licences. This resulted in differences in the national licensing systems across the EU. The Authorisation Directive seeks to address these differences by allowing for general authorisation of all providers of electronic communications services and networks without requiring any explicit decision or administrative act (Article 3). Conditions that may be attached to general authorisations are limited to what is strictly necessary to ensure compliance with Community and national law obligations. Specific obligations may be imposed, *inter alia*, on undertakings designated to provide universal service under the USD (Article 6). Universal service is described in recital 4 USD as "the provision of a defined minimum set of services to all end-users at an affordable price".

11. The requirements of the directives noted above were transposed into UK law mainly by the 2003 Act. Under section 45 of the 2003 Act, OFCOM can set a number of conditions on providers of electronic communications services and networks, including a general condition ("GC") and a universal service condition ("USC"). Section 46 of the 2003 Acts stipulates that a GC may be applied generally to, *inter alia*, every person providing an electronic communications network or service. In contrast, a USC may be applied to a particular person specified in the condition.

12. USC7, which was intended to implement the provisions set out in Article 5 USD, requires BT to make available the contents of OSIS in machine readable form to any person seeking to provide publicly available DQ services on fair, objective, cost oriented and non-discriminatory terms. This obligation requires BT, as a universal service provider, to provide, upon reasonable request, directory data in relation to all telephone subscribers in the UK, whether BT's or those of another communications provider. It therefore places an obligation on BT to obtain such data from all communications providers, aggregate the data and supply it to those operators seeking to provide DQ services following a reasonable request.

13. Separately, under GC19 BT (along with all other communications providers) is required under its licence to supply the name, address and telephone numbers of BT's subscribers and of any other end-user assigned a telephone number originally allocated to BT on fair, cost oriented and non-discriminatory terms. GC19 effectively implements the requirements laid down in Article 25(2) USD.

14. In theory, a provider wishing to supply DQ services could request "own subscriber" data under GC19 individually from all communications providers (including BT) and aggregate this information into a database to enable the provider to supply DQ services. In practice, however, it could avoid the necessity of compiling data on a piecemeal basis and instead request access to OSIS from BT under USC7.

III OFCOM'S DETERMINATIONS

15. During their initial consideration of the disputes, OFCOM notified the parties that they had been advised by leading counsel that USC7 does not properly implement Article 5 USD. Their concern was that the mechanism set out in USC7 fails to impose an obligation on any undertaking (and, in particular, on BT as a designated provider) to guarantee that at least one comprehensive DQ service is provided to all end-users at the retail level. At section 5 of the Determinations, OFCOM set out that, in their view, Article 5 USD, when read together with the 11th recital, lays down the minimum set of universal services relevant to the dispute that must be made available at an affordable price. Those services, they state, are at least one comprehensive directory and one comprehensive telephone DQ service covering all listed telephone subscribers of PATS and their numbers. As USC7 does not implement Article 5 USD, OFCOM concluded that the adoption of USC7 was beyond their powers and hence unlawful.

16. Furthermore, OFCOM also considered as a separate matter that the particular provision of USC7.4 relating to the regulation of charges was incompatible with the USD or with the provisions of the 2003 Act that implement the USD. Therefore, even if the rest of USC7 was held to be compatible with the USD, OFCOM concluded that USC7.4 is itself flawed and unlawful.

17. In relation to GC19, OFCOM concluded that BT is only required by its terms to provide a subset of the data actually provided to The Number and Conduit in the form of OSIS. In addition, OFCOM found no compelling evidence that BT had overcharged the Appellants for access to the data required under GC19.

IV GROUNDS OF APPEAL

18. In summary, the principal grounds of appeal on which the Appellants rely are that:

(a) The Determinations are wrong in law and/or are an improper exercise of OFCOM's discretion;

(b) OFCOM erred in law in deciding that USC7 is unlawful and that, contrary to OFCOM's findings in the Determinations, USC7 is lawfully made under the domestic statutory framework and entirely consistent with the requirements of USD; and

(c) USC7 is the obligation which underpins the supply of directory information from BT's OSIS to all directory enquiry service providers in the UK and that the Appellants are severely prejudiced by OFCOM's decision that BT is not bound by its obligations under USC7.

19. The Appellants also raise the possibility that a reference to the ECJ under Article 234 of the Treaty establishing the European Community ("the EC Treaty") may be required in order to establish the true meaning of Article 8(1) USD and its impact on the construction of Articles 3 and 5 USD. In particular, the Appellants note that linguistic differences may arise in relation to the interpretation of the term "guarantee" in Article 8(1) i.e. "Member States may designate one or more undertakings to guarantee the provision of universal service…" The Appellants submit that Article 5, read in conjunction with Article 8, does not require that there be a legally enforceable duty on BT to provide or ensure the provision of Article 5 services; rather it merely requires Member States to ensure that a DQ service is provided to end users.

20. Finally, the Appellants contend that there is nothing in the USD which is inconsistent with the provisions of USC7.4. They do not, however, seek to overturn any of the findings in the Determinations with respect to GC19 i.e. the appeal is in main part against section 5 and annex 7 of the Determinations only.

21. In terms of relief, the Appellants seek the following:

(a) A declaration that USC7 is lawful and an order setting aside the Determinations in so far as they hold USC7 to be unlawful;

(b) An order that OFCOM re-determine the disputes on the basis of USC7 and re-determine the issue of overpayment by the Appellants to BT; and

(c) Such other relief the Tribunal considers appropriate and costs.

V THE VALIDITY OF USC7 UNDER EU LEGISLATION

22. The central question at issue is whether, in accordance with the European legislation, it was permissible to impose USC7 on BT at all. The subsidiary question is whether USC7.4 is invalid even if the other provisions are valid. The question is simply one of authority. The actual imposition of USC7 is not challenged on any other ground if there was authority to impose it.

THE VALIDITY OF USC7

23. In addressing the validity of USC7, Article 8 is of central importance because the designation of an undertaking is a pre-requisite for the imposition of any specific obligations permitted by Article 3(2) of the Authorisation Directive. The parties have naturally focused principally on Article 8 as the source of the power, if there is one, to impose USC7, addressing the issue as one of construction of that Article in the context of the USD including, importantly, its recitals; in turn, the USD is to be construed in the context of the entire CRF taking account of the interlinking provisions of the Framework Directive, the Authorisation Directive, the Access Directive and, of course, the USD itself. For reasons which will become apparent, we think that that focus is too narrow and that Article 3(2) of the USD is also to be

considered as a possible source of the power to impose USC7. It seems to us that Article 3(2) gives the Member State wide-ranging authority to determine how universal service is to be implemented; that authority is constrained by Article 3(2) of the Authorisation Directive which constraint is in turn modified by Article 6(2) of that Directive. Accordingly, it is to Articles 3(2) and 8 of the USD, read together, that one must look to establish the limits of what is permissible.

24. We have received detailed submissions from the Appellants and OFCOM, to set the scene for addressing the true meaning of Article 8(1), under three inter-related headings: (i) the policy considerations behind the CRF in general and the USD in particular; (ii) the legislative history (including the *travaux préparatoires*); and (iii) OFTEL's reasons for considering why it was felt appropriate to impose USC7.

25. We take (i) and (ii) together. Prior to the implementation of the CRF, provision of fixed public telephone services was governed by Directive 98/10/EC of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment ("the RVTD"). Article 6 dealt with DQ services and contained a provision which is now reflected in Article 5 of the USD, namely a requirement that at least one telephone directory enquiry service covering all listed subscriber numbers be available to all users, including users of public pay telephones. There is disagreement between the Appellants and OFCOM about whether it would have been permissible to impose licence conditions under the RVTD regime similar in their effect to USC7. We do not propose to resolve that disagreement; although the previous legislation is of some interest, there is no need, for the resolution of the issues before us, to know precisely what it did or did not allow.

26. The old regime was perceived by the Community legislators as deficient. It is worth spending a few moments on some of the *travaux préparatoires* to the CRF now in force.

The travaux préparatoires and European Commission Communications

27. The first in time is the European Commission's 1999 Communications Review (COM(1999) 539 final) - "Towards a new framework for Electronic Communications infrastructure and associated services". The Introduction and Executive Summary notes that:

> "By allowing competition to thrive, this policy [of liberalisation of the telecommunications market] has had a major impact on the development of the market, contributing to the emergence of a strong communications sector in Europe, and allowing consumers and business users to take advantage of greater choice, lower prices and innovative services and applications." (page ii)

28. But not all in the garden was rosy: some pruning no doubt was necessary. The Review was therefore seen by the Commission as:

> "an opportunity to re-assess existing regulation, to ensure that it reinforces the development of competition and consumer choice, and to continue to safeguard objectives of general interest." (page iii)

29. The policy objectives of the new framework were described in this way:

> " - **To promote and sustain an open and competitive European market for communications services**, to provide an even better deal for the consumer in terms of price, quality and value for money.
>
> - **To benefit the European citizen**, by ensuring that all have affordable access to a universal service specified at European level, and access to Information Society services; protecting consumers in their dealings with suppliers; ensuring a high level of data protection and privacy; improving transparency of tariffs and conditions for using communications services; and addressing the special needs of specific social groups, in particular disabled users and the elderly.
>
> - **To consolidate the internal market in a converging environment**, by removing obstacles to the provision of communications networks and services at the European level so that, in similar circumstances, similar operators are treated in similar ways wherever they operate in the EU." (page v)

30. Five principles for regulatory action were then identified. These include the principles that regulation should:

(a) be based on clearly defined policy objectives (as set out above); and

(b) be the minimum necessary to meet those objectives, "building mechanisms into the new framework to reduce regulation further where policy objectives are achieved by competition" (page vi).

31. The Commission saw the new regulatory framework as a considerable simplification over existing regulation. It also intended there to be "greater reliance on the general competition rules of the Treaty, allowing much of the sectoral regulation to be replaced as competition becomes effective" (page vi).

32. Under the heading "Universal service" (page ix) it is stated as follows:

> "**Ensuring affordable access for all to communications services necessary for participation in the Information Society remains a key priority for the Commission**. The benefits of the Information Society will only be realised if all are able to participate in it. This is essential to avoid the emergence of a "digital divide". The current framework defines a set of services which make up universal service."

33. Turning to the body of the Review, there is to be found in section 3.3 some more detail under the heading "Design of the future regulatory framework". Three key elements of the framework were identified: binding sector-specific legislation, complementary non-binding sector-specific measures and competition law. Binding Community measures would include a new Framework Directive based on the five regulatory principles described above, combined with four specific directives. The Framework Directive would, among other matters, guarantee specific consumers' rights (such as dispute resolution procedures, emergency call numbers and access to information). The four specific directives would be in relation to the following matters: (i) authorisation and licensing; (ii) provision of universal service; (iii) access and interconnection; and (iv) data protection and privacy. The USD was envisaged as incorporating elements of the RVTD.

34. Section 4.4, headed "Universal service", describes the then current regulatory framework. It is described as requiring national regulatory authorities to place obligations on network operators to ensure that a defined minimum set of services of specified quality are available to all, independent of their geographical location, at an affordable price.

35. A major priority for the Commission was to ensure that all consumers have the opportunity to "reap the benefits of the Information Society", an objective essential to avoid a "digital divide" between the haves and have-nots. It was recognised that competition alone was not sufficient to achieve this policy objective. It was therefore perceived as essential that the new regulatory framework should continue "to ensure all are provided with those services considered essential for participation in society and already available to the great majority of citizens. This is the origin of the concept of universal service" (page 41).

36. Universal service is based on the concept of affordability as the driver of charges; cost to the provider does not feature in this aspect of the regulatory regime. There are separate provisions designed to deal with the position where a provider is, in effect, required to provide at less than cost.

37. The next document in time to which we were referred is the Commission's proposal for the Authorisation Directive and the accompanying Explanatory Memorandum (COM(2000) 386 final).

38. According to the Introduction, the proposal was for a Directive to replace the current common framework for general authorisations and individual licences. However, the Commission had expressed "serious concern about the way in which the current Directive had been implemented within the Community" (page 2). Consultations had revealed strong support for further harmonisation and simplification of national authorisation rules.

39. The proposal was therefore to "revise" the existing regimes, a proposal "based on the need to stimulate a dynamic, competitive market for communications services, to consolidate the internal market in a converging environment, to restrict regulation to the necessary minimum…" (page 2). It is noted that, as a result of the creation of different licence categories by different Member States, the regulatory workload varies from relatively light to extremely heavy with corresponding differences to the administrative charges imposed on operators. There was no objective justification for "splitting up authorisations in ever so many services categories and this approach should therefore be abandoned" (page 3). As it is put:

> "An efficient and effectively functioning single European market can be achieved by rigorously simplifying existing national regimes using the lightest existing regimes as a model. Only if procedures and conditions for authorising electronic communication services are reduced to what is strictly necessary, a single European authorisation or mutual recognition of authorisations, would not seem to be needed to allow and support the development of a dynamic and competitive internal market." (page 3)

40. The second sentence in that quotation is particularly significant, the policy being to achieve uniformity of treatment across the Community, an aspect reflected, as will be seen, in Article 8(3)(a) of the Framework Directive.

41. The solution then appears under the next heading, which we quote in full:

> "**3. PROPOSED REMEDIES**
>
> **General authorisations instead of individual licences**
>
> Although the existing Licensing Directive gives priority to general authorisations, it still leaves a wide margin to Member States for the use of individual licences. A majority of Member States has made ample use of this margin to the extent that individual licences have become the rule rather than the exception in most national regimes. This makes entry in the national market cumbersome and creates a barrier to the development of cross-border services.
>
> » *The present proposal intends to cover all electronic communication services and networks under a general authorisation and to limit the use of specific rights to the assignment of radio frequencies and numbers only...*
>
> **Disentangling different categories of conditions**
>
> The Licensing Directive has established an exhaustive list of conditions which may be attached to general authorisations and individual licences. However, in practice this list seems to have been read as establishing conditions which *must* be imposed. Moreover, individual licences often include conditions which merely repeat provisions of general telecommunications regulation or general legislation. This creates inappropriate linkages and conditionalities between the right to provide services or networks and various requirements of national law and make authorisations less transparent than they could be.
>
> » *The proposed Directive would further limit the number of conditions which may be imposed on service providers and requires a strict separation between conditions under general law, applicable to all undertakings, conditions under the general authorisation and conditions attached to rights of use for radio frequencies and numbers...*" (pages 3 and 4)

42. The next document in time is the Commission's proposal for the USD and the accompanying Explanatory Memorandum (COM(2000) 392 final).

43. The Introduction (contained in Section I) commences by describing the proposed Directive as one which:

> "brings forward and consolidates existing texts in telecommunications regulation, updating where necessary in response to technological and market developments."

44. It goes on:

> "…The second chapter focuses on traditional universal service obligations, and includes provisions for designation of operators by Member States for the provision of universal service …"

45. Provision for designation across the board is a novelty, a more limited power of designation being found in Articles 5 and 25(2) of the RVDT.

46. The aims of the proposed Directive are set out in Section II, the first aim being "to adapt and modernise existing measures on universal service…" Section III contains a heading "Universal service obligations". The second paragraph under that heading provides:

> "At the same time, the Directive provides for a more efficient means of designating operators with universal service obligations, for calculating any net costs and for any necessary compensation of undertakings. Member States are required to find the most efficient means of guaranteeing universal service obligations, including giving all undertakings an opportunity to fulfil obligations, and using allocation mechanisms for part or all of universal service obligations by tendering or auction methods where appropriate."

47. One sees the use of the word "guarantee" again two paragraphs later where, referring to the draft proposed Directive, it is said that:

> "Articles 3 to 8 deal with the guaranteed scope of universal service obligations. Article 3 guarantees the services that comprise the scope of universal service obligations and requires Member States to implement such obligations… Article 8 ensures that Member States have powers to designate one or more operators to guarantee part or all of the universal service obligations…"

48. The next communication from the Commission relates to the second periodic review of the scope of universal service dated 25 September 2008 (COM(2008) 572 final). On page 3 one finds the following:

> "Member States are required to find the most efficient means of guaranteeing universal service obligations (USO), including giving all undertakings an opportunity to fulfil them. If the market fails to deliver these services obligations may be imposed on undertakings to provide them at specified conditions…"

The common regulatory framework

49. Turning to the legislation in the form as it is on the statute book, we go first to the Framework Directive which, we note, repealed the RVTD at Article 26. The role of *ex ante* regulatory obligations is mentioned in Recitals (25) and (27): "There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market" in the context of the concept of dominance (replacing significant market power as the touchstone). But: "It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem".

50. Article 1 defines the scope and aim of the Directive, Article 1(1) providing that it:

> "establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. 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."

51. It contains a number of definitions at Article 2 which we do not need to set out, but we draw attention to the definitions of "electronic communications network", "subscriber" (a person contracting with a provider but who need not be an end-user) and "end-user" (being a user not providing public networks or services to others). There is also a definition of "universal service" which refers back to the USD and is the minimum set of services of specified quality "which is available to all users regardless of their specific national conditions, at an affordable price".

52. Article 8 of the Framework Directive sets out the policy objectives and regulatory principles, found in Articles 8(2) to (4). We need refer only to Articles 8(2)(a) and (b) and (4)(a) and (b).

(a) Article 8(2)(a) and (b) require national regulatory authorities ("NRAs") to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by ensuring (Article 9(2)(a)) that users, including disabled users,

derive the maximum benefit in terms of choice, price and quality and (Article 8(2)(b)) that there is no distortion or restriction of competition in the electronic communications sector.

(b) Article 8(4)(a) and (b) requires NRAs to promote the interests of citizens of the EU by (a) ensuring that all citizens have access to a universal service specified in the USD and (b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures.

53. Next we look at the Authorisation Directive. Recital (1) again identifies the need for harmonisation and for less onerous market access regulation. The Directive is designed (see Recital (3)) to create a legal framework to ensure the freedom to provide networks and services and (see Recital (7)) by using the least onerous authorisation system possible. This can be best achieved (see Recital (8)) by general authorisations without requiring any explicit decision or administrative act by the NRA and such general authorisations are to include (see Recital (9)) the rights and obligations of undertakings in order to ensure a level playing field. The conditions which may be attached to general authorisations should be limited (see Recital (15)) to what is strictly necessary to ensure compliance with the requirements and obligations under Community law and national law in accordance with Community law.

54. Article 1 defines the objective and scope of the Directive, Article 1(1) providing that:

> "The aim of this Directive is to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community."

55. Article 3(2) is a provision of some importance in the present case. It provides in its first sentence as follows:

> "The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation..."

56. Article 3(2), it can be seen, envisages the general authorisation (which may contain provisions affecting all providers) but effectively prohibits the imposition of specific obligations (going beyond those provisions) unless they fall within Article 6(2).

57. Article 6(2) provides as follows:

> "Specific obligations which may be imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of Directive 2002/19/EC (Access Directive) and Articles 16, 17, 18 and 19 of Directive 2002/22/EC (Universal Service Directive) or on those designated to provide universal service under the said Directive shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation."

58. The obligations referred to in Article 6(2) thus include "specific obligations which may be imposed […] on those designated to provide universal service under [the USD]". We will come, in due course, to see what obligations the USD allows to be imposed and, at the same time, to consider further the meaning of "those designated to provide universal service" in Article 6(2), bearing in mind that the relevant provisions of the two Directives need to be construed together as part of the CRF, with the meaning of one informing the meaning of the other.

59. Although the Access Directive forms part of the CRF, we do not consider that its provisions assist us in determining the questions we are asked to decide, except to mention the scope and aim as set out in Article 1(1), again referring to harmonisation and the establishment of a regulatory framework for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

60. We come, then, to the USD. We need to refer to a number of Recitals before turning to the substantive provisions.

61. Recital (1) refers to the "liberalisation of the telecommunications sector and increasing competition and choice for communications services which go hand in

hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service". One can see a focus on end-users in Recital (2), referring to Article 153 of the EC Treaty and the protection of consumers.

62. Recital (4) is of some relevance, effectively identifying "universal service" as the "provision of a defined minimum set of services to all end-users at an affordable price".

63. Recital (5) refers to certain obligations which should apply to all undertaking "providing publicly available telephone services at fixed locations" and others which should apply only to undertakings "enjoying significant market power or which have been designated as a universal service provider".

64. Recital (7) provides that Member States "should continue to ensure" the availability of the universal service to all end-users; and (the long) Recital (8), focusing on Article 4, spells out in some detail what is expected in the fulfilment of a "fundamental requirement […] to provide users on request with a connection to the public telephone network at a fixed location, at an affordable price".

65. The Appellants place considerable reliance on Recital (9) which they submit is central in ascertaining the scope of Article 8. Recital (9), like Recital (8), is directed at Article 4; it is not suggested that it is directed at Article 5 but it does, according to the Appellants, provide a compelling analogy. Recital (9) reads as follows:

> "The provisions of this Directive do not preclude Member States from designating different undertakings to provide the network and service elements of universal service. Designated undertakings providing network elements may be required to ensure such construction and maintenance as are necessary and proportionate to meet all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location."

66. We will return to this after referring to Article 4 and other relevant Articles of the USD.

67. Recitals (10) and (15) refer to affordability. Affordability for individual consumers is related to their ability to monitor and control their expenditure. It means giving power to consumers through obligations imposed on undertakings designated as having universal service obligations.

68. Recital (11) is directed at directory information and DQ services. These constitute an essential tool for PATS and form part of the universal service obligation.

69. Recital (13) refers to Member States being required to guarantee access and affordability. It refers to standards to assess the quality of services received and "how well undertakings designated with universal service obligations perform in achieving these standards". In addition, Recital (14) envisages universal service obligations to be provided by undertakings other than those with significant market power, referring to "the willingness of undertakings to accept all or part of the universal service obligation" and stating that "…universal service obligations could in some cases be allocated to operators demonstrating the most cost-effective means of delivering access […]. Corresponding obligations could be included as conditions in authorisations to provide publicly available services."

70. Recital (26) is directed at Articles 16 to 19 in Chapter III, not at the provisions of Articles 5 and 8 with which we are primarily concerned. Although some submissions have been made to us based on it, we have not found this Recital of assistance in resolving the issues before us.

71. Turning to the Articles of the USD, Article 1 defines the scope and aims of the Directive. Within the scope of the Framework Directive, the USD "concerns the provision of electronic communications networks and services to end-users". The aim is:

> "to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market."

72. The Directive "establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services…"

73. Article 2 contains definitions; it incorporates the definitions of the Framework Directive and thus, in particular, of "universal service" and "end-user" (see paragraph [51] above). We note the definition of "public telephone network" as an electronic communications network which is used to provide "publicly available telephone services", essentially a service available to the public for originating and receiving calls and accessing emergency services.

74. Chapter II is headed "Universal Service Obligations Including Social Obligations". It starts with Article 3 which, in turn, is headed "Availability of universal service". We set out Article 3 in full:

> "*Article 3*
>
> **Availability of universal service**
>
> 1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.
>
> 2. Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest."

75. One sees in Article 3(1) the obligation of Member States to "ensure that the services set out in this Chapter are made available at the quality specified to all end-users". The word "services" is a *portmanteau* word used to cover all the matters of which the Member States are required to ensure provision.

76. In Article 3(2) one sees that the Member States are then required to determine, in their own individual territories, the most efficient and appropriate approach for implementing the Community obligation. This does not give a Member State *carte blanche* to implement whatever national legislation it wishes in order to achieve the provision of universal service. Member States can enact legislation and impose

regulatory requirements and conditions only consistently with the aims, objectives and provisions of the CRF, and in particular, in compliance with the broad parameters, of objectivity, transparency, non-discrimination, proportionality and minimisation of market distortions, set out in Article 3(2) itself.

77. Article 4 deals, as the heading describes it, with provision of access at a fixed location. Under Article 4(1), Member States are to ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to PATS at a fixed location are met by at least one undertaking. This single provision covers the separate items of network connection and access to services. Both are seen as the provision of access.

78. Article 5 deals with the provision of directories and DQ services. Article 5(1) provides as follows:

> "Member States shall ensure that:
>
> (a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;
>
> (b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones."

79. Paragraph (a) relates to physical directories; this would be, typically, a phone-book but it could include a CD or other electronic medium issued to consumers. Paragraph (b) relates to DQ services. In either case, the directories should include all subscribers of PATS other than those who have excluded their names and details from entry (Article 5(2)).

80. Article 6 requires Member States to ensure that NRAs are able to impose obligations on undertakings to provide public pay telephones to meet the reasonable needs of end-users. Article 7 requires Member States to take specific measures for disabled end-users to ensure access to and affordability of public telephone services, including access to emergency services, DQ services and directories.

81. Article 8 is central to the dispute and deals with designation of undertakings. It reads as follows:

"*Article 8*

Designation of undertakings

1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.

2. When Member States designate undertakings in part or all of the national territory as having universal service obligations, they shall do so using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated. Such designation methods shall ensure that universal service is provided in a cost-effective manner and may be used as a means of determining the net cost of the universal service obligation in accordance with Article 12."

82. Some detailed submissions have been made in relation to Articles 9 to 12; we do not consider that we need at this point to describe the provisions of the Articles. We should, however, mention Article 25 dealing with operator assistance and DQ services.

83. Article 25(1) is really the converse of Article 5(1)(a); subscribers are to be entitled to have an entry in the available directory under the latter provision. Article 25(2) requires Member States to ensure that undertakings assigning phone numbers to subscribers (i.e. as defined in the Framework Directive) meet all reasonable requests to make available, for the purposes of the provision of publicly available DQ services and directories, the relevant information in an agreed format. This means that a number provider must make available to directory or DQ service providers certain core information concerning its own subscribers to enable the directory or DQ service provider to compile a complete directory or offer a full DQ service.

Preliminary observations on the USD

84. Before leaving the USD, we wish to make some (we are sorry to say rather lengthy) observations about how these provisions relate to each other. These observations may appear at first to be at best tangential and at worst irrelevant to the questions

before us. However, they do, we think, assist in addressing precisely how Article 8 operates; and are relevant to some of the arguments presented to us.

85. The universal service obligation placed on Member States is to ensure the availability of a certain defined minimum set of services to all end-users. That set of services is found in Article 3(1) – "the services set out in this Chapter [Chapter II]". It is only in Chapter II that this minimum set of services to all end users is to be found and it is by reference to the set that "universal service" is defined. Consistently with that, Article 8 refers to "universal service as identified in Articles 4, 5, 6, 7 and, where applicable, Article 9(2)". It is then necessary to identify the "services" which are set out in each Article so as to fall within "universal service". Most Articles present no difficulty. Thus the service referred to in Article 5(1)(a) is provision of a directory, printed or electronic; such provision must be made available to end-users (although an end-user may choose not to make use of the service and decline to receive, for instance, a paper directory). Under Article 6, the "service" is the provision of pay telephones and the provision of emergency calls from such phones. The obligation of the Member State to provide that service is qualified by Article 6(2), but that qualification does not mean that provision of pay telephones is not part of universal service.

86. The position in relation to Article 4(1) is not so straightforward. Article 4 does not in express terms require the provision of a network or the provision of telephony services; nor does any other provision of the USD do so. This is, perhaps, not surprising because the policy of the USD is to ensure that everybody should have access to the basic facilities which are already being made available to the majority of subscribers, an aspect which is reflected in the closing words of Article 4(2). In practice, the market provides an adequate network and adequate services at affordable prices.

87. Nonetheless, it is the case, in our view, that universal service includes the service comprised in a "nationally available telephone service". Access to and provision of telephony services are not, however, identical. Several providers may be willing to provide telephony services to a given subscriber at a given location. But unless the network provider allows them use of the network to provide that service, the end-

user cannot access the service at that location, and mere connection to the network is not of itself enough. Instead, the service provider needs a contract or licence to use the network from the network provider which will then configure its network to allow that service to operate. It seems to us that the network provider, in granting a licence to the service provider, is thereby allowing access to the end-user to the telephony services for the purposes of Article 4(1). In other words, there is more to access to a service than the willingness of the provider to provide it. The provision of access can therefore be seen as part of the universal service too: it is one of the services "set out in this Chapter" within Article 3(1) which it is the obligation of Member States to ensure.

88. Further, we consider that in thus allowing access to the end-user to the services provided by the service provider, the network provider is itself providing a service to the end-user notwithstanding that the network provider is not in contractual relations with the end-user so far as provision of the service is concerned.

89. Accordingly, we see access under Article 4 as comprising two elements: the provision of actual services by the provider when required; and the licence of the network provider to enable such service to be provided. It may well be the case that the same undertaking is able to provide both elements, depending on the particular structure of the market. However Recital (9) specifically enables Member States to designate different undertakings to provide the network and service elements. These elements together constitute the access which it is the obligation of the Member State to ensure under Article 4(1); and that access is part of universal service.

90. We have referred to what we see as the relevant provisions of the *travaux préparatoires* and the legislation in some detail in order to address the submissions of Counsel about the aims and objectives of the CRF. We do not perceive as large a gulf between them on this aspect of the case as they might, in their own ways, wish us to think exists.

91. Miss Rose, for the Appellants, sees the new regime as a continuation of the old regime with certain alterations reflecting a policy of lighter regulation and more

harmonisation, but detecting no policy – and certainly no express provision – limiting the level at which regulation may be effected. According to her, it was permissible, under the old regime of the RVTD, to impose licence conditions which took effect at the level of provider to provider, or what is referred to as the wholesale level; regulation was not restricted to the lower level of provider to end-user, or what is referred to as the retail level. Given the continuity which exists, and given that there is no express prohibition of regulation at the higher level, Miss Rose submits that the Directives should not be construed in a restrictive way but should be read as leaving with Member States the power to allow NRAs to impose conditions at this higher level.

92. But even if the argument based on the RVTD is wrong or not persuasive, she has detailed arguments on the true meaning of the USD which lead to the same conclusion and which we will come to in a moment.

93. Moreover, it is said that OFTEL's reasons for imposing USC7 were entirely justifiable; USC7 was a fair and proportionate response to the perceived problem. It would be surprising, Miss Rose submits, if there were not power to impose just that sort of condition.

94. Mr Vajda, in contrast, emphasises the unsatisfactory aspect of the old regime which resulted in a plethora of different regulation in different Member States. As the Commission noted in the Explanatory Memorandum accompanying its proposal for the Authorisation Directive, a majority of Member States had made ample use of the margin for using individual licences to the extent that individual licences had become the rule rather than the exception in most national regimes. One of the major policy planks of the new regime was to eliminate these differences and to produce a harmonised approach to regulation in this field. Accordingly, it is said that Article 8 of the USD is in reality an exception to general authorisation and is, in the context of the CRF as whole, to be construed restrictively. The old legislation has been repealed. The new legislation represents, on Mr Vajda's argument, a new approach to regulation and although aspects of the old can be seen in the new, it is the aims and objectives as identified in the *travaux préparatoires* and the Directives themselves which form the only reliable guide to the policy of the new legislation.

95. We agree with that conclusion and gain no assistance from consideration of the old legislation. The policy aims and objectives of the new regime are, as Mr Vajda submits, sufficiently identified in the *travaux préparatoires* and the Directives themselves.

96. The submissions of the parties revealed a disagreement about what sort of regulation (i.e. at the wholesale or retail level) is lighter than another and from what perspective that question is to be judged. Miss Rose submits that regulation at the lower (retail) level is more intrusive (and thus more costly to implement and supervise) than regulation at the higher (wholesale) level. Given the policy objective – which is common ground – of reducing regulation, it would be odd that, assuming regulation is needed at all because the market cannot be guaranteed to ensure provision of the universal service, the only option would be to impose regulation at the lower, more intrusive, level without the NRA being able even to consider an option of regulation at a higher level.

97. As to the relative intrusiveness of regulation at the higher or lower levels, both Mr Vajda and Mr O'Flaherty (who appears for BT, intervening in this appeal) submit that it is not possible to say, *a priori*, that regulation at one level is more intrusive than regulation at the other level. It all depends on what is being regulated and how exactly it is sought to achieve the object of the regulation at each level.

98. Mr Vajda and Mr O'Flaherty must, we think, be right in saying, in effect, that it all depends on the facts and the actual regulation proposed. But equally, Miss Rose must be right in saying that there will be more regulation overall if, in order validly to introduce regulation at the higher level, it is necessary to introduce regulation at the lower level as well. We do not obtain any assistance from consideration of this issue in resolving the questions which we have to resolve, and say no more about it.

99. Before we come to consider the true meaning of Article 8 of the USD, there is one other aspect which we should mention, namely the nature of what it is that is provided to the Appellants under their licences. This is explained in Annex 4 to the Determinations of OFCOM which are under appeal, at A4.33 to A4.38. In essence, the Appellants are provided with a copy of OSIS which they then install on their

own servers; it is that database, on their own servers, which is accessed each time an end-user makes an enquiry.

Article 8 USD

100. We come now to a detailed consideration of the meaning of Article 8. Miss Rose correctly points out that Article 8 does not require a Member State to designate any undertaking at all. If the market is performing without the imposition of specific obligations in a way which results in the provision of universal service, there is no need for regulatory intervention. Neither does Article 5 require that there is to be found a legally enforceable duty on any particular undertaking, that is to say, an obligation enforceable by the Member State, to provide or ensure the provision of services within Article 5; all that the Member State has to do is to ensure provision of the service to end-users: and the proof of the pudding being in the eating, the actually delivery of the service is enough, whether or not pursuant to a legally binding obligation.

101. Miss Rose submits that it is therefore possible to implement Article 5 – that is to say, to ensure the objective of service to the end-user – by the imposition of obligations under Article 8 read with Article 3(2), at the higher (or wholesale) level. In support of that conclusion she raises these two propositions:

(a) First, that the first sentence of Article 8(1) is to be read as authorising the designation of an undertaking; such designation is made in order to guarantee – in the sense of ensure – the provision of universal service i.e. in fulfilment of the Member State's own obligations, but does not actually envisage designating the undertaking in a way which obligates the undertaking actually to provide or guarantee in a legally binding way the provision of the service under Article 5. She says that it is incorrect to read the provision as only permitting designation of an undertaking which is itself to guarantee – in the sense of being placed under a legal obligation or duty – to provide universal service (or any part of it); it is thus not to be read as allowing a Member State to say to a provider that it must guarantee, or even ensure, the provision of universal service (or any part of it). Instead,

an undertaking may be designated with a view to ensuring the Member State's own obligations; if that is best achieved by regulation at the higher level (as in the case of USC7), that is within the scope of Article 8. On that basis, any obligations imposed are within Article 6(2) of the Authorisation Directive and thus not prohibited by Article 3(2) of that Directive.

(b) Secondly, the reference to "elements of universal service" in the second sentence of Article 8(1) is to be given a wide meaning. On this wide construction, it is not restricted to the different items of universal service to be found in each of Articles 4 to 7, for example the two items in Article 5(1) of a comprehensive directory and a comprehensive DQ service. On this wide construction, the database which each of the Appellants accesses in the provision of DQ services is an "element" of that service. Since the database is simply a copy of OSIS, OSIS itself is an "element" of that service which BT can be designated to provide; alternatively, BT can be designated to provide the copy which the Appellants access on their own servers. By providing OSIS (or the copy) at the wholesale level, BT is automatically providing part, or an element, of universal service to end-users. If this is correct, then it is not necessary to rely on the first proposition.

102. Mr Vajda submits that both of those propositions are incorrect. As to the first, he submits that Article 8 is to be read restrictively. Read with Article 3(2) and Article 6(2) of the Authorisation Directive, as it must be, Article 8 can be seen to provide an exception to the general rule under Article 3(2) that specific obligations cannot be imposed. Article 8 is then to be read as permitting the designation of an undertaking only for the purpose of imposing on that undertaking obligations itself to provide, or itself to ensure, the provision of services, for instance under Article 5. Thus an undertaking such as BT could be designated to ensure the provision of DQ services; it could fulfil that obligation by providing them itself, or by ensuring that some third party did so. But the undertaking could not be designated to provide a service at the higher, wholesale, level in order to assist the provision of such services in furtherance of the Member State's own obligation.

103. As to the second proposition, he submits that the elements of universal service being referred to in Article 8 are the elements which one sees identified in the various Articles of Chapter II, albeit that a particular Article may identify more than one element. For instance, Article 4 identifies connection (to the network) and access (to telephony services) and Article 5 identifies the availability of a directory and the availability of DQ services.

104. Whatever the correct resolution of those differences is, there are three aspects of Article 8 which we consider are clear and which need to be borne in mind in construing the provision:

(a) The first is that the mere designation of an undertaking to guarantee the provision of a particular element of universal service will not necessarily identify the totality of the obligations which may be imposed on it. Thus, even if, as was argued before us, the designation of an undertaking to provide connection to the network were to carry with it the obligation actually to provide that connection (rather than that being imposed by a separate condition) and were of itself sufficient to oblige the undertaking to provide that connection, it goes no further than that. In practice, it may be appropriate to impose expressly additional obligations on the undertaking, such as providing a functioning network in order for the connection to be of any value to the end-user. This approach can be seen in USC1 under which BT is obliged to ensure that its networks are "installed, kept installed and run…" These additional obligations are not, we think, imposed under Article 8; rather they are imposed under Article 3(2) USD by virtue of which they are valid exceptions under Articles 3(2) and 6(2) of the Authorisation Directive.

(b) The second is that the designation of an undertaking which is designed to result in the imposition of requirements on the undertaking must identify the particular elements of universal service the provision of which the undertaking is to guarantee. This does not mean that words to the effect "X is hereby designated to provide service Y" must be used; it is enough if the designation and what follows it clearly identify what it is that is to be

guaranteed. Thus, the designation of BT is clearly effective in relation to services within Article 4 because, reading the 2003 Designation as a whole, it is possible to see that an obligation is placed on BT to provide those services or, at least, access to them.

(c) The third is that, although the designation of an undertaking which is limited so as to operate in relation to a particular element of universal service may allow the Member State to impose obligations on that undertaking designed to ensure the provision of that element, that designation will not allow the Member State to impose obligations on that undertaking in relation to an entirely different element of universal service, unless the undertaking is also designated in relation to that different element. If a provider is not designated at all, it clearly cannot have obligations imposed on it under Article 8. Thus a provider of telephony services (but which has not been designated as such) could not have imposed on it obligations to provide DQ services (unless it were designated for that purpose). Suppose, that such a provider were then to be designated to provide telephony services. Why, we ask rhetorically, should that make any difference to the ability of the Member State to oblige it to provide DQ services without actually designating it to do so? We do not think that it does make any difference. We ought to add that it is a separate question whether, by purporting to impose obligations at the higher (wholesale) level on an undertaking in order to ensure a particular element of service, the Member State is automatically designating the undertaking to guarantee the provision of that service. Clearly that would not be the case if OFCOM's approach is correct; but it may be the case if the Appellants' approach is correct. However, reference should also be made to paragraphs [125] to [137] below discussing Miss Rose's arguments based on Recital (9).

105. There is a fourth aspect which we also think is clear, although it does, we acknowledge, require more explanation than the three aspects which we have just mentioned. It is that, in contra-distinction with the third aspect, once an undertaking has been designated to provide an element of universal service, obligations can be imposed on it in relation to that element even if they are not

obligations which are strictly necessary to ensure the provision by that undertaking of the service. As we see it, the designation of an undertaking to provide a particular element of universal service is necessary (see paragraph [104(b)] above). It is for the Member State, under Article 3(2), to determine the "most efficient and appropriate approach for ensuring the implementation of universal service" and thus, focussing on a particular element of universal service, it is for the Member State to determine how best to ensure the implementation of that element.

106. In particular, once an undertaking has been designated to guarantee the provision of a particular element of universal service, the Member State is entitled to impose obligations on it under Article 3(2) if that is seen by the Member State as the "most efficient and appropriate approach". This includes, we consider, the imposition in an appropriate case of obligations relating to the service in question even though such obligations are not needed to ensure that that undertaking itself actually provides that element of universal service. We see no justification for limiting the scope of Article 3(2) of the USD in relation to the very service the provision of which the undertaking in question is designated to guarantee.

107. It will be for the Member State to judge in the light of its own national circumstances whether or not the case is an appropriate one for the imposition of such conditions having regard, in particular, to provisions of the policy objective and regulatory principles set out in Article 8 of the Framework Directive. It is not right, in our view, to say *a priori* that the imposition of such obligations is completely forbidden. Nor do we consider that such a result follows even if Mr Vajda is correct in saying that we must construe Article 8 of the USD restrictively as an exception to the general rule found in Article 3(2) of the Authorisation Directive.

108. It follows from this analysis that if BT had been expressly designated to provide DQ services with an obligation imposed on it to guarantee the provision of those services to end-users, it would have been possible not only to require BT to maintain OSIS but also to make it available, in the way that USC7 makes it available, to other service providers. Thus, BT would not have been able to refuse to accept that obligation by arguing that it was itself willing to provide the service

so that the obligation to make OSIS available to potential providers of DQ services was unnecessary.

109. As will have been seen from many of the provisions of the *travaux préparatoires* and the Directives which we have mentioned, there is frequent reference to an undertaking being designated to provide universal service or elements of it; see for instance:

(a) Article 8(1) itself, in its second sentence, refers to the designation of different undertakings to provide different elements of the universal service.

(b) Article 8(2) refers to a Member State designating undertakings as having universal service obligations.

(c) Recital (9) of the USD envisages Member States designating undertakings to provide the network and service elements of universal service.

(d) Article 6(2) of the Authorisation Directive refers to specific obligations which may be imposed on those designated to provide universal service under the USD.

(e) The passage from the introduction to the Explanatory Memorandum to the proposal for the USD set out at paragraph [43] above refers to a designated operator providing an aspect of universal service.

(f) The passage in that Explanatory Memorandum set out at paragraph [45] above refers to the Directive providing "a more efficient means of designating operators with universal service obligations".

110. These references suggest that the designated undertaking is seen as itself providing universal service or elements of it. However, a later passage of the Explanatory Memorandum set out at paragraph [47] above describes Article 8 as ensuring that "Member States have powers to designate one or more operators to guarantee part or all of the universal service obligations…" and, of course, Article 8(1) itself uses the wording which it does. It might be said that, if the intention had been to ensure

that an undertaking was itself to provide universal service, Article 8 could simply have used the words "to provide" in place of "to guarantee the provision of".

111. In response to that last point, it could be said that the scheme of Article 8 is to allow obligations to be imposed on an undertaking to ensure the provision of an element of universal service: it does not have to provide it itself, but may procure its provision by a third party. That may or may not be a good point, an aspect relevant to Miss Rose's first proposition. But whether or not it is a good point, it can be seen that Article 8 goes beyond the provision of universal service by the undertaking itself. It is no doubt the case that the paradigm "guarantee [of] the provision of universal service" is provision of that service by the undertaking itself so that the provisions from the *travaux préparatoires* we have just listed are accurate in that they focus on that aspect of the guarantee. However, those provisions are not, we consider, a reliable guide to or the last word on the meaning of Article 8 itself and are not to be taken as limiting what we would otherwise consider to be the true meaning of Article 8(1). Further, we see the references in Articles 8(1) and (2) and in Article 6(2) of the Authorisation Directive to an undertaking which is designated to provide universal service simply as a reference to an undertaking which is designated "to guarantee the provision of universal service" in Article 8(1), whatever that phrase may mean.

112. Given that approach, and in the light of the four clear aspects described at paragraph [104] above, we consider that the imposition of an obligation at the higher (wholesale) level on an undertaking is capable (depending on the factual context) of being a designation of that undertaking "to guarantee the provision of universal service". The reasons for this conclusion appear in the following paragraphs.

113. Consider the present case, and USC7. USC7 imposes obligations on BT; these are obligations which are designed to ensure compliance by the UK with its obligations under the USD; they are obligations which clearly, in our view, could have been imposed if the designation of which USC7 formed part had used words such as "BT is hereby designated to provide directory and DQ services as specified in Article 5"; and they are obligations which are not challenged assuming that they were not actually prohibited by the USD.

114. It will be apparent from what we have already said that we consider that an obligation to "guarantee the provision of" an element of universal service is different from an obligation actually to provide it, if only to the limited extent that an obligation to guarantee would be satisfied by ensuring that a third party provided it. In the context of Article 8(1), we do not consider that an obligation to "guarantee" provision of universal service is any more than one to "ensure" such provision. Accordingly, the designation of an undertaking to provide a service means no more than the imposition of an obligation to ensure the provision of that service (whether by the designated undertaking or some other undertaking); it is not a requirement that the undertaking enter into a guarantee that the services will be provided.

115. Further, the USD recognises that provision of services can be "ensured" (or we would say "guaranteed") without any compulsion: it is clear that a Member State is not compelled to designate undertakings under Article 8 and need not do so if the market is certain to provide the service. Similarly, or so it seems to us, an undertaking which had been designated to provide services ought to be able to rely on markets for the actual delivery of those services. It would, in our view, be possible for an undertaking which had been designated to guarantee the provision of an element of universal service to comply with its obligation by putting third parties into a position to provide the service leaving it to the market actually to provide the service to end-users. Thus, in the present case, if BT had been designated in words such as "BT is hereby designated to guarantee the provision of DQ services" with an express obligation imposed to do so but without any obligation such as USC7, it would have been open to BT to comply with its own obligation by: (a) providing third parties such as the Appellants with the information in fact required by USC7; and (b) leaving it to the market then to provide the service to end-users. Assuming, as in fact has proved to be the case, that the market delivers, BT would, by making OSIS available, be guaranteeing the provision of the service even if it might not itself be in the DQ market and thus would not (subject to Miss Rose's argument about the meaning of "elements") itself actually be providing an element of universal service.

116. In reaching that conclusion, we reject the contrary argument of OFCOM to the effect that BT does not, in any sense, "guarantee" the provision of DQ services as the result of USC7. It is said that USC7 has nothing to say about provision of services to the end-user but is only concerned with the provision of something different at the higher (wholesale) level. That, in our view, is to place a wrong interpretation of the word "guarantee" in the context of Article 8(1).

117. We can draw two conclusions from all of this. First, BT could have been specifically designated in relation to DQ services and, if it had been, USC7 could have been validly imposed on it. Secondly, if BT had been so designated, it would have been able to "guarantee" the provision of those services by making OSIS available to third parties and leaving those third parties to provide the services in the market without any requirement for BT to enter into binding contracts obliging third parties to provide such services. Indeed, apart from BT (or its subsidiary) itself providing the service, probably the only way in which BT could guarantee the provision of such services would be to do precisely what USC7 compels it to do; at least, we have not thought of any other sensible way.

118. If that is right, as we think it is, it would be surprising if BT could be compelled to make OSIS available to the extent required by USC7 only if it were, at the same time, subjected to some further obligation either itself to provide the services or to ensure that some other person does so as a matter of legal obligation rather than through operation of markets. It would come to this: BT could be designated to guarantee the provision of directory and DQ services; at the same time, a USC could be validly imposed; BT would not have to provide the service itself because the market provides, given the USC7 obligation. And yet, without a designation which covered DQ services, it would not be possible simply to impose USC7.

119. We think that the answer to this is that the 2003 Designation of which the USC forms part is a designation of BT to provide directory and DQ services. It is to be noted that the designation does not in express terms designate BT in relation to any aspect of universal service. What it contains is wording which designates BT (of course in the context of Article 8(1)) without, at that stage, identifying the services which it is designated to guarantee. It is necessary to turn to the USCs in order to

ascertain what the relevant services are. Thus, USC1 clearly relates to services falling under Article 4(1); and there is no dispute that a valid designation has been made in that regard. Similarly with other paragraphs. It is only in relation to USC7 that it is said by OFCOM that there has been no valid designation. We disagree and consider that there has been a valid designation. We see no difficulty in reading the general words of designation coupled with USC7 as a designation of BT to guarantee the provision of services falling under Article 5 which, at the same time, imposes on BT obligations which may validly be imposed on an undertaking which is designated for the purposes of that guarantee. Certainly, the predecessor to OFCOM considered that by imposing USC7, the UK would be compliant with Article 5 because provision of the Article 5 services would be ensured. BT was therefore indeed guaranteeing the provision of those services and, by USC7, was designated to do so. In our judgment, USC7 was validly imposed. We thus reach the same conclusion as Miss Rose but by a slightly different route.

120. We are not deflected from that conclusion by arguments which have been addressed to us by Mr Vajda on Articles 9(1), 11, 12 and 13.

121. As to Article 9(1), this imposes an obligation on NRAs to monitor retail tariffs for services provided by designated undertakings. In looking at that provision, it should be appreciated that an undertaking designated to guarantee a service may in practice also be obliged itself to provide it, not because that it was what the designation of itself provides but because that is an obligation imposed on the designated undertaking under Article 3(2) applied in the context of Article 8(1). Even if that is not so, one would expect that, normally, a designated undertaking would be a provider of the relevant service even if not (as under USC7) actually obliged to provide it. We gain no assistance one way or the other from Article 9 which is clearly focusing on that part of the service "provided" by designated undertakings and not that part "guaranteed" by them.

122. As to Article 11, this provides that NRAs shall – this is an obligation – ensure that all designated undertakings with relevant universal service obligations publish their performances "based on the quality of service parameters, definitions and measurement methods set out in Annex III". These parameters appear to apply only

to services to end-users. OFCOM say that this applies to all designated undertakings with obligations under any of the relevant Articles. They argue that these quality of service parameters are not apt to cover the type of obligation, USC7, that has been imposed on BT so then they say USC7 cannot be a universal service obligation permitted under Article 8. In particular, there are no quality of service parameters there that are apt to cover the maintenance of a comprehensive database, and therefore the maintenance of a comprehensive database cannot be a universal service obligation.

123. There are two comments to make about that. First, the parameters are not apt to cover phone-books or special measures for disabled users either, so that on any view Annex III does not cover all services within universal service. It is true that the form of the phone-book can be regulated to some extent by virtue of Article 5(1)(a) itself, which requires prior approval by the relevant Member State authority, but that is hardly a satisfactory answer to Miss Rose's point that there is no difference in principle between that example and the example of USC7. Secondly, if we are right in our view that USC7 could be validly imposed were BT under an express obligation to guarantee the provision of directories and DQ services and perhaps even to provide them itself, then the same point would arise and there could be no answer to it other than to accept that Article 11 is not all-embracing. Again, there will be many cases where the designated person does supply services to end-users. But as with Article 9(1), we gain no assistance one way or the other from this.

124. We have not found Articles 12 and 13 of any assistance one way or the other in resolving this dispute.

125. Notwithstanding our conclusion on the validity of USC7, we should say something about Miss Rose's second proposition. It might be thought that the most natural meaning of "elements" is a reference to the various different services the provision of which it is the obligation of Member States to provide. Thus, each of the following would be an element of universal service:

(a) Connection to the public telephone network: Article 4(1).

(b) Access to PATS services: Article 4(1).

(c) A comprehensive directory available to end-users: Article 5(1)(a).

(d) A comprehensive telephone DQ service available to end-users: Article 5(1)(b).

(e) Public pay telephones: Article 6.

(f) Access to services for disabled persons: Article 7. This element might be broken down into the various components (each of which would be an element) specified in Article 7(1) in particular.

126. Miss Rose submits that such a narrow interpretation is incorrect. There is no reason, she says, why a wider construction is not to be preferred, thus giving NRAs an option to adopt regulatory measures in relation to any part of the structure, if we may use that word, which is integral to the provision of the relevant service, something without which the service cannot be provided to end-users. If that is going too far, then anything which is made available to end-users in the provision of a particular element of universal service is itself an element of universal service.

127. Apart from one quite complex argument which she makes, we would reject her submission. It seems to us that the USD focuses on the service which the end-user enjoys. Universal service is the conglomeration of the various services set out in Chapter II; the provision of a directory such as a phone-book is one of the services identified and is in that way an element of universal service. In order to compile the directory, the compiler will have to obtain information. One way to do this would be to exercise rights under Article 25(2) and obtain the relevant subscriber details from each number provider. We would be surprised to find that each number provider was, by complying with its Article 25(2) obligations, providing an element of the relevant service i.e. making the directory available.

128. Miss Rose's argument to the contrary is based on Recital (9) and the way in which it is said to inform the construction of Article 8(1).

129. That Recital expressly envisages the designation of different undertakings to provide the network and service elements of universal service. Miss Rose reads Recital (9) as focusing only on Article 4 and she may be right to do so. Certainly Mr Vajda does not suggest otherwise. We propose to proceed on the basis that Miss Rose is correct. Accordingly, the "network and service elements" referred to in Recital (9) are the elements of that part of universal service which together subsume the combination of connection to the public telephone network and access to PATS. On that footing, Recital (9) shows that obligations can be imposed in relation to network provision in the context of the services referred to in Article 4; similarly, Miss Rose says that it should be possible to impose obligations in relation to OSIS which, in the context of Article 5, is analogous to the network in the context of Article 4. In other words, Recital (9) informs the scope of the powers which Member States can exercise consistently with Article 3(2) and Article 8.

130. Thus it is said that Recital (9) recognises that within one Article, Article 4(1), it is possible to perceive different elements of the particular universal service with which that Article is concerned, elements which do not all have to be provided by one undertaking; according to Miss Rose, one of the undertakings providing a particular element may be doing so on a wholesale basis. For example, one undertaking may have an obligation to maintain a telephone network and another undertaking may have an obligation to provide services at a retail level. The consumer may contract with one undertaking, the telephone company that provides the service, and that company may contract with another undertaking, the company that provides the network, that contract being for access to the network in order to provide the services to the consumer. That does not, it is said, stop both of those undertakings being regarded for the purposes of Recital (9) as providing elements of the universal service.

131. Miss Rose then explains the analogy this way. It is possible to look at the obligation to ensure that a comprehensive DQ facility is available to end-users and it is possible to divide it into elements. One element is the construction, compilation and maintenance of a comprehensive database. This database is the infrastructure of the DQ facility in the same way that the network is the infrastructure of the telephone service facility. Another element is the provision of

DQ services, for instance providing consumer enquirers with a number requested and then perhaps connecting the enquirer to the number. Those are both said to be "elements" of the universal service. The question is whether the obligation that has been placed on BT is an element of the universal service; and the answer which Miss Rose gives is that it is, because it is not possible to have a comprehensive DQ service provided to end-users unless somebody is responsible for keeping a comprehensive database of subscribers.

132. Further, Miss Rose's analysis of the second part of Recital (9) shows, she says, that the position is closely analogous to the sort of obligation envisaged under USC7. The scope of Article 3(2) and Article 8 is wide so that an undertaking designated to provide services within Article 4 (i.e. BT) can be placed under an obligation relating to services (i.e. DQ services) which it is not itself designated to provide. The position is *a fortiori* where the undertaking in fact provides the other service even though it is not designated to do so.

133. We have to say that we do not find the provisions of Recital (9) entirely clear. It all depends on what is meant by the "network and service elements of universal service" in the context of Recital (9). If the provision of the network is seen by Recital (9) as an element of that part of universal service identified in Article 4(1) (and thus provision of service to end-users), then we can see considerable force in the proposition that provision of the network is also part of universal service for the purposes of Article 8. Accordingly, it would be possible to designate an undertaking to provide the network so that the imposition of the obligations set out in Recital (9) would clearly be authorised.

134. But even if that is the correct approach, there is, in our view, no relevant analogy with Article 5. OSIS would not stand in the same relationship to the provision of DQ services as the network stands in relation to the provision of connection to it and access to telephony services. In the case of the network, its provision to end-users is actually part of universal service. It is part of universal service not because connection and access to services cannot be provided without it but because, on the hypothesis under consideration, it is one of the "services set out in this Chapter" as provided in Article 3(1). In contrast, the provision of OSIS is not one of the

services set out in Chapter II. It is not even something without which the Appellants are unable to provide DQ services since it is within their power to compile their own database by collecting data from number providers under Article 25(2). It is nothing to the point now under consideration that, for the reasons given by the Director in imposing USC7, such a course would be undesirable as representing an unnecessary duplication of work and effort.

135. However, Article 4(1) does not expressly require Member States to ensure provision of a network. Rather, it appears to be assumed that the network exists and is already available to the majority of end-users; the USD is designed to ensure that network is available to all and does so by requiring requests for connection to what already exists to be met. The relevant "services set out in this Chapter" referred to in Article 3(1) could therefore be seen as provision of the connection and not provision of the network. If that is correct, Recital (9) can nonetheless be made sense of if the "access" referred to in Article 4(1) is seen as itself comprising two components.

136. For reasons already given, we see the provision of "access" as part of universal service as well as the provision of the services to which access must be provided. Access in this sense can be seen as comprising two components: first, a network component which enables the end-user to contact the service provider to request the services required (with subsequent use of the network for the provision of the services provided); and secondly, the making of the request and use of the actual services. We think that Recital (9) can be seen, on the hypothesis now under consideration, as focusing on those two components as the network elements and the service elements respectively. But each of those elements is part of "access" and thus part of universal service. So once again, the analogy which Miss Rose draws breaks down for the same reasons as before.

137. Our conclusion is that OSIS cannot be seen as an "element" of universal service within Article 8. Accordingly, BT cannot be designated to provide OSIS on that basis. If the validity of USC7 depended on Miss Rose's second proposition, we would hold it to be invalid. Our actual conclusion, of course, is that it is valid for the reasons given.

THE VALIDITY OF USC7.4

138. There is a subsidiary point. It is said by OFCOM that even if the imposition of USC7 as a whole is authorised, paragraph 7.4 is nonetheless invalid. This point was not pursued by Mr Vajda in his oral submissions, but we deal with it briefly.

139. OFCOM's argument in the Determination may be summarised in this way:

(a) Articles 12 and 13 of the USD are designed to deal with the situation in which undertakings designated under Article 8 incur an "unfair burden" by allowing Member States to calculate the net cost incurred by the undertaking and to compensate it either from State funds or by sharing those costs among providers of electronic communications services.

(b) Any provision concerning the extent to which persons other than end-users contribute to the costs of providing universal service is a compensation mechanism – the aim of such a provision will be to provide that the universal provider recovers, and recovers no more than, its net costs of providing the universal service.

(c) But the USD plainly precludes any compensation mechanism outside Articles 12 and 13.

(d) Articles 12 and 13 therefore preclude Member States from regulating the charges made to providers of electronic communications services in relation to the provision by BT of its universal service obligations, save by employing the mechanism set out in Articles 12 and 13 (as implemented by domestic legislation).

(e) USC7.4, which does exactly that, is therefore invalid.

140. The Appellants say that USC7.4 is consistent with the USD. Miss Rose submits that Articles 12 and 13 of the USD have no relevance to the analysis of OFCOM's powers. They are relevant only where the NRA considers that the provision of universal service places an unfair burden on designated undertakings. She further

submits that there is nothing in the USD which is inconsistent with the provisions of USC7.4. OFCOM are entitled to regulate prices, with the aim of ensuring that the universal service in question should be provided to end users at an "affordable price", as required by Article 3 of the USD. It was rational for the Director to conclude that restrictions on the price which BT could charge to DQ providers were appropriate in the pursuit of that aim.

141. We agree with Miss Rose's arguments. They speak for themselves and we do not think there is really anything we can add in reaching the conclusion that USC7.4 was not separately beyond the powers of the Director to impose if USC7 as a whole was within his powers.

VI DOMESTIC LEGISLATION

142. We now turn to the domestic legislation, which is to be construed in the context of the CRF.

143. The starting point is the Electronic Communications (Universal Service) Regulations 2003 ("the US Regulations"). These were made by the Secretary of State, before the passing of the 2003 Act, pursuant to his powers under section 2(2) of the European Communities Act 1972, in order to enable the Director General of Telecommunications ("the Director") to carry out certain preparatory work required by the Framework Directive and the USD. Regulations 4 and 5 implement Art 8 of the USD.

144. Under Regulation 2:

(a) "the universal service" means the provision in the UK of the services and facilities set out in Articles 4, 5, 6, 7 and 9(2) of the USD, thus reflecting the wording of Article 8; and

(b) "universal service provider" means a person who is designated as a person who provides the whole or part of the universal service.

145. Regulation 4(2) provides that the Director "may propose the designation of such persons as he considers appropriate as universal service providers". And Regulation 4(3) deals with the making of such proposals by notice giving the reasons for making the proposal. The notification may set out, pursuant to Regulation 4(4), "the conditions that the Director is proposing to set on a person designated as a universal service provider in accordance with Articles 4, 5, 6, 7, 9, 10 and 11 of the [USD]". After a period for representations, the Director may confirm the proposals.

146. There is no provision of the US Regulations which expressly states that the designation must identify which part of universal service the designated person is to provide. But given that the US Regulations are intended to implement the USD, we consider that it is implicit that there must be a correlation between designation and an element of universal service in the same way as one finds, according to our analysis, in the USD itself. But as with the USD, there is no need to find words to the effect "X is hereby designated to provide service Y"; it is enough if the designation clearly identifies what it is that is required to be provided pursuant to the designation.

147. Regulation 4(4) is not entirely clear in its reference to the various Articles there mentioned. The Articles themselves do not impose, or in most cases authorise the imposition of, any conditions so it is not easy to see how the words "in accordance with Articles…" can qualify the setting of conditions. But nor do those Articles provide for designation, a matter covered by Article 8, so it is not easy either to see how the words "in accordance with Articles…" can qualify designation. We think that the reference to the Articles is really to indicate that conditions can be imposed on undertakings to achieve the objectives set out in the various Articles and to impose the conditions envisaged by Articles 9, 10 and 11; or, as it is put by both the Appellants and OFCOM, "in accordance with" is to be read as meaning "in order to guarantee the provision of the services within". Further, we consider that this provision underlines the need for a link between designation and the element of universal service to which that designation relates.

148. It should be noted that the definition of "universal service provider" does not refer to the guaranteeing of any part of universal service. Rather, it refers to designation as "a person who provides" the whole or part of universal service. In our analysis of the USD, we concluded that BT had been designated to guarantee the provision of DQ services for the purposes of that Directive. We do not consider that the position should be any different for the purposes of the US Regulations and would reject any suggestion that although BT is designated to guarantee the provision of DQ services for the purposes of the USD, it is not designated as a person who provides DQ services for the purposes of the US Regulations. The USD adopts a concept of designation to guarantee universal service, not a concept of designation to provide it. We consider that, when the US Regulations define a "universal service provider" as a person "designated as a person who provides" the whole or part of universal service, it is adopting precisely the same concept as the USD and is saying no more than that the designated person is designated to guarantee the provision of the relevant part of universal service, in this case DQ services.

149. Pursuant to those provisions, BT was designated as a universal service provider. The proposal, as confirmed, stated (at paragraph 2 of the Schedule to the 2003 Designation) that the Director "is proposing to designate [BT and Kingston Communications (Hull) plc] as universal service providers". There is no express statement there that BT is designated to provide any particular element or elements of universal service. However, as we have said already, we consider that the compulsive element of a designation is effectively put in place if it is possible to identify the relevant elements of universal service. As to that, the proposal, at paragraph 3, identified the conditions which it was proposed would be set on BT; they are the USCs found in Part 2 of the Schedule. They clearly result in a designation of BT with duties to provide for several elements of universal service, most importantly the services falling within Article 4 of the USD. To put this point in a slightly different way, it can be seen that USC1, to take that condition as an example, fulfils two roles. First, it can be seen, reading paragraph 2 together with USC1, that BT is designated as a person which provides Article 4 services. Secondly, it can be seen reading paragraph 3 and USC1 together that actual obligations are imposed on BT in respect of Article 4 services,

150. The position in relation to DQ services is not so clear because USC7 does not impose an obligation on BT itself to provide such services. However, just as BT is, in our view, designated for the purposes of the USD to guarantee the provision of DQ services, so too it is designated for the purposes of the US Regulations as a person to provide those services. That designation is seen by reading paragraph 2 with USC7; and the actual obligation imposed is identified by reading paragraph 3 and USC7 together. Our view is that USC7 was validly proposed and confirmed under the US Regulations, assuming that we are correct in our interpretation of the European legislation.

151. Under the transitional provisions of the 2003 Act (see paragraph 7 Schedule 18), where a proposal for the designation of a person as a universal service provider has been confirmed under Regulation 10 of the US Regulations, the designation is to have effect, once section 66 of the 2003 Act has been brought into force, as a designation in accordance with regulations under that section. In addition, any condition imposed is to take effect as if it had been made by OFCOM under section 45 of the 2003 Act (as to which see below)

152. As it happens, no regulations have in fact been made under that section. But that does not matter; the transitional provision operates to treat the designation made pursuant to the US Regulations as if it had been made in accordance with hypothetical (if actually non-existent) regulations under section 66.

153. Subject to that, however, the designation could only be valid, on the coming into effect of section 66, if it could have been made under the 2003 Act. We consider that USC7 is not open to a validity attack on the basis that it could not have been introduced consistently with provisions of that Act.

154. Section 45 provides that OFCOM are to have power to set conditions under the section binding the persons to whom they are applied under section 46. On the facts of the present case, USC7 could be valid only if it is a "universal service condition" that is to say a condition which contains only provisions authorised or required by section 67. Section 46 allows a universal service condition to be applied to a communications provider designated in accordance with regulations made under

section 66. Section 66 in turn provides that OFCOM may by regulations make provision for the designation of the persons to whom universal service conditions are to be applicable. And section 67 provides, at subsection (1), that OFCOM may set any such universal service conditions "as they consider appropriate for securing compliance with the obligations set out in the universal service order".

155. In this context, the universal service order is the order described in section 65. Under section 65(1), the Secretary of State is under an obligation to set out by order the extent to which the things falling within subsection (2) must be provided or made available. This duty is expressed to be for the purpose of securing compliance by the UK with its Community obligation. The things set out in subsection (2) include the matters covered by Chapter II of the USD and in particular "directory enquiry facilities capable of being used for purposes connected with the use of" networks and services previously mentioned. An order has been made – the Electronic Communications (Universal Service) Order 2003 SI 2003/1904 – which sets out, so far as relevant, the extent of the DQ obligation namely "At least one comprehensive telephone directory enquiry facility shall be made available to end-users, including users of public pay telephones", thus imposing the minimum requirement of Article 5(1)(b).

156. Although there was some debate about this before us, we consider that the discretion given to OFCOM under section 67(1) is wide. Conditions need only be appropriate, rather than necessary, and the judges of appropriateness are OFCOM. The statutory words no doubt reflect the USD itself where it is provided in Article 3(2) that it is for the Member State to determine the most efficient and appropriate approach for ensuring the implementation of universal service. OFCOM are therefore entitled to impose conditions which, as regulator, they see as a proper and effective method of achieving the aim, namely ensuring the provision of universal service. We do not find decisions concerning the word "appropriate" in other cases in relation to different legislation to be of assistance. We simply give to an ordinary word in the English language its ordinary meaning.

157. We consider that USC7 is valid in accordance with the provisions of the US Regulations and the 2003 Act:

(a) BT was the subject of a valid proposed (and confirmed) designation under the US Regulations.

(b) BT is a communications provider and is treated for the purposes of the 2003 Act as a person designated pursuant to regulations made under section 66.

(c) OFCOM can set conditions under section 45 provided they contain only provisions authorised under section 67. USC7 contains provisions which the Director considered, and OFCOM now consider, to be appropriate for achieving the objective that there be at least one DQ provider. USC7 now takes effect as a condition set by OFCOM under section 45.

158. The result is that there is nothing in the 2003 Act which would render USC7 invalid if the proposals made under the US Regulations were otherwise valid (as we have decided they were). It follows, that USC7 is valid as a matter of domestic law assuming that it is also consistent with the USD and the other components of the CRF (which we have decided it is).

VII REFERENCE TO THE ECJ

159. One of the matters raised before us is whether we should make a reference to the ECJ for a preliminary ruling on the question whether, broadly speaking, the USD permits a Member State to designate an undertaking to create and maintain a comprehensive database and to require it to make that database available to any person seeking to provide publicly available DQ services. OFCOM's position has consistently been that we should not make a reference. The Appellants' original position, as indicated in their Notice of Appeal, was that the proper meaning of Articles 3, 5 and 8 USD is clear but flagged the possibility that a reference might be necessary. In that context, they raised the point that the different language versions of the USD referred to by the parties, both in written and oral argument, do not clearly match. The ECJ, the Appellants submit, "is likely to be best placed to reconcile such differences by reference to the submissions (potentially) of the Commission and the Member States themselves" (Notice of Appeal, paragraph 67).

160. We were also referred to the position in Ireland where it was accepted by all parties that the regulatory scheme adopted there is equivalent to USC7. Eircom, the former state-owned monopoly provider, has an obligation to compile a database but not a retail obligation to supply DQ services directly to end-users. The Appellants contend that, were we to find in favour of OFCOM, the apparent divergent practice in Member States is a further factor in favour of a reference.

161. By the end of the hearing, before us, the Appellants' position had shifted so that a reference had become their preferred outcome. They saw an appeal as inevitable whichever side won. They also saw a reference as almost inevitable at some stage of the litigation. Miss Rose therefore took the position that it would be far preferable for the reference to be made sooner rather than later. That is a position repeated in further written submissions provided to deal with a point raised by the Tribunal at the end of the hearing. She submits that "this question [the proper interpretation of Articles 3, 5 and 8 of the USD] may only properly be answered by way of the procedure under Article 234 EC".

162. Mr Vajda does not accept that an appeal is inevitable; in any case, this Tribunal, he said, is a specialist tribunal which should be well able to decide questions of interpretation of the USD and should be cautious – to the extent of extreme reluctance – to refer unless a very strong case was made out which it was not.

163. Article 234 EC is well-known and we do not set it out. It gives this Tribunal a discretion to refer questions to the ECJ for a preliminary ruling concerning (among other matters) the interpretation of the EC Treaty. One of the jurisdictional hurdles for the making of a reference is that a decision on the question referred must be necessary to enable the national court or tribunal to give judgment.

164. The general test whether to refer, where there is a discretion to refer, is set out in *R v International Stock Exchange of the United Kingdom and Republic of Ireland Ltd Ex p. Else* [1993] QB 524 at 545 per Sir Thomas Bingham MR:

> "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national

> court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer."

165. There are, of course, many factors which make the ECJ the most suitable Court to consider interpretation of legislation such as the USD. For a list of some important factors, reference can be made to the decision of Bingham J in *Commissioners of Customs and Excise v Samex ApS* [1983] 1 All ER 1042 at 1054-1055, subsequently approved in *R v Intervention Board Ex p. The Fish Producers' Organisation* [1988] 2 CMLR 661 at 676-677 and in *Brown v Secretary of State for Scotland* [1988] 2 CMLR 836. And so the Appellants argue that importantly, the dispute in the instant case regarding the proper interpretation of the USD involves consideration of the objectives of the legislation, separately and in the context of the CRF. It is submitted that the choice between alternative submissions in the present case turns not on purely legal considerations but on a broader view of what the orderly development of the Community requires, an aspect with which the ECJ is uniquely equipped to determine.

166. But we, as a Court of first instance, must also bear in mind what was said in *Professional Contractors Group v Commissioners for Inland Revenue* [2002] STC 165, where the Court of Appeal held that, in general, regard should also be had to the Opinion of Advocate General Jacobs in Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495 at para. 18, where he urged "a greater measure of self restraint on the part of both national courts and this Court [the ECJ]".

167. We are therefore effectively urged not to swamp the ECJ with references and to refer only when it is really necessary. And this is so even recognising the difficulties which national courts can face in predicting with confidence the approach which the ECJ will adopt in relation to the wording of a directive. Further, Mr Vajda referred us to the decision of the House of Lords in *Optident Limited and another v Secretary of State for Trade and Industry* [2001] UKHL 32

in support of the proposition that the Tribunal should not be overly concerned by the fact that there may be different views on the correct application of Article 8 USD throughout the EU. We do not feel able to derive that proposition from the decision; nor do we find the decision of assistance at all not least because the House of Lords found the meaning of the relevant European legislation to be so clear that it was not necessary to refer any question to the ECJ.

168. We clearly have a discretion to refer a question to the ECJ provided that we consider that a decision on the question is necessary to enable us to give judgment. In order to identify the factors to which we should have regard in deciding first, whether a decision on the question of Community law is necessary to enable us to give judgment and second, how to exercise our discretion, we refer again to *Samex* and also *HP Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226.

169. On the question of the necessity of a reference, Lord Denning MR in *HP Bulmer*, at 1234ff, set out a number of guidelines, stating that regard should be had to: whether the point sought to be referred is conclusive in the context of the relevant proceedings; previous rulings of the European Courts on the same issues; and whether the answer to the issue is so clear that no reference is required (the so-called "acte clair" doctrine).

170. In relation to the exercise of discretion, Lord Denning MR in *HP Bulmer* stated that the referring court or tribunal should consider the time taken to get a ruling, the undesirability of overloading the ECJ, the need to formulate the question clearly, the difficulty and importance of the point in the context of the proceedings, expense and the wishes of the parties.

171. In *Samex*, Bingham J expressed some difficulty in applying the guidelines set out by Lord Denning MR and considered the features in the passage of his own judgment we have referred to at paragraph [165]. Those features all go to the question of whether the ECJ, with the inherent advantages it enjoys due to its unique position in the Community judicial hierarchy, is the court best fitted for the deciding the issue.

172. In the present case, all the relevant facts are known. Further, if the USD permits the imposition of USC7, so too does domestic law. In contrast, if the USD prohibits such a condition, it cannot validly be imposed under domestic law. Accordingly, the issue of interpretation of the USD is determinative of the validity of USC7 one way or the other. Further, whilst we have formed a clear view that the USD does not prohibit the imposition of USC7, it would be idle to suggest that the matter is "acte clair".

173. Nonetheless, we do not consider that we should make a reference ourselves. We are far from convinced that an appeal against our decision is inevitable or, even if an appeal is launched, that it will proceed to a hearing. Far from eliminating delay, we think it is just as likely that the issue will be resolved between the parties on the basis of our decision without the need for an appeal, let alone a reference to the ECJ. Further, although we accept that the matter is not "acte clair" we do not entertain any real doubt about the validity of USC7. In all the circumstances, we conclude that we should not ourselves make a reference to the ECJ under Article 234; the parties will remain free to ask for a reference if the matter is to go any further.

Mr Justice Warren Michael Blair Sheila Hewitt

Charles Dhanowa Date: 24 November 2008
Registrar