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Case No: C1/2009/0491

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
The Hon Mr Justice Warren, Michael Blair QC and Sheila Hewitt
Case No: 110/3/3/08 [2008] CAT 33

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th December 2009

Before :

LORD JUSTICE WALLER Vice President of the Court of Appeal, Civil Division
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE PATTEN

- -

Between :

BRITISH TELECOMMUNICATIONS PLC	**Appellant/ Intervener**
- supported by -	
THE OFFICE OF COMMUNICATIONS	**Respondent**
- and -	
(1) THE NUMBER (UK) LIMITED	**Respondents/ Appellants**
(2) CONDUIT ENTERPRISES LIMITED	

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- -

Rhodri Thompson QC and **John O'Flaherty** (instructed by BT Legal) for the Appellant BT
Dinah Rose QC and **Brian Kennelly** (instructed by Olswang) for The Number
Christopher Vajda QC, George Peretz and **Fiona Banks (**instructed by) for the Appellant OFCOM

Hearing dates : 9th and 10th November 2009

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Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by British Telecommunications Plc ("BT") and The Office of Communications ("OFCOM") against a decision of the Competition Appeal Tribunal (The Hon. Mr Justice Warren, Michael Blair QC and Sheila Hewitt) dated 24th November 2008. The Tribunal allowed an appeal by The Number (UK) Limited ("The Number") and Conduit Enterprises Limited ("Conduit") under s.192 of the Communications Act 2003 ("the 2003 Act") against a determination by OFCOM dated 10th March 2008 of various disputes between those companies and BT about the amount of the charges made by BT for the supply of its Operator Services Information System ("OSIS") database.

2. This is compiled and maintained by BT as part of its regulatory obligations under Universal Service Condition 7 ("USC 7") imposed by OFCOM's statutory predecessor, the Director General of Telecommunications ("the Director"), as part of the designation of BT and Kingston as universal service providers under the provisions of the Electronic Communications (Universal Service) Regulations 2003 ("the 2003 Regulations"). It is a comprehensive core database containing aggregate information relating to subscribers who are provided with publicly available telephone services ("PATS") by BT and other operators. The information which it contains has been compiled and updated over time by BT using its own subscriber details and those obtained from other network providers on payment of a fee.

3. The 2003 Regulations (which came into force on 11th February 2003) were made by the Secretary of State for Trade and Industry in exercise of the powers contained in s.2(2) of the European Communities Act 1972 in order to give effect to Directive 2002/22/EC of 7th March 2002 ("the Universal Service Directive" ("the USD"). This is one of four directives of the same date which came into force on 24th April 2003 with an implementation date of 25th July 2003. They comprise a Framework Directive (Directive 2002/21/EC) which established a common regulatory framework ("CRF") for electronic communications networks and services throughout the EC; an Authorisation Directive (Directive 2002/20/EC) which aims to harmonise and simplify the rules and conditions governing the authorisation of such networks and services; the USD which is concerned with ensuring the provision of a minimum set of services to end-users at an affordable price in the context of a competitive market; and an Access Directive (Directive 2002/19/EC) which governs access to and the interconnection of electronic communications networks. I will refer to them in this judgment by those names.

4. The determination of the Tribunal and this appeal is concerned with the implementation in the UK of the USD in relation to directory enquiry ("DQ") services. Regulation 3(1) imposed on the Director an obligation to carry out the functions set out in the 2003 Regulations in accordance with the policy objectives and regulatory principles contained in Article 8 of the Framework Directive. I shall come to the detail of that shortly but Article 8 requires Member States to carry out the regulatory tasks specified in the Framework Directive in a way which contributes to the development of the internal market by a process of consultation and co-operation with other national regulatory authorities and the Commission.

5. Subject to this, the Director was required under regulation 4 to make proposals for securing the universal service and, to this end, to designate appropriate persons as universal service providers. The two companies selected for this purpose were BT and Kingston (which provides a public telephone service in Kingston-upon-Hull and the surrounding area). One of the duties of the national regulatory authorities under Article 8(4) of the Framework Directive is to ensure that all citizens have access to the universal service specified in the USD. This is spelt out in Article 3(1) of the USD which provides that:-

> "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."

6. The core elements of universal service are set out in the Directive. They are: provision for access to the public telephone network and to PATS at a fixed location (Article 4); comprehensive directory enquiry services and directories (Article 5); the provision of public pay telephones (Article 6); and special measures for disabled users (Article 7).

7. Designation under Regulation 4 of the 2003 Regulations is carried out by a process of notification under which the Director publishes details of his proposed designation and the reasons for it and invites representations about the proposal. This will also include details of any conditions which the Director intends to impose in accordance with Articles 4-7, 9, 10 and 11 of the USD. Regulation 4(12) provides that any such conditions must comply with and be necessary for satisfying the requirements in those Articles.

8. The notification of the proposed designation of BT and Kingston with details of the conditions which any designation would include was published and sent out for consultation on 12th March 2003. A closing date of 2nd May 2003 was given for any responses. On 22nd July 2003 OFTEL published the designation which took effect on 25th July 2003. It contains a summary of the responses and a schedule in Annex A of the conditions imposed on the two universal service providers.

9. As mentioned earlier, one of the key elements of universal service specified in the USD is a DQ service. Recital (11) of the USD states that:

> "Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ensures the

> subscribers' right to privacy with regard to the inclusion of their personal information in a public directory."

10. This is given effect to by Article 5(1) which provides that:-

> "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."

11. Before the expansion of the telecommunications market took place, BT was, of course, the sole provider of these services and therefore maintained a comprehensive database recording the names and addresses of subscribers and their telephone numbers. Directive 98/10/EC of 26th February 1998 contained provisions for ensuring that, in the implementation of open network provision, certain key services were preserved including connection for all users to the fixed public telephone network and the availability of at least one comprehensive DQ service. In order to maintain this service, Article 6(3) required each Member State to ensure that all organisations which assigned telephone numbers to subscribers should provide these details on request in an agreed format on terms which were "fair, cost oriented and non-discriminatory".

12. This allowed any telephone company (including BT) to obtain this subscriber information and therefore to compile and update a subscriber database which could be used to provide a DQ service. These provisions have been carried forward into the USD. Recital (35) states that:

> "The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner."

13. This is implemented in Article 25(2) of the USD which provides that:

> "Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory."

14. The conditions imposed upon BT by the Director as part of its designation as a universal service provider include USC 7 which is in these terms:-

> "7. 1 BT shall maintain a database containing Directory Information for all Subscribers who have been allocated Telephone Numbers by any Communications Provider ('the database'). BT shall ensure that the database is updated on a regular basis.
>
> 7.2 BT shall, in accordance with paragraphs 7.3 and 7.4 below, and on request, make available:
>
> (a) to any Communications Provider subject to paragraph 8.2 of General Condition 8 for the purpose of allowing that Communications Provider to comply with that paragraph, such Directories as BT compiles which comply with the requirements of that General Condition;
>
> (b) to any person seeking to provide publicly available Directory Enquiry Facilities and/or Directories, the contents of the database, in machine readable form.
>
> 7.3 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, BT may refuse to supply such items if:
>
> (a) the person requesting such items does not undertake to process the data or information contained in them in accordance with any Relevant Code of Practice, and/or
>
> (b) BT has reasonable grounds to believe that the person requesting such items will not comply with Relevant Data Protection Legislation.
>
> 7.4 BT shall supply the items in sub-paragraph (a) and (b) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with his dispute resolution functions."

15. The effect of this condition is to impose on BT an obligation to provide to other communications providers (who are not universal service providers) the contents of its OSIS database at a regulated price. Any disputes about price arising between DQ service providers who are also communication providers can be referred to what is now OFCOM for determination in accordance with the formula set out in condition 7.4. This is obviously derived from the provisions of Article 25(2) of the USD. This

information in BT's hands represents the product of its own time and expense incurred in compiling and maintaining OSIS from the subscriber information available to itself or purchased from other communication providers pursuant to what is now the Article 25(2) regime. The provisions of Article 25(2) have been implemented through General Condition 19 ("GC19") which is imposed on all communications providers as part of the general authorisation regime pursuant to the powers contained in s.45 of the 2003 Act. For other network providers apart from BT the purchase of OSIS and any updates provides a valuable shortcut to their ability to provide an effective and reliable DQ service. Without it they would not be prevented from compiling their own subscriber database because they can purchase from each network provider (including BT) a list of its own subscribers and then use it to create a DQ database for their own service. But this would be time-consuming and possibly less accurate and comprehensive than what OSIS offers.

16. The Number was set up to market voice and on-line DQ services to end-users in the UK. It applied for and obtained the OSIS database for this purpose but has disputed the amount which it has been charged. This and a similar dispute between BT and Conduit were referred to OFCOM for a determination as to whether the charges are within the regulatory formula prescribed by USC 7.4.

17. Prior to this, BT seems to have had no real difficulty in agreeing to supply OSIS at a price which reflected the cost of compiling it. The present dispute appears to have stemmed from the decision of the ECJ in Case C-109/03 *KPN Telecom BV v OPTA* [2004] ECR 1-11273 that charges for making available "relevant information" should not include the internal costs of assembling, compiling and updating the information derived from the provider's own subscribers.

18. OFCOM published its final determinations on 10th March 2008. Much of the dispute centred on the scope of BT's obligations both under GC19 and USC 7 including whether The Number was entitled to full access to OSIS data if it did not provide a comprehensive DQ service to all end-users. OFCOM made a number of detailed findings about the scope and effect of GC19 and the charges which it justified. But, as part of its determination, it also decided that USC 7 was unlawful and that BT was not therefore required to provide access to the OSIS database other than to the extent required under GC19. It was this which therefore regulated the scope of the data which BT was required to supply and the charges which it could levy for it. Any data comprised in OSIS which fall outside GC19 do not therefore have to be supplied by BT on regulated terms.

19. OFCOM's view (which is based on advice received from Mr Vajda QC) is that USC 7 does not properly implement Article 5 of the USD and that USC 7.4 was, in any event, incompatible with and ultra vires the provisions of the 2003 Act which implement the USD. The Number does not accept this and appealed against the determinations on this point to the Tribunal. BT was allowed to intervene in the appeal and supported the position of OFCOM in relation to the legality of USC 7. The Tribunal allowed The Number's appeal and rejected OFCOM's findings of invalidity both in respect of the incompatibility of USC 7 with the CRF including the USD and in relation to the argument that USC 7.4 is in any event ultra vires the relevant domestic legislation. It also declined to refer the question of Community law to the ECJ under Article 234 EC even though the matter was not in its view acte clair.

20. On 24th February 2009 BT applied to the Tribunal for permission to appeal. This application was dismissed on the grounds that the appeal had no real prospect of success and that there was no compelling reason why the appeal should be heard. Both grounds for refusal were, in my view, unsustainable and BT and OFCOM now appeal against the Tribunal's determination with the leave of this court.

The validity of USC 7 under EU legislation

21. As mentioned earlier, any conditions which are imposed under regulation 4 of the 2003 Regulations must comply with and be necessary for satisfying the requirements specified in the USD: see regulation 4(12). This includes Article 5 of the USD quoted earlier. There is therefore nothing in regulation 4 which purports to confer a wider power than is justified by the USD.

22. Both before the Tribunal and on this appeal BT and OFCOM contended that the USD is concerned with ensuring that end-users have access to the minimum set of services prescribed at an affordable price. As such, it operates as an exception to the general prohibition on ex ante regulation enshrined in the Framework and the Authorisation Directives. USC 7 does not require BT itself to provide any DQ service to end-users. The regulatory position adopted by OFTEL and continued under OFCOM is that the minimum level of DQ universal service which the UK has to ensure is available under Article 5(2) has been provided by operators in the market without the need for that degree of intervention.

23. But the appellants contend that, whether the universal service is provided in that way or through a specific direction to the designated universal service providers, the USD neither envisages nor empowers Member States to impose obligations on service providers which regulate the wholesale supply of data to third parties like The Number except to the limited extent provided for under Article 25(2). The imposition of a wider obligation is neither necessary in order to secure the provision of a minimum service to end-users nor is it permissible. They submit that the role of the national regulatory authorities under the USD is limited in terms to ensuring the provision of the relevant services to end-users if necessary by designating an undertaking to provide that service. What the Director has done in this case is to compel BT to provide the OSIS database to other would-be DQ service providers who are then free to use it to provide such DQ services as they choose but not necessarily a comprehensive or affordable DQ service to all end-users. Condition 7.2(b) applies to any person seeking to provide publicly available DQ services but contains no other restrictions.

24. In order to consider these arguments and the Tribunal's response to them it is necessary to look at the CRF in more detail. For this purpose one can begin with the Framework Directive. This refers in its recitals to the Commission's 1999 Communications Review (COM (1999) 539 final) which advocated a new regulatory framework for electronic communications designed to produce a light regulatory approach for new service markets combined with measures to prevent abuse of market power by dominant players. This approach is evident in recitals (25) and (27) of the Framework Directive which state that:-

> "(25) There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a

> competitive market. The definition of significant market power in the Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (1) has proved effective in the initial stages of market opening as the threshold for *ex ante* obligations, but now needs to be adapted to suit more complex and dynamic markets. For this reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities.
>
> ……
>
> (27) 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. It is necessary therefore for the Commission to draw up guidelines at Community level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines will also address the issue of newly emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly to ensure that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational."

25. Article 1 of the Framework Directive sets out the scope and aim of the CRF:-

> "1. This Directive 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."

26. This Directive contains detailed provisions for the provision of information and consultation between national regulatory authorities and the involvement of the Commission in relation to measures which would affect trade between Member States and so impact on the internal market. Article 7(1) expressly requires national authorities to take account of the policy objectives and regulatory principles set out in Article 8. These objectives are intended to govern the measures taken in accordance with each of the four Specific Directives (as they are termed) comprised in the CRF and "such measures shall be proportionate to those objectives": see Article 8(1).

27. In summary, there are three policy objectives referred to: the promotion of competition in the telecommunications market; the development of the internal market by the removal of obstacles to the provision of networks including trans-European networks; and the promotion of the interests of EU citizens by, inter alia, ensuring that they have access to a universal service of the type specified in the USD.

28. Against this background one can turn to the Authorisation Directive. This is primarily relevant to the second of the three objectives specified in the Framework Directive. This is to be achieved by licensing communications providers through a general authorisation subject only to a minimum set of conditions limited to what is "strictly necessary to ensure compliance with requirements and obligations under Community law": see recital (15).

29. The Authorisation Directive recognises that some regulation may be necessary in respect of providers who occupy an actually or potentially dominant position in any particular national market. This point is taken up in recital (17) which states that:-

> "Specific obligations which may be imposed on providers of electronic communications networks and services in accordance with Community law by virtue of their significant market power as defined in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)[1] should be imposed separately from the general rights and obligations under the general authorisation."

30. This is a reference back to Article 14 of the Framework Directive which defines significant market power for the purposes of the Specific Directives as a position equivalent to dominance in any relevant market.

31. The policies outlined in these recitals are given effect to in Articles 3 and 6 respectively of the Authorisation Directive:-

> "Article 3
>
> *General authorisation of electronic communications networks and services*
>
> 1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the

[1] See page 33 of this Official Journal

conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.

2. 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. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7.

…

Article 6

Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C of the Annex. Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.

2. 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.

3. The general authorisation shall only which are specific for that sector and are set out in Part A of the Annex and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation."

32. The basic change introduced by Article 3(2) is the requirement that there should be a general authorisation for providers rather than individual licences. The only type of conditions which may be attached to a general authorisation are those specified in Part A of the Annex to the Directive which include such things as environmental and planning requirements; personal data and privacy protection; and measures to maintain the integrity and security of the network. The list expressly excludes access obligations provided for under Article 6(2) which are required to be legally separate from the rights and obligations imposed by the general authorisation.

33. The arguments of both BT and OFCOM begin with Article 6(2). They rely on these provisions as having the effect of limiting the ex ante regulation of authorised providers to the specific derogations which are referred to in Article 6(2). This was accepted by the Tribunal and is common ground on this appeal. Miss Rose QC does not suggest that the words of Article 3(2) give regulatory authorities wider powers to impose specific obligations than those contained in Article 6(2). Her submission is that, in construing the scope of those powers, one needs to keep firmly in mind the policy objectives of the CRF and to recognise that the purpose of the Specific Directives is to prescribe the ends rather than the means of achieving those objectives. I shall return to this point shortly.

34. The provisions of the Access Directive and of Articles 16 to 19 of the USD are not relevant to the issues on this appeal. USC 7 has therefore to be justified under the third rubric in Article 6(2): i.e. "specific obligations which may be imposed … on those designated to provide universal service under the [USD]". This takes one then to that Directive.

35. In one sense the whole of the USD operates as an exception to the open market provisions of the CRF in that it aims to guarantee in an otherwise competitive environment certain specified services which are to be made available for all end-users at an affordable price. The Directive recognises that ensuring universal service may involve the provision of some services to end-users at prices which depart from normal market conditions: see recital (4). Recital (10) states that:-

> "Affordable price means a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure."

36. Some of the aspects or components of universal service are undoubtedly social in character. Article 7, for example, deals with measures for disabled users. But it would be misleading to characterise universal service simply as the making of provision for economically or socially disadvantaged sections of society. The bulk of the Directive is aimed at providing minimum levels of service to all end-users. In order to do this elements of subsidy will inevitably occur (e.g.) between those living in well-populated as opposed to remote geographical locations. But the purpose of the Directive is to ensure that an increasingly competitive market does not displace accessibility to basic services. This is made clear in Article 1 of the USD which sets out its scope and aims:-

> "1. Within the framework of Directive 2002/21/EC (Framework Directive), this Directive 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.
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> 2. This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines."

37. As mentioned earlier, Article 3(1) sets out the basic obligation imposed on Member States: see paragraph 5 above. Article 3(2) provides that:-

> "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."

38. At this point one has to return to the question of what Article 3 is intending to prescribe. In relation to the validity of USC 7 under Community law, the principal difference between the parties lies in identifying the form of the measures by which a national regulatory authority may implement the obligation imposed upon them by Article 3(1). As mentioned earlier, the basic submission of both BT and OFCOM is that the USD requires the regulator to operate exclusively through the imposition on designated providers of universal service obligations to end-users. It does not, they say, sanction the imposition of obligations to make subscriber data available at a wholesale level to other providers except to the extent that this is catered for under Article 25(2).

39. This argument is essentially one of construction. In causal terms the availability of an effective and reliable level of DQ services is, if anything, more rather than less likely to be achieved by the sharing of OSIS than by each new service provider being required to compile its own database. But the USD and the other Specific Directives have as one of their objectives the promotion of a liberalised and competitive internal market and the provision of the OSIS data at a regulated price is, on any view, an

intervention in that market and an interference with BT's right to charge a commercial price for what they own.

40. By way of background, Miss Rose QC took us to some of the pre-designation material. In the notification of his proposals for the designation of BT and Kingston as universal service providers sent out for consultation on 12th March 2003, the Director expressed the view (in paragraph 3.64) that general conditions 8 and 22 (which require providers of PATS to make a DQ service available to their subscribers and which require them to share subscriber information with other operators seeking to provide DQ services) would not be sufficient on their own to ensure that the obligations under Articles 5 and 25 of the USD were met efficiently and transparently:-

> "3.64 …Whilst they do allow for data to be passed between providers of PATS, significant duplication of effort would be required for such providers to ensure that any end-user can access a comprehensive DQ facility and to supply any end-user upon request with a comprehensive directory.
>
> 3.65 Oftel is therefore of the view that BT should have a further universal service condition requiring it to provide access to its (comprehensive) DQ database to other DQ providers whether or not they are also providers of PATS. This specific condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8 (but not to those persons who do not have this obligation).
>
> 3.66 In Oftel's view this condition will ensure that Articles 5 and 25 of the Universal Service directive are implemented in the UK in an efficient and effective manner, in that BT will be required to act as a central dissemination point for the directory information of all subscribers to telephone services in the UK.
>
> …
>
> 3.69 The imposition of this condition on BT is objectively justifiable and proportionate in that it is necessary to fulfil the requirements of Articles 5 and 25 of the Universal Service Directive and paragraphs (d) and (e) of the Schedule to the Universal Service Order, namely that at least one comprehensive directory and one comprehensive telephone directory enquiry service shall be made available to end-users. This condition imposes obligations on BT only, because BT is in a unique position in that it already compiles a comprehensive DQ database that it makes available to third parties, and it already possesses a significant proportion of the entries in that database as a result of its retail telephony business which makes it particularly efficient for BT to undertake this activity. This condition is therefore, in Oftel's view, not unduly discriminatory. Oftel also believes that the condition is transparent."

41. He therefore clearly took the view that USC 7 was necessary in order to fulfil the obligations imposed by Articles 5 and 25 which is, of course, the test under regulation 4(12) of the 2003 Regulations for the imposition of conditions. Regulation 4(12) does not mention Article 25 because the process of designation under Article 8 is limited to guaranteeing the provision of universal service as set out in Articles 4 to 7 of the USD. Compliance with Article 25 is a matter for the general conditions and the Director was arguably at fault if USC 7 was intended to achieve anything in excess of that. Miss Rose, I think, accepts that if the condition cannot be justified by reference to Article 5 then it must fail.

42. Concentrating for the moment on the language of the USD, it is immediately apparent that there are certain common themes. The obligation contained in Article 3(1) is one to ensure that the services are made available to all end-users. This theme is taken up in Articles 4 to 7 which set out the various services in question. In each case the same formula is used. Member States are required to ensure that the service is made available to end-users: see Article 5 quoted in paragraph 10 above.

43. The means of doing this is also prescribed. Article 8 sets out machinery in the form of a designation:-

> "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."

44. The issue of vires turns on the provisions of Articles 3 and 8. As recognised in Article 6(2) of the Authorisation Directive, the specific obligations permitted are those which may be imposed on those *designated to provide* universal service. This is relied upon by Mr Thompson QC as at least a pointer to the correct interpretation of Article 8 of the USD. But Article 6(2), whilst identifying the class of provider and the means which are to be used to carry out these obligations, does not in terms limit the form of the obligation which can be imposed on the designated provider in order to satisfy the duties of the Member State set out in Article 3(1). For this one needs to look at Articles 8(1) and 3(2).

45. At this point in the argument one encounters a certain amount of linguistic controversy. Article 8(1) (in its English version) allows Member States to designate an undertaking "to guarantee the provision" of universal service as identified in

Articles 4 to 7. The second sentence seems to make it clear that the purpose of the designation is to require the undertaking concerned actually to provide the relevant part of the service to end-users. But the opening words of Article 8(1) appear to be more ambiguous because, on one view, the obligation which the designation imposes is one to guarantee the provision of universal service rather than to provide it. The Number relies upon this as supporting the validity of USC 7 because the obligation to make OSIS available to other would-be DQ service providers does (albeit indirectly) serve to guarantee the provision of that aspect of universal service through the market. Article 8(1) does not, they say, limit the obligation to the direct provision of a comprehensive retail DQ service to end-users and nothing else.

46. An alternative way of reading Article 8(1) is to treat the words from "to guarantee" down to the end of the first sentence as referring to the obligation imposed on the Member States and not that created by the designation. Read in this way the section means that, in order to guarantee (ensure) the provision of universal service as set out in Articles 4 to 7, the Member States may designate one or more undertakings. The French version of Article 8 is worded similarly to the English. The undertaking is designated in order to (afin de) guarantee the provision of universal service. But in the German version the Member States designate one or more undertakings *who are to guarantee* the universal service (die die Erbringung des Universaldienstes). This version therefore indicates that the words "to guarantee the provision of universal service" are descriptive of the obligation imposed on the designated provider.

47. I am not sure that this slight variation between the texts makes any substantive difference. If the designated undertaking is thereby obliged to guarantee the provision of universal service it can only do so either by providing that service itself or by getting someone else to do so. Either way, there has to be a provision to end-users of a comprehensive and affordable DQ service for which the designated provider is responsible. The submissions of BT and OFCOM do not therefore depend on whether there is provision of the service by BT direct or through some other undertaking. What they depend on is the limitation of Article 8(1) to an obligation to provide or guarantee the provision of universal service in the sense described in Articles 4 to 7. USC 7 does not do this, they say, because it does not impose on BT an obligation either to provide a DQ service to end-users itself or to do so through someone else. All that it requires BT to do is to sell OSIS to any service provider who wishes to acquire it.

48. Miss Rose's response to this is that the first sentence of Article 8(1) can be read as casting on the universal service provider through the designation the same level of obligation as is cast on the Member State by Article 3(1). The making available of the universal service may, she argues, be achieved (as in the UK) without the imposition on a designated provider of an express obligation to provide or ensure the provision of the service. Instead the Member State may decide to take certain steps which will have the effect of allowing the market to provide the level of service required. This is what USC 7 is intended to do and, it is said, has succeeded in producing. Article 8(1) should therefore be read as permitting the imposition of whatever obligations will best achieve that end. It should not be construed as dictating the means by which this is done.

49. She relies on the fact that the Director thought it was objectively necessary to impose USC 7 on BT in order to ensure the provision of a comprehensive DQ service in

accordance with Article 5. And she points to the consequences that would follow if BT and OFCOM are right about the scope of the conditions which can be imposed. If USC 7 is invalid BT will be under no obligation to maintain OSIS as a comprehensive database or to make it available to competitors.

50. These points were in fact considered by OFCOM as part of a review of USC 7 which followed the determinations under appeal. In a consultation document in March 2008 there is an assessment of the impact on BT and its competitors of the determination that USC 7 is invalid. Paragraph 5.27 of the document states that:-

> "As stated earlier, we consider that access to comprehensive wholesale directory information on reasonable terms is essential for the requirements of the Universal Service Directive for directories and DQ services to be met under normal market conditions."

51. But the view of OFCOM after analysis was that BT was likely to continue to maintain and update OSIS for the foreseeable future at least so long as it remained a profitable activity. If BT were to use its ownership of OSIS to restrict competition in the DQ services market by refusing to supply the information to competitors at any price or by charging prices that were excessive then there might be a risk that consumers would face higher charges for DQ services at least until an alternative database of directory information was compiled and made available by some other network provider. In that event enforcement measures could, it is said, be taken to prevent anti-competitive behaviour by BT. OFCOM states that it did not envisage the need to control the situation by some form of ex ante regulation.

52. The consultation document is interesting because it underlines the essentially light-touch approach to regulation that has been adopted by both OFTEL and OFCOM thus far. Apart from the general powers available to curb market abuse, Chapter III (Articles 16 to 19) of the USD contains specific provisions entitling Member States to impose regulatory controls on retail services in relation to undertakings with significant market power. These controls are one of the sets of provisions which can justify the imposition of ex ante regulation in the form of specific conditions under Article 6(2) of the Authorisation Directive. In addition a national regulatory authority may, under Article 13(1) of the Access Directive, impose cost recovery and price controls on any network operator which has been designated as having significant market power in a specific market following a market analysis carried out in accordance with Article 16 of the Framework Directive. To date, however, there has been no determination that BT is in the position of an undertaking of significant market power within the meaning of Article 14 of the Framework Directive and the only form of regulation in respect of DQ services has been through the medium of designation under USC 7. The availability of these alternative remedies is, however, highly relevant to a consideration of the limits of the Article 8 power.

53. The argument for The Number stresses, as I have mentioned, the importance of construing the provisions of the USD by reference to the more general policy objectives encapsulated in Article 8 of the Framework Directive. These, Miss Rose says, are the overriding considerations to be applied: the liberalisation measures set out in the Authorisation Directive are not paramount and have to be read consistently with the policies in the Framework Directive.

54. When one comes to the specific provisions of the USD she relies on Article 3(2) as containing guidance as to how the obligation contained in Article 3(1) to ensure that universal service is provided to all end-users should be implemented. This, of course, includes the provision of a comprehensive DQ service under Article 5(1). It gives regulatory authorities, she says, a measure of discretion as to how to achieve the provision of universal service which must be exercised in accordance with the wider policy objectives of the CRF. Article 3(2) therefore informs the construction of Article 8(1). Article 8(1) states what obligation is imposed on the designated undertaking but does not limit the measures which can be included within the designation. That is for the regulatory authorities to decide having regard to what, in the words of Article 3(2), they determine is "the most efficient and appropriate approach for ensuring the implementation of the universal service". We know, Miss Rose submits, from the consultation document that preceded designation and from the designation itself that the Director thought that USC 7 was necessary in order to ensure the implementation of Article 5.

55. Broadly speaking, the Tribunal accepted this approach. It rejected an alternative argument from Miss Rose which equated OSIS with one of the "elements of universal service" mentioned in Article 8(1). Although contained in her skeleton argument, that argument has not been placed at the front of her submissions on this appeal. It is enough to say that I agree with the Tribunal's reasons for rejecting it.

56. The Tribunal's view about the construction of Article 8(1) of the USD was based on a number of propositions which it described in its judgment as clear. The first was 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 obligation which may be imposed on it. So if an undertaking is designated to provide a connection to the network it is said that ancillary obligations such as the proper functioning of the network could be imposed under Article 3(2) in order to facilitate compliance with the primary obligation. This line of reasoning is continued in paragraphs 105 to 106 of the judgment:-

> "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."

57. The reference in paragraph 105 to the ancillary obligations not being strictly necessary to ensure the provision of the service is difficult to square with regulation 4 of the 2003 Regulations but, in terms of Community law, the Tribunal's test based on what each Member State considers most efficient and appropriate still has to accommodate the fact that, in this case, BT is not required under the designation either to provide or to guarantee the provision of any element of universal service. The premise (in paragraph 106) that Article 3(2) can be used to impose ancillary obligations necessary or even merely appropriate for the attainment of that obligation therefore has no application in this case if designation under Article 8 can only be used to impose an obligation on the relevant undertaking to provide or ensure the provision by a third party of an element of universal service in the sense described in paragraph 45 above.

58. This therefore takes one back to Article 8(1) and to the central question of what a designation can require an undertaking to do. The Tribunal (in paragraph 112) expressed the conclusion 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'."

59. They accepted (by reference to the travaux préparatoires) that the obligation to *guarantee* the provision of universal service was one imposed on the designated undertaking (i.e. as expressed most clearly in the German text) but the extension of this formula to include an obligation to do something other than to provide some element of the service through a third party needs to be explained. On this point the Tribunal adopted Miss Rose's argument that what Article 8(1) does is to allow the Member State in effect to transfer on to the designated undertaking the same type or level of obligation which is imposed on it by Article 3(1). The designation may therefore impose a type of obligation which is likely to have the effect of ensuring that end-users have the benefit of a comprehensive DQ service without requiring the designated undertaking actually to provide that service.

60. They also reason that even if the obligation imposed upon BT by USC 7 was one in terms to guarantee the provision of the DQ element of universal service it would have

been open to BT to have complied with that obligation by making OSIS available to other network operators and leaving the market to do the rest.

61. In this way the Tribunal seeks to meet OFCOM's argument that USC 7 does not "guarantee" the provision of comprehensive and affordable DQ services to all end-users by concentrating on the practical effect of the condition. The reference in Article 8(1) to a "guarantee" means no more, they say, than that the provision of the relevant element of universal service should be ensured by the measures taken. If, with the benefit of USC 7, the market is able to deliver the level of service required then the conditions imposed by Article 8(1) are satisfied.

62. In deciding whether this construction of Article 8(1) is correct one or two preliminary matters need to be addressed. The first is the relevance of the travaux préparatoires. These were considered by the Tribunal and include the 1999 Communications Review referred to earlier. But, although explaining the background to the changes in policy and structure introduced by the CRF, they add nothing in my view to what is apparent from the Directives themselves. Although they indicate that Article 8(1) should be used in the sense most clearly identified in the German text, they give no real assistance as to whether an obligation to guarantee the provision of universal service extends beyond actually providing that service to end-users either directly or through some third party operator.

63. The next matter to mention is the question of authority. Mr Thompson submits that any derogations from fundamental treaty rights should be construed strictly: see Case C-319/06 *Commission v Luxembourg*. This is recognised in recital (15) of the Authorisation Directive at least in relation to the conditions which may be attached to any general authorisation and it is clear that Article 6(2) should be construed as a comprehensive definition of the source of any specific derogations from Article 3(2). But the resolution of the issues of construction in this case really depends upon looking at the words used in the context of the regulatory framework as a whole and seeking a meaning which is consistent with what appears to be the purpose of the relevant provision. Article 8(1) provides the machinery (or at least one of the means) by which the objectives of the USD can be implemented. I am not sure that a rule of construction that derogations from treaty rights should be construed strictly really helps very much when applied to provisions of this kind. Miss Rose is, I think, right in her submission that the USD forms an integral part of the scheme of the CRF and has to be interpreted in that context. But there is no dispute that the USD does allow national regulatory authorities to impose specific conditions on those designated to provide universal service as an exception from the principle of a general authorisation. Article 6(2) of the Authorisation Directive says so. The only question is what form these obligations may take. Our task is, I think, to give the language of the USD a meaning which is consistent with and respects its position within the general framework of the CRF.

Article 8(1)

64. Article 8 is included in the USD because that is the method prescribed for implementing the Directive through the imposition of specific obligations on network providers. This is made clear by Article 6(2) of the Authorisation Directive which is only concerned to identify the scope of derogations from a general authorisation beyond what is permitted under the general conditions.

65. What Article 6(2) does is to stipulate the source of authority for the imposition of any such obligations. It therefore offers the national regulator a range of options. In the case of the USD, these include the power in Articles 16 to 19 to impose regulatory controls on undertakings with significant market power such as by imposing price or tariff controls on retail services: see Article 17(2). But unless these measures are adopted, the choice for the regulator is between doing nothing beyond monitoring whether operators in the market are in fact supplying the minimum elements of publicly available service described in Articles 4 to 7 and intervening in the market by exercising the power of designation.

66. For a Member State to comply with its obligations under Article 3(1) the requisite elements of universal service must be publicly available to all end-users in the UK at an affordable price. Since the provision of these services will be carried out by authorised network operators, the obligation on the Member State to "ensure" that the services are available must involve an assessment of what the market currently provides and the introduction of such corrective measures as may be necessary. The preliminary choice between allowing the market to function unhindered and some form of intervention has both cost and subsidy implications and therefore requires the exercise of judgment. The requirement to carry out this assessment is mandatory as is the ultimate responsibility to ensure that universal service as defined is provided. But the choice of method is discretionary having regard to the circumstances then prevailing.

67. This is made clear by Article 3 of the USD. Article 3(1) sets out, in unqualified terms, the obligation imposed on the Member States. Article 3(2) requires an assessment of how best that obligation can be implemented whilst respecting the other framework objectives and the need to minimise market distortion by the provision of services on terms or at prices which depart from normal market conditions.

68. As mentioned earlier, the Tribunal treated Article 3(2) as conferring authority for the imposition of obligations additional or ancillary to what could be imposed under Article 8. This is relied on in the present case if BT and OFCOM are right about the limits of the Article 8(1) power. In paragraphs 105-6 of its judgment the Tribunal said that the power under Article 3(2) even extends to imposing obligations that are not strictly necessary for ensuring that the designated undertaking would itself provide the necessary element of universal service. It therefore justifies conditions such as USC 7 which are not directed to the retail provision of an element of universal service but may have that effect.

69. My own view is that this is a misunderstanding of the meaning and purpose of Article 3(2). Read in its context, it is not addressing the question of what should be imposed as part of a designation at all. It is concerned with the prior question of what steps (if any) the regulator should take to intervene in the market in order to ensure the provision of universal service. The language of Article 3(2) is directed to the much more general issue of market intervention. As the Tribunal itself recognised, that may involve a determination that designation is in fact unnecessary.

70. This point is made most strongly by Article 8(1) itself which (by contrast with Article 3(2)) confers a power that is both discretionary and can only properly be exercised once the assessment required under Article 3(2) has been carried out. If the regulator opts for designation as the method of ensuring the provision of universal service then

he is limited to what Article 8 permits. I accept, of course, that the exercise of the Article 8(1) power necessarily involves a consideration of what steps are required having regard to the defects in the provision of universal service which the regulator may have identified or his view as to what degree of intervention in the market is in fact necessary. But that does not justify reading into Article 8 the provisions of Article 3(2) as a definition of what Article 8 allows the regulator to do. That approach mischaracterises Article 3(2) as conferring a power to impose specific conditions (which it is not). Because of the general language of Article 3(2) which makes perfect sense in the context in which it is used, its translation into Article 8(1) creates most of the problems of construction about the meaning to be attributed to the word "guarantee" which the Tribunal had to deal with in these proceedings. Once the function and purpose of Article 3(2) is properly identified, those difficulties largely disappear.

71. In the Tribunal's judgment the controversy about the scope of Article 8(1) seems to centre on the reference to the undertaking being designated to "guarantee" the provision of universal service as opposed to being designated to provide it. It is this formulation which allowed them to equate the limits of the Article 8(1) power with the duty imposed on Member States by Article 3(1). However, in my view, they are not the same thing. It is clear from the second section of Article 8(1) that the phrases "guarantee the provision" and "provide" are used almost interchangeably and essentially mean the same thing. In recital (9) of the USD and in Article 6(2) of the Authorisation Directive the references are to undertakings being designated to provide the service but, as I explained earlier, the differences between the two phrases are minimal. A reference to an undertaking being designated to guarantee the provision of universal service would usually mean that it must either provide it itself or do so through a third party. Either way, it is an obligation to provide the service to end-users: not one to take a preliminary and different step in relation to other network operators which may ultimately have the same result. The references in the other parts of the USD and in Article 6(2) of the Authorisation Directive point strongly to it having the primary meaning I have indicated.

72. The Tribunal held that the power of Member States to designate one or more undertakings to "guarantee the provision" of universal service included the power to impose a wholesale obligation such as USC 7 because an obligation to "guarantee" the provision of the DQ element of universal service meant no more than the undertaking should "ensure" that such a service was provided. The next step in the Tribunal's reasoning was to say that had a condition been imposed on BT which expressly required it to guarantee the provision of DQ services that would have allowed the company to fulfil the obligation by providing OSIS to other operators and allowing the market to do the rest.

73. As already mentioned, the context of Article 8(1) and the references in other parts of the USD and the CRF to designation requiring an undertaking to "*provide*" universal service point very strongly to this being the correct interpretation of the words "*guarantee the provision*" in Article 8(1). But my principal reason for preferring this construction is that I do not think that the first sentence of Article 8(1) was intended to reproduce the obligation cast on Member States by Articles 3 to 7 of the USD. The common theme of all those provisions is that Member States should ensure that the relevant services are made available. These words are addressed to Member States as

regulatory authorities with a choice of options as explained above. In that capacity they have a wide discretion as to how to achieve the objectives of the USD. But the designated undertaking does not have any such discretion. What is imposed on it is an obligation to provide or guarantee the provision of the service. It seems to me unlikely that Article 8(1) was intended by these words in effect to allow national regulatory authorities to delegate to the undertaking the decision as to how to ensure that DQ services were made available. BT is not a regulator and has no regulatory function. Decisions as to whether it should seek to comply by selling the contents of OSIS or by actually providing the service itself are not ones for it to make. The way in which a Member State should intervene in the market to ensure that universal service is provided is uniquely a matter for it to consider having regard to the policy objectives described earlier. No designated universal service provider is in the position to make an objective determination of that kind as to what measures are required in the public interest to implement the primary obligations cast on Member States. Furthermore, the suggestion by the Tribunal that the meaning of the language of the USD contained in Article 8(1) can be read as giving BT a discretion as to how it should comply with its obligations ignores the fact that the only terms upon which it is permitted to provide OSIS to other network operators under USC 7 is at a regulated price. That is a decision which only a regulator would be entitled to make.

74. The problem in this case is that the Director has not designated BT to provide or even to guarantee the provision of a universally available DQ service. The obligation imposed by USC 7 is a very different kind of obligation. It requires BT to make OSIS available to all operators regardless of whether they wish to use it in order to provide a comprehensive and publicly available DQ service. In doing so, it imposes a price control on the supply of material which, on OFCOM's findings, is more extensive than would have to be provided under Article 25(2). USC 7 is not therefore directed to controlling the provision of a universal DQ service to end-users nor is it (in the words of Article 6(2) of the Authorisation Directive) a specific obligation imposed on those designated to provide universal service under the USD. BT has not been designated to provide any element of universal service. No one has.

75. Article 25(2) receives scant mention in the Tribunal's judgment but is also difficult to square with the construction which has been put on Article 8(1). The relevant context for construing Article 8(1) must include the existence of the Article 25(2) obligation which, on the Tribunal's findings, would have enabled other operators to assemble comprehensive DQ databases at a regulated cost, albeit with more time and effort being involved. This seems to me in itself a strong indication that the framers of the USD did not contemplate that a more extensive obligation to provide subscriber information could be imposed under Article 8(1).

76. Mr Vajda for OFCOM also pointed out that the power to impose cost-oriented pricing at a wholesale level is provided for in the CRF but within very restricted limits. Under Article 13(1) of the Access Directive, a regulatory authority may impose price controls on operators designated as having significant market power but not otherwise: see Article 8(2) of the Access Directive. Such controls can only be imposed after the regulatory authority has conducted a market analysis and followed the consultation procedures specified in Articles 6 and 7 of the Framework Directive. Again, this points strongly away from USC 7 being a legitimate use of the Article 8(1) power.

77. I am not therefore persuaded that Article 8(1) read in context confers any greater power than to impose on BT a condition or obligation requiring it to provide (either itself or through another entity) the DQ element of universal service. It is not therefore strictly necessary to deal with ground 3 of BT's grounds of appeal which is directed to whether USC 7 is also ultra vires the 2003 Regulations. I propose therefore to deal with this point very shortly.

The validity of USC 7 under domestic law

78. BT and Kingston were designated as universal service providers under the powers contained in regulation 4 of the 2003 Regulations. As mentioned earlier, these were made under s.2(2) of the European Communities Act 1972 and came into force on 1st February 2003 prior to the passing of the 2003 Act. The status of the 2003 Regulations and designations made under them is dealt with in the transitional provisions contained in paragraph 7 of Schedule 18 to the Act. Paragraph 7(1) provides that:

> "Where a proposal for the designation of a person as a universal service provider has been confirmed under regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003 (S.I. 2003/33), the designation is to have effect after the commencement of section 66 of this Act as a designation in accordance with regulations under that section."

79. Section 66 of the 2003 Act and Schedule 18 were brought into effect by Statutory Instrument on 25th July 2003. The rule-making power has not been exercised but the effect of the transitional provisions is to treat a confirmed designation under the 2003 Regulations after 25th July 2003 as if it were a designation made in accordance with regulations under s.66. Paragraph 7(2) of Schedule 18 provides that a condition imposed as part of such a designation continues in effect as a universal service condition under s.45 of the 2003 Act.

80. If USC 7 is unlawful under Community law it must follow that it is also ultra vires the relevant domestic legislation. Section 67 of the 2003 Act limits universal service conditions to what OFCOM considers appropriate for securing compliance with the obligations set out in any regulations made under s.65. This power is limited to what is necessary to secure compliance with Community obligations. It confers no greater power.

81. But BT also contend that even if USC 7 is valid under Community law it is nevertheless ultra vires the 2003 Regulations because, under regulation 4(12), any proposed condition must be "necessary" for satisfying the requirements of Article 5 of the USD. They rely on the Tribunal's findings that USC 7 was not strictly necessary for this purpose because of the alternative source of information available under Article 25(2). It was not, they say, therefore open to the Director to have imposed USC 7 on BT under the 2003 Regulations.

82. There are, I think, two answers to this. The first is that the Director has in fact formed the view that USC 7 is necessary for these purposes and there has been no challenge to the reasonableness of that determination on *Wednesbury* or other grounds. But Mr Vajda and Miss Rose are also, I think, right that, with effect from 25th July 2003,

the deeming provision in paragraph 7(2) of Schedule 18 means that the statutory test for imposing universal service conditions is that contained in s.67(1) of the 2003 Act. This is not based on what is necessary but is a much broader test of what conditions OFCOM considers appropriate for securing compliance with any s.65 regulations and with Community law.

A reference

83. We have been asked by Miss Rose not to allow these appeals without referring the question about the proper meaning of Article 8(1) to the ECJ under Article 234 EC. To do this a decision on the question must be necessary to enable this court to give judgment. In practice, this requires the issue of Community law to be critical to the outcome of the case and for the national court to consider whether it can, with complete confidence, resolve that issue without the benefit of assistance from the Court of Justice. In cases of real doubt it should refer: see *R v International Stock Exchange of the United Kingdom & Republic of Ireland Limited ex parte Else* [1993] QB 524 at page 545.

84. Although I have been able to reach a conclusion about Article 8(1) based on my own reading of the relevant Directives and a consideration of the principles involved, differences between the authoritative texts and the points taken in argument persuade me that the point cannot be regarded as beyond doubt. I think that we should therefore refer this matter to the ECJ before giving judgment on the appeal.

85. I therefore propose that a preliminary ruling should be sought on the following questions:

(1) Is the power afforded to Member States under Article 8(1) of Directive 2002/22/EC ("the Universal Service Directive"), read together with Article 8 of Directive 2002/21/EC ("the Framework Directive"), Articles 3(2) and 6(2) of Directive 2002/20/EC ("the Authorisation Directive"), and Article 3(2) of the Universal Service Directive and other material provisions of EC law, to designate one or more undertakings to guarantee the provision of universal service, or different elements of universal service, as identified in Articles 4, 5, 6, 7 and 9(2) of the Universal Service Directive, to be interpreted as:

(a) Permitting the Member State, where it decides to designate an undertaking pursuant to this provision, only to impose specific obligations on that undertaking which require the undertaking itself to provide to end users the universal service or element thereof in respect of which it is designated? Or

(b) Permitting the Member State, when it decides to designate an undertaking under this provision, to place the designated undertaking under such specific obligations as the Member State considers to be most efficient, appropriate and proportionate for the purpose of guaranteeing the provision of the universal service or element thereof to end users, whether or not those obligations require the designated undertaking itself to provide the universal service or element thereof to end users?

(2) Do the above provisions, when read also in light of Article 3(2) of the Universal Service Directive, permit Member States, in circumstances where an undertaking is designated under Article 8(1) of the Universal Service Directive in relation to Article 5(1)(b) of that Directive (comprehensive telephone directory enquiry service) without being required to supply such a service directly to end users, to impose specific obligations on that designated undertaking:

(a) to maintain and update a comprehensive database of subscriber information;

(b) to make available in machine readable form the contents of a comprehensive database of subscriber information, as updated on a regular basis, to any person seeking to provide publicly available directory enquiry services or directories (whether or not that person intends to provide a comprehensive directory enquiry service to end-users); and

(c) to supply the database on terms which are fair, objective, cost oriented and non-discriminatory to such a person?

Lord Justice Maurice Kay :

86. I agree

Lord Justice Waller :

87. I also agree.