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4 **IN THE COMPETITION**

5 **APPEAL TRIBUNAL**

Case No:1567/3/3/22

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

10 Thursday 25th May 2023

11
12 Before:

13 THE HONOURABLE MR JUSTICE MORRIS

14 (Chair)

15 JANE BURGESS

16 ANNA WALKER CB

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

19
20
21 BETWEEN:

22
23 **SKY UK LIMITED**

Appellant

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25
26 v

27
28 **OFFICE OF COMMUNICATIONS**

Respondent

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

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

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

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(10.30 am)

(Proceedings delayed)

(10.45 am)

Housekeeping and procedural matters

MR JUSTICE MORRIS: Good morning.

Can I first of all start by making a formal statement about the live stream. Some of you are joining the live stream on our website, so I must start therefore with the customary warning.

An official recording is being made and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Thank you very much.

Good morning, Mr Pickford.

MR PICKFORD: Good morning, Sir.

Mr Chairman, members of the Tribunal, I appear for Sky with Mr Gregory. Mr Holmes KC and Mr Grubeck appear for Ofcom.

You should have bundles. I believe there are in fact five physical bundles: two parts of a core bundle and three parts of an authorities bundle.

MR JUSTICE MORRIS: Yes.

MR PICKFORD: I have only just discovered that you had five. My bundles have all been grouped together into just core and authorities. So I will give you tab references and I will try to direct you to the right one. But I'm afraid I am not necessarily always sure which of your three, say, in your authorities bundle I will be referring you to.

Your authorities bundle, if it has been updated, should now run to 37 tabs. There have

1 | been a few updates yesterday.

2 | MR JUSTICE MORRIS: Yes. What I believe we have is a bundle 2A, which has tabs
3 | 32 and following.

4 | MR PICKFORD: That is very helpful.

5 | MR JUSTICE MORRIS: It has not been put into volume 2. We have volumes 1 and
6 | 2. And in terms of core bundle, it is in two bundles and the split comes after tab 3. So
7 | the second volume of the joint core hearing bundle runs from tab 4 onwards. Certainly
8 | mine does, but I am sure we will find it.

9 |

10 | **Opening submissions by MR PICKFORD**

11 | MR PICKFORD: Great. Thank you very much.

12 | The core point on this appeal is what is the proper construction of subsections (2) and
13 | (2A) of section 32 of the Communications Act 2003, which provisions define what is
14 | and what is not an electronic communications service.

15 | Now, I am very grateful to the Tribunal for the letter that we received this morning. So
16 | what I intend to do is, before continuing with an explanation of the appeal and why we
17 | say in a nutshell we are right, I am going to deal with some of the facts and just try to
18 | lay out some basic factual framework that should hopefully give some context to the
19 | points that we are going to be discussing.

20 | MR JUSTICE MORRIS: Thank you, Mr Pickford. And we apologise for the lateness
21 | of the letter but I think we would certainly find that exercise helpful.

22 | MR PICKFORD: Not at all, Sir. Far better to get it in a letter slightly before the hearing
23 | than in the hearing itself.

24 | MR JUSTICE MORRIS: I could have done that but I thought that would be a little bit
25 | unfair.

26 | MR PICKFORD: So I have done my best in the time available to deal with the

1 Tribunal's questions. I took the view that there would only be incremental benefit in
2 taking more time. I am not able to answer every single question now. What I propose
3 to do is to seek to provide as much context as I sensibly can in opening, which I hope
4 will give the Tribunal sufficient context to understand the issues, and then to follow up
5 at the end of the day with those behind me producing a note, a very short summary
6 note, which will seek to effectively tick off all of the points that were in the Tribunal's
7 letter.

8 I don't think in the time available it would be sensible for us to try to agree that note
9 first with Ofcom. What I propose is, we will get it to you and to Ofcom this afternoon,
10 by say around 5.30, and they can then look at it and say whether they agree with it or
11 disagree tomorrow.

12 MR JUSTICE MORRIS: That is fine. That is very helpful.

13 I should add that since we sent the letter, we ourselves have taken a little time and we
14 have been looking at, certainly in relation to your client's products, a section of
15 your March submissions at page 285 of the bundle.

16 I am not sure I personally have fully digested it all, but we are aware of that. Let's see
17 how we go --

18 MR PICKFORD: Yes.

19 MR JUSTICE MORRIS: -- and I am sure that we will tease out any issues that we
20 have.

21 MR PICKFORD: Thank you, Sir.

22 The only other warning or clarification of what I am going to say is that, unlike other
23 points where my clients have been able to vet what I am about to say with the benefit
24 of time, it may be there are things that they think, ah, he hasn't quite captured the
25 nuance of that. And I apologise in advance if that is the case. No doubt there will be
26 yellow notes and tuggings if that is the case, but hopefully we can keep that to

1 a minimum.

2 MR JUSTICE MORRIS: Fine, very good.

3 MR PICKFORD: I have just been told there is no audio on the live stream, which is
4 obviously less than helpful.

5 MR JUSTICE MORRIS: Thank you. That will get fixed.

6 MR PICKFORD: Would you like me to continue or to wait for that if it is going to be
7 short?

8 MR JUSTICE MORRIS: We will wait a few moments and if not we will rise in
9 a moment.

10 MR PICKFORD: Those with the most technical knowledge of Sky products are live
11 streaming, so it would be highly advantageous if they were able to hear this particular
12 part because they can say, well, this bit is properly to be understood in this particular
13 way.

14 I will sit down whilst we are waiting.

15 **(Pause).**

16 MR JUSTICE MORRIS: How long will it take to fix, do you think?

17 We will rise, because if you want to have people on the link and seeing it, we will rise
18 until that is sorted. Thank you very much.

19 **(10.54 am)**

20 **(A short break)**

21 **(11.24 am)**

22 MR JUSTICE MORRIS: On behalf of the Tribunal, I apologise for the delay. I gather
23 we are now ready to go. Thank you.

24 MR PICKFORD: Thank you, Mr Chairman, members of the Tribunal.

25 So we are going to deal with the facts. And as, Mr Chairman, you noted, Sky's
26 submission to Ofcom in March 2020, which is at core 5/285, is a good starting point

1 for that. Just before going to it -- although you are welcome to get it out -- I'm going to
2 give you some core references of where things are found. So these are the places to
3 look. That is one of them.

4 MR JUSTICE MORRIS: Yes.

5 MR PICKFORD: And then Sky updated and incorporated those submissions into its
6 response to Ofcom's section 96A notification, and that is to be found at core 8/369,
7 paragraph 2.

8 And then annex 2, which is at core 8(ii)/388. And then those are in turn referred to in
9 the notice of appeal at paragraph 7, core 1/4. So that is kind of the route that traces it
10 through.

11 There are also some diagrammatic representations of how content is transmitted, and
12 I will come to those in due course as well. They are annexes 7 and 8 of the 2020
13 submissions.

14 MR JUSTICE MORRIS: Yes.

15 On reading the material in the March submissions, which we did recently, there were
16 references to annexes 13 and 14 at paragraph 89 of those submissions. And I could
17 not immediately find annexes 13 and 14. I am not sure that annexes 7 and 8
18 are -- anyway, take me to them if you need to.

19 MR PICKFORD: Annexes 7 and 8 definitely are there.

20 MR JUSTICE MORRIS: They are, I think.

21 MR PICKFORD: Those beside me and behind me can help me with annexes 13 and
22 14.

23 MR JUSTICE MORRIS: Okay.

24 MR PICKFORD: So then if we turn in the core bundle to tab 5, page 285. This is the
25 beginning of the factual curriculum(?) within our submissions to Ofcom before it took
26 its decision. It is notable that the date -- it is rather faint but we can see at the top -- is

1 6 March 2020, so it is actually more than three years out of date. And that is why I told
2 the Tribunal about the updated references, because we have been trying, to some
3 degree, to continue to provide an updated picture as we go along.

4 Having said that, there are some changes that have taken place that we say are
5 immaterial, and in any event ultimately Ofcom's decision is not based on the situation
6 we see today; it is actually based on the decision it saw at the time and the information
7 that it had when it took the decision.

8 So starting with Sky first, and then we can come on to what other people do shortly.
9 Sky provide pay TV. You pay to access the TV content. And that is distinct from free
10 to air TV.

11 MR JUSTICE MORRIS: Yes.

12 MR PICKFORD: And there are two types of free to air TV. There is that which is
13 funded by licence fee, ie the BBC, and there is that which is funded solely by ads, say
14 ITV. So that is the top level of the scheme.

15 And then pay TV can be effectively one of two things: it can be linear channels or on
16 demand. Sometimes 'on demand' is called 'subscription video on demand'. But these
17 days 'on demand' will certainly do for our purposes.

18 Now, a linear channel is arranged in a schedule, so like BBC One. So if you turn on
19 your telly at 9.15 you will have missed the first 15 minutes of whatever started at 9
20 o'clock and you will see what is being transmitted there and then.

21 That is a linear schedule. Alternatively, there is on demand TV, which I have to say is
22 the only kind of TV I watch --

23 MR JUSTICE MORRIS: I think many of us are like that now.

24 MR PICKFORD: So you sit down, you go through your remote, you go through a menu
25 and you find a programme you want to watch. It doesn't matter whether it was on the
26 linear channel yesterday or whatever.

1 MR JUSTICE MORRIS: Or if you arrive at 9.15, you switch on and start it at 9.00 or
2 see it on demand 15 minutes late.

3 MR PICKFORD: Quite. So you sit down, you choose what programme you want to
4 watch there and then, as opposed to a scheduler having decided what programme
5 you are going to be able to see at 9.00. That is the essential difference between those
6 two.

7 Now, Sky TV, whether it is linear or on demand -- because Sky provides both -- can
8 be thought of as being divided into a number of strands. To be clear, these are
9 elements of a single service. So this is for analytical purposes that I am going to
10 decompose it in this respect. The three things I am going to consider are firstly
11 content, secondly other elements, but excluding transmission for a moment, and then
12 thirdly transmission.

13 MR JUSTICE MORRIS: Yes.

14 MR PICKFORD: So that is for analytical purposes, but they are all part of one service.
15 The principal feature of the service is content. And we see that in the passage that
16 I have taken the Tribunal to on page 285, a description of Sky TV. It begins at
17 paragraph 52. You see the reference then to the linear and on demand television
18 services above paragraph 53. You see a reference to the Sky Entertainment pack.
19 That is something that everyone takes.

20 MR JUSTICE MORRIS: Yes.

21 MR PICKFORD: That has now been updated. In due course I can show you the
22 update, but that is now called Sky Signature rather than Sky Entertainment, and there
23 are a few differences between Sky Signature and Sky Entertainment. I think
24 Sky Signature, for what it is worth, also includes Sky box sets, whereas
25 Sky Entertainment, which is the old package, doesn't include Sky box sets. Those
26 would have to be separate if you were a Sky Entertainment subscriber.

1 MR JUSTICE MORRIS: Just give me a moment.

2 Just so I am clear, when one takes the basic package, does that include both linear
3 and on demand?

4 MR PICKFORD: That's right, yes.

5 MR JUSTICE MORRIS: All right.

6 MR PICKFORD: And it includes both Sky's wholly owned channels and a selection of
7 third party channels.

8 MR JUSTICE MORRIS: Okay.

9 MR PICKFORD: Some. Then one sees over the page the current set, as it was then
10 in 2020, of some of the other channels. And they are then divided out, and we then
11 see additional Sky channels that you can take, the sports channels at 58 and the film
12 channels at 60. And one adds further packages on if you want to take the sports or
13 the cinema. That costs you more.

14 MR JUSTICE MORRIS: Okay.

15 MR PICKFORD: Now, the importance to Sky customers of content is clear, we say,
16 from supporting materials that we will show you a bit later on in these submissions.
17 So if we skip through to page 302, just momentarily -- we may come back in a moment
18 to those other pages.

19 MR JUSTICE MORRIS: Yes.

20 MR PICKFORD: So this is annex 3.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: And it shows the Sky spend on its own channels, the content, and it
23 also shows the spend on third party channels and content. I am not going to say very
24 much more about it, because you can see that the verb and the adverb are
25 confidential, as are the numbers. But the Tribunal can well see the point being made
26 there in relation to the comparison of the two.

1 MR JUSTICE MORRIS: And this is cost to Sky?

2 MR PICKFORD: That's right, yes.

3 Yes, so this point is looking at cost to Sky. Obviously one can infer from what Sky is
4 willing to pay for things, about how important it thinks those things are for its business.

5 MR JUSTICE MORRIS: Okay.

6 MR PICKFORD: Then we see (inaudible) at the bottom:

7 "Sky spent over [blanked] more on acquiring and producing content for its own
8 channels and on demand content than it spent on licensing third party channels and
9 content for Sky TV."

10 MR JUSTICE MORRIS: And "licensing third party channels" means licensing in?

11 MR PICKFORD: That's right.

12 MR JUSTICE MORRIS: As licensee.

13 MR PICKFORD: That's right. We then have a consumer perspective at annex 7, so
14 that is page 303. And we see there -- and I am allowed to say this -- Sky channels
15 achieve significant share of viewing of Sky TV. And that shows Sky channels as
16 a percentage of viewing of all Sky TV channels over time.

17 MR JUSTICE MORRIS: Which means -- "all Sky TV channels" includes third party.

18 MR PICKFORD: Exactly. Everything you can see.

19 MR JUSTICE MORRIS: That you could watch on Sky TV.

20 MR PICKFORD: Yes.

21 MR JUSTICE MORRIS: Yes. Thank you.

22 MR PICKFORD: Then at the next page, annex 8, we see marketing materials, which
23 shows the focus on Sky's content and its channels.

24 MR JUSTICE MORRIS: Yes.

25 MR PICKFORD: Another example at annex 9, over the page. Another example at
26 annex 10 over the page. And then at annex 11 we see that Sky customer research

1 shows that subscribers place significant value also on other elements of Sky TV.
2 So we have the content.
3 MR JUSTICE MORRIS: Yes.
4 MR PICKFORD: Then we have ways of watching, which is recordings, on demand,
5 box sets, catch up on the app, et cetera. And then other features such as PVR
6 (personal video recording), storage, series link, HD, watch from start, series stacking,
7 auto-play, et cetera.
8 So those are the things which customer research shows that Sky's consumers place
9 value on.
10 MR JUSTICE MORRIS: Right. And in relation to that, is it fair to say that the pink and
11 purple boxes reflect what I call the rump, ie those bits which are neither transmission
12 nor content? In your skeleton, you effectively divide the elements into content,
13 transmission and/or the other bits, which I am in shorthand calling the rump. They
14 may not be the rump.
15 MR PICKFORD: I think I can answer that myself. I think that is probably fair, subject
16 to the fact that there is arguably -- it depends what question the consumers are asked
17 and exactly how --
18 MR JUSTICE MORRIS: Okay.
19 MR PICKFORD: There is arguably a bit of bleed perhaps between content and
20 perhaps ways of watching, but --
21 MR JUSTICE MORRIS: But features --
22 MR PICKFORD: -- it should, I think, really divide that way. I am going to turn round
23 and check that those instructing me agree with that.
24 Yes.
25 MR JUSTICE MORRIS: Yes, all right. Thank you.
26 MR PICKFORD: So if I could go then back to page 288 in that bundle.

1 MR JUSTICE MORRIS: Of course.

2 MR PICKFORD: Actually, sorry, 287, first. We have what one sees in 62, that each
3 pack described also includes the provision of related on demand content. So that
4 answers the question that the Tribunal had before, about whether it is always on
5 demand as well.

6 And then we then get into the description at paragraph 63 about box sets, which are
7 also further on demand content.

8 MR JUSTICE MORRIS: Okay.

9 MR PICKFORD: Then, importantly, I am going to make sure I don't read out the
10 number, but in paragraph 65 we see what Sky spent on content. It is a big number.

11 MR JUSTICE MORRIS: Yes.

12 MR PICKFORD: And of course, going back to that pie chart that we saw that was
13 divided into the different elements, one can well see that there are things like the
14 features, and the way in which you can watch, which are very important to consumers.
15 But this bit, the content, is the 'without which not', because it would be pointless having
16 all the gizmos in the world if there was no core content to actually apply those features
17 to.

18 So that helps explain the willingness to spend that kind of money.

19 MR JUSTICE MORRIS: Yes.

20 MR PICKFORD: Now, if we then consider the hardware that is involved, and the
21 different types of services that Sky provides, depending on the hardware -- one of the
22 questions in the Tribunal's letter was comparing Sky+ to Sky Q to Sky Glass. So if
23 I could briefly take you through those distinctions, to the best of my ability.

24 Starting with Sky+, that is in fact a legacy product and it refers to the set-top box that
25 one got if you subscribed to Sky via this method prior to 2016. And it could receive
26 a satellite signal and turn it into an image for a TV.

1 Since 2016, so now over seven years ago, we now have a box called Sky Q, and that
2 is the newer set-top box that was developed at significant expense to Sky. One sees
3 how much expense if you go over the page in this document we have been looking at,
4 288, and look at paragraph 68(a) and there is a highlighted figure there which shows
5 you the amount of money invested in Sky Q.

6 MR JUSTICE MORRIS: Can I just read 68(a) for a moment.

7 MR PICKFORD: Please. **(Pause)**.

8 MR JUSTICE MORRIS: Okay. And the Sky Q is some hardware which operates only
9 in the context of transmission by satellite?

10 MR PICKFORD: No, that is not quite right. So it is able to receive signals by satellite.
11 And I believe it is the case that you will only have a Sky Q box if you have a satellite
12 dish on your roof.

13 MR JUSTICE MORRIS: I think that is what I meant: if you don't receive by satellite,
14 you don't have a Sky Q box.

15 MR PICKFORD: That is right, Sir. The point I just wanted to make clear is that the
16 Sky Q box is effectively connected to receive signals by two means: one is that it is
17 connected to the satellite dish on the roof, and the other is that it is always going to be
18 connected to the Internet as well.

19 MR JUSTICE MORRIS: Ah, okay.

20 MR PICKFORD: So it receives a lot of the content via the Internet. In particular, as
21 of now, everything that you watch on demand is going to come over the Internet. It is
22 not going to come via a satellite.

23 MR JUSTICE MORRIS: Okay.

24 Maybe you can answer this later, but one of the questions I have is a simple question:
25 if a person -- I -- does not have a satellite dish and therefore is not capable of receiving
26 by satellite, how does that person receive -- you don't need to answer it now --

1 MR PICKFORD: I would like to answer it, because I can.

2 MR JUSTICE MORRIS: How does that person receive. I keep saying "I" because
3 I don't have a satellite dish. But when that person subscribes to Sky pay TV, how is
4 the content received?

5 MR PICKFORD: I would be delighted to answer that as my not quite next answer but
6 the one after that.

7 MR JUSTICE MORRIS: And in the context of that answer, would one also have a Sky
8 Q box or not?

9 MR PICKFORD: I can also answer that one.

10 MR JUSTICE MORRIS: Carry on.

11 MR PICKFORD: So we have just considered Sky Q, as compared to Sky+. It featured
12 a number of (inaudible) developments, as the Tribunal have read, it won a number of
13 awards, and there was considerable investment in it by Sky.

14 We then have one other product that is related to Sky Q before we go on to others,
15 which is Sky Glass. This is a product which includes the television. So you get
16 a separate TV, and it is all integrated into the Sky Glass. It was launched in 2021. It
17 is not mentioned here, therefore, because of the 2020 submission. For your note, it is
18 mentioned at footnote 21, which is -- sorry, notice of appeal, which is core bundle,
19 tab 1, page 8.

20 I am not going to go there now because it basically says little more than I have just
21 told you.

22 MR JUSTICE MORRIS: I am just going to mark it. Give me the page number again,
23 please.

24 MR PICKFORD: It is page 8 of the core bundle, which is at tab 1.

25 MR JUSTICE MORRIS: Yes, no, I have it. Footnote 21.

26 MR PICKFORD: Yes, it's footnote 21.

1 MR JUSTICE MORRIS: Thank you.

2 MR PICKFORD: And my understanding -- and again I will be corrected by those
3 behind me if I have this wrong -- but functionally in terms of how the signals get to you,
4 Sky Q and Sky Glass are essentially the same. Sky Glass has the TV, but you still
5 have a satellite dish --

6 I beg your pardon. Sorry, I am wrong. I am very sorry.

7 MR JUSTICE MORRIS: That is quite encouraging, actually, if I may say so.

8 MR PICKFORD: Okay, so Sky Q, then, is the end of the series of products, which is
9 basically just Sky+ and Sky Q, that always have a satellite dish and also have
10 a connection to the Internet.

11 MR JUSTICE MORRIS: Yes.

12 MR PICKFORD: Thereafter, as we go into newer products, from 2021 onwards, and
13 there are a number of them, there is no longer any satellite dish. So the only means
14 by which the signals are conveyed to the user is over the open Internet.

15 MR JUSTICE MORRIS: Okay.

16 MR PICKFORD: And just to re-emphasise, even prior to that, that was not the only
17 means by which they were conveyed by satellite. That was just one possibility,
18 particularly for linear channels.

19 So next we have Sky Glass, launched in 2021. And that is just connected over the
20 open Internet.

21 And then in 2022, Sky launched another piece of hardware with its own associated
22 service. This is called Sky Stream. So this is effectively -- I hope I am not going to
23 get this one wrong. It is basically like Sky Glass but now without the TV. So it is the
24 means of getting Sky channels to your separate television that you provided yourself,
25 but again, purely by plugging in the little box into your broadband connection.

26 Two points to note in connection with any time content is delivered via the open

1 Internet. So that is always with Sky Glass, always with Sky Stream, a lot of the time
2 with Sky Q. The provider of the Internet does not have to be Sky. Whether it is Sky
3 is entirely coincidental, and there is no --

4 MR JUSTICE MORRIS: When you say "whether it is Sky", that is Sky providing
5 a different service, as a broadband -- or ISP or --

6 MR PICKFORD: That's right. That is not part of this appeal. Sky, just like Virgin, like
7 TalkTalk, like BT, does provide broadband services.

8 MR JUSTICE MORRIS: Yes.

9 MR PICKFORD: And it accepts in that capacity --

10 MR JUSTICE MORRIS: It is an ECS.

11 MR PICKFORD: It is an ECS. And that is not what we are considering in this appeal.

12 MR HOLMES: Sir, just for clarity, equally the Sky Glass service would not be within
13 the scope of the decision because the decision only applies insofar as there is
14 a satellite element of distribution in the service. So all of the 'over the top' stuff, all of
15 the stuff done via the Internet, is not on Ofcom's analysis, an ECS, and therefore is
16 not subject to the decision.

17 And that is set out in the decision.

18 MR JUSTICE MORRIS: I just want to make a note of that. The decision only applies
19 insofar as there is a satellite transmission service?

20 MR HOLMES: Yes. I can show you --

21 MR JUSTICE MORRIS: At the moment you don't need to show me anything. This is
22 teasing it out a little bit for us. That is why the focus has been on the satellite
23 transmission, and why I think part of my confusion is noting that a proportion, probably
24 an increasing proportion, of the Sky content that one purchases through Sky pay TV
25 is not transmitted through satellite. I would have been troubled by "what about that
26 bit", but the decision only applies insofar as it is transmitted by satellite.

1 MR PICKFORD: No, my Lord, that is wrong.

2 MR JUSTICE MORRIS: All right.

3 MR PICKFORD: I will --

4 MR JUSTICE MORRIS: You need --

5 MR PICKFORD: I will explain what the distinction is.

6 MR JUSTICE MORRIS: Yes, carry on in your factual distinction, and it will all come

7 out in the wash.

8 MR PICKFORD: So the difference is, Sky Glass and Sky Stream are entirely outside

9 the decision. So Mr Holmes is quite correct about that, because there is never any

10 chance, there is not even a 1 per cent probability, that it would ever go by satellite.

11 MR JUSTICE MORRIS: Okay.

12 MR PICKFORD: Given it is a zero per cent probability that it goes by a means for

13 which Sky is responsible, Ofcom says, okay, we are not going to apply this decision

14 to that type of service.

15 MR JUSTICE MORRIS: Okay.

16 MR PICKFORD: However, Sky Q, which is connected to a satellite dish, as well as

17 being connected to the Internet, it doesn't matter whether the programme that you are

18 watching is on demand and therefore you only received your content over the Internet,

19 or whether you are watching a linear channel that happens to be being provided to

20 you by satellite. It matters not.

21 MR JUSTICE MORRIS: The decision applies to --

22 MR PICKFORD: The decision applies to that service, the whole of that service.

23 MR JUSTICE MORRIS: Okay.

24 MR PICKFORD: And it might be, basically because of the possibility --

25 MR JUSTICE MORRIS: Yes, I have that, okay.

26 MR PICKFORD: -- that the transmission might have been by satellite.

1 MR JUSTICE MORRIS: Okay.

2 MR PICKFORD: So we have gone through what I think is the various types of
3 hardware and the services that are associated with the different types of box,
4 effectively. There are then two further things to mention, which I think are also in the
5 Tribunal's letter. The first of those is a service called NOW. It was previously
6 NOW TV.

7 MR JUSTICE MORRIS: Yes.

8 MR PICKFORD: This is a separate subscription service which is effectively -- well, it
9 is effectively a subscription service. It has actually become a little bit complicated.
10 You can get NOW by subscription. You can also get NOW by paying a much bigger
11 daily rate for a one-off day pass, if there is something particular you want to watch,
12 like a big football match for example.

13 So there are different means, commercially, of receiving NOW. NOW is just a pure
14 'over the top' -- that is over the top Internet streaming service, just like Netflix is. There
15 is no box that you have to buy from Sky. You will need a smart TV or you will need
16 a dongle from someone else that enables you to stream things to your TV --

17 MR JUSTICE MORRIS: It comes through your broadband, does it?

18 MR PICKFORD: It comes through your broadband, and then you have to have the
19 right kind of technology in your home to be able to stream to your TV. Sorry --

20 MR JUSTICE MORRIS: Or a mobile phone.

21 MR PICKFORD: Or a mobile phone, yes, or a laptop, indeed.

22 So you have to have some means, some technological capability, of receiving those
23 signals and getting them on to your screen. And other than that -- that is certainly not
24 provided by Sky.

25 So that is the NOW service, which the Tribunal asked about. That in fact goes back
26 as far as 2012, so that has been a service that has been around for a while.

1 Again, because it is a purely Internet based service, as Mr Holmes would say, that is
2 not part of Ofcom's decision, because there is no probability that that could ever have
3 come via satellite.

4 And then --

5 MR JUSTICE MORRIS: Just pause a moment. **(Pause)**.

6 Carry on, thank you.

7 MR PICKFORD: Then there is something called Sky Go.

8 MR JUSTICE MORRIS: Right.

9 MR PICKFORD: This is in fact the last product.

10 So Sky Go is something you get when you have a Sky subscription, and it is an app.
11 And what it enables you to do is to access content through a device like, for instance,
12 your mobile phone or your iPad. So supposing that I have a Sky Q subscription. So
13 I am in that camp. Occasionally it might be delivered via satellite, but as part of my
14 subscription I am also entitled to Sky Go. So I load the Sky Go app on my iPad.
15 And that means that when I am out and about or in the kitchen or whatever, I can
16 watch things instead via that. Of course, if I am watching that way, they will be
17 delivered solely over the Internet.

18 MR JUSTICE MORRIS: Okay.

19 MR PICKFORD: That is a canter through the different types of service that Sky
20 provides.

21 MR JUSTICE MORRIS: Okay.

22 MR PICKFORD: Hopefully I have made clear in particular how they are transmitted.

23 MR JUSTICE MORRIS: I think I am still interested in the transmission issue.

24 MR PICKFORD: Absolutely, Sir. I am going to make some more submissions in
25 relation to transmission. The first point of these submissions on the facts is just to tell
26 you about the different Sky services.

1 MR JUSTICE MORRIS: Yes. If you look at paragraph -- I am still not sure I ...
2 **(Pause).**
3 I have in mind paragraph 66 on page 287 and I suppose paragraph 68(f) and
4 paragraph 79. I am still struggling a little bit with the notion, if I have a contract for
5 Sky's pay TV service, in some circumstances it is delivered by satellite, but if I don't
6 have a dish I get it in another way, through broadband, do I? But it is one and the
7 same service and as far as, well, assuming I -- this is not Sky Glass, I would, even if
8 I didn't have a dish, and I didn't receive it by satellite, on the basis of Ofcom's decision
9 I would be entitled to an end of contract notice. Is that right?
10 MR PICKFORD: It depends. You are entitled to an end of contract notice under
11 Ofcom's decision if there is a possibility that one of the ways that you might have
12 received the signal is via satellite.
13 MR JUSTICE MORRIS: Okay, that is clear. When you say "a possibility" -- I sign
14 a contract with Sky; I don't have a dish but the contract is presumably a standard form
15 contract that every customer for Sky Q signs.
16 MR PICKFORD: If it is Sky Q, that wouldn't be possible because Sky Q --
17 MR JUSTICE MORRIS: I thought Sky Q had a box.
18 MR PICKFORD: Yes, it has a box, but a box that has always, as part of its means of
19 receiving signals, a connection to a dish.
20 MR JUSTICE MORRIS: Okay.
21 MR PICKFORD: So there are two boxes. There are a total of four different types of
22 bits of hardware. There are the Sky+ and there are the Sky Q boxes.
23 MR JUSTICE MORRIS: Yes.
24 MR PICKFORD: Both of those receive signals via the open Internet, but they also
25 have a connection to a satellite dish. So --
26 MR JUSTICE MORRIS: Therefore you need to have a dish to get one of those?

1 MR PICKFORD: To get that particular product, yes.

2 MR JUSTICE MORRIS: So if we compare -- I mean, we may be looking back in time
3 rather than now. We take two different types of customer: the man or woman with
4 a dish and the man or woman without a dish.

5 MR PICKFORD: Yes.

6 MR JUSTICE MORRIS: Are they different contracts that that person enters into?

7 MR PICKFORD: Yes, they will be different contracts, because they are at the very
8 least --

9 MR JUSTICE MORRIS: We are only talking about, therefore, this decision, the
10 contracts between Sky and customers who have a dish?

11 MR PICKFORD: Correct.

12 MR JUSTICE MORRIS: Okay. That helps. Or at least a possibility. But that customer
13 who has the dish may in fact also receive some content via broadband?

14 MR PICKFORD: Absolutely. As I say, if they are like me, they receive all of their
15 content via broadband, because, as I said to the Tribunal, I am someone -- I don't
16 watch linear TV; I just turn on my television and I choose what I want to watch.

17 MR JUSTICE MORRIS: And on demand can only come through broadband?

18 MR PICKFORD: On demand, as of now, only comes through broadband. Historically,
19 there was a different technology. Historically, on demand could come through your
20 satellite dish basically overnight, so that there was basically a kind of download, what
21 was called push-VOD, where the box stored some programmes that were sent to it
22 overnight from a satellite dish.

23 MR JUSTICE MORRIS: I remember something like that, yes.

24 MR PICKFORD: So you had then those possibilities, but only those possibilities, via
25 a satellite.

26 That technology is now obsolete. That is not how it works. So as of now, and -- well,

1 the situation is that if you are just using it on demand, even though you might actually
2 have a satellite dish on your roof, you are never actually going to make use of that
3 satellite dish.

4 MR JUSTICE MORRIS: So this decision only applies to customers with a dish?

5 MR PICKFORD: Yes.

6 MR JUSTICE MORRIS: And I am assuming that, in practical terms, that number as
7 a proportion of Sky's pay TV services business has decreased over time,
8 I would guess.

9 MR PICKFORD: So would I, but I am just going to turn round to make sure ...

10 Yes.

11 MR JUSTICE MORRIS: Yes, all right. Fine. I am looking to my sides, if there are any
12 further questions on this whilst we are on it?

13 You are going to move on now, I am assuming? We did ask questions about
14 comparisons with others.

15 MR PICKFORD: I am going to address that briefly.

16 MR JUSTICE MORRIS: Now or? You can do it later if you want.

17 MR PICKFORD: Shortly. I wasn't going to address it at this moment. I was going to
18 stick with a bit more explanation about Sky and then go on to some others.

19 MR JUSTICE MORRIS: Yes, go ahead.

20 MS WALKER: I would find it helpful, and I recognise that some of this may be
21 confidential and you may not be able to answer straight away, to have some sense of
22 the number of Sky customers overall, the number who are currently able to take some
23 element with satellite and some sense of how that is diminishing, because I can see
24 in technology terms it must be.

25 MR PICKFORD: That is well understood, ma'am, and I will take that away. And if we
26 can, we will provide those figures as part of what we are going to provide to you later

1 this afternoon.

2 MS WALKER: Fine. Thank you very much.

3 MR JUSTICE MORRIS: Did you have any questions? No, fine.

4 Thank you very much, Mr Pickford. Please continue.

5 MR PICKFORD: What we had moved on to in the description of the different types of
6 box, some of which are in this submission and some of which are newer, is the other
7 elements of Sky TV. So can we go back, please, to page 288.

8 What we have basically been dealing with is 68(a), as updated to the services that are
9 now available and the various bits of hardware that they are available through.

10 So the next thing that Sky also provides, in addition to hardware and content, is the
11 software that runs on the various boxes and also runs on your mobile phone or your
12 tablet if for instance you are using the Sky Go app.

13 That is in (b). And we see there are a number of different types of software that are
14 explained there that Sky provides to ensure that customers are actually able to see
15 the content.

16 MR JUSTICE MORRIS: Yes. Thank you.

17 MR PICKFORD: There is then conditional access. And that can be arranged through
18 a number of different means. It might be a physical viewing card or it might be a code,
19 but that is the technology that makes sure it is only people that pay and are up to date
20 on paying their subscription that receive the services. So there is that technology.

21 There is customer service; there is installation and repair. So down to (e), that is my
22 second tranche of all the other things that you get --

23 MR JUSTICE MORRIS: Yes.

24 MR PICKFORD: -- in addition to the content.

25 Then at (f) we have the final part of the picture, which is that in some circumstances,
26 and as we have seen from the discussion that we have been having in the last half

1 an hour, it is quite complicated to say exactly when -- often it will not be at all -- but in
2 some circumstances Sky is responsible for actually getting you that content, ie when
3 the content has come through a satellite dish, a Sky satellite dish that was put on your
4 roof.

5 MR JUSTICE MORRIS: Okay. I have probably asked this question a few moments
6 ago, but we are talking about the person with the dish and the person without the dish.
7 They are two different types of contract, are they?

8 MR PICKFORD: Yes --

9 MR JUSTICE MORRIS: There's a nod coming from behind.

10 MR PICKFORD: Yes.

11 MR JUSTICE MORRIS: Fine. So we are just talking about the contract between the
12 customer who has a dish and Sky?

13 MR PICKFORD: That's correct.

14 MR JUSTICE MORRIS: That is all that this case is concerned about?

15 MR PICKFORD: That is all this case is about.

16 MR JUSTICE MORRIS: But it may be that that customer may be receiving some of
17 the content through broadband rather than through satellite, but nevertheless there is
18 the capacity to receive it through satellite.

19 MR PICKFORD: That's right. They may in fact be receiving all of it over broadband.
20 But you are right, it is when they have the capacity in some circumstances to also
21 receive it by satellite. That is the case that we are concerned with.

22 MR JUSTICE MORRIS: Okay, fine.

23 MR PICKFORD: So going back to those products --

24 MR JUSTICE MORRIS: Sky Q, Sky+.

25 MR PICKFORD: It is Sky+ and it is Sky Q and that is it.

26 MR JUSTICE MORRIS: Okay. All right, thank you.

1 MR PICKFORD: And of course, by definition, both of those products also include the
2 Sky Go product.

3 MR JUSTICE MORRIS: Which is the app.

4 MR PICKFORD: Which is the app. And whenever you are using the app, by definition
5 you are not getting it through your satellite.

6 MR JUSTICE MORRIS: Yes.

7 One further question. If I have my contract, because I have a satellite dish, with Sky,
8 and for some reason the content doesn't arrive on my TV set, is Sky contractually
9 responsible for that under the contract, even if the reason you haven't received it is
10 because the broadband has broken down?

11 MR PICKFORD: No.

12 NEW SPEAKER: (Inaudible).

13 MR JUSTICE MORRIS: All right.

14 Sorry, if you give it to -- just a matter of form. All right.

15 MR PICKFORD: It depends whose fault it is and who has taken responsibility for it.
16 If, for example, you have subscribed to Sky and you use Sky as the means of, amongst
17 other things, actually accessing the BBC's channels, because that is a third-party free
18 to air channel that is also carried by Sky. If there is a problem with the BBC's own
19 transmission network in providing that signal to Sky, who then provides it onwards,
20 then that is the BBC's problem. That is one example.

21 Now, let's say you are watching a Sky channel, you are watching a football match
22 or -- no, it is a film. And then your film starts buffering. And the reason why it started
23 buffering is because your Internet connection has gone slow -- something that
24 happens to me on an almost daily basis -- that would be not Sky's problem but --

25 MR JUSTICE MORRIS: Your ISP.

26 MR PICKFORD: -- basically my problem to take up with my ISP, because the movie

1 by definition is -- sorry, not by definition, you can actually see the movie on a channel.
2 But most of the time, when people want to watch a movie it is on demand. So I have
3 chosen a particular movie; I am really struggling with it; it is buffering. And the problem
4 there lies -- and it has to be resolved -- between me and my Internet Service Provider.
5 That has nothing to do with Sky.
6 MR JUSTICE MORRIS: Right.
7 MS WALKER: Can I --
8 MR JUSTICE MORRIS: Please.
9 MS WALKER: I am trying to understand the contractual arrangements, if I am a Sky
10 customer.
11 MR PICKFORD: Yes.
12 MS WALKER: If I am a Sky customer using satellite, presumably my contract covers
13 both the Sky content and the delivery, to the extent that it is delivered through satellite,
14 but through the satellite -- if I am a Sky customer and I am getting the majority of my
15 service through the Internet, who is my contract with?
16 MR PICKFORD: It depends -- you are getting two services in that context. So the first
17 service you are getting from Sky, and the service you are getting from Sky is,
18 essentially, it is the content, it is the various bits of software and hardware et cetera
19 that I have described.
20 MS WALKER: Yes.
21 MR PICKFORD: But if it is one of the examples -- say it is an on demand film. And in
22 relation to the transmission of those signals of the on demand film, you are relying on
23 a different service and a different contract that you have with a third party ISP.
24 So there are two parties that are both involved in ultimately you watching that film.
25 And you have your own separate -- there is no liaison between Sky and the ISP in
26 relation to that. Sky says you are going to need an Internet connection for this service

1 and it is up to you to provide your broadband connection for that service.

2 MS WALKER: So your contract actually then is a contract for content. But if you are
3 using the Sky satellite, albeit that it is patchy when you use the Sky satellite, if I have
4 understood what you are saying, does that contract cover both the satellite, because
5 Sky has some ownership -- it may not even have the ownership, but some
6 responsibility for providing that as a means of transmission in certain circumstances?

7 MR PICKFORD: The relevant part of the contract, I understand -- it has been very
8 helpfully drawn to my attention by my junior -- is at 316 of the bundle. So that is tab 6,
9 just a little bit further on.

10 MR JUSTICE MORRIS: Just give me a moment.

11 MR PICKFORD: The core provision is at --

12 MR JUSTICE MORRIS: Can you just pause a moment, please.

13 MR PICKFORD: Of course.

14 MR JUSTICE MORRIS: Thank you. Carry on.

15 MR PICKFORD: If one looks at 316, 3 and then (i) at the bottom, we see what is said
16 contractually by Sky in relation to when you are using on demand.

17 MR JUSTICE MORRIS: Can I just read that?

18 Go on.

19 MR PICKFORD: Back up at (c), we see the comment that I made about other
20 broadcasters. And it may be that in relation to channels that you have contracted for
21 through Sky, they are not actually being provided or transmitted by Sky at all. So Sky
22 effectively has provided an envelope, as it were, to entitle you the right to watch that
23 third party channel, to give you the right to watch that third party channel, but all of the
24 transmission falls entirely outside of what Sky does. So it might never ever go via any
25 part of Sky's satellite network.

26 MR JUSTICE MORRIS: Okay. I have a further follow-up question.

1 Disregard for the moment a third party channel. Disregard on demand. I am
2 a customer with a dish, and I sign up to a dish contract. One of these contracts.

3 MR PICKFORD: Yes.

4 MR JUSTICE MORRIS: When I receive that content, Sky Sports, whatever, or one of
5 the basic Sky channels, will it sometimes be transmitted via the satellite and
6 sometimes via broadband? Or will you always receive that bit by satellite?

7 MR PICKFORD: The linear part?

8 MR JUSTICE MORRIS: A linear Sky channel. **(Pause)**.

9 MR PICKFORD: The answer to that, as ever, is a little complex.
10 The vast majority of that type of linear channel that you have described would be via
11 satellite. However, there are some programmes which are also live streamed over
12 the Internet as well.

13 MR JUSTICE MORRIS: Also. As well. Not alternatively?

14 MR PICKFORD: Not alternatively, no.

15 MR JUSTICE MORRIS: So every --

16 MR PICKFORD: One moment. **(Pause)**.

17 And also, to clarify one other point: Sky Go I gave as an example of something that is
18 going to come through your own Internet connection. That depends on where you are.
19 So if you are out and about, then that is going to be your -- that is going to be your
20 mobile network provider.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: It is conceivable there are some circumstances in which the signal
23 comes from the satellite to a Sky box, if you are someone that has a Sky box, and then
24 is rebroadcast from that Sky box to your mobile phone.

25 MR JUSTICE MORRIS: Shall we leave the Sky Go just to one side for the moment.

26 MR PICKFORD: Of course. I am just trying to --

1 MR JUSTICE MORRIS: I mean, essentially, as I understand it, if I contract for a Sky
2 pay TV service, and I contract as a person with a dish -- because that is what this case
3 concerns and only concerns -- I will be getting linear Sky content, linear third party
4 content and on demand content.

5 MR PICKFORD: Yes.

6 MR JUSTICE MORRIS: On demand is always broadband.

7 MR PICKFORD: Yes.

8 MR JUSTICE MORRIS: The third party linear may well be by broadband? Or is it
9 always by broadband?

10 MR PICKFORD: No, it is not always by broadband. It depends. I think the majority
11 has nothing to do with Sky's satellite. There are some that come through Sky satellite
12 technology.

13 MR JUSTICE MORRIS: But the Sky content, the Sky linear content, will come through
14 my satellite. It is not a matter of: one moment, depending on the signal, it will come
15 through the satellite and another moment it will come through my Internet?

16 MR PICKFORD: That's correct.

17 MR JUSTICE MORRIS: So does it follow that if I just have a broadband -- sorry, if
18 I just have a satellite dish but I don't happen to have a broadband connection, I would
19 still be able to get the Sky linear content?

20 MR PICKFORD: Sorry, I was momentarily distracted by a note.

21 Could you just repeat that question --

22 MR JUSTICE MORRIS: I am bombarding you, Mr Pickford, and you are facing in
23 every direction.

24 Let's assume I have a dish but I don't have broadband, or my broadband contract
25 breaks down or I stop paying my broadband, et cetera et cetera et cetera. And I have
26 this contract. I would be getting whatever I was getting through the satellite dish and

1 it would be largely confined to Sky owned linear content.

2 MR PICKFORD: That's right. You would have a bit of a problem because, as this
3 contract says, one of the things you need to do is to get your own Internet service
4 provider to provide you with broadband.

5 MR JUSTICE MORRIS: It says that, but if I don't --

6 MR PICKFORD: That is going to limit what you can get.

7 MR JUSTICE MORRIS: Limit, exactly.

8 MS WALKER: I had another question, if I may.

9 MR PICKFORD: Sorry, may I just pause a moment, because those behind me want
10 to make sure I have conveyed this correctly.

11 MS WALKER: Yes.

12 MR PICKFORD: (Pause). I beg your pardon.

13 MS WALKER: The question I wanted to ask is, if the delivery is through the satellite
14 services, is the contractual relationship with the customer different in relation to
15 delivery via satellite services? I mean, these conditions are clear. It is for the customer
16 to sort out their broadband or other connection. But where it is satellite delivery,
17 recognising that that may be increasingly less over a period of time, does Sky take
18 any responsibility for that form of connection network operating properly?

19 MR PICKFORD: The first point to make, if I was not clear before, is that the contract
20 we are looking at, at 6, is the type of contract that you would receive if you are
21 a customer who has a satellite dish on your roof, because this is a Sky HD contract,
22 because it is a historical contract.

23 MS WALKER: Yes.

24 MR PICKFORD: So it is contemplating exactly the scenario that is the subject of
25 Ofcom's decision.

26 So these are the contractual provisions. And what it is saying in that context is, we

1 will give you the Sky service but, secondly, you are going to need your own broadband.
2 And implicitly, if there is a problem with that, that is up to you and them.
3 Can I just take instructions just one moment. Sorry, I will just take instructions.
4 MR HOLMES: Sir, I hesitate to rise. The unchallenged findings in the decision at
5 paragraph 6.22 --
6 MR JUSTICE MORRIS: Just give me a moment.
7 MR HOLMES: On page 106 of the core bundle.
8 This is the decision under appeal. No challenge to the findings of fact, including legal
9 appeal. Page 106. I see:
10 "For Sky's wholly owned channels (which Sky itself describes as being "at the heart of
11 Sky TV"), transmission of content shown on those channels is provided by
12 [confidential] and transmitted over [confidential]. Sky is responsible for ensuring that
13 transmission of these channels to the end-users subscribed to them is effective.
14 Specifically, the content is transmitted via a satellite and uplink and downlink to the
15 satellite dish and from there via wiring to the Sky set-top box."
16 MR JUSTICE MORRIS: That was the point that I had teased out.
17 But carry on, of course.
18 MR PICKFORD: I have a submission on that, which is that actually 6.22 is
19 a somewhat misleading paragraph essentially because what it says on its face is true,
20 as long as one understands that when it is talking about Sky's wholly owned channels
21 it is meaning just the schedule of linear channels.
22 MR JUSTICE MORRIS: Yes, it is Sky's linear channels.
23 MR PICKFORD: So it is not quite accurate. And the reason why we know it is not
24 quite accurate is -- we didn't challenge that paragraph, because 6.21 makes it quite
25 clear that Ofcom understands and recognises that there is also on demand content.
26 If one goes back just to 6.21:

1 "Where content is not delivered by satellite, for example on demand content
2 downloaded to a set-top box over the open Internet, the content is transmitted to the
3 customer by the customer's Internet access provider."

4 MR JUSTICE MORRIS: Yes.

5 MR PICKFORD: So you have to read 6.22 in the light of 6.21, where you realise that
6 when they say channels they don't actually quite mean that.

7 MR JUSTICE MORRIS: Right.

8 MR HOLMES: Right. The only reason I drew your attention to this paragraph is
9 because of the reference to Sky's responsibility for its satellite broadcast, which I took
10 to be the question that was being posed.

11 MR JUSTICE MORRIS: Yes, that is fine.

12 And then the last sentence in 6.22 also provides transmission for third party channels
13 that are carried on Sky TV. I am assuming the words "Provides transmission" there
14 mean "provides satellite transmission" but I wholly accept that for other third -- and
15 I am not looking at the numbers or anything -- some third party channels go via satellite
16 and some don't -- go by broadband.

17 Yes. I am just looking in front of me. I know that we would like to take breaks for the
18 shorthand writers, but I don't know whether we can carry on until 1.00, because we
19 started late.

20 Yes, we will carry on. Thank you.

21 Yes, Mr Pickford.

22 MR PICKFORD: Thank you.

23 Coming back, if I may, just to tie some of these points together on the submissions
24 that we were looking at at page 285 of the bundle. So back at the 2020 submission,
25 if I may, just a few final points to make on those.

26 One of the questions that the Tribunal asked in its letter was some kind of sense of

1 the relative importance of different aspects of the Sky service.

2 MR JUSTICE MORRIS: Yes.

3 MR PICKFORD: I have shown the Tribunal some of those. So I have shown the figure
4 at 65, which is the figure that was spent on content in 2019.

5 MR JUSTICE MORRIS: Yes.

6 MR PICKFORD: I also showed the Tribunal the figure that is at 68(a) which is what
7 was spent on developing Sky Q as illustrative of hardware costs.

8 Obviously that is not an annual hardware sum. That is just what was spent to develop
9 that particular product.

10 Then, importantly, at paragraph 69, in response to the Tribunal's question, we see in
11 2019 Sky spent over X on conditional access, customer service, installation and repair
12 and transmission of content. The cost of transmission within this amount was around
13 Y. And you see the relationship between X and Y there.

14 MR JUSTICE MORRIS: Yes.

15 MR PICKFORD: And hopefully that gives some sense in terms of the importance from
16 a Sky budgeting point of view of these different aspects of the service.

17 So if I could then just deal with something that I have partially touched on, but just to
18 make sure that I have made my position clear on this.

19 In a number of places in Ofcom's defence and Ofcom's skeleton, it implies that we
20 characterise our service, singular, as a package of services, including a content
21 service and a transmission service et cetera.

22 We don't do that, so the implication would be wrong. We provide a service, and it has
23 a number of elements. And that is important.

24 MR JUSTICE MORRIS: Yes. And we are very well conscious of your case that this
25 is a "unified service with a number of elements" and there is a distinction between that
26 and a bundle of services. In due course we may need to hear more about the

1 significance of what a bundle is, but I am not asking you to deal with that now. I am
2 conscious of the provisions in section 51 and I am conscious but not necessarily clear
3 in my own mind as to their significance.

4 But I am aware that the unified versus bundle is a potential issue. And I am aware of
5 your case that this is one contract which the purchaser buys and it is one service and
6 it has a number of elements.

7 MR PICKFORD: And indeed it is common ground, Ofcom accepts it was a unified
8 service. They have never made a finding that there is an autonomous and distinct
9 transmission service. And given the debate that we have had about transmission that,
10 is hardly surprising, that there is no specific transmission service, because it is a very
11 complicated picture for a start.

12 MR JUSTICE MORRIS: Yes.

13 MR PICKFORD: So then I said I would try to assist as best I can with the final element
14 of the Tribunal's questions, which is comparison with other services.

15 MR JUSTICE MORRIS: Yes.

16 MR PICKFORD: I am going to be very quick here. I think in part this will be for Ofcom,
17 because I am with Sky and I can tell you about Sky, but there is obviously less I can
18 tell you about others, but I can do a little bit.

19 We discussed NOW TV and Sky Stream. Purely over the top Internet services. And
20 the same is true of Netflix, Amazon Prime, Disney Plus and Apple TV. Those are all
21 examples of content services that are just provided over the open Internet.

22 So that is those.

23 MR JUSTICE MORRIS: Fine.

24 MR PICKFORD: Analogous to -- effectively analogous to NOW TV.

25 MR JUSTICE MORRIS: Yes.

26 MR PICKFORD: Then we have the providers such as Virgin and TalkTalk, for

1 | example. Now, to the best of my knowledge -- and Ofcom can obviously correct me if
2 | I am wrong -- to the best of our knowledge, insofar as they provide TV, they are not
3 | producing or exercising editorial control over their own channels. If you take Virgin for
4 | example, it no longer -- it used to have a content business, but it no longer has
5 | a content business where it is the producer of the channels.

6 | If you get TV channels from Virgin, what Virgin is doing is providing you firstly with its
7 | broadband service and secondly saying, on top of that, would you also like us to bundle
8 | in some pay TV, and we will transmit that to you too.

9 | MR JUSTICE MORRIS: Okay.

10 | MR PICKFORD: That is very different obviously to what Sky is doing because Sky is
11 | the originator of a large amount of that content itself. It is a content business.

12 | MR JUSTICE MORRIS: In that situation, you wouldn't describe that which Virgin is
13 | supplying as a content service?

14 | MR PICKFORD: No. And I am going to come on to that.

15 | MR HOLMES: Just to let you know, Sir, that is not common ground.

16 | MR JUSTICE MORRIS: Okay. I will come back to that.

17 | MR PICKFORD: We would not describe that as a content service, unless it meets -- in
18 | order to be a content service, we need to get permission, and that means that either
19 | they provide the content themselves, that is they effectively come up with it, produce
20 | it, or they exercise editorial control over the content.

21 | MR JUSTICE MORRIS: Certainly not editorial control. Editorial control means making
22 | a programme, doesn't it?

23 | MR PICKFORD: Actually, my submission is that it is -- I will come on to the test. That
24 | is the easiest thing.

25 | MR JUSTICE MORRIS: I am looking at section 32(7).

26 | MR PICKFORD: That is the test, yes.

1 MR JUSTICE MORRIS: And the first part of it is: provision of material with a view to
2 it being comprised in signals. And I imagine Ofcom say that that bit is satisfied by
3 Virgin.

4 MR HOLMES: That's correct.

5 MR JUSTICE MORRIS: Okay.

6 MR PICKFORD: That is news to us.

7 MR JUSTICE MORRIS: Anyway. But you say that Virgin -- you have told us what
8 Virgin do. They provide third party content, and not by satellite, by Internet,
9 by broadband.

10 MR PICKFORD: In Virgin's case, yes.

11 MR JUSTICE MORRIS: In their case, that is what they do. And you say that is
12 different from what you do.

13 I am just trying to get to the facts.

14 MR PICKFORD: Yes.

15 MR JUSTICE MORRIS: Then I think on that side of the balance we picked up on BT
16 and TalkTalk.

17 MR PICKFORD: Yes.

18 MR JUSTICE MORRIS: So I don't know if you can tell us anything about what they
19 do.

20 MR PICKFORD: Again, this is based on my understanding, and those behind me will
21 correct me, and indeed Ofcom will correct me, but I think BT does produce certain
22 channels -- it has a sports channel. TalkTalk does not produce --

23 MR JUSTICE MORRIS: TalkTalk is a pure ISP, is it?

24 MR HOLMES: Just to save time later, would it help if I were to briefly explain a couple
25 of points where I think we differ in relation to this factual material. I can save it for my
26 own submissions. Whatever you would rather.

1 MR JUSTICE MORRIS: I think it would be helpful.

2 MR HOLMES: It would only take a second.

3 MR JUSTICE MORRIS: Do you mind, Mr Pickford?

4 MR PICKFORD: No.

5 MR HOLMES: So Virgin Media supplies over its television programmes -- provides
6 content as we say -- which it purchases from others via its cable network. It is not
7 broadband or Internet as such --

8 MR JUSTICE MORRIS: I was wondering where cable would come.

9 MR HOLMES: It is not how the transmission pathways work in Virgin's network that it
10 supplies via cable. And that was the original use for which the cable network was
11 constructed and it also provides broadband over that network. But the television
12 broadcasting is separate.

13 MR JUSTICE MORRIS: Okay. Let me just -- so in this context with television, Virgin
14 is providing third party content and it is doing it through cable rather than broadband,
15 is that right?

16 MR HOLMES: That's correct, through its cable network.

17 BT and TalkTalk both provide content, in BT's case some of it is content that they have
18 made themselves --

19 MR JUSTICE MORRIS: Sport.

20 MR HOLMES: -- yes -- via the Internet, but also via DTT channels. That is digital
21 terrestrial television channels, which is conditional access, so they have set-top boxes
22 which unscramble a signal for a linear channel which is encrypted. So that is why they
23 have a transmission element to their service. They are not purely over the top. And
24 that is what we would describe as traditional pay TV.

25 MR JUSTICE MORRIS: I am assuming that, regardless of the means of transmission,
26 whichever means of transmission Virgin and BT and TalkTalk use, they are ECSs.

1 MR HOLMES: Yes, Sir, by reason of their traditional pay TV role as well as any other
2 services they provide, on Ofcom's analysis.

3 MR JUSTICE MORRIS: Sorry, they are ECSs because they convey signals?

4 MR HOLMES: Yes.

5 MR JUSTICE MORRIS: Or -- the current section 32 includes Internet, doesn't it.

6 MR HOLMES: It does.

7 MR JUSTICE MORRIS: So you can either be an ECS because you convey signals
8 under 32(2A)(c) or (a) or (b)?

9 MR HOLMES: Exactly, yes.

10 MR JUSTICE MORRIS: And some of those, TalkTalk or BT, might be (a) or (b) rather
11 than --

12 MR HOLMES: That's right.

13 MR JUSTICE MORRIS: And if they do it via broadband, it is (a), is it?

14 MR HOLMES: That's right.

15 MR JUSTICE MORRIS: All right. Thank you.

16 Thank you, Mr Pickford.

17 MR PICKFORD: I would be very grateful to Mr Holmes if he is able to direct me to
18 where this is in the decision because my understanding from those behind me is that
19 this is wrong, so we would want to be able to address the Tribunal on that. But I am
20 not sure where it appears.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: In any event, I have done my best to field the Tribunal's questions
23 from this morning's letter.

24 MR JUSTICE MORRIS: That is very helpful.

25 MR PICKFORD: If I may now, I am going to --

26 MS BURGESS: Sorry, can I just ask one question.

1 Just going back to the linear and the schedule, when you were saying that a majority
2 of that is transmitted by satellite, can you get those services without
3 the -- in March 2020, could you get those services, those linear scheduled services,
4 without a satellite dish?

5 MR PICKFORD: Yes. You would need to have been a paid subscriber, for example,
6 to the NOW TV service. That would have enabled you to have received the linear
7 channels without having a satellite dish.

8 MR JUSTICE MORRIS: But not under this contract?

9 MR PICKFORD: Not under that contract, no, because by definition this contract is
10 about when you have got a satellite dish.

11 MS BURGESS: Thank you.

12 MR JUSTICE MORRIS: Yes, Mr Pickford.

13 MR PICKFORD: So notwithstanding the somewhat complicated factual context, this
14 appeal in fact turns on one very simple point of law, which is what the proper
15 construction is of subsections (2) and (2A) of section 32 of the Communications Act,
16 and in particular what is within and what is outwith the definition of an ECS.

17 Now, if we could start, please, in the authorities bundle, and I am going to give
18 a summary of our case and then I am going to go back and deal with certain bits
19 obviously in more detail. This is just so you know --

20 MR JUSTICE MORRIS: Volume 1 --

21 MR PICKFORD: I am going to -- yes, volume 1, tab 1, page 6.

22 When I go through the legislation, I am actually going to go through in more detail from
23 the beginning, but this is just so you have the provision in front of you as it currently
24 exists, so it is easier to follow the submissions.

25 So the question obviously is whether Sky TV, as we have defined it -- sorry, Sky TV
26 as defined, Sky TV as defined, is the types of services that I have discussed that

1 involve at least the possibility of satellite transmission. And we see that by
2 subsection (2):

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

6 And then (2A) sets out the types of service referred to: Internet access service,
7 a number based inter-personal communications service, and then the core part for our
8 purposes, (c) any other service consisting in, or having as its principal feature, the
9 conveyance of signals, such as the transmission service used for machine-to-machine
10 services or for broadcasting."

11 So it is common ground we are not in (a) or (b). The question is about the interpretation
12 of (c) together with subsection (2).

13 Now, what we say is the right approach to this provision is as follows. Step one is that
14 you ask yourself whether the service under consideration -- that is the actual service,
15 considered as a whole, is within any of subsection (2A), (a), (b) or (c). And you apply
16 the test, for our purposes (c), to the actual service provided. And if the service does
17 not consist in or have as its principal feature the conveyance of signals, then it is not
18 an ECS.

19 That is step one. There is a positive aspect in which you need to work out whether
20 the service either consists in or has as its principal feature the conveyance of signals.

21 That is part 1. That is what we can term the positive part of the test.

22 There is then a further negative part of the test, which is, even if you get past part 1,
23 there is then an exclusion. And the exclusion applies to content services, and that is
24 the conclusion we see in subsection (2).

25 Now, that is, in our submission, the obvious and natural reading of that provision.

26 Ofcom, for its part, has had three different approaches to the construction of this

1 particular provision during the course of these proceedings. We would say, given that
2 it is represented obviously by some of the country's finest lawyers, that that in and of
3 itself is somewhat telling. But in any event it has now decided to settle on one
4 particular version.

5 And we can see Ofcom's version if we just go very briefly to tab 12 of the core bundle.
6 If you can keep the authorities out because I am going to be still using it, but also look
7 at the core bundle, tab 12, and it is paragraph 35 of Ofcom's skeleton argument.

8 MR JUSTICE MORRIS: Right. Sorry, I am not looking -- my skeleton is not in the --

9 MS BURGESS: Sorry, what page is that?

10 MR JUSTICE MORRIS: I have my skeleton separate.

11 MR PICKFORD: I only have internal numbering of Ofcom's skeleton in my bundle.
12 But it is internal numbering 9, paragraph 35.

13 MR JUSTICE MORRIS: Can you just bear with me. For me the skeletons are not in
14 the bundle. I just have them loose.

15 MR PICKFORD: Of course.

16 MR JUSTICE MORRIS: It is Ofcom's skeleton --

17 MR PICKFORD: Paragraph 35.

18 MR JUSTICE MORRIS: The paragraph beginning "Instead ..."

19 MR PICKFORD: That's right. And what they say is:

20 "The natural meaning in section 32 is that the principal feature of a service should be
21 assessed without reference to any content service element."

22 And then they quote that part of the provision. "In other words, the fact that
23 an undertaking provides content as part of the service does not mean that that service
24 cannot be an ECS even if the content provision could be said to be its principal
25 feature."

26 And then just to underscore exactly what they mean, there, if we could go back to the

1 defence.

2 MR JUSTICE MORRIS: It is clear in the defence, I think. Paragraph 63.

3 MR PICKFORD: Exactly, paragraph 63 of the defence, which is at tab 2 of the core
4 bundle.

5 I am a little slow getting there, paragraph 63, which is on page 63. Thank you.

6 MR JUSTICE MORRIS: Yes.

7 MR PICKFORD: There it says:

8 "Putting to one side the content service provided by Sky, as required by the legislation,
9 Sky provides a transmission service."

10 So the way that Ofcom approach section 32 is very different. They say their step one
11 is to ask the question, is any of the service a content service? And if the answer to
12 that is no, then they are safe to go and apply the test in (2A)(c), which we have just
13 considered, the actual service. But if the answer to the first question, the content
14 service, is yes, then they do something very different, because they say put to one
15 side the content service.

16 So what that actually means in reality is that they are not applying the test in
17 subsection (c) to the actual service. They are applying it to a hypothetical service
18 which has been stripped of the content part. It is a new hypothetical service. It is not
19 the service which has been provided. It may be a service that no one would ever
20 conceivably want. It doesn't matter. In Ofcom's view, they simply have a new
21 hypothetical service as the residual, and they pose the wholly or mainly test by
22 reference to that.

23 Now, if I could hand up, please, a handy visual aid, and I believe my US friends call
24 these demonstratives. It is not a word I was familiar with before.

25 MR JUSTICE MORRIS: I am sure it will catch on.

26 MR PICKFORD: Yes. **(Handed)**.

1 MR JUSTICE MORRIS: Thank you very much.

2 MR PICKFORD: This is a stylised representation of two services. It is obviously not
3 factually -- it is a stylised representation. And what I have done is, I have created three
4 elements for simplicity.

5 So there are three elements to this service. There is content, there is transmission
6 and there is hardware, for simplicity. And I created two pie charts. And for both of
7 these services, we see the content is 95 per cent service. We say it is all about the
8 content in these particular contexts.

9 So if we apply our approach, there is no conceivable way that these Sky services could
10 be ECSs because you could not say that they have the conveyance of signals, that is
11 transmission, as their principal feature.

12 So you would reject, on our approach, both of these services. They also look rather
13 similar, as being ECSs. Let's consider how they fare under Ofcom's test. Let's start
14 with the pie chart on the left. So the pie chart on the left, on Ofcom's approach, step
15 one, is this: all of that red bit, put to one side, to use Ofcom's terminology. Forget
16 about that.

17 Now let's imagine we have a hypothetical service that is just made up of two things:
18 transmission and hardware. Now let's apply the test, the test in subsection (c) to that
19 hypothetical service. Well, what that requires us to do is to look at the balance of the
20 hypothetical service. So we see on my first example on the left that transmission
21 makes up more than hardware.

22 MR JUSTICE MORRIS: It is 60-40 on the left and 40-60 on the right.

23 MR PICKFORD: Exactly, it is 60-40. And on Ofcom's analysis, on the left that is
24 an ECS, because once you have stripped away the important part and you are left
25 with just this residual, it turns out that, of these two small parts, transmission is a bit
26 bigger than the other, okay?

1 On the right, a very similar service but on this occasion, again, ignoring the bit that
2 matters, just looking at the residual, we get the opposite answer, because now we see
3 that of the two elements that are in the residual, actually transmission is now in the
4 minority. Something else that is the most important bit, so that one is not an ECS.
5 Now, on our submission, that is, with respect, absurd. It is not a sensible construction
6 of these words. One of the reasons why is because a core part of the job of this
7 provision is to distinguish in a sensible way between services that are content services
8 and services that are wholly or mainly transmission. Those are the jobs of what this
9 particular provision is doing. That requires us to look at the actual service and make
10 judgments based on a comparison of the actual service, not by looking at hypothetical
11 services where one gets into quite absurd distinctions depending on elements of the
12 service that are really not what the service is all about.

13 So in essence, the question of construction is going to come down to this. In (2A)(c),
14 do you apply the test to the actual service -- that is the service being referred to there
15 in (2A)(c), if we come back to that, it is the third word in (2A)(c), "Any other service
16 consisting in" -- is that the actual service or is it a hypothetical service that has been
17 shorn of any content aspect. That is basically it. The former means you are with me
18 and the latter means you are with Ofcom.

19 What I propose to say in the rest of this appeal, is it is not what the provision says on
20 its face. We say it leads to absurd consequences. It is inconsistent with European
21 law and it is not supported at all by the so-called purposive analysis. When you
22 actually apply the proper rules of construction, purposive construction, to this provision
23 you do not get to Ofcom's answer. So that is the core issue on this appeal.

24 There is a second one, which is what did Ofcom actually decide in the decision?
25 Because I am going to show the Tribunal that, even if Ofcom are right about their
26 construction of section 32, which obviously you have my position on, they never

1 applied that construction in the decision. You will read the entire decision and you will
2 not find the analysis that is necessary to support their position as they now articulate
3 it.

4 So for --

5 MR JUSTICE MORRIS: There are two separate issues there, aren't there? One is,
6 does it really matter whether they put their legal case in a different way from the way
7 it was put in the decision? That is one issue.

8 MR PICKFORD: Yes.

9 MR JUSTICE MORRIS: The other is -- how do I put it? Did they properly apply what
10 they now say the right construction is to the facts of the case?

11 MR PICKFORD: That's right.

12 MR JUSTICE MORRIS: I mean it is a point that you raise in the opening bit of your
13 skeleton, the second bit, that even if they are right, they haven't done the exercise.

14 MR PICKFORD: Exactly. It is the second of those.

15 This is not some sterile pleading point where they say "Oh well, your version of it all
16 was slightly different"; this is a point that matters. The reason why it matters is
17 because, if Ofcom are right on their new analysis, they needed to make different
18 findings in the decision from the findings that they made. Given their analysis, they
19 simply didn't ask themselves the question that they now say is the pertinent question.
20 That is the problem.

21 MR JUSTICE MORRIS: I think we have that point well in mind.

22 MR PICKFORD: Thank you.

23 MR JUSTICE MORRIS: You don't need to answer this but whilst we are on the
24 construction of 32(2) -- and I've got various questions -- but in section 32(2), second
25 line, and "except so far as it is a content service", just for your benefit, I have in
26 shorthand described that to myself as "the content exclusion".

1 MR PICKFORD: Yes.

2 MR JUSTICE MORRIS: What does the word "it" refer to? You don't need to answer
3 it now but -- or, put another way, does it refer to a service in general, above, or
4 a service of any of the type specified in subsection (2A). You don't need to answer it
5 now because I am not sure I've got an answer but I throw it out -- you may want to
6 think about it over lunchtime.

7 MR PICKFORD: I will think about it because, initially --

8 MR JUSTICE MORRIS: There are quite a lot of bootstraps in some of these
9 definitions, or circularity.

10 MR PICKFORD: Initially I am -- perhaps, Sir, you may be able to help me with this,
11 I am probably very slow -- I am not immediately able to see why that would make
12 a difference.

13 MR JUSTICE MORRIS: It might not. I don't know but I am trying to understand. I am
14 looking at the words very carefully and I am also in my own mind considering whether
15 you apply the content exclusion first or second, which is I think the dispute between
16 you.

17 MR PICKFORD: So I think my answer is it is a service of any of the types specified in
18 subsection (2A). It is those taken together.

19 MR JUSTICE MORRIS: Okay. It might not make any difference, I don't know.

20 MR PICKFORD: I will reflect on that and give it further thought.

21 MR JUSTICE MORRIS: Carry on.

22 MR PICKFORD: So whilst -- no, in fact I am going to come back to that, sorry.

23 So in the remainder of my submissions, what I am going to do -- I don't need to show
24 you the facts anymore, we did that, I hope -- I am going to go through the decision and
25 we are going to look at what Ofcom did actually decide in the decision; we are then
26 going to look at the legislation, both at European and domestic level; we will then look

1 at the case law; I am then going to draw that briefly together; and then I am going to
2 spend a little more time on the purposive construction argument that Ofcom advances.

3 That is my scheme.

4 MR JUSTICE MORRIS: That is very helpful.

5 MR PICKFORD: So if we dive straight into the decision, as a precursor, I remind the
6 Tribunal that, obviously, what we are looking for, I say, is the analysis that I just
7 showed you, is Ofcom's new case. So I am looking at the decision partly through that
8 lens. I am going to show you what it says but I will also, as I go through, going to be
9 saying, "Well, has Ofcom done what it now says it needed to do".

10 So if we start, please -- yes, it is in the core bundle at -- sorry, just one precursor, and
11 it may be that the Tribunal is already up on this. Ofcom says that it did turn its mind in
12 the decision to the particular test that it now applies. It says that at paragraph 55 of
13 the core bundle and it is core bundle tab 12. It is probably just worth looking at
14 paragraph 55 of their skeleton.

15 MR JUSTICE MORRIS: Their skeleton, yes.

16 MR PICKFORD: Because it makes it clear what it is that Ofcom say that they did, so
17 you can then judge them against their own standard effectively as we run through the
18 decision. That is back in tab 12 of the core bundle, skeleton 55.

19 "Sky is also wrong to suggest that nowhere in the decision did Ofcom ever turn its
20 mind on to whether transmission by satellite over non-content aspects of Sky TV. This
21 is a point first raised in Sky's skeleton. It was not previously advanced to Ofcom. In
22 any event, it is not borne out by the decision."

23 Then they quote point 6.19(b) of the decision through to 6.29 of the decision. That is
24 the core part that I am going to go to as I go through the decision as well, to examine
25 whether those paragraphs do what they say -- what Ofcom claims they say on the tin:
26 that is turn Ofcom's mind to whether transmission by satellite predominates over other

1 non-content aspects of Sky TV.

2 MR JUSTICE MORRIS: Can I just re-digest those paragraphs. I know you will go to
3 them again, and I have read it, but I just want to read 56 and 58.

4 Okay. I have read those again. No doubt you will take me to them.

5 MR PICKFORD: I am going to do that, yes.

6 The reason why I took you back to Ofcom's skeleton there is that there is
7 absolutely -- there is no dispute that I have correctly characterised what their test now
8 is. The question is whether they did it or not.

9 MR JUSTICE MORRIS: Yes.

10 MR PICKFORD: So if we go then to the decision, the decision is found in the core
11 bundle at tab 3 and we start, if we may, on page 100 --

12 MR JUSTICE MORRIS: Yes.

13 MR PICKFORD: -- which is section 6, which contains the key analysis.

14 MR JUSTICE MORRIS: Yes, thank you.

15 MR PICKFORD: I am a bit behind myself. I am actually locating ...

16 Okay, so 6.1:

17 "This section sets out the services provided by Sky to which the obligation to provide
18 end-of-contract notifications in the General Conditions apply, ie to which the General
19 Conditions in force since 17 December 2021 apply."

20 Of course, the background context to this dispute is do we or don't we have to comply
21 with the end of contract notification, and we obviously only do have to comply with
22 those requirements if we are an ECS.

23 Then we see in 6.3, they set out the basis for their conclusions that the end of contract
24 notification obligations apply to Sky's pay TV services and "explain why we have
25 rejected Sky's submissions in this regard" and of course there Sky's pay TV services
26 has a definition, and it is basically the definition that we have already covered.

1 Then we start by explaining with reference to the relevant legislation, but:
2 "Pay TV services fall within the definition of ECS, insofar as they include
3 a transmission element which meets the definition set out in the Act and the General
4 Conditions."

5 So there the test is about whether they include a transmission element. That does not
6 on its face seem to be the same test is that is now being applied and I will come back
7 to explain why it isn't, as we develop it.

8 MR JUSTICE MORRIS: Can we just clarify for the purposes of understanding the
9 decision, how the decision defines Sky's pay TV services -- it must be somewhere in
10 the decision?

11 MR PICKFORD: It is. There is a definition which basically says it is those that may
12 involve DTH satellite in the transmission. And someone will identify --

13 MR JUSTICE MORRIS: Your junior is going to give you the paragraph number.

14 MR PICKFORD: Page 73, apparently, is a helpful place to go to, second bullet down
15 in the box:

16 "We have decided that Sky's pay TV services that rely on satellite transmission fall
17 within the definition of public electronic communications services."

18 MR JUSTICE MORRIS: All right.

19 MR PICKFORD: As we discussed, actually, it is broader than that because it is not
20 just when they are deemed --

21 MR JUSTICE MORRIS: Okay, but I think we have got to the bottom of what it is.

22 MR PICKFORD: We have got that. I don't want to spend too much time on that point.

23 MR JUSTICE MORRIS: All right.

24 MR PICKFORD: So if the Tribunal are content, I will go back to the decision, and I see
25 it is now 1.00.

26 MR JUSTICE MORRIS: Yes, if it is a convenient moment for you, it has been a bit of

1 a roller-coaster for you this morning, Mr Pickford, and we are very grateful for the
2 explanations.

3 We will start again at 2.00. Thank you very much.

4 MR PICKFORD: Thank you, Sir.

5 **(1.00 pm)**

6 **(The lunch break)**

7 **(2.00 pm)**

8 MR JUSTICE MORRIS: Just give me a moment.

9 Mr Pickford, can I just start by asking how we are doing on timing? I know that we
10 have taken up a reasonable amount of time this morning on that factual section. I want
11 to be sure that we can finish tomorrow and that each party has an appropriate amount
12 of time. Where do you think you are, and do you think you can finish today?

13 MR PICKFORD: I don't think I am going to finish today, but in my submission that
14 shouldn't mean -- because of the various technical problems we have had and the
15 discussion we had initially, I kicked off on what was going to be -- what I was hoping
16 to do at 10.30 -- I think somewhere around 12.30. I have now not had to deal with
17 some factual stuff that we would otherwise have had to have done.

18 But I think what that means is that I am going to go into tomorrow morning. I spoke to
19 Mr Holmes. Obviously how long he takes is subject somewhat to how long I take, but
20 he initially indicated he had about half a day. If that is right, then we should still be on
21 track, because with a short reply at the end, even if I took, say, an hour of tomorrow
22 morning, we would still easily finish tomorrow.

23 MR JUSTICE MORRIS: Mr Holmes, do you have any -- I suppose one of the things
24 I am thinking about is -- I am not particularly keen on starting early tomorrow but I am
25 wondering aloud whether we ought to --

26 MR HOLMES: If the Tribunal were able to start at 10.00 am, that might give us a little

1 | comfort. At present I think my submissions are about half a day in length, but it
2 | obviously depends on questions and also on the points that Mr Pickford covers.
3 | As we see it, it is at heart quite a short point of statutory construction.
4 | MR JUSTICE MORRIS: Yes. I think then we will start at 10.00 tomorrow, with a view
5 | hopefully for you to be able to finish by about 11.00 tomorrow.
6 | MR PICKFORD: Understood.
7 | MR JUSTICE MORRIS: Thank you very much.
8 | MR PICKFORD: Thank you, Sir.
9 | We were on page 100 of the core bundle and we were looking at section 6 of the
10 | decision.
11 | I had taken the Tribunal to 6.3(a) and I am now going to go on further to 6.3(b), where
12 | Ofcom go on to explain in the decision:
13 | "A pay TV service may include both content and transmission services. The relevant
14 | legislation carves out content services as an exception from the types of services
15 | which may fall within the definition of an ECS."
16 | What I say about that, and I will develop it later, is that the Ofcom approach in their
17 | skeleton doesn't carve out content services from the definition of an ECS, it carves
18 | them out from the assessment of an ECS.
19 | And there is an important difference, because what the Ofcom approach has the effect
20 | of doing is bringing content services within the definition of an ECS when you wouldn't
21 | expect that to be the answer.
22 | So if you remember my pie chart, where the service that we are concerned with is
23 | essentially all about content. And what Ofcom's approach does is, it says, okay, so
24 | we are -- the purpose of those words is simply to put the content part aside whilst we
25 | are thinking about the definition.
26 | So they put the content to one side. They analyse what the residual looks like in the

1 hypothetical service of the residual. They may come to the view that the hypothetical
2 residual is mostly about the conveyance of signals.

3 In that case, on their approach, the service is an ECS because they ignore that it is
4 actually all about content. So that doesn't exclude content. It has the opposite effect,
5 because what it actually does is bring content within the definition of an ECS, on their
6 approach. It excludes it from the assessment, not from the definition. That is the
7 difference between the way that Ofcom approaches it and the way that I approach it.

8 MR JUSTICE MORRIS: So the Ofcom case now --

9 MR PICKFORD: The Ofcom case now.

10 MR JUSTICE MORRIS: -- is that content is excluded from the assessment?

11 MR PICKFORD: That's right. I say it is telling that at this point in their decision they
12 actually -- what they said is, it is correct, what they said in 6.3 (b) is correct. It should
13 be that content is excluded from the definition but when you actually apply their
14 approach now, you see that what happens is, by the back door, content ends up being
15 included within the -- it is brought in, it is brought into the definition, because it is left
16 out of the assessment, if I can put it that way.

17 I would probably encapsulate it as brought into the definition because it is left out of
18 the assessment.

19 MR JUSTICE MORRIS: Okay.

20 MR PICKFORD: We then have a section of the decision that purports to analyse the
21 case law. I am going to skip over that for now because I am going to go back to the
22 case law myself.

23 Then we get to 6.19(b), which is the provision that Ofcom referred to in its skeleton
24 argument. That is page 105.

25 We see Ofcom says:

26 "[It] has the power to regulate a pay TV service provided to an end user as an ECS

1 insofar as there is a service, or an element of a bundled service, which consists wholly
2 or mainly or primarily in the conveyance of signals on an ECN. As noted in the 2019
3 Statement, whether a particular pay TV service falls within that scope will depend on
4 the specific nature of the service in question."

5 "The specific circumstances should be assessed on a case-by-case basis."

6 That is just a statement of their approach in law. That doesn't have any findings and
7 it is not one that says anything about effectively comparing the residual elements in
8 this hypothetical service. If we then continue through the analysis, we see at 6.20
9 Ofcom refers to there being a range of elements of what Sky does but again it doesn't
10 seek to assess whether they are more or less important than transmission in relation
11 to those what we can call residual elements.

12 At 6.21 and 22 -- we actually already went to this earlier on, because Mr Holmes took
13 you to 6.22 and I took you to 6.21. So you already have my point on that. But 6.22 is
14 a little unclear on its own, and you need to read it in the light of 6.21 to realise the
15 restrictive sense in which they are talking about Sky's wholly owned channels, ie it is
16 linear channels, not on demand content, that they are referring to in 6.22.

17 Then 6.23 just refers down to the rest of the analysis. And 6.24 --

18 MR JUSTICE MORRIS: It is interesting there, 6.23 is written in terms that "the
19 transmission services constitute an ECS".

20 MR PICKFORD: That's right. That is because in essence what they do in this decision
21 is, they simply look around for a transmission service. So they basically say to
22 themselves: insofar as it is a transmission service, can we identify it? Yes, got
23 a transmission service. Job done. It is now an ECS.

24 And that is not their new approach, because they realise, I think, I would suggest, that
25 that cannot be right because it doesn't give any effect to this idea of the wholly or
26 mainly or the predominantly test. So they have now moved away from that analysis.

1 And their new version says, well, you do look at the balance but you only look at the
2 balance in relation to residual once you have got rid of the content. So that is how
3 they deal with that problem in their initial analysis.

4 So they --

5 MR JUSTICE MORRIS: What they don't say there is, they don't say Sky's pay TV
6 services is an ECS. They say the transmission service is an ECS.

7 MR PICKFORD: Well, that is right there.

8 MR JUSTICE MORRIS: Yes.

9 MR PICKFORD: In fact we get it all.

10 MR JUSTICE MORRIS: All right, carry on. That is fine. Thank you.

11 MR PICKFORD: They are basically aligned -- that is one of the problems with the
12 decision that we have explained in the notice of appeal. They elide often between the
13 transmission service and then the whole service.

14 MR JUSTICE MORRIS: Yes.

15 MR PICKFORD: Yes. So then 6.24 OTT services, which we all now understand are
16 out of scope. There is then analysis at 6.25 through to 6.27 where there are arguments
17 about what Sky TV does, but none of them are making the comparison that I have said
18 that Ofcom now makes.

19 MR JUSTICE MORRIS: Yes.

20 MR PICKFORD: Then we have 6.28, where it says:
21 "Sky is therefore responsible vis-a-vis subscribers for transmission of the signal which
22 ensures that they are supplied with the Sky pay TV services."
23 As we understand now, that is not quite right, because that is only the case in relation
24 to a service which has been delivered by satellite. So for instance, if it is an on demand
25 service and there is a problem with the on demand part of it, that is not
26 Sky's responsibility.

1 MR JUSTICE MORRIS: Right.

2 MR PICKFORD: That is the point that we debated this morning.

3 MR JUSTICE MORRIS: It depends what you mean by the words "transmission of the
4 signal".

5 MR PICKFORD: I think, unless I can assist further on that -- I don't think there is
6 anything further I can add beyond what I said this morning on that point.

7 Then 6.29 is the crux. That is where we find the quotation from the decision in Ofcom's
8 skeleton where they say that they did what they needed to do.

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

14 So they are saying that the transmission service is a service which has its principal
15 features, and they are not looking at the residual. They are looking just at the
16 transmission service at this point. And it is hardly surprising the answer they come to,
17 because, by definition -- I mean, we all use "transmission service" in this appeal as
18 shorthand for the conveyance of signals. And funnily enough if you look at the
19 conveyance of signals you find it is primarily or wholly the conveyance of signals. So
20 that is a somewhat circular point in their reasoning. And for that reason, it is wrong.
21 But it is also not what they are now saying that they did.

22 Now, a very small point. My learned friends complain in their skeleton, as you saw,
23 that we didn't point out this discrepancy in our notice of appeal. I don't know whether
24 they are taking a point on that. Obviously we could not have pointed out the
25 discrepancy between the decision and what they say in their defence in our letters of
26 appeal. That would have been impossible for us.

1 MR JUSTICE MORRIS: Yes.

2 MR PICKFORD: So that is simply a bad point.

3 So that is the analysis. That is it. That is what they present as their analysis of why
4 apparently we are an ECS. It is wrong on its own terms. It is not what they now say.
5 If you then go on to the annex at A1. This is the Confirmation Decision. And there are
6 just a couple of bits that it is probably helpful to show you for completeness.

7 MR JUSTICE MORRIS: Thank you.

8 MR PICKFORD: If we begin on page 128, which is the notification given by Ofcom
9 under section 96A of the Act. That sets out that on 14 May we were given a notification
10 that Ofcom had reasonable grounds for believing --

11 MR JUSTICE MORRIS: Where are you reading from?

12 MR PICKFORD: I beg your pardon. It is page 128, and it is paragraph A1.12.

13 MR JUSTICE MORRIS: Thank you.

14 MR PICKFORD: And I am reading:

15 "On 14 May 2021, Ofcom gave Sky notification that it had reasonable grounds for
16 believing that Sky had contravened Condition C1.10 by failing to send End-of-Contract
17 Notifications."

18 There is then a reference in A1.13 to the fact that this was due to a longstanding
19 disagreement over its status in law. And in fact that disagreement goes back to 2006.
20 I am not going to take you to it, but simply for your reference, in our notice of appeal
21 at paragraph 76 we explained that, since then, Sky has always accounted to Ofcom
22 for its revenues on which its fees are based, on the basis that Sky TV is not an ECS.
23 It has always been very explicit and transparent about that. So Ofcom have known
24 since 2006 that Sky has considered itself not to be an ECS. And Ofcom didn't take
25 issue with that until this argument that we had with them about the applicability of the
26 EOCNs.

1 Paragraph A1.17 records that they have decided to give the confirmation following
2 their analysis. And then at A1.18 it requires us to take various steps.
3 At A1.19, this may assist in relation to the Tribunal's question about to what services
4 it applies:
5 "Sky's relevant pay TV services for these purposes are any of its pay TV services
6 which rely in whole or in part on a digital satellite transmission service."
7 So that is the core definition.
8 Then at A1.21 there is an important paragraph because it shows that, in terms of what
9 we were required to do, if we appealed against the Confirmation Decision, rather than
10 complying with the notice, we had to provide progress reports and we were instead to
11 take the necessary steps to comply with the end of contract notification requirements
12 no later than nine months from the date of the Tribunal's decision on the appeal.
13 MR JUSTICE MORRIS: Okay.
14 MR PICKFORD: So that underscores that this has been something in which Sky has
15 openly engaged with Ofcom, transparently and, in the light of that, Ofcom has not
16 imposed penalties, on the contrary it has actually stayed its decision because there is
17 simply a dispute in law as to whether we are or are not an ECS.
18 Sometimes the tone of Ofcom's skeleton doesn't quite capture that nuance, and there
19 is a particular bit that caused concern to my clients, where it says that Sky has
20 consistently refused to send notifications to customers of its pay TV services, thus
21 depriving a very significant number of consumers of the benefit of such notifications."
22 That is paragraph 10. And that doesn't quite capture -- I am not saying that it should
23 have done necessarily, but there is somewhat more to it than that, because, as we
24 say, we have engaged proactively on this issue. And indeed I showed that you
25 submission from March 2020. Ofcom didn't take its decision until August 2022. That
26 is Ofcom's time-line.

1 So insofar as there had been some customers, if they are right, and there are
2 customers that have lost out -- obviously we say they are wrong -- that cannot be really
3 laid all at Sky's door.

4 Obviously Ofcom has not prosecuted this as rapidly as it could have done if it really
5 wanted.

6 So that is the decision. If I could then ask the Tribunal to put away the core bundle
7 and get out the authorities bundle. If we can start with the first of the authorities
8 bundles and look at the EU legislation, first of all.

9 MR JUSTICE MORRIS: Yes. Just give me a moment. Authorities bundle volume 1.

10 MR PICKFORD: Authorities bundle volume 1, exactly. I hope so. Tab 9.

11 Just a very quick overview before I then descend to the particular provisions.

12 MR JUSTICE MORRIS: Yes.

13 MR PICKFORD: The concept of ECS originates in the European Union Telecoms
14 Regulatory Framework that was implemented in the UK by the 2003 Act, the
15 Communications Act. For the period prior to December 2020, the relevant EU law
16 scheme was found in the Framework Directive and then thereafter,
17 from December 2020, the European Electronic Communications Code. I am going to
18 go to both of those.

19 It is common ground that although there were some changes to the definition of ECS,
20 nothing turns on that change of definition for the purposes of the correct
21 characterisation of Sky TV. Because Sky TV is within and has always been within the
22 bit that says "Wholly or mainly consisting in --

23 MR JUSTICE MORRIS: Wholly or mainly.

24 MR PICKFORD: Sorry, a momentary lapse.

25 Right, so if we could then go to tab 9.

26 MR JUSTICE MORRIS: I have tab 9 open, yes.

1 MR PICKFORD: Yes. And if we start on page 137 recital 5, this is an important recital
2 in particular for the content exemption.

3 So if you go about two thirds of the way down that recital, you see a sentence
4 beginning "It is necessary to separate ..."

5 MR JUSTICE MORRIS: I have that.

6 MR PICKFORD: "It is necessary to separate the regulation of transmission from the
7 regulation of content. This framework does not therefore cover the content of services
8 delivered over electronic communications networks using electronic communications
9 services, such as broadcasting content, financial services and certain information
10 society services, and is therefore without prejudice to measures taken at Community
11 [level] or national level in respect of such services, in compliance with Community law."

12 So the central part of the definition that we are going to come on to see is that this
13 directive is seeking to distinguish between content and ECSs and to ensure that the
14 ECS regime doesn't apply to content.

15 Content has its own regime. Examples of the sorts of things that would be particular
16 to content would be the watershed in relation to a linear broadcast, making sure that
17 what you put in your linear broadcast before 9.00 pm is appropriate.

18 Another example of content specific regulation would be impartiality of news
19 broadcasts. That is the sort of thing that the Directive has in mind at that point.

20 So if we then go on to 139 we have Article 1, the scope and aim. And in paragraph 1:
21 "This Directive establishes a harmonised framework for the regulation of [ECSs],
22 [ECNs], associated facilities and associated services.

23 It lays down tasks of national regulatory authorities and establishes a set of procedures
24 to ensure the harmonised application of the regulatory framework throughout the
25 Community."

26 So we see it is a harmonising Directive. And then at Article 2 we have definitions. And

1 over the page we have the crucial definition at sub (c):

2 "Electronic communications service means:

3 A service normally provided for remuneration which consists wholly or mainly in the
4 conveyance of signals on electronic communications networks, including
5 telecommunications services and transmission services in networks used for
6 broadcasting, but exclude ..."

7 That is a typo there. I think that should be "excludes".

8 MR JUSTICE MORRIS: I have a question on that, but we will come back to that in
9 a minute.

10 MR PICKFORD: "... services providing, or exercising editorial control over, content
11 transmitted using electronic communications networks and services."

12 So that is the originating, if we may call it this, legislative cornerstone for this appeal,
13 because it introduces the definition of ECS. It changes over time but, as I explained,
14 no one says that those changes over time make any difference to the interpretation on
15 these facts in this appeal.

16 So --

17 MR JUSTICE MORRIS: I make my point about the word "exclude", which you have
18 quite rightly put the letters "(sic)" after in your skeletons.

19 I throw out for consideration whether it means excludes or excluding. The reason I say
20 the latter is because of the reference two lines above to the word "including".

21 MR PICKFORD: Yes.

22 MR JUSTICE MORRIS: So either it means services blah blah blah, "including (a) but
23 excluding (b)", or if it is "excludes", it is "which consists but which excludes".

24 Now, it may not make too much difference, but it is worth giving some thought to.

25 I have to say, in my own mind I rather favour "excluding", and if I am getting extremely
26 pedantic it might be worth looking at some French text or alternative text.

1 MR PICKFORD: I understand that the French text says "mais qui exclut".

2 MR JUSTICE MORRIS: So then it would be "excludes".

3 MR PICKFORD: Yes.

4 MR JUSTICE MORRIS: All right. Well, that is the first point. The second point is

5 interesting, isn't it, because again you have this slightly bootstrapsy thing, because it

6 says "services transmitted using electronic communications services", which seems

7 to suggest that by definition you can't really exploit the electronic communications

8 service because it is transmitted by it.

9 Do you see what I mean?

10 MR PICKFORD: Yes. It is not one of the most beautiful pieces of drafting, it would

11 seem. However --

12 MR JUSTICE MORRIS: I am raising this because of this focus which I have at the

13 moment on how the content exclusion works.

14 MR PICKFORD: Yes. I am going to address the Tribunal on that.

15 MR JUSTICE MORRIS: Okay.

16 MR PICKFORD: As I have explained, there are two options: one is that the content

17 exclusion operates as an actual exclusion from the definition. That is, if it is a content

18 service, it shouldn't be an ECS.

19 MR JUSTICE MORRIS: Okay, go on.

20 MR PICKFORD: That is -- or at least it shouldn't be an ECS insofar as it is a content

21 service.

22 MR JUSTICE MORRIS: Okay. Because there is another point in there as well. Let's

23 say you have a service like yours is, which plainly does have a content service within

24 it.

25 MR PICKFORD: Yes.

26 MR JUSTICE MORRIS: Does the definition operate so as to take the whole service

1 outside ECS or only the part which is the content service? That is a question which
2 you address in your skeleton, or you refer to, but you say I don't need to answer it.

3 MR PICKFORD: Yes, I am going to make two points in response to that. First I am
4 going to answer you. My submission is the exclusion operates insofar as it is a content
5 service. So it does not have the effect that if there is some content there,
6 suddenly -- so say you satisfy the first part, and you have found some service which
7 principally is about transmission. And the way it doesn't work is that you then look at
8 this exception and you say, aha, but there is a tiny bit of content there, you know, they
9 bought the rights to one football game.

10 I don't say that. I say, strictly speaking, you don't -- the reason I say you don't need to
11 answer that is because -- the reason why we win this appeal is, we win on the wholly
12 or mainly bit before you even get to content. But I totally understand why you want to
13 have a cohesive and comprehensive answer to the way in which I say this provision
14 works.

15 It has a positive part and it has a negative part, and that is what the EU case law in
16 fact goes on to make very clear. The positive part is the wholly or mainly test. The
17 negative part is whether it is a content service.

18 And if the service meets the positive part in one and it doesn't fall foul of the negative
19 part in two, then it is all an ECS.

20 If it partly falls foul of two because some of it is a content service, then some bit of it
21 gets carved out. That is how it works.

22 And in every case, as is clear, I would say, from the face of the legislation itself, it is
23 applying to the service in question. Whatever the service is that we are worrying about,
24 we analyse the service by reference to these particular provisions. What we don't do,
25 which is what Ofcom needs, is to create a hypothetical service and apply the wholly
26 or mainly test to the hypothetical service, having constructed something in its own

1 mind which is a version of that service but without content.

2 And I noticed some, I think, puzzlement before, perhaps, when I was saying that their

3 approach removed content from the assessment but not -- sorry, I said that they claim

4 that what they are doing is removing content from the definition. Actually, what they

5 are doing is removing content from the assessment. And those are different things.

6 I hope that point is now clear, at least my submission on it.

7 So those are the words in the initial Framework Directive.

8 MR JUSTICE MORRIS: Thank you.

9 MS WALKER: Sorry, may I ask one question?

10 MR PICKFORD: Yes, of course.

11 MS WALKER: You highlighted recital 5 --

12 MR PICKFORD: Yes.

13 MS WALKER: -- about the separation of transmission from the regulation of content.

14 MR PICKFORD: That's right.

15 MS WALKER: At the end of that recital there is a reference to this not prejudicing

16 taking into account the links existing between them.

17 MR PICKFORD: Yes, indeed. Indeed. And I think we don't have any problem with

18 that. Obviously insofar as there are arguments and it is necessary to give effect to

19 them, then one should. And indeed that is the basis for the interpretation that I give to

20 the content exclusion.

21 It is not that when you find some content in what would otherwise be an ECS, you

22 therefore give up altogether on the ECS regime. You continue to apply the ECS

23 regime but you don't apply it to the content bit.

24 So that is indeed an example of giving effect to the relationship between the two when

25 you have a mixed service.

26 So if I then go to the EECC Directive. This is the next step in the European legislation,

1 and that is to be found in tab 13 of the authorities bundle. If we could go, please, to
2 page 148, recital 7.

3 So this is explaining the reasons why there are some modifications to the definition.

4 "The convergence of the telecommunications ..."

5 In fact, as it is not critical because we are in agreement, if I can ask the Tribunal to
6 read down to the words "in accordance with European Union law", which is about
7 halfway down. **(Pause)**.

8 MR JUSTICE MORRIS: Yes. Thank you.

9 MR PICKFORD: Again, emphasising the separation between the regulation of ECSs
10 and the regulation of content, as I showed you in the Framework Directive recital 5.
11 And then if we look, please, at recital 15, over the page -- I beg your pardon,
12 I misspoke before. 7 is in fact basically the analogue of 5. It is recital 15, that then
13 goes on to explain why the definition has changed, and if I could ask the Tribunal
14 please to read recital 15. **(Pause)**.

15 MR JUSTICE MORRIS: Yes. But that just explains the expanded definition of
16 transmission, doesn't it?

17 MR PICKFORD: That is the essential thing it does. But it is also worth noting in
18 particular the sentence beginning about halfway down:

19 "The definition of electronic communication services should therefore contain three
20 types of services which may partly overlap."

21 Then it sets out three types, the third of which is:

22 "Services consisting wholly or mainly in the conveyance of signals."

23 That is very hard to reconcile with Ofcom's approach, because that makes sense when
24 you consider it on my approach, talking about actual services. It doesn't really make
25 sense of a hypothetical service that would be something that consisted wholly or
26 mainly of conveyance signals, if only you took out the content part of it.

1 MR JUSTICE MORRIS: Okay, yes.

2 MR PICKFORD: Now, I anticipate Mr Holmes is also going to show you recitals about
3 consumer protection. They are also in this Directive. I am going to make some
4 submissions about that in due course. I am not going to take the Tribunal to them.

5 And the reason is, I say they cannot be relevant to the Tribunal's task because the job
6 of this Tribunal in these proceedings is to construe what the dividing line is between
7 an ECS and something that is not an ECS. It is not its job to construe what the end of
8 contract notifications mean. And the dividing line that exists and exists in this version
9 in the EECC Directive is exactly the same as the dividing line that existed in the 2002
10 Directive before, when we didn't have any of those further provisions.

11 So the submission I am going to be making in due course on that is that you cannot
12 use provisions in legislation from 17 years later to tell you about what something must
13 have meant in 2002 and 2003.

14 MR JUSTICE MORRIS: Okay, yes.

15 MR PICKFORD: Simply for your note, but I don't particularly want to deal with it at any
16 length, but the Tribunal did note to me that it had interest in bundles. And bundles
17 appear at recital 283, page 156. I am not going to read it but that is where the bundles
18 appear.

19 MR JUSTICE MORRIS: Yes. I don't have a self-standing interest in bundles, but it
20 has cropped up in the skeletons and I want to know its significance, if any.

21 MR PICKFORD: Okay, well, its significance will become apparent --

22 MR JUSTICE MORRIS: In due course.

23 MR PICKFORD: In due course. It is not front and centre of the argument but it is
24 relevant to one of the points we are going to come on to on the purposive construction
25 in particular.

26 So if we then take out page 158.

1 MR JUSTICE MORRIS: Article 2.

2 MR PICKFORD: And go to Article 2(4):

3 "[ECS] means a service normally provided for remuneration via electronic
4 communications networks, which encompasses ..."

5 And then there is the clause:

6 "With the exception of services providing, or exercising editorial control over, content
7 transmitted using electronic communications networks and services, the following
8 types of services:"

9 And then we have (a), (b) or (c), and that is reflected in the 2003 Act as amended.

10 Now, there is no suggestion in the recitals to this Directive that the change in the
11 placement of the exception clause, the words beginning "with the exception of
12 services" and ending "communications networks and services", has created any
13 change in the definition. They have just reorganised it.

14 If you remember in the Framework Directive it comes at the end. Here, it has moved
15 up, but it plainly is, in my submission, exactly the same thing as it did before.

16 And I would therefore make the same submission about it, that it is referring to the
17 actual services provided. There is no warrant whatsoever for reading this as referring
18 to some sort of hypothetical service requiring the person applying it first to strip out
19 any content that there might be and then apply the test of wholly or mainly to that.

20 MR JUSTICE MORRIS: Can you just pause for a moment. I just want to ...

21 MR PICKFORD: Of course.

22 MR JUSTICE MORRIS: Thank you. **(Pause)**.

23 I am still struggling, and it may not take us anywhere, with this notion, "With the
24 exception of services ..." ie content services, call that "service (a)", being transmitted
25 using electronic communications services and therefore must be something other
26 than -- service (a) cannot be an electronic communication service because it is being

1 transmitted using that other thing.

2 MR PICKFORD: So --

3 MR JUSTICE MORRIS: I don't know where it takes us. Maybe I am being over --

4 MR PICKFORD: The way, Sir, that I understand it, and I may not have fully
5 appreciated, Sir, your point, is that the exception of providing or -- so, okay, we have
6 ECSs, means a service which encompasses certain things. And then with the
7 exception of -- we are looking at the "with the exception of" part.

8 MR JUSTICE MORRIS: Yes, "the exception of services", plural. So that is obviously
9 something that must be different from an electronic communications service.

10 MR PICKFORD: Yes.

11 MR JUSTICE MORRIS: Because it cannot be self-transmitted. I am not expressing
12 myself very clearly.

13 MR PICKFORD: Yes. And the exception there is that it is talking about the content
14 aspect of something that is transmitted --

15 MR JUSTICE MORRIS: No, I understand it is content services. Just call the content
16 service "service A" and call electronic communications services "service B". By
17 definition, service A cannot form part of service B. Maybe. I don't know.

18 MR PICKFORD: Yes, I'm not sure where that --

19 MR JUSTICE MORRIS: I am not sure where it takes us, but I just find it odd, the
20 definitions just seem to go round in circles a bit.

21 Let's move on. You can both give it some thought. There may be nothing in my
22 thoughts.

23 MR PICKFORD: Just one point to make here, which is to scotch a bad point that
24 Ofcom make in their skeleton. They seize on the words in (c) where it refers to
25 services consisting wholly or mainly in the conveyance of signals such as transmission
26 services used for broadcasting.

1 And they say, aha, and they say, plainly, in order to give that some sensible meaning
2 we cannot be right because broadcasting is exactly what you do and therefore your
3 content exemption means you cannot be right about your content exemption.
4 The answer to that is, there are plenty of general ECSs that involve transmission
5 services used for broadcasting.
6 One example in the UK is, there is a company which was regulated by Ofcom, called
7 Arqiva. And we have the documents in the bundle but I will just explain. Arqiva doesn't
8 provide content. What Arqiva does is it provides transmission services. It owns
9 broadcast towers and it has lots of means of getting signals across the country.
10 So that is an example of what would be an ECS involving broadcasting. Another
11 example would be the service that is providing the case we are going to come to, of
12 Hilversum, which is a cable service. And indeed probably, I would suggest, Virgin, on
13 the basis of what Mr Holmes says about Virgin's business, where they are involved in
14 providing ECSs for broadcasting, it is not -- it doesn't -- broadcasting is not
15 synonymous with content. Broadcasting means the transmission part of it.
16 MR JUSTICE MORRIS: Okay. All right.
17 MR PICKFORD: Next, if we could go to -- I think in order to save some time I am
18 going to go to the domestic instrument.
19 MR JUSTICE MORRIS: Same bundle.
20 MR PICKFORD: Same bundle, back to tab 1. Page 3 is where we start.
21 MR JUSTICE MORRIS: Yes. This is the original definition.
22 MR PICKFORD: That is the original definition. I show you the original definition
23 because it has slightly different syntax and it follows the simpler version in the
24 Framework Directive.
25 MR JUSTICE MORRIS: Yes.
26 MR PICKFORD: So there is no (2A) at this point. It is simply:

1 "Electronic communications service. Service consisting in, or having as its principal
2 feature, the conveyance by means of an [ECN] of signals, except insofar as it is
3 a content service."

4 It is easy. In my submission it is obvious what that means. First step, does it have as
5 its principal feature the conveyance of signals? Second step, remove the content part.
6 What it doesn't say is remove the content part from your assessment of what its
7 primary feature is.

8 We then see over the page at subsection (7) a provision which hasn't changed, which
9 is what a content service is.

10 MR JUSTICE MORRIS: Yes.

11 MR PICKFORD: That means so much of any service consisting in one or both of the
12 following:

13 "The provision of material with a view to its being comprised in signals conveyed by
14 a means of electronic communications network."

15 And (b):

16 "The exercise of editorial control over the contents of signals conveyed by means of
17 such a network."

18 Now, I am not sure where it is going to go, and it may be that it is better for me to
19 respond to Mr Holmes on this point. But I think there may be an argument between
20 us brewing on what this term means. I don't know because I haven't seen it in any
21 skeleton, but I think it is that he is going to say that merely providing -- basically
22 transmitting content, if you have some content that you bought from someone
23 else -- say you are Virgin and you are providing Sky to your customers, that you satisfy
24 this definition.

25 And my submission on that is that that is plainly wrong. It is contrary to the European
26 legislation. What that makes clear is that what content is all about is coming up with

1 the content. It is about editorial control. Editorial control is one of the limbs here. But
2 in fact when you look at the case law, it is clear what the courts think about it, and it
3 means the production or making --

4 MR JUSTICE MORRIS: Making the programmes.

5 MR PICKFORD: Making the programmes. Or somewhere which is perhaps more on
6 the boundaries but, we would say, still within content, is not necessarily making the
7 programmes but arranging them, having editorial control over exactly how they are
8 arranged in the schedule.

9 So it might be that you make some of the programmes, you might buy in some of the
10 others because someone else made them for you, but you decide how to put it all
11 together, because you create the channel, and you run the channel.

12 That is what this is about. It isn't about Virgin simply saying, oh, you can have Sky's
13 channels.

14 MR JUSTICE MORRIS: Okay. That is 32(7).

15 MR PICKFORD: That is 32(7). Then we go over the page to the new version of
16 section 32. And my submission on this is that you obviously have to read the exception
17 in the same way as you read the exception for the previous one. And the change in
18 the order doesn't make any difference. And then, if necessary -- I might just give you
19 the reference. At 7.28 of the explanatory note to the 2020 Regulations, which are the
20 UK regulations which implemented the EEC Directive, which I showed you.

21 MR JUSTICE MORRIS: What page number are you on?

22 MR PICKFORD: It is in the authorities bundle, tab 4, page 110. Let's go there.

23 MR JUSTICE MORRIS: I don't necessarily need you to take me there, but I have
24 a habit of when any provision is referred to, I like to just mark it, that it has been
25 referred to.

26 MR PICKFORD: In which case, we may just go very briefly to it.

1 MR JUSTICE MORRIS: 7.28?

2 MR PICKFORD: Yes, page 110.

3 MR JUSTICE MORRIS: I have it.

4 MR PICKFORD: It makes the point of how the change in the legislation isn't supposed
5 to bring any new services within scope.

6 MR JUSTICE MORRIS: Okay.

7 MR PICKFORD: That is all that does.

8 MR JUSTICE MORRIS: Yes, got that.

9 MR PICKFORD: Then if we continue on back in the current version in force, the 2003
10 Act, and go back to page 9, we see the power for Ofcom to set conditions. And that
11 includes a power to set general conditions.

12 And then we see in 46 persons to whom conditions may apply. And we see 46(2) that
13 general conditions can apply to persons providing ECNs or ECSs.

14 MR JUSTICE MORRIS: Yes.

15 MR PICKFORD: So that is the legislative route through which this all does or doesn't
16 take effect, depending whether we are or are not an ECS.

17 I am not going to take the Tribunal to the General Conditions themselves, because
18 there is nothing in dispute about those. It just depends on whether we are or are not
19 an ECS as to whether we should be complying with them.

20 Sir, that is my slightly whistle-stop tour through the underlying legislation. And I am
21 now going to turn, if I may, to the relevant case law.

22 MR JUSTICE MORRIS: Yes.

23 MR PICKFORD: There are four cases I am going to address. That is Hilversum, UPC,
24 SkypeOut and Gmail.

25 MR JUSTICE MORRIS: Okay.

26 MR PICKFORD: If we could start, then, with Hilversum. That is in the authorities

1 bundle. So we can go on -- I think this might be your next tab.

2 MR JUSTICE MORRIS: Volume 2.

3 MR PICKFORD: It is volume 2, yes, and it is tab 23.

4 This is a reference from the Dutch court to the CJEU, and if you can start, please, at
5 paragraph 35, which is on external page 443.

6 So we see by question one, the court is asked in essence -- very important to ask in
7 essence:

8 "... Article 2(c) of the Framework Directive must be interpreted as meaning that a
9 service consisting in the supply of a basic cable package, the charge for which
10 includes transmission costs as well as payments to broadcasters and royalties paid to
11 copyright collecting societies in connection with the transmission of programme
12 content falls within the definition of an [ECS] and, consequently, within the substantive
13 scope of both that directive and the Specific Directives..."

14 Then at 36, an important observation:

15 "In this connection, it must be observed that, under Article 2(a) and (c) of the
16 Framework Directive, [ECS] means a service normally provided for remuneration
17 which consists wholly or mainly in the conveyance of signals on electronic
18 communications networks, including [et cetera] telecommunications services and
19 transmission services..., but excluding ..."

20 MR JUSTICE MORRIS: "Excluding".

21 MR PICKFORD: Yes.

22 "... services providing, or exercising editorial control over, content transmitted using
23 electronic communications networks..."

24 MR JUSTICE MORRIS: Yes.

25 MR PICKFORD: Now, this is going to become slightly repetitious, but obviously the
26 Tribunal will have my submission on that, but they are referring to the actual services

1 | there. And when they are talking about excluding services they are genuinely talking
2 | about excluding them.

3 | What they are not talking about at all here is coming up with some hypothetical service
4 | to apply the wholly or mainly test to, which is what Ofcom does.

5 | Because, as I have explained, if what you do -- and I mean, I will make the point once
6 | more because it is critical. If what you do is you remove from the test the content
7 | service, and you put it to one side, it has the effect of dragging in by the back door
8 | content services into the definition of an ECS.

9 | MR JUSTICE MORRIS: I am still puzzled, I think. This is your criticism that their
10 | approach is one of assessment, is that right?

11 | MR PICKFORD: That's right. I mean, you can think of it perhaps using --

12 | MR JUSTICE MORRIS: Your pie chart.

13 | MR PICKFORD: -- my pie chart.

14 | Let's look on the left-hand side again. It is to make the point. This service that we are
15 | considering here on the left is basically all about content.

16 | MR JUSTICE MORRIS: Yes.

17 | MR PICKFORD: However, there is a bit, an aspect to it, which is concerned with
18 | transmission, and there is a smaller aspect that is concerned with something else. We
19 | are calling it hardware. It really doesn't matter what it is.

20 | MR JUSTICE MORRIS: Rump, I call it.

21 | MR PICKFORD: Yes.

22 | MR JUSTICE MORRIS: Maybe that's not the sort of thing I should say.

23 | MR PICKFORD: My clients have impressed on me that it is not in any way a rump.
24 | These are important parts of --

25 | MR JUSTICE MORRIS: I am sure. I hope no offence was taken.

26 | MR PICKFORD: I am sure none.

1 So this is a hypothetical service which is basically all about content. But what Ofcom
2 does in its analysis of whether it is an ECS is, it says, step one, forget about --

3 MR JUSTICE MORRIS: Yes, we will take the red bit out.

4 MR PICKFORD: We will just take the red bit out. So we are only now looking at the
5 green and the blue bit. And now we do our analysis on the green and the blue bit.
6 And lo and behold, we discover it is wholly or mainly transmission. And therefore they
7 say the service is an ECS.

8 MR JUSTICE MORRIS: Yes.

9 MR PICKFORD: And I say that that has the opposite effect of excluding content from
10 the scope of the ECS regulation as the recitals tell us they want to do. The recitals tell
11 us it is important to not regulate content under --

12 MR JUSTICE MORRIS: In this way.

13 MR PICKFORD: In this way. They say some content has its own regime. Apply the
14 content regime to content. And so by approaching it in the way that Ofcom do, what
15 that has the effect of doing is, when you have a mixed service that is principally all
16 about content, you then subject that service to ECS regulation, because you ignored
17 the fact that it was all about content when you were determining whether it was
18 an ECS.

19 MR JUSTICE MORRIS: Okay.

20 MR PICKFORD: That is the effect of Ofcom's approach. And I say it is the opposite.
21 That does the absolute opposite of excluding a content service.

22 MR JUSTICE MORRIS: You have just said you ignored it.

23 MR PICKFORD: Sorry?

24 MR JUSTICE MORRIS: Did you not just say you ignored the content service?

25 MR PICKFORD: They ignored the content service for the purpose of assessment of
26 whether the service is an ECS. Once they get to the conclusion that it is an ECS, then

1 they apply the regulation to the service, because remember we are only talking about
2 a service here. There are different provisions to deal with bundled services.

3 MR JUSTICE MORRIS: Okay.

4 MR PICKFORD: But this just about a service. And so the effect is basically to
5 transform something which has very little to do with the conveyance of signals at all
6 into being regulated as if it were mostly about the conveyance of signals.

7 MR JUSTICE MORRIS: I think I am understanding the point. And I think the point
8 chimes with -- I mean, what you are saying is, you have the pie, you decide whether
9 this pie, the service, is an ECS, and for the purpose of deciding whether it is an ECS
10 you cut out the red bit for the time being. You look at the whole pie, because it is
11 a single service, and it is an ECS. Once you have decided it is an ECS, what is
12 regulated as an ECS is the whole pie.

13 MR PICKFORD: Yes, because there's only one service --

14 MR JUSTICE MORRIS: So that links into a point which has occurred to us, which is
15 this -- and you can both go away with this.

16 Assuming that Ofcom is right and assuming that the unified pay TV service of Sky is
17 an ECS, and assuming that that is supplied under a single contract, is it Ofcom's
18 position that the end of contract notice has to be given in respect of the whole lot,
19 effectively? You can't have a notice saying you have got to give notice to terminate
20 only that bit which deals with the transmission?

21 I don't know, but I am assuming that is -- the remedy or the obligation to send a EOCN
22 applies to the unified service provided under one contract?

23 MR PICKFORD: Yes, well, in my submission --

24 MR JUSTICE MORRIS: In that regard, that sort of chimes with your point that
25 95 per cent of this is being regulated as an ECS when 95 per cent of it is content.

26 MR PICKFORD: Yes. And what that comes down to, Sir, is this:

1 The example that you just posited involved a single unified service.

2 MR JUSTICE MORRIS: Yes.

3 MR PICKFORD: As we have.

4 MR JUSTICE MORRIS: Yes.

5 MR PICKFORD: And in my submission, by definition, because it is a service, you can
6 only treat it as singular. You can only treat it as a service. There is no separate part
7 that is transmission and a separate part that is content and therefore you can never
8 treat it in the way that is implied in effect by trying to make sense of Ofcom's approach,
9 which is saying, aha, don't worry, we didn't touch the content part. Of course you
10 touched the content part, because it is only one service.

11 Where there is more than one service -- and we did have examples of that --

12 MR JUSTICE MORRIS: Again, all right. Okay.

13 MR PICKFORD: That is where we have the difference.

14 MR JUSTICE MORRIS: I think I see your point about this distinction between
15 assessment and actually it being included. I think I see the point now, but I struggled
16 with it. But that is a concern. One of the issues that we have had is the question about
17 a remedy and what the EOCN applies to.

18 Anyway. Carry on.

19 MR PICKFORD: I don't want to go through this now but, for your note, we deal with
20 this issue about the remedy and how it aligns with the findings in our notice of appeal.
21 It is at paragraphs 105 to 109 and the reference is core, tab 1, page 34.

22 MR JUSTICE MORRIS: I will just need to mark it. 105 --

23 MR PICKFORD: Core 1, page 33, I think. And the paragraphs are 105 to 109.

24 MR JUSTICE MORRIS: I have read it. I will come back to it.

25 MR PICKFORD: Page 33, paragraphs 105 to 109. And they deal with this issue.

26 MR JUSTICE MORRIS: We will read it in due course.

1 I am conscious of time and I am trying not to interject, but as I say, I needed to
2 understand the point that you are making about this distinction between assessment
3 and definition.
4 Okay.
5 MR PICKFORD: So --
6 MR JUSTICE MORRIS: We were at 36.
7 MR PICKFORD: We were at 36. Then if I could ask the Tribunal, please, to read 38.
8 **(Pause).**
9 MR JUSTICE MORRIS: Okay.
10 MR PICKFORD: Again, my emphasis is on the --
11 MR JUSTICE MORRIS: Sorry, we are back in the authorities bundle, page --
12 MR PICKFORD: We are back in the authorities bundle on page 443. I think it is the
13 second volume of yours --
14 MS WALKER: 38.
15 MR PICKFORD: That's right.
16 MR JUSTICE MORRIS: I have read 38, which is essentially the recital, really.
17 MR PICKFORD: It is. And then over the page at 41, the critical part of the decision:
18 "It follows from the foregoing that, as the Advocate General observed in point 33 of his
19 Opinion, the relevant directives, in particular the Framework Directive, the Competition
20 Directive and Audiovisual Media Services Directive, make a clear distinction between
21 the production of content, which involves editorial responsibility, and the transmission
22 of content, which does not entail any editorial responsibility. The content and
23 transmission are covered by different measures which pursue their own specific
24 objectives..."
25 So that reinforces the point I was making about the proper interpretation of 32(7).
26 MR JUSTICE MORRIS: Okay.

1 MR PICKFORD: "In the present case, it is apparent from the order for reference and
2 the written and oral submissions made before the Court that UPC's principal business
3 is the transmission of radio and television programmes via cable to its subscriber[s].
4 UPC confirmed at the hearing before the Court that it does not produce those
5 programmes itself and it does not exercise any editorial responsibility over their
6 content."

7 So this is a key part of this decision, because what they are going on to say is, okay,
8 so they are not in the content exclusion, not producing the content, and therefore they
9 are an ECS.

10 And we see at 43 through 44 the analysis that shows that the court understands that
11 their principal business consists in transmission. If I can ask the Tribunal to read 43
12 to 44.

13 MR JUSTICE MORRIS: Yes. **(Pause)**.

14 MR PICKFORD: If the Tribunal has finished 44.

15 MR JUSTICE MORRIS: 43 and 44 do not, however, at that stage refer to the mainly
16 or wholly, do they? No. It is insofar as that service includes.

17 MR PICKFORD: Yes, so what I am going to say about that is --

18 MR JUSTICE MORRIS: It is all right, I have seen what it says.

19 I have to say, at the moment, having read in the skeletons the authorities, well, you
20 both seem to think that they are highly relevant, but I am not sure any of the authorities
21 address the construction of the content exclusion. And I am not sure how they assist.
22 But carry on taking me through them. But I would like in the end to know how these
23 authorities assist. Of course they are in the area. Here, we have basically a cable
24 transmitter and they find that their main business is transmission rather than content,
25 therefore they are an ECS. That is what I get out of this case.

26 MR PICKFORD: Well, in my submission they are of considerable assistance, and the

1 reason is this --

2 MR JUSTICE MORRIS: Okay.

3 MR PICKFORD: -- because what they are always considering is the actual service
4 that is provided. There is never a hint in any of these cases that the analysis, the
5 wholly or mainly analysis, should be conducted by reference to a hypothetical service
6 that has got rid of the content part.

7 You never find that anywhere. They always, on their face, just take the plain words
8 from the Directive and say, okay, question: is this service mainly or wholly consisting
9 in the conveyance of signals?

10 MR JUSTICE MORRIS: Okay.

11 MR PICKFORD: Second question: should we exclude it from ECS because in fact it
12 is actually a content service?

13 In this case, they answer those questions. The first question they answer positively.
14 It is wholly or mainly to do with --

15 MR JUSTICE MORRIS: Cable transmission.

16 MR PICKFORD: -- cable transmission. And no, we are not going to apply the content
17 exception, because they are not producing the content; these guys are just
18 retransmitting the content.

19 MR JUSTICE MORRIS: Okay. Carry on taking me through. I am just sharing my
20 thoughts.

21 MR PICKFORD: No, that is extremely helpful to know where the Tribunal is coming
22 from, so I can hopefully make points such as the one I have just made.

23 MR JUSTICE MORRIS: So that was 44.

24 MR PICKFORD: I would also make another point, actually, in relation to the
25 helpfulness or otherwise of some of these submissions -- some of these authorities.

26 MR JUSTICE MORRIS: You are going to submit that your submissions are helpful.

1 I would like that point to be developed, please.

2 MR PICKFORD: It is this: one of the reasons why perhaps the Tribunal is slightly
3 puzzled by quite how relevant some of these are is because of the change of case by
4 Ofcom.

5 It used to be the case, on the analysis that you find in the decision, that Gmail was
6 absolutely critical. Gmail was critically against them. And I will come on to that case
7 in due course, because the reason is -- the point was made in Gmail that it is not good
8 enough merely that the service includes some transmission. That is not the test. It
9 has to be wholly or mainly. And that was the error they made in the decision --

10 MR JUSTICE MORRIS: In these decisions.

11 MR PICKFORD: So that case was directly on point.

12 Now, I would accept Gmail still has some relevance, and I am going to show you why.
13 But because of the shift in their case, that has altered to some degree the way in which
14 the authorities interact with this appeal.

15 MR JUSTICE MORRIS: Carry on.

16 MR PICKFORD: So I got to 33 through to 34. There is a reference to "includes", and
17 I will come back to that in a moment. And then 45 makes the important point that just
18 because UPC didn't restrict itself to conveying signals, it doesn't mean that it is not still
19 providing an ECS.

20 The key point there being it doesn't have to exclusively convey signals, it just has to
21 do it wholly or mainly. And again, they are talking about the service, not the
22 hypothetical service.

23 Then 46 again makes the same point in relation to the inclusion of charges for
24 royalties.

25 And then at 47 the court sets out its ratio. And one sees at the end of that that the key
26 test that it is applying is the "in so far as that service entails primarily the transmission

1 of television content".

2 MR JUSTICE MORRIS: Yes.

3 MR PICKFORD: And the reason why I draw attention to that is because that qualifies
4 the "includes the conveyance of" test, the words that appear to be at 44.
5 That is loose language, in my submission. It doesn't mean that the test is that it just
6 has to include. And indeed, it makes that very clear that that must be the case from
7 paragraphs 45 and 46. The test is: does it entail primarily?

8 MR JUSTICE MORRIS: Yes. And that is reflected presumably in the answers to the
9 question at the end?

10 MR PICKFORD: Exactly. Article 1 is tortuous, but it is basically the same as 47 in
11 substance, so I am not going to go through --

12 MR JUSTICE MORRIS: I have just marked it right at the end, "insofar as it entails
13 primarily".

14 MR PICKFORD: So the next authority, next tab. That is the UPC case. And again
15 concerning a pay TV service, this time in Hungary, and again where there was no
16 editorial control, so it couldn't be said to be a content service.
17 Again in stark contrast to Sky. If we go to paragraph 33.

18 MS BURGESS: And the page?

19 MR PICKFORD: I beg your pardon, it is page 456. We see the questions that the
20 court is proposing to answer. And 34 through to 39 take us through the Hilversum
21 analysis.

22 MR JUSTICE MORRIS: Just give me a moment. I just want to read the question.
23 **(Pause)**.

24 Okay. I am not conscious of Article 2(f), but the question was whether it was an ECS.
25 And on the facts this is transmission by satellite, yes?

26 MR PICKFORD: No.

1 MR JUSTICE MORRIS: It is a service consisting in the supply of conditional access.

2 MR PICKFORD: There is retransmission by satellite, but I am not sure that is the only
3 means. I would have to double check. I don't think it matters --

4 MR JUSTICE MORRIS: All right. Carry on.

5 MR PICKFORD: -- what the particular form is.

6 MR JUSTICE MORRIS: I am just trying to understand what the issue in that case was.

7 MR PICKFORD: I will take you to the paragraphs that show us what the issue was.
8 There were actually two issues but they are to do in particular with the conditional
9 access part which is what the (c) referred to in 33, because that gave rise to a question,
10 so if we go to 42 to 43, we see this reasoning by the court. And this one of the
11 differences from the Hilversum case:

12 "UPC argues that it doesn't supply an [ECS] ... since it doesn't transmit any signal and
13 does not have an electronic communications network, that is to say, infrastructure. In
14 that regard it must be noted that the fact of the transmission signals is by means of an
15 infrastructure that does not belong to UPC is of no relevance."

16 That is the first point which is I don't think in issue between us, but that was one of the
17 issues in this case, which is, if you don't own it all yourself but you have taken
18 responsibility for it, can you still be providing an ECS? Answer: yes.

19 The next point is of more relevance to us and that is the second difference which one
20 finds at paragraph 45 and following. That is, if I can maybe just ask again the Tribunal
21 to read 45 through to 48.

22 MR JUSTICE MORRIS: Yes, I have read to 48.

23 MR PICKFORD: Thank you, so that is setting up the issue. The issue is, the company
24 is saying we have a conditional access service and so that changes the game, that
25 means we can't be an ECS.

26 That is answered at the end of 50 and into 51. The court says:

1 "A conditional access system does not, by itself, enable access to be given to a radio
2 or television service. Such access still depends on the transmission of signals by the
3 electronic communications network. The operation of a conditional access system is
4 therefore directly linked [key words, I would like to emphasise] to the provision of the
5 protected service. [In] any situation in which the operator of the conditional access
6 system is simultaneously the provider of the radio or television programme
7 broadcasting service, which appears to be the case in the main proceedings, the
8 service is a unified service in which the supply of the radio or television service is the
9 core element of the activity carried out by that operator, and the conditional access
10 system being the ancillary element."

11 Over the page:

12 "In view of its ancillary nature, a conditional access system may be attached to
13 an electronic communications service for the broadcasting of radio or television,
14 without that service losing [its status as] an [ECS]."

15 So the reason why I say that is important is because what the court is doing here is
16 looking at all of the elements of the unified service and it is saying it is important to
17 apply the test to the unified service. You don't start dividing it up and applying the test
18 separately to one bit or another bit. You don't just apply it to the conditional access
19 service. You look at it all together as a cohesive whole, and that is when you assess
20 whether it wholly or mainly consists in the conveyance of --

21 MR JUSTICE MORRIS: Is there any express reference in this case to "wholly or
22 mainly"?

23 MR PICKFORD: I beg your pardon, Sir, I'm sorry, I was --

24 MR JUSTICE MORRIS: Is there any reference in this case to the "wholly or mainly"?
25 Does it say expressly -- maybe it doesn't -- "Yes, there is a conditional access but this
26 service is wholly or mainly a transmission service"? It says that the service supply is

1 the core element, I suppose -- maybe that is it -- carried out. The conditional access
2 is the ancillary. I am not sure it actually refers to the wholly or mainly bit, does it?

3 MR PICKFORD: I think that is right, Sir, that it doesn't in terms refer to the wholly or
4 mainly. But in my submission it is conducting that analysis by looking at the core
5 element.

6 If it were the case -- let's just posit something different. If what the court had said is,
7 actually, what we have realised here is that the conditional access, that is what this
8 sentence is all about, it is all about conditional access and that is what it is
9 primarily -- then obviously it couldn't have come to the same conclusion.

10 MR JUSTICE MORRIS: All right.

11 MR PICKFORD: My junior has asked me to draw to your attention -- I am not going
12 back to it -- paragraphs 19 and 20 explain the factual background, in case that is of
13 assistance, but I know I've got to press on.

14 MR JUSTICE MORRIS: Yes. Are we going to Skype next?

15 MR PICKFORD: So we are now going to SkypeOut. That is next tab. I am
16 conscious at some point there may be a break?

17 MR JUSTICE MORRIS: Thank you for reminding me. I think probably now is the time
18 for a break. Can we start again at 3.30? I hope that is enough for the shorthand
19 writers.

20 Very good, thank you very much.

21 **(3.20 pm)**

22 **(A short adjournment)**

23 **(3.33 pm)**

24 MR JUSTICE MORRIS: Thank you. Yes, Mr Pickford.

25 MR PICKFORD: Thank you, so I am going to go on next to the SkypeOut case, which
26 is to be found at tab 25 of the authorities bundle. This was a reference from the Court

1 of Appeal, Brussels, and it provides a counter point to UPC. So remember UPC was
2 a case where what the court said is, but when these services are all unified, when they
3 are all part of the same thing, you have a core element and an ancillary element, you
4 look at it all together, and this was effectively the opposite of that.

5 So if we go, very briefly, I am just going to draw your attention to paragraph 8, which
6 describes the Skype service, but it is reprised again a bit later, so I don't think we need
7 to spend too much time on that.

8 MR JUSTICE MORRIS: Yes, okay.

9 MR PICKFORD: We then have paragraph 22 where the court is asking whether the
10 Skype service is an ECS, and Skype -- sorry, whether SkypeOut is an ECS and,
11 actually, sorry, I am conscious of the time and I am going a bit fast and I think it might
12 be slightly better if I went just slightly slower.

13 MR JUSTICE MORRIS: Yes. I sympathise with your predicament.

14 MR PICKFORD: I am going to go back to paragraph 8 just for a moment. I would ask
15 the Tribunal, please, to read paragraph 8. **(Pause)**.

16 MR JUSTICE MORRIS: Yes, okay.

17 MR PICKFORD: Then we have the question in 22 where the court is asking whether
18 the SkypeOut service is an ECS and of course, so as you will have seen from
19 paragraph 8, the particular feature of the SkypeOut service is it is voice-over IP, and
20 it is not just from one computer to another, the SkypeOut thing means that you can go
21 basically from a data service to someone's actual land-line or mobile and call them as
22 if you were calling in from a normal phone network.

23 The first part of the case is unsurprising for me. They decide that SkypeOut is an ECS.
24 The interesting part comes when we then get some of SkypeOut's -- Skype's counter
25 arguments, which are addressed in 41 to 42, the second (Inaudible) ones, and it says,
26 well, the fact that SkypeOut is -- this is the court responding to the point -- "the fact

1 that SkypeOut is merely a feature of the Skype software, which can be used without
2 that feature, cannot have any bearing on whether or not the service provided by Skype
3 Communications is to be classified as an electronic communications service."

4 "It is true, as Skype Communications argues, that the Skype software provides
5 a bundle of services which are not at issue in the main proceedings, including, on the
6 one hand, a service allowing users to make free audio and/or video calls between
7 terminal equipment connected to the Internet and, on the other hand, a number of
8 services such as screen-sharing services, instant text messaging."

9 Et cetera.

10 "[Those latter services] cannot ... do not consist wholly or mainly in the conveyance of
11 signals."

12 Then it goes on to say in paragraph 43 that the SkypeOut feature is nonetheless
13 clearly distinct in its purpose and remains autonomous in its operation, as compared
14 to the other services that we have been just considering. So therefore in contrast to
15 the result in UPC, what the court is saying is that it is fine just to look at the one
16 particular set --

17 MR JUSTICE MORRIS: Sorry, so it finds SkypeOut to be an ECS?

18 MR PICKFORD: Yes, it does.

19 "Although the installation of the SkypeOut feature ... requires the prior installation of
20 the Skype software [so that means all of the services you get] the fact remains, as the
21 various governments have noted, that the services offered respectively by the Skype
22 Software itself and by its SkypeOut feature appear clearly distinct in their purpose and
23 remain entirely autonomous in their operation."

24 So what Skype was trying to argue is, look, we have loads of things which are not
25 ECSs here and therefore they are not wholly or mainly about transmission, therefore
26 we cannot be providing an ECS, and what the court answers is, no, you have got that

1 wrong because the thing that we are concerned with is SkypeOut and that is clearly
2 distinct in its purpose and autonomous, entirely autonomous, in its operation from the
3 rest of the Skype services. Therefore it doesn't matter if you have got other services
4 that are not ECSs, we can ignore those because they are different services.

5 MR JUSTICE MORRIS: Yes, well, that is just a distinction between what you say is
6 a unified service with elements and a bundle of services comprising more than one
7 service.

8 MR PICKFORD: Well, it is, but of course as I said I think this morning, there isn't
9 a factual dispute between us as to whether this is in fact a unified service.

10 MR JUSTICE MORRIS: Yes, I understand that, I think.
11 Does the term "unified service" appear in the case law only in the second case; this
12 concept of unified service?

13 MR PICKFORD: I think that is right.

14 MR JUSTICE MORRIS: It arises in and only in -- I cannot remember the name of it,
15 the UPC.

16 MR PICKFORD: I call it UPC.

17 MR JUSTICE MORRIS: The DTH, the Hungarian case.

18 MR PICKFORD: Yes, the Hungarian one, rather than the Dutch one.

19 MR JUSTICE MORRIS: They don't use the term "unified service" in this case, do they,
20 Skype, by contrast?

21 MR PICKFORD: No, they don't. I am using it as a counter point because I am saying,
22 look, here are two different ways in which the court has dealt with it.

23 MR JUSTICE MORRIS: And, secondly, you made the submission to Ofcom that you
24 are a unified service and Ofcom have accepted that in their decision?

25 MR PICKFORD: They have.

26 MR JUSTICE MORRIS: Fine, okay.

1 MR PICKFORD: So, next and final decision of the CJEU and that is in the next tab,
2 26, this is Gmail.

3 MR JUSTICE MORRIS: Yes.

4 MR PICKFORD: So this concerned the question of whether Google's web-based
5 email service was an ECS, and we have some explanation of what Google does in 8,
6 9 and 10. There is an explanation about how it owns network infrastructure and it
7 provides an over-the-top service, which is an email service, and then, 21, we have --

8 MR JUSTICE MORRIS: Just explain to me, without taking me to the paragraphs, in
9 one paragraph -- this is Gmail we are talking about?

10 MR PICKFORD: We are talking about Gmail, yes.

11 MR JUSTICE MORRIS: I read it in the skeletons, just explain to me the steps about
12 when one sends a Gmail, who it goes to and through and who provides what?

13 MR PICKFORD: Okay, so in this case, there were a number of steps to transmission --

14 MR JUSTICE MORRIS: Yes.

15 MR PICKFORD: -- and what the court heard, accepted as the facts, is that Google
16 was responsible for bits of it. It is potentially quite complicated but there were certain
17 parts of the steps that they are responsible for. However, the service as a whole uses
18 the Internet as a whole and they were not responsible for the entirety of the
19 transmission. They were only responsible for certain bits of transmission.

20 MR JUSTICE MORRIS: Okay.

21 MR PICKFORD: So, I mean, that is really the heart of this case.

22 MR JUSTICE MORRIS: That is why I raise it.

23 MR PICKFORD: Because what the court says in paragraphs that I can take you to,
24 but just to summarise why it is of any relevance at all, what the court says is, well, the
25 fact that there is some transmission, some conveyance of signals going by Google is
26 not enough to say the service they are providing is wholly or mainly the transmission

1 and what they look at there is the service. So if I could go to 24 in particular, these
2 are submissions from BNetzA, who were trying to argue that Google was an ECS, and
3 these were the sorts of considerations that they referred to, to say, look, Google is
4 doing things that involve conveyance of signals. So that is what the court was taking
5 into account.

6 Then at 26, we see what the court asks, which is basically is Gmail an ECS? And then
7 I would like to focus on, because in my submission it is important, paragraphs 27
8 through to 29.

9 MR JUSTICE MORRIS: Okay.

10 MR PICKFORD: So:

11 "It must first be recalled that the concept of "electronic communications service" is
12 defined, in positive and negative terms ..."

13 That is reflecting the structure that I say applies.

14 MR JUSTICE MORRIS: Yes.

15 MR PICKFORD: "... and that definition is reproduced in equivalent terms in [the later
16 directive]."

17 "Article 2(c) of the Framework Directive defines, first, an electronic communications
18 service as a service normally provided for remuneration ..."

19 Et cetera. It is the test that we know. And then it says:

20 "[Under the same provisions] it specifies secondly that the concept of "electronic
21 communications service" excludes, on the one hand, "services providing or exercising
22 editorial control over content transmitted using electronic communications networks
23 and services"."

24 So that, in my submission, is on all fours with our construction. There is a positive
25 aspect and there is a negative aspect and the first question you ask yourself is are you
26 a service which consists wholly or mainly in the conveyance of signals, and that is the

1 positive aspect; and the second is that you also ask, again of the actual service, is it
2 in fact a content service in the way that we have defined it, ie effectively about editorial
3 control? If you satisfy the positive bit and you don't fall foul of the negative bit, then
4 you are an ECS.

5 That is very different, for all of the reasons that I have already explained, to the
6 approach that Ofcom introduces, which requires us to consider the hypothetical
7 service.

8 MR JUSTICE MORRIS: It doesn't say in terms that -- it does say that it has positive
9 and negative aspects, and it does sort of say first and second, but it doesn't I think say
10 in terms that you must consider the first bit first and the second bit second.

11 MR PICKFORD: Well, it does not say that --

12 MR JUSTICE MORRIS: It does not say that.

13 MR PICKFORD: -- in terms but, in my submission, what it does say is -- it is totally
14 consistent with what we say and it is not consistent with -- the Ofcom analysis, and
15 remember this is a new analysis which they didn't even think about in their decision,
16 is quite sophisticated because it involves thinking about a hypothetical to this. You put
17 the content to one part --

18 MR JUSTICE MORRIS: I have that, yes.

19 MR PICKFORD: You would need to see something a lot clearer in my submission,
20 both in the legislation and in the case law that is applying it, if that were really what the
21 court thought was going on.

22 MR JUSTICE MORRIS: Okay.

23 MR PICKFORD: So then we see the reasoning, finally, on page 485.

24 MR JUSTICE MORRIS: Paragraph?

25 MR PICKFORD: 34, 35 and 37.

26 So what it is saying is the point that I made to the Tribunal before, which is that, yes,

1 Gmail may be conveying signals but then in 35 it cannot be concluded that it is an ECS
2 because the service doesn't consist wholly or mainly in the conveyance of signals;
3 and, 37, the fact that it participates, again, in the transmission is not sufficient to enable
4 that service on a technical level to be regarded as consisting wholly or mainly in the
5 conveyance of signals.

6 Remember -- this is a slightly different point to the one that I just made -- remember
7 on Ofcom's approach, the court would need to be really careful here because it is
8 coming to conclusions about what is sufficient to mean that the Gmail service is wholly
9 or mainly the conveyance of signals.

10 If you were employing Ofcom's approach, the first thing you have to do as a court is
11 make sure you have identified whether there is any content in there at all, because
12 you have got to get rid of that content and then only apply the test to the remainder,
13 and there is no consideration of that in this test, in this case, at all. In my submission,
14 it would be --

15 MR JUSTICE MORRIS: Can I just --

16 MR PICKFORD: Whereas my definition --

17 MR JUSTICE MORRIS: I am not sure, to be honest, I fully understand the facts in the
18 Gmail case to the extent that what, other than the conveyance of signals, did the Gmail
19 service comprise? It wasn't content as we know it.

20 MR PICKFORD: No, that is true. That was not being argued to the court. I accept
21 that. So there is only so far I can go with the submission that I made, but my point is,
22 on my approach, you always fail the ECS test if you are not wholly or mainly about the
23 conveyance of signals. So you can just stop at that point.

24 MR JUSTICE MORRIS: Yes.

25 MR PICKFORD: Whereas on Ofcom's test, in order to delimit the particular set of
26 things that you are supposed to be comparing, you always have to be quite careful

1 that you are comparing the transmission element against things that are definitely not
2 content. That is my only point.

3 Yes, it wasn't argued in the particular case but you would expect, if that was really the
4 test, to have seen a greater hint of it in at least some of the cases because it would
5 be, in my submission, a very sophisticated and different thing to do.

6 Okay, I have gone through the case law and as I said, one of the reasons why I am
7 also going to the Gmail case is in case there is some reversion tomorrow to the
8 analysis in the decision, because what it does make very clear is the decision's
9 analysis doesn't work.

10 MR JUSTICE MORRIS: Okay.

11 MR PICKFORD: Just the identification of an involvement in conveyance of signals is
12 not enough.

13 MR JUSTICE MORRIS: Yes.

14 MR PICKFORD: So let's draw those strands together for my positive case before then
15 dealing with some of the points from Ofcom.

16 MR JUSTICE MORRIS: Yes.

17 MR PICKFORD: We say Sky TV doesn't constitute an ECS because it is not wholly
18 or mainly consisting in the conveyance of signals, and that is on the plain words of
19 section 32(2A)(c), read on their face and equally read in the light of all the preceding
20 EU legislation and indeed the previous version of the 2003 Act.

21 The principal feature of Sky, I think not disputed in these proceedings, is content. It is
22 content that predominates. I took the Tribunal to the sums that are spent on content
23 as opposed to transmission, in particular, but also other ancillary elements. One saw,
24 also, the comparison between transmission and other elements of Sky. I can't really
25 say more about it in open court but the point is there.

26 Can I just check one thing. **(Pause)**.

1 | What I am quite permitted to say is that the transmission element is very small relative
2 | not only to content but also relative to all the other aspects in this service --

3 | MR JUSTICE MORRIS: The rump.

4 | MR PICKFORD: -- that has been described as "the rump" -- the software, the
5 | hardware --

6 | MR JUSTICE MORRIS: Just remind me, is within the skeleton or the notice of
7 | appeal -- I can't remember, I have seen the comparison between content and
8 | transmission. Is there somewhere where you actually do say what the relevant
9 | comparison between -- I am looking, I suppose, at paragraph 16 of the skeleton. 16(a)
10 | is then compared perhaps with 23, but do you somewhere say --

11 | MR PICKFORD: So I think you might be referring to -- I have not got 16(a) out but
12 | I think you might be referring, Sir, to paragraph 69 of the 2020 submission which is on
13 | page 289.

14 | MR JUSTICE MORRIS: One minute. Yes.

15 | MS BURGESS: Is that what you mean?

16 | MR JUSTICE MORRIS: Yes, okay.

17 | MR PICKFORD: So that shows 2019's expenditure.

18 | MR JUSTICE MORRIS: That is some indication of the rump versus transmission
19 | comparison.

20 | MR PICKFORD: That's right.

21 | MR JUSTICE MORRIS: Fine.

22 | MR PICKFORD: Of course that was never the focus of Ofcom's --

23 | MR JUSTICE MORRIS: No, we know that, but if we get to that point, and if you have
24 | a point on that point, that might be relevant.

25 | MR PICKFORD: So the most that can be said, we say, of transmission is that it is
26 | a minor and ancillary element to the core and therefore it is to be treated in the way

1 that we saw in the UPC case.

2 MR JUSTICE MORRIS: Yes.

3 MR PICKFORD: We have already discussed the extent to which Sky does or doesn't
4 play a role in transmission. I am not going to go over that again. What is clear is it is
5 neither distinct nor autonomous, and there is no finding to the contrary by Ofcom.

6 That, in my submission, is one of the reasons why it is impossible, in fact, to imagine
7 a situation where, under Ofcom's approach of putting to one side content, and then
8 finding that we are an ECS, to then say "Don't worry, that only applies to the ECS bit
9 of this service, it doesn't apply to the content bit", because it is all one service. It would
10 be nonsensical and our customers wouldn't understand if we wrote to them and said,
11 "Right, well, we are now sending you an end-of-contract notification in relation to your
12 transmission service". They would be like, "What? There isn't a separate transmission
13 service". A lot of them probably don't even have a great deal of understanding of what
14 are in fact highly complex routes by which the transmission takes place.

15 MR JUSTICE MORRIS: Yes, I see that. Yes.

16 MR PICKFORD: So we say then that it follows from the uncontested facts that we, in
17 providing Sky TV, do not provide an ECS, and I have also made -- but I am not going
18 to repeat but this is a core part of my case -- that on our approach, the exclusion from
19 the scope of what is treated as an ECS for content services makes sense. It is very
20 simple: you apply the test and then at the end of it you say "Okay, is it content? Well,
21 insofar as it is content, we are going to regulate that separately". That is easy, it makes
22 sense.

23 So now we are going to go on to Ofcom's analysis and there are three aspects I would
24 like to deal with: firstly, briefly, the language of the provisions, but obviously I have
25 developed most of that already; secondly, the European case law but, again, I have
26 obviously developed most of that already; then, finally, the purpose of the provisions

1 and the purposive construction.

2 I think now -- if I may now go to 4.30 today if that is what the Tribunal is

3 expecting -- I think, with the indulgence of the Tribunal, I should be able to finish by

4 11.00 tomorrow.

5 MR JUSTICE MORRIS: That is good.

6 MR PICKFORD: So I think we are definitely on track.

7 MR JUSTICE MORRIS: Good, all right.

8 MR PICKFORD: I may be even able to help the transcript writer and stop speaking

9 quite as fast as I have been. I do apologise to the transcript writer.

10 MR JUSTICE MORRIS: You must not apologise.

11 MR PICKFORD: I appreciate I have been going faster than I would

12 ordinarily because --

13 MR JUSTICE MORRIS: Take your time. We set you a task this morning which did

14 obviously extend everything and I understand, so, yes.

15 MR PICKFORD: I think just briefly, but the Tribunal will move me on if you have

16 already got this, if you go back to the authorities bundle, tab 9, page 140, volume 1.

17 So we are in volume 1, tab 9, page 140. We are looking -- so this is the Framework

18 Directive, Article 2(c) and, as I said, this is in some ways the originating legislation

19 from which this all stems, and I say that if you read 2(c) it is very hard to read that

20 consistently with the approach that Ofcom adopts. It would need to talk about

21 hypotheticals and what would be the case, the natural reading of those provisions,

22 which explains the wholly or mainly test and then has the exclusion at the end for

23 content services, is the one that I have articulated and not Ofcom's.

24 MR JUSTICE MORRIS: Okay.

25 MR PICKFORD: Secondly --

26 MR JUSTICE MORRIS: You seem to be saying that the order of the wording there is

1 consistent with your case that you, first of all, asked the question, does a service,
2 singular, consist wholly or mainly and, if it doesn't, that is the end of it?

3 MR PICKFORD: Yes, and then you go on for the further exclusion, and I say you
4 really have to mangle those words to get the Ofcom approach, which is, step one, put
5 to one side anything to do with content; step two, apply to that hypothetical service the
6 test.

7 MR JUSTICE MORRIS: Yes, we have the point, I think. Yes.

8 MR PICKFORD: On the case law, I think, actually, I have said probably everything
9 I need to say as we went through the case law in response to the questions to the
10 Tribunal. So I don't think I need to say more on that.

11 So we then turn to the purposive construction.

12 MR JUSTICE MORRIS: Yes.

13 MR PICKFORD: There is a fair bit to say on this. It is the very substantial part of
14 Ofcom's case, and so there is a fair bit for me to say in response but, as I said, I think
15 we are doing well for time.

16 So what we are left with, we say, is the submission from Ofcom that for alleged
17 consumer protection purposes, we need to, what we say is do damage to Parliament's
18 words and the European legislature's words and the judgments of the Court of Justice
19 and distort the meaning of ECS because of the alleged desirability of bringing Sky TV
20 within the General Conditions.

21 Now, Ofcom develops that point, firstly, by reference to the explanatory memorandum
22 to the ECWT Amendment Regulations that I took the Tribunal to the explanatory
23 memorandum for, and they refer to the fact that, in the same memorandum, it is said
24 that the EEC Directive seeks to ensure effective consumer protection and
25 engagement. We don't demur from that.

26 At paragraph 48, they also identify recitals in that Directive that identify the merits of --

1 MR JUSTICE MORRIS: Paragraph 48 --

2 MR PICKFORD: Paragraph 48, so that is of their skeleton. I am just explaining, just
3 in very very summary terms what the argument is against me before going on to
4 address it.

5 MR JUSTICE MORRIS: Yes.

6 MR PICKFORD: The essence of their argument is that they say, well, Sky's
7 interpretation undermines the benefits that we say would flow from the EOCNs and
8 therefore we, Ofcom, must be right. I say there are five flaws in that argumentation.
9 The first is one that I have largely already made. It seeks to interpret a definition that
10 is fundamentally unchanged since 2002 in the Directive, and 2003 in the Act, by
11 reference to regulations that were made in 2020, the best part of two decades later,
12 and I will go on to explain why that is illegitimate.

13 MR JUSTICE MORRIS: Okay, sorry, can I just, in my own mind, these are recitals in
14 the EECC Directive?

15 MR PICKFORD: That's right.

16 MR JUSTICE MORRIS: And they weren't there in the original Framework Directive?

17 MR PICKFORD: That's right.

18 MR JUSTICE MORRIS: Okay.

19 MR PICKFORD: That is point one and I will develop that.
20 Point two is that we say that Ofcom's approach goes beyond the limits of a -- or the
21 legitimate limits of a purposive construction because it is not actually an attempt to
22 construe the language. We say what it ultimately ends up being is an attempt to distort
23 the language to achieve a collateral aim, ie they are identifying something that they
24 say is good and just asserting that Ofcom -- sorry, that Parliament must have intended
25 it but there is not the proper link back to Parliament's words and Parliament's
26 intentions. That is the second point.

1 MR JUSTICE MORRIS: Yes.

2 MR PICKFORD: The third point is that Ofcom's approach fails to respect the rule
3 against doubtful penalisation because there are potentially severe financial penalties
4 if you don't do what you are supposed to do if you are an ECS.

5 Fourth, I say that it ignores the actual purpose of the scoping provisions because the
6 definitions, in my submission, are all about making it clear that there is a distinct line
7 between who is and who is within and who is without the regulation. That makes
8 sense; and I say that Ofcom's approach leads to very bizarre results -- I gave you one
9 example on my slide and I am going to give you some other examples in my
10 submissions.

11 Then my fifth point is going to be that there is not any need to do damage to the
12 definition of ECS, to capture services which are not within it for two reasons. Firstly,
13 it is the bundles point that I said I was going to come back to. Parliament has already
14 brought within the scope of what Ofcom is permitted to set conditions for content
15 services, when they are bundled with an actual ECS such as broadband or phone. So
16 if that is what we were doing, we could be regulated. Secondly, Parliament has open
17 to it the option of legislating by other separate mechanisms and that is precisely what
18 the government is proposing in the Digital Markets, Competition and Consumers
19 [rights] Bill. It is going to subject everyone who is not an ECS to essentially the same
20 rules. That will be the instrument that applies to Sky. That is the right way of doing it,
21 not the wrong way by saying that that we are actually ECSs, which has a whole host
22 of other ramifications, not merely that we have to comply with these particular
23 ramifications -- apply with these particular obligations in the EOCNs.

24 So the first point I can do very briefly because I have largely covered the ground for
25 that already -- I set it up when we went through the legislative framework. I showed
26 the Tribunal that, whilst the definition in the EEC Directive at EU level and the 2020

1 Regulations at UK level was amended -- so the definition of an ECS -- those definitions
2 were to make clear two things: that Internet access services, firstly, and, secondly,
3 number-based interpersonal communications services were captured by the definition.
4 That is what they are all about and it is no part of Ofcom's case that Sky TV is either
5 of those.

6 So the core part that applies to Sky TV, that it is common ground between me and
7 Mr Holmes, has remained the same since 2002 in the directive, 2003 in the Act, and
8 I showed the Tribunal the explanatory memorandum that underscores that point.

9 So the only legitimate purposive construction we say that arises from the 2020
10 Regulations is that, save for two special cases, they were intended not to amend the
11 class of services -- though included in an ECS. What you cannot do is look to other
12 provisions that introduced new obligations.

13 MR JUSTICE MORRIS: But those recitals, which appear to set out -- in the EECC
14 Directive, which were not in the Framework Directive -- they are not limited to the two
15 new categories that have been brought in, are they? The new categories --

16 MR PICKFORD: No, no.

17 MR JUSTICE MORRIS: I mean, are they not setting out expressly what might be
18 behind the original provisions?

19 I don't know, it is just a bit odd, isn't it? Because if it is legitimate to construe Article
20 2(4) of the EECC Directive by reference to those recitals, it seems odd that you cannot
21 construe article -- when you come to Article 2 (a) of the 2002 Directive, you have got
22 to ignore their existence.

23 MR PICKFORD: Well, I am not sure -- I may have made a point that I didn't mean to
24 make. What I am saying is that the 2020 Regulations --

25 MR JUSTICE MORRIS: You mean you are talking about the new amended Act?

26 MR PICKFORD: Yes.

1 MR JUSTICE MORRIS: Yes. The section 32(2), as amended?

2 MR PICKFORD: Yes. Okay, so that Act has developed the definition.

3 MR JUSTICE MORRIS: Yes, to include two different means of transmission,
4 effectively.

5 MR PICKFORD: Yes. As regards the definition of an ECS, those are the only changes
6 and those changes --

7 MR JUSTICE MORRIS: Are not relevant.

8 MR PICKFORD: -- are irrelevant.

9 So where that takes us back to is that the definition of an ECS has to mean exactly
10 the same thing in relation to Sky's pay TV services, insofar as it is applicable, today
11 as it meant in 2002.

12 MR JUSTICE MORRIS: Yes.

13 MR PICKFORD: In 2002, we did not have all of the recitals to do with specific
14 consumer protection claims arising from the obligation to send end-of-contract
15 notifications.

16 MR JUSTICE MORRIS: Yes.

17 MR PICKFORD: Therefore, as laudable as they may or may not be, they were never
18 part of the statutory context by which we would have interpreted this particular
19 legislation were we back in 2003.

20 MR JUSTICE MORRIS: Yes.

21 MR PICKFORD: Because we wouldn't have known about them.

22 MR JUSTICE MORRIS: I have understood the point you are making. It just seems
23 a bit odd.

24 MR PICKFORD: It seems an odd point?

25 MR JUSTICE MORRIS: Not odd that you make the point but it is a bit odd that here
26 we are today, section 32(2A), the current version, right, is an implementation of an EU

1 directive, EEC Directive, Article 2(4); Article 2(4) itself has to be read in the context of its
2 statutory background, including its recitals and therefore, standing on its own, one
3 might conclude that it is a perfectly appropriate way to -- forget the history for the
4 moment. I know the point you are making. I am looking at today. You might think it
5 would be a perfectly orthodox approach to construe section 32(2) in its current form
6 by reference to matters including the recitals to the Directive, and you are saying we
7 can't do that because this is a re-enactment of something that was there before, before
8 the recitals were there.

9 MR PICKFORD: It depends which recitals of the Directive you are concerned with,
10 the latter directives.

11 MR JUSTICE MORRIS: I am talking about the purposive recitals -- the content
12 transmission regulation split was there initially, wasn't it, in the recitals?

13 MR PICKFORD: Yes.

14 MR JUSTICE MORRIS: You are talking about the consumer protection recitals.

15 MR PICKFORD: Yes, I am.

16 MR JUSTICE MORRIS: That is the oddity. I understand what you are saying and why
17 you are saying it, it is just a rather odd result --

18 MR PICKFORD: Well --

19 MR JUSTICE MORRIS: -- because it almost -- anyway, go on.

20 I think it is a rather odd result.

21 MR PICKFORD: Well, in my submission it is a required result because of the history.
22 If we didn't have the history, and we had contemporaneous regulations that were
23 introduced at the same time as the enactment itself, then it would be legitimate to say,
24 okay, well, this is all part of the same package --

25 MR JUSTICE MORRIS: Can I ask you this question? Can it be said that those
26 recitals -- I can't remember the numbers and you can point me to them -- the consumer

1 protection recitals, the new ones, could be said to relate to other parts of the EECC
2 Directive and not to the definition; in other words, that they have been introduced for
3 some other purpose?

4 MR PICKFORD: Yes.

5 Sorry, I just want to clarify because I had both comments from the left and the
6 question. You were referring to the consumer --

7 MR JUSTICE MORRIS: I think we need to pull the document up. Can you tell me
8 where the relevant Directive is?

9 MR PICKFORD: So the EECC Directive --

10 MR JUSTICE MORRIS: Authorities, bundle 1.

11 MR PICKFORD: Authorities, bundle 1.

12 MR JUSTICE MORRIS: Tab?

13 MR PICKFORD: It is in the B section at tab 13.

14 MR JUSTICE MORRIS: 13. Can I just see --

15 MR PICKFORD: That is the Code.

16 MR JUSTICE MORRIS: Perhaps you can just point to me the directives that you say
17 we should not take account of. It is the recitals relied upon by Ofcom, isn't it,
18 presumably?

19 MR PICKFORD: That's right. So --

20 MR JUSTICE MORRIS: Which are they?

21 MR PICKFORD: I am afraid I haven't --

22 MR JUSTICE MORRIS: No, 283 is bundling. We might need to go to their skeleton.

23 MR PICKFORD: It is recitals 260, 265, 273.

24 MR JUSTICE MORRIS: Right, and those are the ones said to be relied upon -- it might
25 be spelled out in the Ofcom defence or skeleton. It is the skeleton.
26 260, 265, 273 and 277.

1 MR PICKFORD: That's right.

2 MR JUSTICE MORRIS: And you say we can't take that into account?

3 MR PICKFORD: Yes, I do. Yes.

4 What they all go to, effectively, is to underpin the provision, the article that we find at

5 105(3), which is on page 167.

6 MR JUSTICE MORRIS: Okay.

7 MR PICKFORD: Which deals with national law or a contract providing for automatic

8 prolongation of fixed duration contracts, and so those recitals are supporting the

9 introduction of, within Article 105, specific provisions that deal with contract duration

10 and termination.

11 MR JUSTICE MORRIS: Fine. Which is what the EOCN goes to?

12 MR PICKFORD: Exactly.

13 MR JUSTICE MORRIS: Am I right, there was no equivalent provision of 105(3) in the

14 Framework Directive?

15 MR PICKFORD: That's correct.

16 I do apologise if I didn't make myself clear before, but my submission is, of course we

17 can use the recitals in the amending Directive to interpret new legislation that gives

18 effect to new provisions such as Article 105 -- of course we can, and I certainly didn't

19 mean to suggest otherwise if that is the impression I gave.

20 But what we can't do, because they are concerned with something totally different --

21 MR JUSTICE MORRIS: That is the point that I hadn't picked up on. I hadn't picked

22 up on the point that your submission is that those recitals deal with something other

23 than Article 2(4).

24 MR PICKFORD: Exactly, whereas recital 15, which was --

25 MR JUSTICE MORRIS: Yes, okay.

26 MR PICKFORD: -- the one I took the Tribunal to, that is the one that deals with the

1 definition. So that is the one that you can have regard to, albeit it is irrelevant in this
2 context, but you could if it mattered.

3 MR JUSTICE MORRIS: Right, okay.

4 MR PICKFORD: So that is the essence of the submission. I would like, if I may, to go
5 to one of the cases in the authorities to support what I say. It is at tab 36.

6 MR JUSTICE MORRIS: That will be in bundle 2A, 36?

7 MR PICKFORD: 36, yes. This is a House of Lords case concerning provisions in
8 deposit protection legislation, from the headnote.

9 MR JUSTICE MORRIS: Yes.

10 MR PICKFORD: The facts really don't matter for the principle that I am going to take
11 the Tribunal to, which is to be found on page 667.

12 MR JUSTICE MORRIS: 667 is the beginning of the authority.

13 MR PICKFORD: I beg your pardon, 697. Sorry, I misspoke.

14 MR JUSTICE MORRIS: Thank you.

15 MR PICKFORD: 697, and we have on that page, in the judgment of Lord
16 Browne-Wilkinson, an analysis of whether the prima facie meaning of provisions has
17 been displaced and we see in the second paragraph down there this statement:
18 "I can deal with the second of those reasons quite shortly."
19 Those reasons being that an order of 1991 was a legitimate aid to construction, and
20 one sees that just up in the previous paragraph.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: "Although there are occasions on which regulations can be used as
23 an aid to construction of the Act under which they were made, that is only where the
24 regulations are roughly contemporaneous with the Act being construed. In my
25 judgment, regulations made by a government department and rushed through in order
26 to counteract an identified mischief, ([namely] the accountants' device which is the

1 subject matter of this appeal) throw little if any light on the meaning of an Act passed
2 by Parliament four years previously."

3 We say that is a fortiori the case where there are two factors that go in our favour in
4 relation to our facts: the statutory definition has been around for nearly two decades
5 and, secondly, there isn't any, as there was in this case, any suggestion that the
6 mischief at which the regulations are aimed has any bearing -- I think this is the point
7 where we were at slight cross-purposes or, sorry, where I failed to make myself
8 clear -- where the mischief has any relationship to the definition of ECS, the principal
9 feature test that we are needing to construe. They are totally separate and therefore
10 they cannot help us to understand --

11 MR JUSTICE MORRIS: If those recitals don't go to article 2(4), then I can see that.
12 Yes, carry on.

13 MR PICKFORD: The second point is we say there are other basic principles of
14 purposive interpretation with which Ofcom's argument fails properly to engage.

15 In essence, as I said in my outline, what they are essentially saying is, well, look over
16 here, there are some laudable aims to the notification that are required and therefore
17 we have to interpret this other provision over here as widely as we can to make sure
18 that Sky comes within it but that is not actually how, in my submission, statutory
19 construction works.

20 If I could turn up, please, the case on which Ofcom itself relies, which is tab 19 of the
21 authorities, so I think is that is in your second volume, and this is the case of Black.

22 Does the Tribunal have that case?

23 MR JUSTICE MORRIS: I do. I do. Volume 2, tab 19, page 355.

24 MR PICKFORD: Yes, and if I can just ask the Tribunal, please, to read the headnote
25 for -- the first two-thirds of it, down to the words "... enforcement of smoke-free
26 provisions in prisons", which gives the context. **(Pause)**.

1 MR JUSTICE MORRIS: Okay.

2 MR PICKFORD: One sees the context there is, it is about the application of
3 non-smoking rules and whether they should apply in prisons, and one can well see
4 that there might be very sensible arguments that they should apply in prisons, just as
5 they apply in other cases, but the Secretary of State had said that they didn't bind the
6 Crown and therefore they were not of any application.

7 So there is then an analysis of the provisions, how they should be interpreted and
8 whether they should be interpreted in a way which ensured that in fact they did apply --

9 MR JUSTICE MORRIS: To the Crown?

10 MR PICKFORD: To the Crown, yes.

11 So we see at page 371, in the judgment of Baroness Hale at paragraph 36, the
12 following analysis:

13 "It is certainly open to this court to clarify the test, even if such clarification has the
14 effect of modifying the understanding which some, at least, may have had of it. We
15 can begin with some simple propositions. (1) the Crown is not bound by a statutory
16 provision, except by express words or necessary implication; (2) this is not
17 an immunity from liability, strictly so-called, but a rule of statutory interpretation; (3) the
18 goal of all statutory interpretation is to discover the intention of the legislation; (4) that
19 intention is to be gathered from the words used by Parliament, considered in the light
20 of their context and purpose. In this context it is clear that Lord Hobhouse of
21 Woodborough's dictum in [R (Morgan Grenfell)] that a necessary implication is one
22 that necessarily follows from the express provisions of the statute construed in their
23 context, must be modified to include the purpose as well as the context of the
24 legislation. (5) In considering the intention of the legislation, it is not enough that it is
25 intended for the public good or that it would have been even more beneficial for the
26 public if the Crown were bound."

1 So we say on our facts, just as the desirability of reducing the harm caused by
2 smoking -- sorry, I can go on to say the ultimate conclusion was that the Crown was
3 not bound, so the regulations didn't apply.

4 We say, just as in that case, where the desirability of reducing harm caused by
5 smoking didn't justify expanding the scope of the health act of the Crown, nor does the
6 common ground that end-of-contract notices may be often desirable -- not necessarily
7 always but they are suggested as such by Ofcom -- the legislation which introduced
8 them, as I said, post dates and has nothing to do with the particular provisions with
9 which we are concerned. So it is just not good enough to say, well, wouldn't it be good
10 if we could interpret it this way. You are not permitted to do so because what you are
11 required to do is just to focus on the language and what Parliament intended at the
12 time. So desirability, again, is basically irrelevant.

13 Third point --

14 MR JUSTICE MORRIS: Go on, yes.

15 MR PICKFORD: -- is the principle on purposive readings and that they should not
16 offend against doubtful penalisation. So that is set out in Bennion -- sorry Bennion is
17 at tab 30 of the authorities bundle.

18 MR JUSTICE MORRIS: Which is in this same bundle --

19 MR PICKFORD: Thank you.

20 MR JUSTICE MORRIS: -- as far as we are concerned.

21 MR PICKFORD: Good.

22 MR JUSTICE MORRIS: Right at the back.

23 MR PICKFORD: If we go to 574, page 574, we see section 26.4, "Principle against
24 doubtful penalisation":

25 "It is a principle of legal policy that a person should not be penalised, except under
26 clear law. This principle forms part of the context against which legislation is enacted

1 and, when interpreting legislation, [the] court should take it into account."
2 There is then a development of the extent of the principle in the following passage and
3 it goes over the page to the section which is entitled "Strength of presumption", in
4 terms of the bit that I say is relevant on this case.
5 Could I ask the Tribunal, please, just to read that bit to yourselves.
6 MR JUSTICE MORRIS: Which bit?
7 MR PICKFORD: It is a relatively long passage, which is why I am going to ask you --
8 MR JUSTICE MORRIS: Just, it's from the words "The presumption against ..."
9 That box?
10 MR PICKFORD: From the words, "In the context of legislation, the principle of
11 a person ..."
12 Sorry, I read the first part.
13 MR JUSTICE MORRIS: Let's just -- you want us to read from page 574, from
14 "Comment", until where?
15 MR PICKFORD: Until over the page, just above "Chancing one's arm".
16 MR JUSTICE MORRIS: Oh right, okay. **(Pause)**.
17 Yes.
18 MR PICKFORD: So the reason why I asked the Tribunal to read that is because I do
19 appreciate it is a relatively long passage. It is actually a convenient way of avoiding
20 me taking you through lots of authorities to get to the propositions.
21 The essential point is that it is an indicator of great weight. That is the point made by
22 now Lord Sales, then Mr Justice, in the Bogdanic case.
23 It is not absolute, so there may be circumstances in which one can offend against the
24 principle of doubtful penalisation, but it is a factor and indicator of great weight if it
25 does.
26 MR JUSTICE MORRIS: Can you just explain to me, or remind me, how this applies

1 on the facts?

2 MR PICKFORD: I will, indeed.

3 So on these particular facts in this case, we have not been penalised. However,
4 obviously what we are seeking to do is construe a provision which will be of general
5 applicability to the UK at large and there is the ability for Ofcom to impose penalties
6 on anyone that breaches the General Conditions and refuses to do effectively what
7 they have been told to do as an ECS. For your reference, that is in the authorities
8 bundle 1, page 30, and it is section 96C(4)(d)(i) of the 2003 Act.

9 MR JUSTICE MORRIS: Okay.

10 MR PICKFORD: So if you are an ECS, you need to be careful, you need it make sure
11 that you do everything that you are supposed to do under the law or you may well get
12 fined.

13 MR JUSTICE MORRIS: Okay.

14 MR PICKFORD: We say that we are not even in the realm of a provision for which
15 there are two equal interpretations. So the general principle which I just showed you
16 a reference to, Bennion, is that when you have got two equal interpretations, you
17 should err in favour of the one that avoids penalisation, rather than the one that brings
18 penalisation about, and that is where they are equally weighted.

19 In our situation, it is not just that they are equally weighted; we say you have to do
20 immense damage to the words on their face to get to Ofcom's construction.

21 MR JUSTICE MORRIS: Yes.

22 MR PICKFORD: In so doing, if Ofcom are right, Sky, although it has not been fined
23 on this occasion, would be exposed to potentially serious financial consequences.
24 That is yet a further reason why one should not be taking the words in the statute and,
25 for no better word, mangling them.

26 MR JUSTICE MORRIS: I was going to use the word "twist", but you have used

1 "mangle". There we are.

2 MR PICKFORD: To achieve what they say is a particular policy aim because of the
3 effectively unintended consequences of doing so, in particular penalising or opening
4 for penalisation companies that might fairly think that the regulation didn't apply to
5 them.

6 MR JUSTICE MORRIS: Yes.

7 MR PICKFORD: Sir, I would like, if I may, to pause, if that is a convenient moment for
8 the Tribunal?

9 MR JUSTICE MORRIS: I think it is, particularly in view of the fact that, if I may, I would
10 like to just raise a number of points for both of you to consider overnight. Some are
11 for one of you, some are for both of you. I think I have about maybe five or six points,
12 or we have.

13 MR PICKFORD: Would it be okay, Sir, if I sat down?

14 MR JUSTICE MORRIS: Of course, and you will pick it up on the transcript anyway
15 but you can make a note.

16 The first question is, on Sky's approach to the construction, in what circumstances will
17 the content exclusion make any difference to the conclusion in respect of any -- not in
18 this case but in respect of any particular service?

19 That is the question, and just by way of expansion -- this is not the question -- if the
20 transmission element is less than 50 per cent, and I am using 50 per cent for the
21 wholly or mainly point, Sky says that the service on its construction cannot be an ECS;
22 if, however, looking at the whole service, which Mr Pickford urges us to do as the first
23 step, and one comes to the conclusion that that service is more than 50 per cent
24 transmission, then if one then applies the content exclusion, you would come to the
25 same answer. So that is the first question.

26 The second question is, if it is the case that in the decision Ofcom did not do any

1 analysis of the relative proportion of the overall service as between transmission and
2 other non-content elements ("the rump"), and assuming, I think, for the purposes of
3 this question that Ofcom's construction is correct, what are we to do in that situation?

4 What is the solution?

5 Thirdly, considering services such as provided by Virgin and BT which we understand
6 at the moment are regarded as ECSs and who do provide end of contract notices, if
7 Sky's construction is right, is there a prospect that, if and when those services move
8 or increase the volume of their content, they would no longer be an ECS?

9 Fourthly, in respect of providers such as BT and Virgin who provide transmission and
10 content, assuming they do, when an EOCN is given, is that notice given in respect of
11 all of its services or part only?

12 Fifthly, and we may have already touched upon this, is there any indication of the
13 relative importance for a Sky pay TV customer (with a dish) of (a) Sky linear content,
14 (b) third party linear content, and (c) on demand content? I don't know how that would
15 be expressed, whether it is in terms of consumer survey or amounts of programming
16 being watched or the like, I don't know.

17 Finally, is it either party's contention that the Sky pay TV service with a satellite
18 transmission is in fact a unique model compared with all the other methods of
19 television provision?

20 Finally, I think appendices 13 and 14 to the March 2020 submissions may not have
21 been included in the bundle and it may be useful for us to see them.

22 Those are our questions.

23 MR HOLMES: That is very helpful Sir, and we will address them overnight.

24 May I trespass on the Tribunal's time for just one moment to make a factual correction
25 which is of relevance to some of the questions as they relate to other pay TV providers.

26 I had understood on instruction that BT and TalkTalk provided some pay TV content

1 over DTT. The situation is, as I now understand it, that they did some years ago do
2 so but now, while some of their set-top boxes have provision to watch DTT content, it
3 is only free to air DTT content. They no longer circulate any pay TV content via DTT,
4 and I wanted to correct that because it was a factual error that --

5 MR JUSTICE MORRIS: That is fine, but they do provide content through broadband,
6 do they?

7 MR HOLMES: They do provide content through broadband but my understanding is
8 that is purely an over-the-top service --

9 MR JUSTICE MORRIS: That can be clarified tomorrow. I think at the moment, at this
10 time of day --

11 MR HOLMES: Of course, I only wanted to correct it now.

12 MR JUSTICE MORRIS: Mr Holmes, it is perfectly proper of you to do so. I suspect
13 at the moment in my limited capacity I might not be fully digesting that, but thank you
14 for correcting that.

15 Very well. Can I thank everybody for sitting a little bit late. We will start at 10.00 and
16 we will conclude tomorrow.

17 Thank you very much.

18 **(4.40 pm)**

19 **(The hearing adjourned until 10.00 am the following day)**

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