IN THE COMPETITION APPEAL TRIBUNAL Case No 1100/3/3/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd October 2008

Before:
THE HON. MR. JUSTICE WARREN
(Chairman)

MICHAEL BLAIR QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

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

- v -

OFFICE OF COMMUNICATIONS Respondent

Supported by

BRITISH TELECOMMUNICATIONS PLC ("BT") Intervener

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

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

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

HEARING DAY ONE

THE CHAIRMAN: Before we begin I would just like to say a few words. We are grateful for the thorough and thought provoking skeleton arguments, although perhaps BT have had something of a free ride. It might be helpful if I indicated at the outset a couple of points which we will be particularly keen to hear about.

The central issue we divined from the skeletons is whether the USD entitled Oftel to regulate by imposing conditions at what has been referred to as "the wholesale level". The appellants say that the retail regulation is more intrusive than wholesale regulation and since the USD is concerned with lightening the regulatory touch it cannot be that the Regulator must now use the more heavy handed approach of retail regulation. We would like to hear more in due course about why it is said that retail regulation is more intrusive; it is not self-evident and Mr. Blair will be addressing an analogy to you in a moment.

In this context we will also be interested to have developed the appellants' reasons for saying that other regulatory powers available and dealt with in Part 5 of Ofcom's skeleton argument are not adequate to meet the points made against it other than the argument of despair that it will be far too late. As to that we hope to hear more about the argument of despair on the merits of the facts. A detail on that – is there now agreement that the number of providers of information to OSIS is 73 rather than the 1800 or so suggested by the appellants?

The next point that particularly concerns us is this: assume for the moment that the appellants are correct on their interpretation of Article 8(1) of the USD so that "guarantee" is not to be read as imposing an obligation on the designated person but is simply to indicate the object of the designation is to ensure compliance by the Member State with its obligations. In that case designation by itself does nothing. Presumably the authority and power to impose particular conditions is then found in Article 3(1) of the USD, but a particular condition can only be imposed by Article 3(2) of the Authorisation Directive which throws us in to Article 6(2) of the same Directive; but Article 6(2) refers to the persons, and I quote: "… designated to provide universal service". If BT is not regulated at the retail level then how is it said to be designated to provide an element of the universal service, in this case directory inquiry services.

We are sure that part of the submissions will focus on that concern, and the related wording in Article 8(1) of the USD itself which refers in its second sentence to designation of undertakings "… to provide different elements of universal service". Those are particular concerns that we have and we are sure you are addressing them but they are very important.

We are listed for two days, some members of the Tribunal, that is to say all of us, are concerned that we should end as early as possible on Thursday afternoon - if we need to go the

whole day I suppose we will have to but it is going to prove very difficult if we cannot finish in the two days allocated.

MR. BLAIR: On the first issue identified by the Chairman, that is to say the wholesale point, the suggestion appears to be that wholesale is bad whereas retail is good. This is a point we need to explore in the context of the Chairman's first essential issue. The wholesale/retail split appears to be derived from the concentration on the end user in a number of the European texts, but I personally am puzzled as to why it follows from that that wholesale has to be bad. Suppose that there is a journey that has to be made by train from London to Edinburgh and the end user is in Edinburgh. If the train stops at York, that is to say it does the wholesale element of it and there is a connecting service from York to Edinburgh, that is to say getting to the retail user, why is the first leg to York a bad leg? Further, allied to that point if the counterfactual, as mentioned in the skeleton argument of using regulatory powers, particularly under the Competition Act is said to be adequate for overseeing journeys from London to Edinburgh, why is it not adequate to use the Competition Act for the connecting service from York, and why does that not make the first leg from London to York legally valid? So there is a puzzle which has been perplexing me and I hope to be enlightened on it and I think the other members of the Tribunal are equally puzzled. I am sorry to interrupt you.

MR. O'FLAHERTY: I apologise for interrupting as well. I represent BT. My leader, Mr. Thompson, has an unavoidable conflict and will not be with us either today or tomorrow and he sends his apologies.

MISS ROSE: As the Tribunal know I appear for the appellants with Mr. Kennelly and my learned friend Mr. Vajda appears for Ofcom with Mr. Peretz and Fiona Banks, and Mr. O'Flaherty appears for BT today.

As the Tribunal has already identified there is a single issue of law in this appeal. The question is whether or not Oftel (Ofcom's predecessor regulator) had the power to impose on BT the condition known as USC7. Under that condition BT is required to maintain a database containing the directory information for all subscribers who have been allocated telephone numbers by communications providers and to make that database available to any person seeking to provide directory inquiries facilities on a fair and cost orientated basis. What makes this case highly unusual is that it is Ofcom which is seeking to argue that that condition is *ultra vires* and it is The Number and Conduit (the appellants in this case) who are seeking to argue that it was validly imposed upon BT.

Again, as the Tribunal knows, the appellants who are now commonly owned, both operate directory inquiry services; I am sure that the Tribunal will be familiar with the 118 118 advertising of the Number, and their business model depends on being able to purchase access

to the comprehensive database of information maintained by BT, and to that end they have a licence agreement with BT.

Following a decision of the European Court of Justice in the *KPN Telecom* case, the appellants became concerned that BT was overcharging them for access to the database because they were concerned that terms that they were being offered were not cost oriented as USC7 required. So the appellants referred disputes to Ofcom. The first was referred by The Number on 7th September 2005, and the second was referred by Conduit on 20th December, contending that BT's charges exceeded the amount that they were permitted to charge under USC7.

As the Tribunal knows the decision of Ofcom was that in fact USC7 itself was *ultra vires* and therefore BT was under no obligation at all to supply the data under USC7.

If we can just look at the material passages in Ofcom's determination. It is in the bundle at tab 8. If we go to p.152, at the bottom of the page, para. 1.20 there is the summary of Ofcom's conclusions.

> "We have concluded that USC7 is unlawful for the reasons set out in section 5. As a result, we have determined that BT is not required to provide access to the OSIS database under USC7. No issues can therefore arise in relation to the consistency of BT's charges for OSIS with USC7."

As indicated there the detailed reasons for Ofcom's conclusions are set out at Part 5 of the decision, if you turn forward to p.202. Ofcom's position, under the head "Ofcom's provisional finding", in fact that has remained Ofcom's position throughout. The numbering is slightly odd here because we have 5.1 to 5.4 and then we start again at 5.0. It is the 5.0:

> "In summary, we considered (as advised by Leading Counsel) that USC 7 does not properly implement Article 5 of the USD. Our concern was that the mechanism in USC7 fails to impose an obligation on any undertaking (eg on BT as a designated provider) to guarantee that at least comprehensive DG service is provided to all end-users. This position may be contrasted with other universal service obligations imposed on BT, such as under USC1, which properly implement provisions in Chapter II of the USD, such as Article 4.
>
> 5.1 As a matter of domestic law, we explained that a conclusion that USC7 does not implement Article 5 of the USD leads automatically to the conclusion that it is beyond Ofcom's powers and hence unlawful.
>
> 5.2 Furthermore, we considered that the particular provision in USC7.4 relating to the regulation of charges was incompatible with the USD or with the provisions of the 2003 Act that implement the USD. In other words, even if the rest of USC7 were compatible with the USD, USC7.4 itself is flawed and unlawful."

It is fair to say that over time, as reflected in that Determination and then in Ofcom's defence and in its skeleton argument, the reasoning adopted by Ofcom, with respect, has not always been entirely consistently expressed, but that is not particularly significant. What matters is the pure question of law, whether Ofcom is right or wrong in concluding that USC7 does not properly implement Article 5 of the USD, and that accordingly, as a matter of domestic law it is *ultra vires*.

As the Tribunal knows, it is the position of the Appellants in this case that the consequences of the *volte face* taken by the Regulator here in relation to USC7 are very serious for the Appellants. Ofcom has decided that the regulatory provisions which underpin the Appellants' business model are unlawful. The Appellants have invested hundreds of millions on the basis of that regulatory system. It is quite right, and it is something that Mr. Justice Warren has already pointed out this morning, that Ofcom is consulting on alternative possible forms of regulation and has hypothesised that the regulatory gap could perhaps be filled by an SMP condition, for example, or an access related condition. But the problem remains for The Number which is that the regulatory uncertainty that has been caused by Ofcom's position places into a highly unfortunate and damaging situation.

I know that the Tribunal has pointed out the question of the consequences, but with respect, in my submission, although the question of the consequences is obviously of great interest and significance, it is not a question that this Tribunal needs to decide today, because the question before this Tribunal is purely the legal question, whether or not this condition was permitted within the terms of the Universal Services Directive.

THE CHAIRMAN: I understand that, but it was somebody else who raised the point on your side of the court.

MISS ROSE: Sir, of course that is right, and of course we do say the consequences are damaging.

THE CHAIRMAN: Are we to ignore them or to take them into account?

MISS ROSE: Sir, in my submission, they cannot make any difference to the outcome.

THE CHAIRMAN: We will leave that then.

MISS ROSE: So far as the 73 is concerned, can I just deal with that point. We accept that currently there are 73, but it may be as a result of the consultation that Ofcom is currently undertaking, that the nature of the party on which the obligation is placed may change, and it may at that point be a much, much greater point. Of course, whether it is 73 or 1,800, you are still talking about a far, far different proposition from a situation where you can enter into a single licence agreement with one party which is obliged to maintain a comprehensive central database. If we take the figure of 73 as the agreed common figure, we submit that there is no comparison in terms of the feasibility of the business model.

It is our position in the consultation, which of course is still pending and which has been stayed pending this appeal, that in the absence of any regulatory obligation on BT to maintain the comprehensive database there will simply be chaos.

The question before the Tribunal today turns exclusively on the proper interpretation of provisions of the common regulatory framework and in particular the Universal Services Directive. As the Tribunal will have seen, although it is our primary position that this issue can be resolved in favour of the Appellants we do recognise that this is a compelling case for the reference of preliminary questions to the European Court of Justice under Article 234 of the EC Treaty.

We note that both Ofcom and BT have remained silent on that question, even though we developed it in some detail in our skeleton argument. We have simply no idea whether they consider that a reference might be appropriate or whether they oppose it, but I shall be submitting that this is a case which, unless the Tribunal is absolutely confident it can be resolved in our favour, cries out for a reference.

THE CHAIRMAN: Rather than from the Court of Appeal?

MISS ROSE: Precisely. Of course, it is extremely important that the regulatory uncertainty should be resolved as quickly as possible. The worst of all worlds is a situation in which this court makes a decision. The decision of course will be a decision purely on a question of law. It is a novel point, there is no authority on the point. It is inevitable that we would obtain, or the other side would obtain, permission to appeal to the Court of Appeal, and at that stage the Court of Appeal would have to grapple with the question of whether there should be a reference to the ECJ. The result of that process would simply be to introduce at a minimum an additional six months delay into the process of resolving this question. If it is, and we submit it self-evidently is, a question of EC law that needs to be resolved it is in everybody's interests that it should be resolved as efficiently and quickly as possible, and the way to achieve that is with a reference from this Tribunal. I will return to the question of a reference at the end of my submissions.

With those introductory remarks, the submissions I am going to make will be organised as follows: first, a few brief comments about the applicable regulatory framework and the nature of the Universal Service Conditions, secondly, Oftel's decision to introduce USD7, then the domestic legislation, then the EC legislation and in particular our case on the proper interpretation of the Universal Services Directive, then our response to the arguments of Ofcom and BT, and finally the principles that are applicable to the question of whether a reference to the ECJ is appropriate and why we submit that this is an appropriate case for a reference.

So the first question is the nature of a Universal Service Condition. As the Tribunal knows, under EC law telecommunication services are governed by the common regulatory framework, which consists of the Framework Directive and a number of specific directives. The Tribunal has those directives in the first volume of authorities between tabs 2 and 6. If we just look at the index for the time being, there is the Framework Directive at tab 5 and then the specific directives, including in particular the Universal Services Directive.

The CRF is intended to constitute a single coherent regulatory scheme which pursues a number of aims. Two of those aims are central, and we submit are both engaged when considering the proper approach to the construction of the Universal Services Directive: first, the promotion of competition in the field of telecommunications, and secondly, the protection of the interests of consumers. As the Tribunal knows again, the principal directive with which we are concerned is the Universal Services Directive. That Directive has a social purpose. Its aim is to ensure that certain minimum services are universally available throughout the European Union at an affordable price to all end users so that certain people or classes of people are not excluded from the benefits of the technology of telecommunications, either by reason of social disadvantage or their geographical inaccessibility.

THE CHAIRMAN: Can I just ask you a question. It may be that the other members of the Tribunal will think this an idiot question. We see the word "universal", which I had understood to be a reference to the type of provision rather than its universality in reaching the community. Of course it is the objective to achieve that end, but when we see "universal service", the adjective describes "service" and not the target of the receipt of the service, I think – in other words, it does not just cover telephones, it covers directory services, and all the other things listed. Is that correct?

MISS ROSE: Yes. The idea is that these are the base minimum of services that should be accessible to everybody, so "universal" in the sense that everybody has access to these particular services.

THE CHAIRMAN: That is exactly what I do not think the word "universal" means. It may be that nothing turns on it, but I do just want to get this conceptually correct.

MISS ROSE: When we come on to look at the Directive itself it may become clear. I am going to take you in some detail through the recitals and the provisions, but that is certainly my understanding.

MR. VAJDA: May I just say, so far as we are concerned, "universal" means "universal" in both senses that you, sir, mentioned. In the fields of telecoms, "universal" in terms was qualifying a service, but also "universal" in the sense that Miss Rose said, which is available to everybody. One sees, and indeed BT point out in their skeleton, that this concept of "universal service" does not just apply to telecoms, it applies to energy, and so on.

THE CHAIRMAN: Thank you.

MISS ROSE: For example, we can see in the most recent review of the scope of universal service that the Commission has discussed whether or not broadband services should be brought within that concept. Essentially the sorts of factor they consider are – they have not made a decision on it – are we now at the point where we can say that people really cannot live without broadband because it has become such an essential part of people's daily existence, and if they are deprived of the opportunity to shop at Marks & Spender on-line their standard of living falls below an acceptable European minimum. I am parodying it, but that is the notion, that there are services that everybody should be able access.

So, for example, we see that one of the elements of the universal service is access. Everybody must be able to have access to a fixed line telephone. Another is the comprehensive directory enquiry service which must be available. That is, of course, universal in two senses: firstly, that all the numbers are supposed to be on it unless somebody has specifically asked for their number to be withheld for privacy reasons; and secondly, universal in the sense that everybody must have access to that service.

MR. BLAIR: May I just ask in that context, I should know, but if it is a mobile telephone is that within the scope of a directory enquiry or is it only fixed line?

MISS ROSE: No, everybody must be able to have access.

MR. BLAIR: So when you buy a SIM card you have to produce your name and address, do you?

MISS ROSE: There is not a comprehensive directory for mobile phones, but you must be able to access the directory enquiry service when calling from a mobile phone.

MR. BLAIR: Yes, there is outward only.

MR. VAJDA: I am instructed that the position is what is called an "opt-in", so you have a choice of opting in, you are not in unless you opt in, not opt out.

MR. BLAIR: Thank you.

MISS ROSE: There is, I believe, a current proposal that the Government has put forward as an anti-terrorism measure to require everybody to produce a passport when they get a mobile phone, because there has been a problem in the past of people with pay-as-you-go mobiles simply buying a pay-as-you-go mobile, using up the credit and planning a terrorist attack – we do not know if they all do that – and sticking it a bin.

That is the overall concept of a universal service. Then particular undertakings may be designated as providers of universal service, and as such placed under universal service obligations. We know that BT is a designated universal service provider and that its obligations as such include USC7, which is the controversial provision in this case.

That then brings me to the decision to impose USC7. If you pick up the bundle of documents we can see the consultation by OFT in 2003 at tab 11, 12th March 2003. Technically it is the Director General of Telecoms consulting, Oftel being his office. The relevant passage is at p.660 under the heading "Supply of directories and databases for provision of directory services". What is said here is:

> "3.60 This specific condition is required to ensure that at least one comprehensive directory and one comprehensive directory enquiry facility are available to end-users.
>
> 3.61 Under Article 5 of the Universal Service directive, all end-users should have access to at least one comprehensive directory and to at least one directory enquiry service. Furthermore, under Article 25, providers of publicly available directories or DQ services must also have access to the information required to compile such directories."

Then they refer to other conditions. Then at 3.64:

> "However, these general conditions will not be sufficient on their own for ensuring that the obligations under Articles 5 and 25 of the Universal Services Directive are met efficiently and transparently. Whilst they do allow for data to be passed between providers of [publicly available telecoms services], significant duplication of effort would be required for such providers to ensure that any end-user can access a comprehensive DQ facility and to supply any end-user upon request with a comprehensive directory."

That is the 73 providers point. If everybody who wants to provide a directory enquiries facility has to obtain their data from 73 different providers there is going to be a huge waste of resource and effort.

> "3.65 OFT is therefore of the view that BT should have a further universal service condition requiring it to provide access to its (comprehensive) DQ database to other DQ providers whether or not they are also providers of PATS. This specific condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8 (but not to those persons who do not have this obligation).
>
> 3.66 In OFT's view this condition will ensure that Articles 5 and 25 of the Universal Service directive are implemented in the UK in an efficient and effective manner, in that BT will be required to act as a central dissemination point for the directory information of all subscribers to telephone services in the UK.

> 3.67 The basis upon which BT supplies the matters required under the condition must be fair, objective, cost oriented and not unduly discriminatory. BT competes in the downstream market [and so forth] …
>
> 3.69 The imposition of this condition on BT is objectively justifiable and proportionate in that it is necessary to fulfil the requirements of Articles 5 and 25 … and paragraphs (d) and (e) of the Schedule to the Universal Service Order, namely that at least one comprehensive directory and one comprehensive telephone directory enquiry service shall be made available to end-users. This condition imposes obligations on BT only, because BT is in a unique position in that it already compiles a comprehensive DQ database …"

So that was what was said in the consultation. Then the Decision of 22nd July 2003 is at tab 10. If we go to pp.580-582 there is a useful potted history there of the changes in the regulatory scheme. First of all, there are two general paragraphs about the "Provision of universal service in the UK":

> "1.1 Universal service is a concept fundamental to the regulation of telecoms in the UK. It means that basic telephone services should be available to everybody upon reasonable request and at an affordable price."

That is the way that Oftel characterised the concept of a universal service.

> "These services are considered essential for everyone in current social and economic conditions …"

Then at 1.2 the point is made that under the previous regime universal service was dealt with through licence conditions, but then, as is explained under the heading, "The changing regulatory regime", under the new CRF licences will no longer be required, instead there will be a regime of general authorisation, and then it is said at 1.6:

> "In contrast, specific conditions can only be imposed on individual communications providers in particular circumstances, such as where a universal service designation has been made.
>
> 1.7 The Universal Service Directive replaces the RVTD in that it deals specifically with universal service and other end-user issues. Whilst the two Directives are similar in a number of respects, there are differences and the Director therefore needs to set new conditions which will achieve the objectives of the Universal Service Directive."

Then if we go to p.583, "Designation of BT and Kingston", which is a Hull based company that we do not need to be concerned with. So BT is designated as a universal service provider. Then the specific conditions are discussed at Chapter 3 starting at 585, and directories are dealt

with at 595 starting at para.3.74. I would invite the Tribunal to read down to the end of this passage on p.597. It is in similar terms to the passage that we looked at in the Consultation Paper, and essentially the case is made that this obligation on BT to compile and maintain the comprehensive database is necessary to ensure that the obligations under Articles 5 and 25 are met.

Then going on to p.606, there is commentary on the responses to the consultation, and at p.611, para.5.41, in relation to directory information database and directories:

> "BT argued that OFT was exceeding the scope of the EC Directives by requiring it to provide directories, the contents of it subscriber databases and on-line access to the database to certain parties."

We know that BT chose not to challenge this decision in 2003 and it came into effect.

Then we see USC7 itself at p.626 of the bundle:

> "7.1 BT shall maintain a database containing Directory information for all Subscribers who have been allocated Telephone Numbers by any Communications Provider. BT shall ensure that the database is updated on a regular basis.
>
> 7.2 BT shall … on request, make available the matters at A and B",

and the key one here is B:

> "To any person seeking to provide publicly available directory enquiry facilities and/or directories the contents of the database in machine readable form."

Then 7.4 which Ofcom separately identify as being *ultra vires*:

> "BT shall supply the items in subparagraph (a) and (b) of para. 7.2 on terms which are fair, objective, cost oriented and not unduly discriminatory."

Then there is to be agreement and if no agreement the Director may determine the format in accordance with his dispute resolution functions which explains how it was that the matter came before Ofcom.

So in essence it is our case that this decision was a perfectly lawful decision for the Director General to have made. In order to make that good we need to look first at the domestic legislation and then at the European ----

THE CHAIRMAN: It is not challenge as a decision if there is power to make it, is it?

MISS ROSE: I beg your pardon, Sir?

THE CHAIRMAN: It is not challenged by Ofcom now other than on the basis that there was no power to make it?

MISS ROSE: That is correct. Nobody suggests that it was disproportionate, unreasonable, and inappropriate. The pure question is one of *vires*. We then come to the domestic legal framework which we can pick up in the first volume of authorities. The 2003 Communications

Act in a somewhat ungainly printout, sections of the Act are at tab 13. As the Tribunal knows under this Act Ofcom was established as the new regulator to fulfil the role of the National Regulatory Authority required under the framework directive and provision made for Ofcom to regulate telecoms in the UK in accordance with the provisions of the Common Regulatory Framework.

The duties imposed on Ofcom, p.302, General duties of Ofcom.

> "(a) to further the interests of citizens in relation to communications matters; and
>
> (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition."

There the Tribunal sees the twin aims that are referred to at the outset clearly set out, the promotion of competition and consumer protection. Those we say are themes that flow through the whole of the CRF. The significance of that point, and I am going to return to this in more detail, is that the submissions made by Ofcom in this appeal that the universal services obligations are to be strictly construed as being an exception to the light touch regulation which is required under the authorisation directive. It is said what the CRF was attempting to achieve was a liberalisation of regulation and that therefore a strict approach to the permissible obligations under the USD is appropriate and necessary, and we submit that is simply a misreading of the CRF, we are going to look at it in detail but in my submission what you have clearly in that scheme is parallel aims being pursued at the same time by the community – certainly the promotion of competition and the removal of unnecessary regulation, but in parallel with that a recognition that simple competition alone cannot necessarily deliver the consumer benefits and social benefits and, of course, the economic benefits that the Community considers to be appropriate.

MR. BLAIR: You said a minute ago when talking about the CRF, that there were two main aims, one of which was competition and the second of which was protection of consumers.

MISS ROSE: Yes.

MR. BLAIR: Both of those seem to be rammed in to 3(1)(b) with the words: "where appropriate" between them. So they do not seem there to be of a similar size, one is regarded as a "where appropriate" subset of the other. What is the reason for 3(1)(a)? Is that part of the CRF as well?

MISS ROSE: Ofcom's functions go beyond telecoms, and they include matters such as the regulation of the content of broadcasts. So the interests of citizens in relation to communications matters includes not only, as it were the economic interest of consumers in receiving services, but also matters such as inappropriate content of broadcasts, political advertising and so forth, huge areas in which Ofcom is involved.

MR. BLAIR: On the point about 3(1)(b) is it your case that those two stand evenly or does "where appropriate" make competition a servant consumer protection?

MISS ROSE: That is certainly the way it is put, and of course that would further my argument on the appeal even more, because the argument that is being put against me is that the consumer protection purpose of the Universal Service Directive is to be regarded as strictly construed exception to the liberalisation of the regime under the Authorisation Directive and we say on any view that is a misreading of the legislative scheme.

We then turn to s.4 where we have Ofcom's duties for fulfilling Community obligations and s.4(1) "This section applies to the following functions of Ofcom - (a) their functions under Chapter 1 of Part 2" and that is the relevant part we are concerned with. You can also see that at (c) there is a reference to dispute resolution, and then at subsection (2) "It shall be the duty of Ofcom in carrying out any of these functions to act in accordance with the six Community requirements which give effect amongst other things to the requirements of Article 8 of the Framework Directive, and are to be read accordingly. The first Community requirement is a requirement to promote competition."

Then at (c) "in relation to the supply of directories capable of being used in connection with the use of electronic communications networks, or electronic communications services."

Then subsection (5), the third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union.

So again you can see the aims of promoting competition on the one hand and protecting the interest of citizens on the other.

We then go to the powers of Ofcom to set conditions. We start at p313, s.45 "Power of Ofcom to set conditions".

> "(1) Ofcom shall have the power to set conditions under this section binding the persons to whom they are applied in accordance with section 46".
>
> (2) A condition set by Ofcom under this section must be either –
>
> (a) a general condition; or
>
> (b) a condition of one of the following descriptions –"

And the first is "a universal service condition." Then at subsection (4):

> "A universal service condition is a condition which contains only provisions authorised or required by s.67."

Then if we go to s.46 "Persons to whom conditions may apply", subsection (3):

> "A universal service condition, access-related condition, privileged supplier condition or SMP condition may be applied to a particular person specified in the condition."

Then at subsection (5):

> "The particular person to whom a universal service condition is applied –
>
> (a) except in the case of a condition relating to matters mentioned in subsection (3) of section 66, must be a communications provider designated in accordance with regulations under that section;"

MR. BLAIR: We can forget 66(3) can we?

MISS ROSE: Yes, we can, sir.

THE CHAIRMAN: There is no mention of the person being designated as universal service provider either in the Directive, or in this Act, is there? Those words "designated as a universal service provider" do not appear in the legislation do they?

MISS ROSE: I do not think so. We are going to look at the relevant provisions so we will see exactly what they say.

THE CHAIRMAN: I only ask because it is a phrase that we have seen in Ofcom's consultation and it is a phrase that you have used, and it is a shorthand.

MISS ROSE: Yes, it is a shorthand and it may be a misleading shorthand I agree, with respect. So if we go to s.65, there is the heading "Universal Service Conditions", now just for the sake of completeness we have in the print-out here down to s.69, in fact this section goes down to s.72. I do not think we need to look at all the provisions but we have got them here.

THE CHAIRMAN: We have got the book.

MISS ROSE: Fine, I do not need to hand it up then.

MR. BLAIR: I do not have it.

THE CHAIRMAN: You had better hand them up then. (Documents handed to the Tribunal)

MISS ROSE: Just so everybody has the complete section under the head "Universal Service Conditions." We start with s.65, which places a duty on the Secretary of State.

> "The Secretary of State must by order ("the Universal Service Order") set out the extent to which the things falling within subsection (2) must, for the purpose of securing compliance with Community obligations for the time being in force, be provided, made available, or supplied throughout the United Kingdom."

The relevant one is (e) which is directory enquiry facilities capable of being used for purposes connected with the use of such a network or service. We say that it is significant here that what the universal service order does is not to designate functions or obligations that may be imposed on a person but rather to designate the end objective. The objective is that whatever obligations you impose they have the effect that a comprehensive directory enquiry facility will be provided. So it is ends based not means based.

Then "Designation of universal service providers" that face does appear here, it is at s.66 – it is the heading to s.66.

"(1) Ofcom may, by regulations make provision for the designation of the persons …" rather brilliantly the rest of s.66 is cut off. I think we will have to look at it in the grey book.

> "Ofcom may, by regulations make provision for the designation of the persons to whom universal service conditions are to be applicable."

MR. VAJDA: Just in relation to the Chairman's question, Mr. Peretz has very helpfully pointed out that in the definition section 151 of the Coms. Act, which I sadly do not seem to have photocopies, p.969, there is a definition of designated Universal Service Provider and that says "… person for the time being designated in accordance with regulations under s.66"

THE CHAIRMAN: Yes, as a person to whom Universal ----

MISS ROSE: Yes, there are obligations for that. Then we come to s.67 and this is the key provision in terms of the domestic legislation because this is the section that gives Ofcom the power to set the Universal Service Condition and in national law terms, the question for the Tribunal is whether what Ofcom has done falls within the scope of this section or not. So Ofcom may set any such Universal Service Conditions as they consider appropriate for securing compliance with the obligations set out in the Universal Service Order. If we then go to the Universal Service Order which is in the next tab, tab 14 – keep s.67 as it were open and go on to the Universal Service Order – p.390, para. 3 of the Order,

"… the things falling with in s.65(2) of the Act must be provided, made available, or supplied throughout the United Kingdom is set out in the Schedule to this Order."

Then para. 3 of the Schedule, "Directory Enquiry Facilities":

> "At least one comprehensive telephone director enquiry facility shall be made available to end-users, including users of public pay telephones."

So if we look at s.67, together with this order, what we find is that Ofcom has the power to set any condition which it considers appropriate to secure that at least one comprehensive directory enquiry facility shall be made available. I do submit that the wording of that is significant because neither the Act nor the order made under the Act is limiting the power to set the condition as being on the person who is actually going to provide the directory inquiry facility themselves. It is simply whatever condition is necessary to secure that that service is provided to end users. My submission is – and I am going to come on to the European legislation – that that reflects the flexibility that the Directive is intending to give to the National Regulatory Authorities to decide what is the most efficient and proportionate method, given our own national conditions, given the state of competition in our own domestic market, for ensuring that this end result is achieved. The European Community does not care how the

United Kingdom ensures that a comprehensive directory enquiries' facility is available, what they care is that it is available.

We submit that all of the results oriented language that the Tribunal can see in the Statute and in the order reflects that concern.

THE CHAIRMAN: If you were wrong on European Law then this ----

MISS ROSE: It would have to be read down. I am not submitting to the Tribunal that this would be a situation where there was an irreconcilable incompatibility with UK and EC law, I could not make that submission. What I submit, of course, is that Parliament and the Secretary of State correctly construed European law, and it would be surprising if they did not given that that is what they were trying to do with the benefit of a lot of expert input.

Also, of course, it must be borne in mind that the Community was not legislating in a vacuum, that the United Kingdom is participating in the legislative process that results in the production of the CRF; there is interplay. I am going to show the Tribunal in a minute that the Directive itself expressly recognises the fact that there is already competition in the provision of directory enquiry services, and I submit that that is significant because it means that when the Community produces the Universal Services Directive it does so recognising that in some countries, and certainly in the United Kingdom, there was retail competition in the directory enquiries market.

One thing I do submit about the domestic regime is that Ofcom were wrong when they submitted or found that this statutory scheme means that Ofcom can only impose a Universal Service Condition which is required by Community law, and we can see that statement by Ofcom in its decision, if we go back to the core bundle … (After a pause) We will go back to that when I find the reference. In any event, Ofcom made the finding that they only had the power to impose a Universal Service Condition which was required by EC law. That is manifestly not what the 2003Act says. What the 2003 Act says is that Ofcom can impose any condition which it considers to be appropriate to secure compliance with the obligation in the order, which is not quite the same thing, there is an element of discretion.

THE CHAIRMAN: So you say they can do anything if they think it is sensible?

MISS ROSE: Appropriate; they can do anything that is appropriate to secure compliance with the end result.

THE CHAIRMAN: Provided it is not expressly prohibited?

MISS ROSE: Exactly, that is the point, it is the margin of discretion between the power to do anything that is not forbidden and a limited power only to do what is expressly required. It is quite clear that s.67 does give that margin of discretion to the Regulator, and how odd it is to be standing here arguing against Ofcom that they have a margin of discretion.

THE CHAIRMAN: You no doubt will relish it!

MISS ROSE: Yes. So as the Tribunal has already seen, the Director General, who was performing a transitional function before Ofcom got up and running in 2003 considered that USC7 was necessary to secure compliance with some of the obligations under the Directive for the reasons that we have seen that were set out in the 2003 decision, because the Director General concluded that it was necessary to require BT to compile and maintain the central comprehensive database with all the directory information in it, all the subscriber information in it, which could then be supplied to those who were going to supply the publicly available directory enquiries service, because without that you would have duplication, inefficiency, people scrabbling to get comprehensive data. You clearly need somebody who is going to perform that function and he concluded that it was not necessary for that obligation to extend to an obligation on BT to offer the comprehensive directory enquiry service to end users, because the market was already catering for that. There was already sufficient competition in the market for the provision of the comprehensive directory enquiry service to be ensured provided the database was available. What people like The Number needed was access to the database and then they would compete with each other and secure for end users the affordable comprehensive directory enquiry service. So, in my submission, this is a paradigm of proportionate, sensible, regulation, because the Regulator is stepping in only where it is necessary to prevent inefficiency and duplication of costs. But he is not intervening in a situation where competition will already supply consumer benefits and is therefore minimising the distortion of competition. But Ofcom say that that eminently sensible result is prohibited by the provisions of CRF and, in particular, the Universal Service Directive. We say that that is a very surprising conclusion for Ofcom to come to, and I am now going to turn to the CRF to see if it is right.

The starting point is the Framework Directive, which sets the overarching structure for the CRF, and you have that at tab 5 of the authorities' bundle. Recital 5 – we do not need to read it now but I simply draw it to the Tribunal's attention because it is a useful summary of what the CRF is, what it consists of and what it is intended to do.

Then if we go in the body of the Directive itself, Chapter 1 "Scope, Aim and Definitions". We have the scope and aim of the Directive at Article 1: "This Directive establishes a harmonised framework for the regulation of electronic communications services …" and other facilities and so forth.

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

At a later stage, when I come on to the question of a Reference it is significant, in my submission, that what we have here is harmonising provisions. The intention is not to set any floor but to achieve a harmonised system throughout the Community and in that situation in particular it is my submission that obviously the ECJ is best placed to decide what ought to be the standards to apply throughout the Community, and that is particularly so because there are a number of factors I will return to later. Then at Article 2 we have various definitions including a definition of universal service at para. (j):

> "The minimum set of services defined in [the Universal Service Directive] of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price."

So there you can see why I characterised the universality as being the availability of the service to everybody.

Then Chapter II establishes the National Regulatory Authorities, and Chapter III establishes the tasks of the National Regulatory Authorities, in particular Article 8 sets out the policy objectives and regulatory principles and, in particular, the duties under which the NRAs operate, and Article 8(2):

> "The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*:
>
> (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
>
> (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
>
> (c) encouraging efficient investment in infrastructure, and promoting innovation;"

And so on. So again we can see the aims that I referred to earlier. Then at para.(4) under here:

"The national regulatory authorities shall promote the interests of the citizens of the European Union by *inter alia*

(a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC."

So there you can see very clearly at para.2 the aim for the promotional competition and at para.4 the promotion of the interests of citizens *inter alia* by ensuring the provision of Universal Service, and again we say that structure is wholly incompatible with the approach that Ofcom advocates where they say that light touch regulation is the prime aim and the universal service is to be strictly construed as an exception to that is quite wrong. It is not

simply the point about provision of universal service and itself being one of the principal aims of the whole of the framework, but also the duties that are imposed on the NRAs in terms of the promotional competition include ensuring there is no distortion or restriction of competition and that again we submit would be incompatible with the system that Ofcom submits applies under the Universal Service Directive where Ofcom is seeking to argue that the Universal Service Directive is so prescriptive as to the type of obligation that can be imposed upon a universal service provider that if the market cannot do it the only universal service condition that can be provided is the whole hog retail obligation and they say you cannot have a provision where a gap is plugged so that a combination of the Universal Service obligation and the operation of competition ensures the provision of the Universal Service and affordable price. That, I would suggest is Mr. Blair's analogy – the train going to York, and then on to Edinburgh, because it is our case that it would be disproportionate, or contrary to one of the fundamental policy aims of the Universal Service Directive to suggest that under that Directive the Regulator could only regulate the whole of the journey direct to Edinburgh even where that was unnecessary and could not just regulate the connecting service and allow the market to regulate the on journey to Edinburgh.

We then turn to the Authorisation Directive.

THE CHAIRMAN: Well that may be right, but regulate by what? Because the Framework Directive is to do with all sorts of other instruments including existing competition law.

MISS ROSE: Yes, of course.

THE CHAIRMAN: So you are making a leap which is that the Universal Service Directive has to be construed as though it was a duty under that Directive to promote competition.

MISS ROSE: Yes.

THE CHAIRMAN: Which is not necessarily logically necessary.

MISS ROSE: My submission, I hope, is a little more subtle than that. It is not that there is a duty to promote competition through Universal Service conditions but that when considering what is the proportionate and appropriate Universal Service condition to adopt the Regulator must have in mind the desirability of minimising any distortion in competition.

THE CHAIRMAN: Absolutely.

MISS ROSE: That is the point, so that if ----

THE CHAIRMAN: He can only exercise the powers that he has in promoting that objective.

MISS ROSE: Of course.

THE CHAIRMAN: So in a sense your submission assumes the conclusion that you want to reach because you are assuming ----

MISS ROSE: I am distressed by that, I hope it is not right.

THE CHAIRMAN: You are assuming that it can be done through the Universal Service Directive which involves construing it first.

MISS ROSE: No, my submission, what I am doing when asking the question "How do you construe the Directive?" to do so in the light of the principal aims of the Framework, and say that given you have a regulatory framework, which is the two themes running through it are promoting competition, minimising distortion of competition on the one hand, protecting consumers on the other, it would be surprising if that framework did not give powers to the Regulator that were sufficiently flexible to permit the most proportionate and appropriate method of protecting consumers that does not result in unnecessary distortion of competition. We say that would be a surprising result, so I hope it is not a circular argument. It is a purposive construction.

The oddity of Ofcom's position is that even though they do not dispute that the method of regulation chosen by Oftel is efficient, proportionate, does what is necessary, plugs the regulatory gap nevertheless to say it is not permissible, and the question is why not? What is the policy reason why you cannot do this, and none has ever been convincingly provided. It would appear from the position adopted by Ofcom and BT that the Community has simply arbitrarily decided that this type of condition is not permissible. It is no answer to that to say "Oh well, we might be able to impose this kind of condition on BT as an SMP condition for example, because a whole different set of hurdles have to be gone through before an SMP condition can be imposed and they may or may not be met. The point about Universal Service is not to protect parties like The Number, or consumers against abuses of significant market power, but to ensure the provision of the Universal Service in the most proportionate way we say with the minimum of interference to competition.

Now then turning to the Authorisation Directive, that is at tab 3. The CRF replaced the old system which was based on licences with a lighter touch regulatory system where there would be a general authorisation of all electronic communications networks with certain general conditions that applied. We can see this starting at recital 1 where it is said that:

> "The outcome of the public consultation on the 1999 review … has confirmed the need for a more harmonised and less onerous market access regulation for electronic communications networks and services throughout the Community."

So here we are trying to promote competition with a lighter touch regulation. Then at 7:

"The least onerous authorisation system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new electronic communications services and pan-European communications networks …"

Then we come to Article 3(2) and these are provisions, of course, that Ofcom relies on:

"The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) …"

– and those are the words that need to be highlighted:

"… only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act."

So the general rule is there is just going to be a general authorisation but without prejudice to provisions under Article 6(2). If we come to Article 6(2) on p.46:

"Specific obligations which may be imposed on providers of electronic communications networks and services under [various Articles] or on those designated to provide Universal Service under the said Directive shall be legally separate from the rights and obligation sunder the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation."

Again, in my submission, that scheme is wholly inconsistent with Ofcom's suggestion that universal service obligations are to be strictly construed as an exception to the general authorisation regime. Again, what you have in this Directive, just as you had in the Framework Directive, is the pursuit of the parallel aims. You promote competition by light touch regulation but without prejudice to that in a separate aim being pursued you have the universal service obligations which are to be separately set out and imposed on particular undertakings. So consumer protection is not an exception it is a part of the principal aims of the scheme.

If we just look at how Ofcom puts its case on this, it is in their skeleton argument, which is in the core bundle at tab 2, paras. 33 to 37. If the Tribunal reads paras. 33 to 37 you can see the argument there made by Ofcom that licensing was to be replaced by general authorisations and then it said that specific obligations are intended to be exceptions and they say that is clear from recitals 7 and 8 of the Authorisation Directive, if we go back and look at those provisions.

THE CHAIRMAN: I may be being very slow but what turns on this particular point, because one first of all has to decide what the Universal Service Directive means, which is not a matter of strict or un-strict construction, and then having decided what it means you apply the words of Article 6 to the Authorisation Directive. What is the difference between the parties once the Tribunal has decided what the Universal Service Directive means?

MISS ROSE: The question is how you approach the construction of the Universal Service Directive.

THE CHAIRMAN: It is not an exception.

MISS ROSE: Indeed it is not, Sir, I wholly agree.

THE CHAIRMAN: It is a separate document that has to be construed in the context of the whole.

MISS ROSE: But the argument that Ofcom are putting forward is that they say it is appropriate when asking what obligations are permissible, particularly under Article 8 of the Universal Service Directive Ofcom's argument is that when you are asking what obligations are permissible you have to take a strict view because these types of obligations are an exception to the general rule that all you are supposed to have is a general authorisation; that is their argument. We submit that is simply wrong, it is not an exception at all, it is a parallel principal aim, and that of course is reflected in the very fact that you have a whole Directive dealing with it, this is a positive policy being pursued by the Community, not an exception to be strictly construed. Indeed, our submission is it is appropriate to give a broad construction to the provisions of the Universal Service Directive so as to promote the interest of consumers and minimalise the distortion of competition.

That then brings me to the key document, which is the Universal Service Directive itself at tab 2.

THE CHAIRMAN: Just before you do, has BT been designated to provide Universal Service, and if so where do I find that?

MISS ROSE: It is part of the Oftel decision, if you just take up the core bundle again. I am sorry I should have shown you the designation. The designation is at p.614. At the bottom of p.614 and the top of p.615 you can see the proposal to designate BT as a universal service provider and then proposing to set conditions 1 to 8. Now, I assume there must be another decision which says "We are doing that", but I do not believe it is in the bundle.

THE CHAIRMAN: I am terribly sorry, I want to track this one down because it goes to the point that I made in my opening remark, the problem being if you go to Article 6(2) we are looking at persons designated to provide universal service.

MISS ROSE: Yes.

THE CHAIRMAN: And if your construction of Article 8, when we get there, that the guarantor is not BT, it is the Member State, then where do I find a person who is designated to provide universal service in what has actually been done, because BT have not been designated to provide universal service, they have been designated to provide their database to your clients.

MISS ROSE: Sir, that of course begs the question what "designated to provide universal service" means.

THE CHAIRMAN: That is it exactly.

MISS ROSE: It is going to be my submission, I am coming on now to the Universal Service Directive, it is going to be my submission that what Article 8 of the Universal Service Directive envisages is that you may designate an undertaking to provide one element of universal service, and in my submission the compilation and maintenance of a comprehensive database is one element of the directory enquiries universal service. You can divide that universal service into two elements.

THE CHAIRMAN: Take it in turn, that is important.

MISS ROSE: I am sorry, it is important, Sir, I absolutely and respectfully agree it is important and that is where I am going now.

MR. BLAIR: But may we just establish before you leave this that the annex that you showed us at p.614, which is only a draft, was actually carried forward in to a real regulation? I imagine that Ofcom could answer that straight away.

MISS ROSE: It may be that we can ask them to return to it.

THE CHAIRMAN: I would like to see the statutory instrument under which that designation was made as well.

MISS ROSE: So now turning to the Universal Service Directive at tab 2, we are obviously going to need to spend a bit of time on this. Recital 1:

"The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service."

So there you see very clearly the point I have been banging on about at some length, that this is not an exception it is a parallel aim, so you have liberalisation in parallel with a regulatory framework which secures the delivery of universal service.

"The concept of universal service should evolve to reflect advances in technology, market development …"

Then going on to recital 5:

"In a competitive market, certain obligations should apply to all undertakings providing publicly telephone services at fixed locations and others should apply only to undertakings enjoying significant market power or which have been designated as a universal service operator."

Then at 7:

"Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price."

So there you see for the first time two things, first of all, the continuity between the universal service here and that in the old regime; and secondly, the concern being with the end result, not with how it is done, but with the fact that these services are to be made available.

Going over the page, recital 8:

> "A fundamental requirement of universal service is to provide users on request with a connection to the public telephone network at a fixed location at an affordable price."

We will see later that that is an obligation that is covered by Article 4. The rest of the recital deals in great detail with the specifications, the technical specifications of the connections to be provided. This is of some significance and goes to the point that I was starting to develop a few moments ago. Recital 9:

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

It is clear that recital 9 is talking particularly about the right to be connected to a land line. What is interesting here is that there is an express recognition here that you may designate one undertaking to provide the network and another network to provide the telephone service. Of course, that is a model that is very common amongst many utilities. To give a few examples, in relation to trains you have got one entity that is responsible for the track and the infrastructure and another entity that is responsible for running the trains. In relation to electricity you have got the company that is responsible for the grid and you have got another company that is responsible for delivering electricity to the customer.

What is significant about that is that it recognises that within one Article, and this is just talking about Article 4 here, you can perceive different elements of that particular universal service and that they do not all have to be provided by one entity, and that one of the entities providing them may be providing them on a wholesale basis, because you may well have a situation where you have a company that has an obligation to maintain a telephone network, another company that has an obligation to provide services, and the consumer may contract with the telephone company that provides the service, and that company may contract with the company that provides the network for access to the network to provide the service. That does not stop both of those entities being regarded for the purposes of recital 9 as providing elements of the universal service.

The significance of that can be seen when we have a look at the directory enquiries analogy because, as I said a little earlier, you can look at the obligation to ensure that a comprehensive directory enquiries facility is available to end-users and you can divide it into elements. One element is the construction, compilation and maintenance of a comprehensive database. If you like, that is the infrastructure, that is the network. Another element is the provision of directory enquiries services, people ringing up, "Can I put you through, do you want another number", these services. Those are both elements of the universal service.

In my submission, talking about the retail wholesale is actually a bit of a red herring. What is actually significant is asking whether the obligation that has been placed on BT is an element of the universal service and the answer is, yes, it is, because you cannot have a comprehensive directory enquiry service provided to end-users unless somebody is responsible for keeping a comprehensive database of subscribers.

THE CHAIRMAN: Is it part of your case then that recital 9 is speaking also to Article 5 as well as to Article 4?

MISS ROSE: It is not, but ----

THE CHAIRMAN: It is an analogy in your mind?

MISS ROSE: It is an analogy, yes. When we come to look at the body of the Directive the Tribunal will see that the same general provisions apply to all the different universal services that are enumerated, you have the same regulatory regime, so therefore the submissions that Ofcom makes as to why I must be wrong in relation to directory enquiries services would also have to apply to the connection to a land line universal service.

What I do submit is that this is indicative of this flexibility of approach and we see it in the substance of the Directive which we are going to come on to. That is recital 9.

THE CHAIRMAN: Can I just read recital 9 again. (After a pause) Thank you.

MISS ROSE: What is particularly interesting, if you look at the end of that recital, is that it specifically says that if you are a designated undertaking providing the network element you may be required to undertake construction and maintenance necessary to meet reasonable requests for access to publicly telephone services. Of course, *ex hypothesi,* the telephone services are being provided by a different entity. That is what this recital is envisaging. One entity is providing the network and another entity is providing the telephone services, but it is saying that the party that is providing the network can be obliged to do the construction and maintenance necessary to support the provision of the service. In my submission, that is closely analogous to the sort of obligation envisaged under USC7.

THE CHAIRMAN: So when you get to Article 8 you are going to say that clearly Article 8 authorises compliance with recital 9, *ergo* it has got a wider construction than Ofcom says?

MISS ROSE: Exactly, and Article 8 cannot be construed as being limited to permitting the designation of one undertaking to provide the entirety of a particular universal service from, as it were, cradle to end user. That is inconsistent with recital 9.

The next recital we need to look at is number 11:

> "Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion."

Then it talks about privacy protection. So that is the origin of why it is a good thing to have a comprehensive directory enquiry service.

Then we go to recital 18:

> "Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net costs which falls outside normal commercial standards. It is important to ensure the net cost of universal service obligations is properly calculated."

That then feeds through into one of the Articles that we are going to look at a bit later.

Then recital 21 deals with unfair burdens:

> "When a universal service obligation represents an unfair burden on an undertaking, it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs."

Then recital 26: this is a recital that is dealing, it is right to say, with significant market power and not with universal service obligations. Significant market power is also dealt with here. It is said half way through the recital:

> "Therefore, national regulatory authorities should have powers to impose, as a last resort and after due consideration, retail regulation on an undertaking with significant market power."

Then towards the bottom of the page:

> "However, regulatory controls on retail services should only be imposed where national regulatory authorities consider relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and public interest."

Ofcom quite fairly make the point that the policy that is reflected there of preferring wholesale regulation to retail regulation and regarding wholesale regulation as less intrusive than retail is in the context of SMP and of course they are right about that. In our submission, the policy that is reflected there reflects a much more general approach that is taken by the European entities, not just in the telecoms field but in many fields of competition law, and I know there are people in this room much more qualified than I am to talk about that. Just to give one example, the international roaming decision, in which the European Commission fixed both wholesale and retail rates for international roaming. It is widely regarded as being far more intrusive to seek to regulate the retail rates than to seek to regulate the wholesale rates.

Slightly mischievously, and I accept this is slightly mischievous, we have provided the Tribunal with the text of a speech that was made last week by David Currie, the Chairman of Ofcom, "The Ofcom Annual Lecture 2008", given on 15th October, where he talks about Ofcom's general approach to regulation. I do not want to make too much of this, but this is an indicator. At p.3 he is talking about Ofcom's general approach to regulation and he says just above the hole punch:

> "Ofcom's approach has three elements. First, a bias against intervention: a well functioning market is the best safeguard of the consumer interest. Second, where intervention is necessary, a preference for the least intrusive form of intervention; for example, price publication rather than price controls, wholesale pricing rather than retail controls. But thirdly, where intervention proves necessary being swift and decisive."

So it is simply a reflection, we submit, of the general approach that is taken which regards retail regulation as more prescriptive, more of a distortion on competition than wholesale regulation.

We submit that at the very least Ofcom need to explain why it is that this Directive permits only retail and not wholesale regulation. What is the policy that is being pursued? They have, we submit, failed to do that.

Can we turn to the body of the Directive at p.20, starting with Article 1:

> "… this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which needs of end-users are not satisfactorily met by the market.
>
> This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and

services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines."

We submit that Article 1.2 is particularly significant when you are looking at the construction of the Directive as a whole, because yet again here we see the concerns of the Directive being on the result, ensuring the availability to the end-user, not on the means by which that result is achieved and the reference to achieving that result without distorting competition.

That brings me back to a point that we were discussing earlier, that whilst I do not submit that the aim of the Directive is to promote competition, when seeking to achieve the aims of this Directive it is certainly the intention that competition should not be distorted.

THE CHAIRMAN: Should not be, sorry?

MISS ROSE: Distorted. The interference to competition should be the minimum necessary to ensure the availability of the universal service, the basic proportionality principle.

We then come on to Article 3 under the heading at Chapter II, "Universal service obligations including social obligations":

"Availability of universal service"

This is the core duty placed on the Member States by this Directive.

"Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions at an affordable price."

That is the core obligation, to ensure that the services are available. Then importantly para.2, that we rely upon:

"Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest."

We submit that that is a clear indication that it is not the intention of this Directive to prescribe to the Member States the particular means by which the universal service is to be achieved, or strictly to prescribe the type of obligations that can be imposed on universal service providers.

Consistently with the principle of subsidiarity, the principle of proportionality and the approach under Article 249 of the EC Treaty the Directive prescribes the end, but leaves the determination of the appropriate means to the Member States, and it does so expressly.

Then we come to the enumeration of the particular universal services that are covered by this Directive. The first of these is provision of access at a fixed location, so this is your fixed line telephone.

> "Member States shall ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking."

We submit that that cannot be read as referring only to the retail market for the reasons that I have already given in relation to recital 9. It must be apt to cover the situation where one undertaking maintains and constructs the network and another undertaking has a licensing agreement with that undertaking and provides services on the network where the consumer contracts with a service provider. That must be a structure that is envisaged by Article 4.

Then Article 5, "Directory enquiry services and directories":

> "1. Member States shall ensure that:
>
> (a) at least one comprehensive directory is available …"

THE CHAIRMAN: You will enlarge on 4 when we get to 8, there is quite a lot to take in?

MISS ROSE: Yes. Of course, Article 4 is to be read together with recital 9.

THE CHAIRMAN: It is not Article 4 being read with Article 9, it is Article 8 to be read with recital 9?

MISS ROSE: It is Article 4 and Article 8 being read with recital 9.

THE CHAIRMAN: We do not know anything about designation.

MISS ROSE: That is absolutely right. Article 5, here is the directory enquiry services and directories:

> "1. Member States shall ensure that:
>
> (a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;
>
> (b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones."

That is the requirement, and again the focus of Article 5, as the focus of all the materials we have looked at, is on ensuring the result, ensuring that the directory enquiry service is available to end-users, not on the means by which that is to be achieved.

THE CHAIRMAN: What does (a) envisage?

MISS ROSE: Sir, (a) envisages a phone book.

THE CHAIRMAN: Contrasted with (b), a phone book.

MISS ROSE: Yes, (a) is a phone book. Sir, (a) is of some significance and I am going to come back to it, but for the moment just note it is there and it is indeed the phone book.

The next provision we need to look at is Article 8, which is, of course, the crunch provision in this appeal.

> "Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 …"

So there you can see all of the universal services taken together, so anything that applies to Article 4 must also apply to Article 5.

> "… and, where applicable, Article 9(2) so that the whole of the national territory can be covered."

Then this:

> "Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory."

So there are two areas of controversy in Article 8.1, which are central to the determination of this Appeal. The first is what is meant by "to guarantee the provision", and the second is what is meant by "to provide different elements of universal service". My primary submission is that to guarantee the provision it does not matter who is right about that, because if I am right about the second point, which is elements of universal service, then on either construction of "to guarantee the provision" the number wins.

Let me just explore that for a second. There are two potential constructions of the phrase "to guarantee the provision". Ofcom says that what that means is that Member States have the power to designate an undertaking and that that undertaking must guarantee the provision of the universal service. In other words, it is the undertaking which guarantees. Our submission is that it is to be constructed "Member States may designate one or more undertakings so as to guarantee the provision". In other words, is it the Member State which is guaranteeing the provision of the universal service through the designation of the undertaking to provide a particular obligation, or is it the undertaking itself which must come under an obligation to provide universal service. That is the controversy in relation to guarantee, and I will come back to what the answer is in a second.

If I am right about the meaning of the elements of universal service it does not matter which it is, because my submission, as the Tribunal knows, is that expressly Article 8.1, and we can see it very clearly when you look at it together with recital 9, is not requiring the whole of any

individual universal service to be provided by one undertaking. Different elements of universal service can be provided by different undertakings. So in the example posited in recital 9 you may have one doing the network and one doing the telephone service. Sir, we say, by analogy, under Article 5, you may have one undertaking required to compile and maintain the comprehensive database, and another providing it to end-users.

We say that once you get to that position there is no obligation on the Member State to designate an undertaking for each element, because if the Member State concludes that if it designates a universal service provider to provide one element – in this case, compiling the database – the market will sufficiently deliver the affordable service to end-users without the need for further regulation, and then the Member State has fulfilled its obligation under Article 5, which is to ensure the result that the directory enquiry service is available to end-users.

MISS HEWITT: Without wishing to distract you too much at this point, are you able to say how some Member States, other Member States, have interpreted this because there is a suggestion that perhaps Ireland has done it in a orthodox way with Eircom.

MISS ROSE: Yes, madam, you are absolutely right. In its original Decision Ofcom did not accept that we were right about this, but they have now conceded the point. Ofcom accept that in Ireland the regulatory scheme is equivalent to USC7 – in other words, in Ireland Eircom has an obligation to compile the database, but not a retail universal service obligation, and there are competing directory enquiries providers, as there are in the United Kingdom. That is very significant when we come on to the question of whether you can decide this appeal against my clients without a reference to the ECJ, because we will be coming on to look at some of the case law and references. In my submission, where there is evidence, as there is in this case – indeed it is common ground – of divergent practice in the other Member States on an issue of important principle where there is no case law at all, it would, in my submission, be wholly inappropriate for this Tribunal to decide the matter in a way that is inconsistent with the practice of another Member State.

THE CHAIRMAN: So this whole argument depends on the compilation of OSIS being an element of the service?

MISS ROSE: Yes.

THE CHAIRMAN: Whereas if you look at Article 5, if it were not for your argument on recital 9 one might think that one element was the phone book, another element was the directory enquiry service. Those are different elements of what Article 5 requires, so they could be provided by different people. It is slightly strange – I am not saying you are wrong, at least not yet – that an element, as you would put it, of the overall provision of services, which the end-user could not care a penny about, is an element of the service. Presumably the electricity

supply of the provider is also an element and could be regulated by Ofcom if it felt it appropriate. I have taken that as an example. You would say everything that goes towards the production of the end product is an element of the service?

MISS ROSE: If you say, "I want to travel from London to Edinburgh, what are the elements of the service that is going to enable me to get to London to Edinburgh", the first is the track and the second is the train. My contract is going to be with the train provider, not with the track provider. The train provider has a contract with the track provider. Nevertheless, I am not going to get to Edinburgh without the track.

THE CHAIRMAN: Or without the diesel.

MISS ROSE: Indeed, sir. Just keeping it simple for a moment, and looking at the ----

THE CHAIRMAN: This is the argument.

MISS ROSE: Absolutely, but if we just look at the key components of the service at 5(b) it is, first of all, a comprehensive telephone directory enquiry service available to all end-users. So what you need for that is a comprehensive database that is made available to all end-users. The production of a comprehensive database is a key element in that service.

THE CHAIRMAN: It follows that the guarantee is split between the two different vertical providers.

MISS ROSE: Whenever you have a situation, which 8.1 expressly envisages, that a Member State may designate different undertakings and provide different elements, so wherever that happens – this is on the assumption that Ofcom are right about what "guarantee" means here, which I do not accept and I am going to return to that – even if Ofcom are right, given the remainder of Article 8.1, the answer must be, yes, because if different elements can be provided by different service providers then, on Ofcom's own case, each must be only guaranteeing the element for which it is responsible. That must be Ofcom's position.

MR. BLAIR: A follow up to that, if the Member State decides not to designate under Article 8 there would be no guarantee?

MISS ROSE: Not necessarily, because the obligation on the State under Article 5 is to ensure the result, to ensure that the comprehensive directory enquiry is available to end-users. The Member State may conclude that the operation of the market in its particular environment is such that commercial forces alone will be sufficient to ensure that that occurs. In that situation there is no obligation on the State to designate anybody, and if you look at Article 8.1 it is not a duty, "Member States may designate", they are not obliged to do it.

MR. BLAIR: So there might be a Community obligation to ensure that the services are provided, but no guarantee?

MISS ROSE: It depends on what is meant by "guarantee", because we submit that "guarantee" means "guarantee in fact". It means, effectively, the same as "ensure". The Member State has

got to make sure it happens. If it does not happen they have got to step in with an appropriate obligation. They are not obliged to do that. There is clearly no obligation on a Member State to designate anybody under the Directive.

THE CHAIRMAN: That is true. I am sorry to keep interrupting, but if it means what Ofcom say it means then designating BT to do something will not guarantee ----

MISS ROSE: It will only guarantee the element for which BT is responsible. That will be so wherever the Member State is operating the Article 8.1 power to have different undertakings providing different elements.

We do also submit, as you know, that that is not what "guarantee" means, because we submit that all that "guarantee" means in Article 8.1 is that the Member State has the power to designate an undertaking so as to guarantee the provision of a universal service – in other words, for that purpose and to that end – but not placing the obligation on the undertaking to guarantee the universal service.

At this point we need to consider some of the different languages of the Directive. I hope your Portuguese is up to scratch.

THE CHAIRMAN: We can do, but you are more experienced than me – I am probably the least experienced person in this room – of how the courts in this country take account of other languages. No Tribunal member of this Tribunal is fluent in all Community languages.

MISS ROSE: You shock me!

THE CHAIRMAN: Does it not need someone really expert to tell us, and he could only do it in English, in translation, what the original language means. I can look at the French, I might get an idea. I am afraid I do not speak any Portuguese and my German is virtually non-existent. There is a dispute about what the four languages say. I can see that that is a reason for a reference, but do I get any assistance by looking at any of the languages?

MISS ROSE: Sir, you absolutely rightly apprehend that the real point about this is that is one of the reasons why – we have already discussed the divergent practice in Ireland point. Another reason why this is an appropriate case for a reference is the divergent languages point. Can I just briefly show the problem to the Tribunal. As you know, Ofcom rely on the Spanish and German versions, because they say, and we do not disagree, that from the Spanish and German versions it would appear that the obligation has been placed on the undertaking – in other words, which guarantees, the undertaking which guarantees. Here you have the French, Dutch and Portuguese versions which clearly take the opposite approach. If you look at the French first, which may be the one we are all most comfortable with: "*Les États membres peuvent désigner une ou plusieurs enterprises afin de garantir …*", "so as to guarantee". So it is clear from that that is not talking about the undertaking guaranteeing, but so as to guarantee.

We see the same construction in Dutch, and I am not going to pronounce this in Dutch, but the word "*teneinde*", however that is pronounced, you can see over the page means "in order", and that is literally as "The Member States may designate one or more undertakings in order to guarantee". So again supportive of our construction.

Then the Portuguese, "… *Estados-Membros poderão designer uma ou mais empresas para garantir* …" - again, "so as to guarantee".

So there is a clear split. What is particularly striking is that there is an inconsistency, or so it would appear, as between the Portuguese and the Spanish, and there is an inconsistency as between the German and the Dutch. This is quite surprising and it may suggest ----

THE CHAIRMAN: Have the equivalent of ----

MISS ROSE: No, we have only got the ones we rely on, but I believe the formulations ----

THE CHAIRMAN: I think the point is made, Miss Rose.

MISS ROSE: The point that I make is that there is a clear ----

THE CHAIRMAN: Mr. Vajda wants to say something.

MR. VAJDA: I have considerable sympathy with the Tribunal. When Miss Rose says we rely on the Spanish and German versions, we rely on the Directive. We are not simply relying on a textual point. I fully take the point that if at the end of the day this all turns on the Portuguese and the French text, then the Tribunal might think this is a case for a reference. My case is not the sort of Chancery 19th century point saying, "If you look at what is said in the Spanish, this is the way home for me".

MISS ROSE: It is interesting to hear Mr. Vajda say that, but of course Ofcom expressly relied in its determination upon the German and Spanish texts in support of its Decision, and this is an appeal against Ofcom's Decision.

THE CHAIRMAN: They might have got it right for the wrong reasons.

MISS ROSE: They might indeed, sir, but it is interesting that they are pulling away from the reasoning that they, themselves, relied on in their determination. I did perhaps slightly cattily make the point in opening that they have not always been wholly consistent in the approach. The point that I make is a more fundamental point. There are two points here. The first, of course, is that I rely on this in support of our contention that this is an appropriate case for a reference. The second point is that the existence of the inconsistency in the language on this point, particularly as between closely related languages, Spanish and Portuguese, German and Dutch, may suggest that, in fact, nothing turns on it.

MISS HEWITT: So really you say you would prefer the language in, say, Article 5, where you say "Member States shall ensure that"?

MISS ROSE: That is right.

MISS HEWITT: So that obligation "to ensure that (a) and (b)". If you were to use the words "ensure that" instead of "to guarantee the provision", that would suit your purposes?

MISS ROSE: Yes, or, "so as to guarantee", or "in order to guarantee", which is, in fact, the formulation that we have in French, Dutch and Portuguese. The English is ambiguous of course. So the position that we have got at the moment is two languages supporting Ofcom, three languages supporting the appellants and the English being ambiguous.

MR. BLAIR: Does it really matter though, because you are not saying that the guarantee in 8 enlarges the Community obligations in 4 and 5, are you, on the Member State?

MISS ROSE: No, but Ofcom are making the submission that Article 8 only permits an obligation to be imposed on an undertaking which guarantees the performance by that undertaking of a universal service obligation. That is Ofcom's case. So Ofcom's whole case is that because of the use of the word "guarantee" in Article 8, the only types of universal service obligation that are permissible under this Directive are obligations which guarantee the performance by the entity of the universal service in question. We submit that is wrong for two reasons: firstly, because the obligation to guarantee is on the State not on the undertaking; and secondly, because of the elements point.

THE CHAIRMAN: Just before you leave that, I quite understand your argument on element, which I had not appreciated from your skeleton argument, because it may not have been in quite such clear terms, but if you are right on that the first question I assume goes?

MISS ROSE: Yes.

THE CHAIRMAN: If you are wrong on that then the second sentence, "and other provision terms", which I think is Article 3.2 in the other Directive, used the word "provide". Certainly Article 8 envisages the provision by the person who is designated of the universal service. If you are wrong on "element" then BT does not provide an element of the service.

MISS ROSE: Yes, that is correct.

THE CHAIRMAN: That is your case, is it not?

MISS ROSE: No, in my submission, it is not, simply because the Directive in a number of places envisages the provision of a service by the party that has got the universal service obligation. It does not follow that the only types of obligations that may be imposed are those which guarantee the provision of the whole of the service. It does not follow.

THE CHAIRMAN: I thought 3.2 of the Authorisation Directive says you can only have general conditions. You can have particular conditions only in the circumstances ----

MISS ROSE: Yes, in 6.2.

THE CHAIRMAN: -- authorised by 6.2, which in terms throws you back to the USD, and we have just been looking at the USD. On this construction, that your view of "elements" is wrong, the USD contains no provision for authorising USD7.

MISS ROSE: The problem with that argument, sir, is that Article 6.2 of the Authorisation Directive does not purport to define the scope of the obligations that may be used Universal Service Directive. What Article 6.2 of the Authorisation Directive is doing is saying, "A party that has obligations under the Universal Service Directive, that is separate from the general authorisation, but the only provision in this scheme which purports to define or limit the types of obligations that may be imposed as a universal service obligation is Article 8.1 of the Universal Service Directive. For my learned friend to succeed, he must show that Article 8.1 of the Universal Service Directive prohibits the imposition of this type of condition.

THE CHAIRMAN: I am not sure I yet agree with that.

MISS ROSE: We go back to Article 6.2.

THE CHAIRMAN: That is tab 3.

MISS ROSE: If you look at Article 6 ----

THE CHAIRMAN: We are addressing the basis that you are wrong on "element".

MISS ROSE: I understand that. Can I explain it again.

THE CHAIRMAN: Can I just put my point?

MISS ROSE: I understand your point.

THE CHAIRMAN: My point being that when you read the words "on those designated to provide universal service" under the USD in Article 6.2, that does not include BT because BT is directed to provide something, an element, but on this hypothesis an element of something which is not the provision of universal service.

MISS ROSE: Yes, I understand that point, but that is not the relevant bit of 6.2. The relevant bit of 6.2 is the first sentence of 6.2 that says "specific obligations which may be imposed on providers of electronic communications network or on those designated to provide universal service". So "those designated to provide universal service" is a shorthand for the people who are designated, but the key point is the specific obligations which may be imposed on those people, and you do not find anywhere in Article 6(2) any assistance as to what are the specific obligations that may be imposed on those designated to provide universal service.

Just going back again to the actual decision made in the case of BT. You will recall, Sir, that the structure of the decision is that BT is designated to provide a universal service.

THE CHAIRMAN: But not if your construction of elements is wrong.

MISS ROSE: The point is that BT has a general designation to provide universal service and then there are specific conditions placed upon it that it has to fulfil.

THE CHAIRMAN: If you are wrong on elements, where is BT designated to provide anything which is a universal service, rather than what it has to provide under condition 7.

MISS ROSE: It is designated in the decision of Oftel, because the decision of Oftel places a range of obligations on BT. The question is whether those can include the obligation to compile a database. Article 6(2) does not enlighten you on that, because all Article 6(2) refers to is "specific obligations which may be imposed on" it does not tell you what those obligations may be, you only find out what those obligations are by looking at Article 8(1).

THE CHAIRMAN: So if BT is specifically directed to provide telephones and was not interested in providing its own commercial end user directory but it happened to have OSIS, you say that because it provides phones it falls within 6(2) and therefore it can be made to provide something which is an element of a completely different service within ----

MISS ROSE: No, I say because it has been designated specific obligations may be placed upon it, and the question is what is the scope of the obligations that may be placed upon it, and you do not answer that question by looking at Article 6(2). Putting it another way the term "designated to provide universal service" is simply used as a shorthand for somebody who is designated under Article 8(1), because the designation is done under Article 8(1). So the question is not what is permissible under Article 6(2) but what is permissible under Article 8(1).

THE CHAIRMAN: So could I just have your wording if we did not use a shorthand and you wrote it out in full, what would it say?

MISS ROSE: It would say: "Specific obligations which may be imposed on providers of electronic communications networks and services under Article 8(1) of the Universal Service Directive", because it is Article 8(1) of the Universal Service Directive that is the substantive provision permitting designation and defining the scope of designation. Article 6(2) is not doing that.

THE CHAIRMAN: I look at the clock only so that I have a note about when you say this in the transcript.

MISS ROSE: So those are submissions on the crucial provision in Article 8(1) and we do submit it is Article 8(1) that matters, it is not Article 6(2). In other words, if I am right about Article 8(1) about the meaning of "guarantee" in Article 8(1) that cannot be cut down by the reference in Article 6(2) of the Authorisation Directive.

THE CHAIRMAN: It makes it even more important that we see precisely the ----

MISS ROSE: Designation.

THE CHAIRMAN: -- authority that you rely on ----

MISS ROSE: I agree.

THE CHAIRMAN: -- and how it goes through.

MR. O'FLAHERTY: The reference is the core bundle, tab 10, it begins at p.576 and it is called "Designation of BT and Kingston as universal service providers, and the specific universal service conditions." If you look at the summary on p.578. The summary, S1 and S2 tell you what it does, and at 583 and 584 beginning at para.2.5 they note that there was an original notification where they asked for responses in relation to the designation. At 2.6 they say that no expressions of interest were received, and "on the basis of the criteria set out in paragraph 2.3 the Director has today confirmed his proposal that BT and Kingston be designated as universal service providers." So that is the designation.

THE CHAIRMAN: And the authority for that is where? What power are they exercising in doing that?

MR. O'FLAHERTY: They are exercising the power under Article 8 which they referred to in 2.2.

THE CHAIRMAN: Is this not in domestic legislation?

MR. O'FLAHERTY: The basis of the designation in the UK is at 2.3.

MR. VAJDA: If one goes to 578 of this document one sees that the domestic *vires* for that is the Electronic Communication and Universal Service Regulations 2003 which I am told were made under s.2(2) of the European Communities Act.

MR. BLAIR: This in para.1 still talks about a proposal.

THE CHAIRMAN: Could someone produce this afternoon a statutory instrument. I am sorry, Miss Rose, it is very important ----

MISS ROSE: It is important.

THE CHAIRMAN: -- to get this detail correct.

MISS ROSE: Sir, the Tribunal has my submission there on guarantee and on elements.

We then come to the remaining provisions of the Directive, and in particular provisions on which Ofcom and BT rely to submit that we are wrong in our construction, because the provisions that we principally rely on are Article 3, Article 5 and Article 8. We say those are the three key provisions that demonstrate the construction that we contend for, namely, results oriented elements of the service, not concerned with the means, and you have all my submissions on that.

They then rely on some subsequent provisions of the Directive which they say point in the opposite direction. The first of these is Article 9 – "National Regulatory Authority shall monitor the evolution and level of retail tariffs of the services identified in Articles 4, 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings, in particular in relation to national consumer prices and income."

They say that the fact that there is an obligation to monitor only retail tariffs indicates wholesale obligations not envisaged, we say that just does not follow at all because of course

the core of the universal service obligation is to ensure that these services are available to end users at an affordable price, and therefore it is not surprising that specific provision is being made here to monitor retail prices, because that is one of the core obligations on the Member State to ensure that these are available at affordable prices. But there is not the same obligation at the wholesale level. The obligation on a Member State if the wholesale level is not operating properly is to regulate to ensure that it works properly at the retail level, so there is nothing we say inconsistent between Article 9 and our construction of Article 8.

Then we come to a very interesting provision, which is Article 11. This is relied on heavily by Ofcom, this is quality of service of designated undertakings, and Ofcom relies on this. If we look at the provision first, and then we will see what Ofcom says about it:

> "National regulatory authorities shall ensure that all designated undertakings with obligations under Articles 4, 5, 6, 7 and 9 publish adequate and up to date information concerning their performance in the provision of universal service based on the quality of service parameters definitions and measurement methods set out in annex 3. The published information shall also be supplied for national regulatory authority."

Now, Ofcom say this is an obligation – there is no discretion here, it is an obligation – imposed on national regulatory authorities, and it applies, they say, to all designated undertakings with obligations under any of the relevant articles. They say therefore, if we look at the quality of service parameters that are in annex 3 and they are not apt to cover the type of obligation that has been imposed on BT, then they say it cannot be a universal service obligation permitted under Article 8; that is the argument.

If we go to Annex 3, which is at p.34, we can see the parameters – "Supply time for initial connection", "Fault rate per access line", "Fault repair time", "Unsuccessful call ratio", "Call set up time", "Response time for operator services", "Response times for directory enquiry services", "Proportion of coin and card operated public pay telephones in working order" and "Bill correctness complaints". Ofcom say there are no quality of service parameters there that are apt to cover the maintenance of a comprehensive database, and therefore the maintenance of a comprehensive database cannot be a universal service obligation permitted.

THE CHAIRMAN: Nothing that covers a phone book either.

MISS ROSE: You have precisely taken the words out of my mouth, Sir. It was my next point.

Absolutely, and it is fatal to this submission. Let us look at what Ofcom say on this point. It is first of all in their defence – para.106 (tab 5)

> "However, the Appellants do not explain why, if imposing obligations at a "wholesale" level is permissible, the Community legislature has failed to make

provision in Articles 9 and 11 to ensure that, in such a case, the end-user receives the universal service throughout the Member State at an affordable price and to a specified level of quality. Such a lacuna is all the more striking when one bears in mind the importance attached by the USD to these matters.

107. The best explanation for the fact that Articles 9(1) and 11 fail to deal with obligations on designated undertakings to supply at a "wholesale" level is simply that, under the USD, such obligations may not be imposed; on this reading there is no lacuna in Articles 9 and 11 because there can be no obligations to supply at a "wholesale" level."

We then see the same argument developed in Ofcom's skeleton argument, para. 49, that is tab 2, p.52. At 49a they say:

"There is no support anywhere in the text of the USD for the proposition that Articles 9 and 11 only apply in some of the cases where obligations are imposed under Article 8. In particular, Articles 9(1) and 11(1) both impose unqualified obligations on Member States to monitor retail tariffs etc of designated undertakings."

Then looking at (b) they refer to recital 7, "central aim that '*Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified…*' That aim is reflected in Article 1(1) and Article 3(1) of the USD and given concrete expression in Articles 9 and 11. The importance of this aim is further reflected in Article 8(4)(a) of the Framework Directive."

And then this:

"If the Community legislature intended Chapter II of the USD to permit wholesale regulation, it is inconceivable that it would have failed to make provision for the scrutiny of tariffs on a cost-orientated basis and quality of service in such a situation. Thus, where Telecommunications undertakings are to provide information on a cost-oriented basis , specific provision is made for that …"

Well, Sir, you have already anticipated my response, which is that that clearly cannot be right because none of the quality of service parameters at Annex III have any application to a phone book and yet we know for certain that under Article 5(1)(a) the provision of a phone book is a universal service provided for under the Directive. Now, I will agree happily that this is not the world's greatest drafting because what we appear to have here from the Community is a requirement in Article 11 of the Directive – a mandatory requirement – on all undertakings with universal service obligations that they should be assessed against these quality of service parameters, and then the provision of no quality of service parameter that is applicable to one of the specified universal service obligations, namely, the phone book. But regrettably this sort

of lacunae in the drafting is not all that uncommon in European Directives, which are not intended to be scrutinised with the precision of a domestic statute.

MR. BLAIR: It might be a different lacunae to the one you are addressing. It might be that 5(1)(a) was expecting, though it did not say it, that the directory was to be available free in which case you would not need the pricing control.

MISS ROSE: No, but I am talking here about quality of service, not pricing, Article 11.

MR. BLAIR: "The form is to be approved by the relevant authority" in 5(1)(a), that might substitute for the Article 11.

MISS ROSE: If we go back to Article 11: "National regulatory authorities shall ensure …" mandatory –

> ".. that all designated undertakings with obligations under Article 5 publish adequate and up to date information concerning their performance in the provision of universal service based on the quality of service parameters, definitions and measurement methods set out in Annex III."

So it appears to be a completely mandatory obligation.

MR. BLAIR: The only answer is that the control was handed to the national authorities in Article 5.

MISS ROSE: But it is an obligation to publish and it is expressed to be mandatory. What in my submission it shows is that you cannot make the assumption about the comprehensive reach of Article 11 and the quality of service parameters established under Article 11 for which Ofcom contends. You simply cannot apply to a Directive of this nature the type of black letter construction methods that are familiar to English common lawyers when looking at statutes; that is the difficulty. It is another point, of course, in favour of a Reference.

If we go back now to the Directive to look at the remaining provisions that Ofcom rely on. Article 12, costing of Universal Service obligations.

> "Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.
>
> For that purpose national regulatory authorities shall:
>
> (a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A"

So we then go to Annex IV, Part A, which tells us how you calculate net cost. What we are told, looking at the second paragraph is:

> "National regulatory authorities are to consider all means to ensure appropriate incentives for undertakings (designated or not) to provide universal service obligations cost efficiently. In undertaking a calculation exercise the net cost of universal service obligations is to be calculated as the difference between the net cost for a designated undertaking of operating with the universal service obligations and operating without the universal service obligations .."

And they say it depends whether it is fully developed or still undergoing construction and development. Then it is to be based on costs attributable to elements of the identified services, it can only be provided at a loss, and so forth; specific end-users or groups of end-users and so forth, and it is to be done separately.

Our submission is that there is nothing in Annex IV Part A that is inappropriate or cannot be applied to an obligation of the type that has been imposed on BT under USC7; it is perfectly possible to calculate the net cost to BT of having to compile and maintain the database, and to set off against that the commercial benefits that it achieves from doing so, and there is absolutely nothing in Article 12 that suggests that it is only applicable to retail regulation.

The final provision on which both Ofcom and BT seek to rely is Article 25 of the Universal Service Directive (p.27). If you turn this up you will see that Article 25 is placed in Chapter IV of the Directive, which is stated to deal with end-user interests and rights. With typical coherence it actually deals with some things that do not fall within that category, but it is principally concerned with end-user interests and rights.

So if we then go to Article 25, "Operator assistance and directory enquiry services".

> "(1) Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a)."

So that, if you like, is the corollary of the State being required to ensure that there must be a comprehensive publicly available directory, everybody has got to have a right to an entry.

(2) Member States shall ensure that …" again Tribunal note: this is not a power, this is not like Article 8, this is an obligation –

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

So this requires the Member State to oblige everybody who has their own subscribers to provide the information about their subscribers to somebody who is reasonably asking for it.

You can see why that is a *sine qua non* for establishing a comprehensive database for the purposes of a directory or directory enquiry service, because if an individual communications' provider can say "No, I am not going to give you my numbers" the whole system breaks down. That is why this is a mandatory requirement not discretionary. We submit that these provisions in Article 25 are ancillary to the provision of a universal directory in a comprehensive directory enquiry service, but they tell you nothing about the scope of the obligations that may be imposed under Article 8(1). These are the essential rights and obligations without which you cannot begin to start to have a comprehensive directory, everybody has to have a right to be in it, everybody who has the numbers has to be obliged to hand over the numbers if they are asked, otherwise you are not going to get off at first base, but that does not tell you anything about the scope of the universal service obligations that can be applied under Article 8.

So looking at Article 25(3):

> "Member States shall ensure that all end-users provided with a connection to the public telephone network can access operator assistance services and directory enquiry services in accordance with Article 5(1)(b)."

Again, it is an essential ancillary right without which the system is not going to work but does not tell you anything about the scope of obligations that may be imposed under Article 8(1).

THE CHAIRMAN: What are the "operator assistance" services referred to?

MISS ROSE: I am not sure there is a specific requirement to provide operator assistance services, unless somebody tells me I am wrong.

MR. VAJDA: I am told it is things like reverse charge calls.

MISS ROSE: Yes, I am sure that is what it is, I am just wondering where it comes from in regulatory terms. I am told it is a general condition but it certainly does not appear to be a universal service. That really bears out the point I am making, that you cannot use Article 25 to construe the scope of Article 8.

Sir, that is probably a convenient moment.

THE CHAIRMAN: So 2 o'clock.

(Adjourned for a short time)

MISS ROSE: My next point relates to the evolution of the legislative scheme and, in particular, the evolution from the old regime to the CRF, because the submission of Ofcom is that there is a clean break between the old regime and the new regime and that a decision has been taken significantly to narrow the types of obligations that can be imposed for the provision of universal service. We submit that there is nothing in the "Travaux Préparatoires" that suggests

that and there is nothing in the wording of the relevant directives that suggests it, and there is no policy imperative that would justify that approach.

The starting point for this is the old provision in relation to directory enquiry services.

THE CHAIRMAN: Is there any jurisprudence in the ECJ about how you look at old legislation in construing new legislation in anything like the way that we do in this country where the House of Lords has told us we must not look at the old legislation unless we intellectually dishonestly want to get the answers! (Laughter)

MISS ROSE: Sir, I am not aware of anything of that nature, and of course you are looking at a very different environment because you are looking at the development of policy through different Directives, so in my submission it is legitimate to look at it.

If we go in the authorities bundle to tab 12, this is Directive 98/10 known as the "RVTD". The provisions relating to universal services are at Chapter II, p.282. Article 3 "Availability of Services"

> "1. Member States shall ensure that the services set out in this Chapter are made available to all users in their territory, independent of geographical location and in light of specific national conditions at an affordable price."

So you can see an analogy there with the obligation under Article 3 of the Universal Service Directive. Then Article 6 deals with "Directory services".

> "1. The provisions of this Article are subject to the requirements of the relevant legislation on the protection of personal data and privacy …"
>
> 2. Member States shall ensure that:
>
> (a) subscribers have the right to have an entry in publicly available directories and to verify and, if necessary, correct or request removal of that entry."

That is a right that is now reproduced in Article 25.

> (b) directories of all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers, are available to users in a form approved by the national regulatory authority whether printed or electronic or both and are updated on a regular basis."
>
> (c) at least one telephone directory enquiry service covering all listed subscribers numbers is available to all users including users of public pay telephones."

So there is the analogy with Article 5(1)(a) and (b).

THE CHAIRMAN: What is a "user" in this context, is it defined?

MISS ROSE: I do not believe "user" is defined. Yes, "Users" means

> "individuals including consumers, or organisations using or requesting publicly available telecommunications services".

There it is.

THE CHAIRMAN: Where is that?

MISS ROSE: Article 2(2)(a).

THE CHAIRMAN: So that would, in the old regime, be your client?

MISS ROSE: Yes.

THE CHAIRMAN: Whereas your client is not a end-user.

MISS ROSE: Our client is not an end-user, that is correct.

THE CHAIRMAN: But would be end-user in new legislation but would have been a user under the old legislation, is that correct?

MISS ROSE: Well, that begs the question what is meant by publicly available, because we are not requesting publicly available telecommunications' services. We are seeking access to a database in order to provide publicly available telecommunications services.

THE CHAIRMAN: So I think you accept you are not a user under that?

MISS ROSE: Yes, I think we would not be a user. Then para.3 of Article 6:

> "In order to ensure provision of the services referred to at paras. 2(b) and 2(c) Member States shall ensure all organisations which assign telephone numbers to subscribers meet all reasonable requests to make available the relevant information …"

So that is the parallel with Article 25(2) of the new legislation. Under this Directive provisions to ensure these results will be put in licences, because at that time we did not have the general authorisation regime, we had a licensing regime.

Our submission is that there is nothing in these provisions which would prevent the Member States from including as licence conditions obligations of the type included in USC7 in order to ensure the availability of the directory enquiries service to users for that purpose. Indeed, the features on which my learned friends rely in the Universal Service Directive (including the use of the word 'guarantee') and the phrase Universal Service Provider do not appear here. Therefore, Ofcom argues that somehow the Universal Service Directive has narrowed the types of obligations that can be imposed in order to achieve the aim of the provision of universal services. We submit that there is nothing in any of the pre-legislative materials that would suggest that that was the intention of the Community and, in fact, the contrary is the case. In fact, it appears to have been the intention of the Community that there should be continuity in relation to the provision of universal service. Of course we accept that the common regulatory framework marked a very significant change from the regulatory regime that applied before in many respects. But no decision was taken to change the ambit of the universal service. We can see that if you go first of all to the 1999 Review that was produced by the Commission which is the foundation document for the CRF, that is at tab 7, p.105:

"Ensuring affordable access for all to communications services necessary for participation in the Information Society remains a key priority for the Commission".

So there immediately we see continuity.

"The benefits of the Information Society will only be realised if all if all are able to participate in it."

Then the second bullet:

"In addition to funding public access from State budgets .. Member States will retain the option of establishing the above-mentioned financing schemes for universal service. But the type of services which may be funded by such schemes must be carefully assessed."

Then they say:

"Extension of the current obligations for provision of universal service must combine an analysis of the demand for and availability of the service with an assessment of its social and economic desirability, otherwise there is a risk of distortion of competition and unfair cross subsidy … The Commission therefore proposes to maintain at this stage the current definition and scope of universal service. However, given that it is a dynamic and evolving concept, the Commission proposes to put existing criteria for possible extension of its scope, as well as mechanisms for periodic review into Community legislation."

So what you can see is no suggestion at all that universal service is to be restricted or more narrowly confined. On the contrary, the question they are asking is should we have a broader definition? And they say "No", not at this stage.

Page 149 – Universal service. There is a reference to the current regulatory framework.

"The current regulatory framework requires NRAs to place obligations on network operators to ensure that a defined minimum set of services of specified quality are available to all, independent of their geographical location at an affordable price."

It is notable there that that is the construction of course that we put on Article 8, it is interesting to see the Commission adopting that here. Reference in that same paragraph to directory services.

Then there is the heading "Affordable access to all – a Commission priority." Discussion of policy tools ----

THE CHAIRMAN: I am sorry, I did not get the point that you made ----

MISS ROSE: The point I was making was:

"The current regulatory framework requires NRAs to place obligations on network operators to ensure that a defined minimum set of services of specified quality are available to all …"

In other words, it is adopting the purposive point, that the obligations are imposed in order to ensure that these services are available, not to require the undertaking to provide them. I do not think it takes it very much further, it was just a comment in passing.

THE CHAIRMAN: You could have the argument about the construction of this.

MISS ROSE: Yes, I think there is a limit. At p.150:

> "But it is clear that competition is not sufficient to achieve the Community's policy objectives. In an unregulated market, there would be consumers on low incomes, or who live in remote areas, who would not be served by operators, because they would be uneconomic. It is therefore essential that the new regulatory framework continues to ensure all are provided with those services considered essential for participation in society and already available to the great majority of citizens. This is the origin of the concept of universal service."

So again continuity. You see repeatedly in this document "maintain the provision", "continue the provision", nothing about narrowing its scope. Then they say that it is a dynamic and evolving concept. They discuss including new types, and then the Commission position is in the box at p.153:

> "The Commission recognises the importance of universal service in ensuring that all European citizens have access to the Information Society. In particular it proposes to:
>
> * maintain at this stage the current definition and scope of universal service".

And then have criteria for review and "keep under review funding schemes" and "develop pricing principles".

So we submit that the intention is clearly not to radically narrow – or significantly narrow – the scope of the types of obligations that can be imposed for the purpose of ensuring the provision of universal service.

THE CHAIRMAN: Well that is a bit of a leap from the continuity that is suggested, which is to provide the same definition of universal service. If everything was going to be the same why change the regulatory scheme at all? You accept that it is a significant change.

MISS ROSE: Yes, of course, because it is a change from a licensing system to a system of general authorisation, that is why you have to have the concept of the Universal Service Condition at all.

THE CHAIRMAN: Why would you start with the prima facie position that you are intending to create in the new regime the same sort of obligations as there were in licences? It is quite the contrary is it not?

MISS ROSE: In my submission no.

THE CHAIRMAN: It is meant to be a change.

MISS ROSE: No, because what you are seeking to do is to ensure the continuity of the provision of the same services with the same scope. If you have a situation in a particular Member State, such as the UK, where what you have in place is an obligation on one party to maintain and compile a comprehensive database, and then competition dealing with the provision of the directory on a retail basis what is the policy that is saying that you want to radically change that system?

THE CHAIRMAN: Harmonisation is one.

MISS ROSE: That of course brings you up against the fact that we know other Member States do it the same way.

THE CHAIRMAN: Quite, so it is sensible to look at what the legislation now says to see how things proceed in future.

MISS ROSE: Sorry, my point is that we know that the Irish do not consider that this is a problem.

THE CHAIRMAN: Well the law is the law, they might have got it wrong too, we will see. (Laughter).

MISS ROSE: But of course this court is poorly placed, with respect, to make that decision.

THE CHAIRMAN: That is a Reference point.

MISS ROSE: Yes, it is a Reference point, of course it is a Reference point, but the point that I am making is that you find nothing in this document that sets out the policy that you are putting to me. You do not find anywhere in this document any suggestion in order to harmonise the provision of universal service we want to limit the scope of the types of obligations that can be placed on undertakings, that is not set out anywhere, nothing. If that was the policy it is completely un-enunciated. The only policy that you see enunciated in the Travaux in relation to universal service refers to maintaining the scope and continuity. I agree that what you put to me is a possible policy for the Community to have adopted, but if it did so, it did it in silence.

MR. BLAIR: May I ask, I am sorry to hold you up, whether this document specifically applied its mind to directory enquiry services at all?

MISS ROSE: Yes, it did.

MR. BLAIR: I cannot find any immediate reference.

MISS ROSE: I am sorry, we were just looking at the passages where it did that, let me just show you once more. It is at 149, under the heading “Universal Service”.

MR. BLAIR: Thank you, that is the only reference though?

MISS ROSE: I cannot swear to that but that is certainly a relevant reference. It demonstrates the point, yes.

The final substantive point on construction I need to deal with is USC7.4. Here Ofcom's argument is set out at paras. 115 to 118 of its defence, which is at tab 5 of the core bundle, it particularly starts at 117:

> "Articles 12 and 13 of the USD … are designed to deal with the situation in which undertakings designated under Article 8 incur an 'unfair burden' by allowing Member States to calculate the net cost incurred by the undertaking and to compensate it either from State funds or by sharing those costs among providers of ECSs.
>
> Any provision as to the extent to which persons other than end-users contribute to the costs of providing universal service is a compensation mechanism – the aim of such a provision will be to provide that the universal provider recovers, and recovers no more than, its net costs of providing the universal service.
>
> But the USD plainly precludes any compensation mechanism outside Articles 12 and 13.
>
> Articles 12 and 13 therefore preclude Member States from regulating the charges made to providers of ECSs in relation to the provision by BT of its universal service obligations, save by employing the mechanism set out in Articles 12 and 13 …"

So with great respect we submit that that just does not make any sense at all. If we go to the Universal Service Directive and look at Articles 12 and 13, p. 23 behind tab 2. The premise on which Article 12 applies is:

"Where national regulatory authorities consider that the provision of universal service … may represent an unfair burden on the undertakings designated to provide universal service."

That says nothing at all about the situation where NRAs do not consider that the provision of a universal service presents an unfair burden. Now, it must be, on my learned friend's case, that they envisage that a universal service obligation to provide the directory enquiry service could include a situation in which BT was required to compile and maintain a database and then itself to make available to the public a directory enquiry service at an affordable price. In that situation it would be charging for the service, but that would not engage Articles 12 or 13 because there would be no unfair burden. So we are, with respect, mystified as to why on earth the respondent thinks that these provisions designed to compensate, provide for a compensation mechanism, where a universal service obligation places an unfair burden on a party have anything to do with a provision permitting a party who is providing part of the universal service to charge for it, in this case on a cost oriented basis. It just has nothing to do with it.

I wait to see what Mr. Vajda has to say about this, but I have to say we are just baffled.

THE CHAIRMAN: You do not understand the point?

MISS ROSE: No.

THE CHAIRMAN: Which is probably why I do not understand your explanation of it.

MISS ROSE: It may be best for me to deal with it in reply when I have had the benefit of hearing Mr. Vajda explain it to me, because I really do not understand the point.

That brings me to my final submission which relates to the question of a Reference. If we can just turn up in our skeleton argument at tab 1 of the core bundle, we have summarised the applicable principles starting at para.129. So our submission is first to say that the proper meaning of Articles 3, 5 and 8 is clear, but to the extent that the Tribunal finds that it is ambiguous it may be necessary to refer a question under Article 234.

Then Article 234 itself is set out at tab 1 of the authorities bundle and at para.130 we have set out the four requirements for the making of a preliminary reference – these are the jurisdictional requirements.

> "(1) the question must relate to a provision of EC law upon which the ECJ has jurisdiction to give a ruling;
>
> (2) the question must be related to the interpretation and/or validity of those provisions.;
>
> (3) the question must have been raised before a national court or Tribunal; and
>
> (4) a decision on the question must be necessary to enable the national court or tribunal to give judgment."

We submit plainly all those criteria are satisfied in this case.

THE CHAIRMAN: Can you outline the question? I am not asking you to draft it but it has one limb?

MISS ROSE: Yes, the question would be whether – I am not attempting to draft it----

THE CHAIRMAN: We would quite like it tomorrow if you could.

MISS ROSE: It would be better rather than me trying to do it on the hoof we will produce a proposed draft tomorrow morning. I do not want to commit myself. I should say we would be more than willing to talk to Ofcom if they want to discuss the wording of the question, but so far we have had no indication on what their position is on a reference.

So those are the jurisdictional issues, and we say there is no question but that those four requirements are all satisfied.

So then the question is what are the criteria that should influence the Tribunal in deciding whether to exercise its discretion to refer questions? The starting point is the classic passage from the *Else* case – we have set it out here, so we do not need to turn it up, but for your note it is vol.2 tab 23. We actually have it in a different report and you will find it at p.37, this

passage is at p.37 of the report that is in the bundle. Sir Thomas Bingham (as he then was) said:

> "I understand the correct approach in principle of a national court … to be quite clear; if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue … unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court had any real doubts it should ordinarily refer."

Then a word of caution, the *Professional Contractors Group* case is at tab 25 of the bundle – again we do not need to turn it up, but the reference there is paragraphs 90 and 91 of that case which refer to the opinion of Advocate General Jacobs in the *Weiner* case where he urged a greater restraint, and I do want to turn that decision up. This is vol.1 of the authorities bundle, tab 18. Just to put it into context, one can sympathise with the irritation of Advocate General Jacobs who was being asked to grapple with the question of whether a particular type of undergarment was or was not pyjamas.

THE CHAIRMAN: Or a nightdress.

MISS ROSE: Or a nightdress, yes.

THE CHAIRMAN: Was it a VAT case?

MISS ROSE: Yes, Customs' tariff. One can feel the man's pain! He said at para.18:

> "It seems to me that the only appropriate solution is a greater measure of self-restraint on the part of both national courts and this Court.
>
> 19. So far as national courts are concerned, a distinction must be drawn between courts which … have a discretion to refer and courts of last instance which … are obliged to refer. In the present case the reference is made by a court which must be regarded as a court of last instance and I will consider below the scope of the obligation to refer in such a case.
>
> 20. Where a court is not a court of last instance and has a discretion to refer this Court has consistently held that the exercise of that discretion is a matter for the referring court alone, and this Court will not normally question whether the reference is appropriate. It is however clear that the appropriateness of a reference can be

> assessed in the light of the object of Article 177, [now Article 234] which is to ensure that Community law is the same in all Member States. A reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union."

We say that applies here.

> "A reference will be least appropriate where there is an established body of case law which could readily be transposed to the facts of the instant case;"

Just pausing there, in this case of course there is no relevant case law at all.

> "or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case."

That, of course, is not this case.

> "Between those two extremes there is of course a wide spectrum of possibilities; nevertheless national courts themselves could properly assess whether it is appropriate to make a reference and the Court of Justice, even if it continued to maintain that the decision to refer was exclusively within the discretion of the national courts, could perhaps give some informal guidance and so encourage self-restraint by the national courts in appropriate cases."

THE CHAIRMAN: Did it?

MISS ROSE: No.

> "For the Court to reply fully to all requests in the future, it may be doubted whether that will continue to be desirable. In some areas of Community law, where there is already an established body of case-law, increasing refinement of the case –law is likely to lead to less legal certainty rather than to more."

And he develops that point.

MR. BLAIR: So "self-restraint" to him means not holding on to it yourself rather than restraining yourself from making a reference.

MISS ROSE: "Self-restraint" means restraining yourself from making a reference where the case in question is a case where the point is narrow or where there is already an established body of European case-law which establishes the principles. Really the only issue for the court is how that can be applied to particular facts, he is saying in that situation the national court should not refer.

MR. BLAIR: That is what I thought until you read the last sentence at the end of the second column. There is the Court of Justice encouraging self-restraint in appropriate cases.

MISS ROSE: "Increasing refinement of the case-law is likely to lead to less legal certainty", what he means is "if you keep sending us endless references with minor factual variations on the same principle we will inevitably produce conflicting decisions and you will end up with less legal certainty not more, so please stop doing it", that is what he is saying. He is saying that once you have an established body of case law that sets out the general principles the national court should just get on with it.

MR. BLAIR: But the Court of Justice is only seized if there is a reference, and so they are encouraging self-restraint not to have so many of them.

MISS ROSE: Sorry, I am not following.

THE CHAIRMAN: (no microphone) It is asking the court for direction …

MR. BLAIR: In a case of which it is seized.

MISS ROSE: Yes, it is already seized of this case, yes.

MR. BLAIR: Yes, thank you.

MISS ROSE: I am so sorry.

MR. BLAIR: No, I understand now.

MISS ROSE: He is urging national courts not to refer, particularly in cases where there is already an established body of case-law and where the point is a narrow factual one.

The next case we need to look at, which is probably the best set of principles to be applied to the exercise of discretion is the *Samex* case. This is in vol.2 of the authorities bundle at tab 22, and the passage starts at p.1054 at "g". "The guidelines as to the proper approach on both those questions …" that is whether it is necessary to give judgment, whether in the exercise of its discretion a court should refer:

> "… given by the Court of Appeal in *Bulmer Ltd v J Bollinger* Lord Denning MR draws attention to four points relevant to the question whether a decision is necessary. The first of those is that the point must be conclusive."

He says he understands that it is. The second point is previous ruling. Lord Denning says:

> "… 'in some cases, however, it may be found that the same point … has already been decided by the European Court in a previous case. In that event it is not necessary for the English court to decide it'."

The third point is:

> "… 'In other cases the English court may consider the point is reasonably clear and free from doubt. In that event there is no need to interpret the treaty but only to apply it, and that is the task of the English court.'
>
> It certainly is of course the task of the English court to apply it, but it must apply the treaty properly interpreted. As I have indicated, I myself feel that the first three

questions raised should certainly, if it rested with me, be answered in favour of the commissioners, but I do not regard the matter as so free from doubt as to render those points acte claire, and I certainly do not regard the fourth point on the principle of proportionality s either reasonably clear or reasonably free from doubt.

Point four: 'Decide the facts first'."

And he says that is an obviously sensible idea.

Then if I turn to the guidelines Lord Denning has indicated governing the exercise of discretion. He mentions first, time to get a ruling, second, the undesirability of overloading the Court of Justice; third, formulate the question clearly; fourth the difficulty and importance of the point. Under that head he says:

"… 'Difficulty and importance. Unless the point is really difficult and important, it would seem better for the English judge to decide it himself. For in so doing much delay and expense will be saved. So far the English judges have not shirked their responsibilities. They have decided several points of interpretation on the treaty to the satisfaction, I hope, of the parties'."

Then he refers to expense and to the wishes of the parties.

THE CHAIRMAN: Does that last one refer to the Court of final appeal as well, or is he talking about a first instance.

MISS ROSE: He is not talking about a court of final appeal, he is talking about the exercise of discretion, and of course there is no discretion if it is the final court. At this point Mr. Justice Bingham takes a somewhat different approach, if we go to "g":

"In endeavouring to follow and respect these guidelines I find myself in some difficulty, because it was submitted by counsel on behalf of the defendant that the issues raised by his client should be resolved by the Court of Justice as the court best fitted to do so, and I find this a consideration which does give me some pause for thought. Sitting as a judge in a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice. It has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are in issue. Where the interests of member state are affected they can intervene to make their views known. That is a material consideration in this case since there is some slight evidence that the practice of different member states is divergent."

And I lay obvious emphasis on that point, that if this point were being referred to the ECJ there would be an opportunity for the Irish Government to make submissions. We so not even know if there are other member states that operate a similar system to USC7, but it may be that there are, but on any view there is at least one member state that has an interest in the answer to this question.

> "Where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival."

And I obviously rely on that point as well.

> "The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton."

We have already seen how Article 11 and Annex III are somewhat difficult to reconcile to the assistance of directories. This is not a text that can simply be equated with a domestic statute.

> "The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court."

And we again rely on that point because the real question here about the extent of the obligations that are permitted under Article 8(1) to be imposed upon undertakings is a question which goes fundamentally to the policy to be furthered by the Universal Service Directive. It is really a policy question, it is not a question of black letter law.

"It does not follow from this that a reference should be made by a national court of first instance whenever a litigant raises a serious point of Community law and seeks a reference, or whenever he indicates an intention to appeal, even if he announces an intention to appeal, if necessary to the highest court which is effectively bound to refer the question to the Court of Justice. For example, as *HP Bulmer Ltd v J Bollinger* points out , it can rarely be necessary to make a reference until the relevant facts have been found …"

There is no dispute of facts, of course, in this case.

> "… and unless the points raised are substantially determinative of the action. Or the question raised may admit of only one possible answer, or it may be covered by Community authority precisely in point, although even here some slight caution is necessary since the Court of Justice is not strictly bound by its own decisions. These

considerations relate to whether a decision is necessary. Other considerations may affect the exercise of discretion. Sometimes no doubt it may appear that the question is raised mischievously, not in the bona fide hope of success but in order to obstruct or delay an almost inevitable adverse judgment, denying the other party his remedy meanwhile."

We submit that self-evidently is not the position here, nobody has suggested it is.

"In my judgment none of these contra-indications obtains here. While I think the defendant is unlikely to succeed, I do not regard its arguments as hopeless …"

THE CHAIRMAN: We have all read that.

MISS ROSE: I am sorry. The Tribunal can see the types of consideration that Mr. Justice Bingham referred to there and we submit that that falls extremely neatly into the circumstances of this case. That approach has been approved in at least two cases that we have in the bundle. If you go first to tab 20.

THE CHAIRMAN: I just want to go off on a tangent, nothing to do with this case. Did it actually get referred and did they get an answer?

MISS ROSE: It did get referred.

THE CHAIRMAN: By the judge?

MISS ROSE: I do not know who by.

THE CHAIRMAN: One always likes to know these things.

MISS ROSE: Yes, it certainly did get referred. Going to tab 20, this is the *Fish Producers' Organisation* case, at p.676 to 677, paras. 52 to 53. There is an application of the *Samex* case and a summary of factors relevant to the exercise of discretion.

Then *Brown v Secretary of State for Scotland*, that is tab 21 and it is paras. 24 to 25 in that case. Again, a similar recitation and reference to the *Samex* case.

So applying those principles we come back to our skeleton argument. I am now at para.134. We have summarised at para.134 what we say are the principles to be derived from the case-law, and then at 135 we submit that the last three considerations recommended by Mr. Justice Bingham in *Samex* are particularly relevant – substantial discrepancy between the different language versions, evidence of the practice of different Member States is divergent, comparison between Community texts in different languages, and then at para.138, the dispute in the instant case regarding the proper interpretation of the Directive involves considerations of the objectives of the legislation separately and in the context of the CRF.

Here, and this is really the most important point, the question that is raised by this case is going to the heart of the policy of the USC in the context of the CRF, and that we submit is a question that can only be authoritatively answered by the ECJ.

Then at 139 we make the point that there is of course no established body of case-law or indeed no case-law at all relevant to the questions that we are raising.

Before I leave this point, just on the question of the approach that the ECJ adopts to construction one says repeatedly in a vacuum that the ECJ does not take a black letter approach, it is not constrained by the actual words of the text but will take a purposive approach to the construction of the Directive, but it is easy to forget just how radical the ECJ can be. If it thinks an answer is right it will reach that answer pretty much regardless of what the Directive says.

I would like to give you just one fairly startling example, not because it has anything at all to do with telecoms, but because it shows how hard it can be for a national court to try and second guess what the right answer is to the proper interpretation of a Directive. The case is called *P v S and Cornwall County Council*. This was a case about the Equal Treatment Directive prohibiting sex discrimination between men and women. A transsexual sought to argue that the protection against sex discrimination contained in the Equal Treatment Directive should be extended to cover discrimination against a transsexual on the grounds that they were changing the appearance of their sex. That was a pretty bold submission for which there was no support whatsoever in the text of the Equal Treatment Directive, but the case was referred to the ECJ by an Employment Tribunal as it happens and the case was successful in the ECJ.

Can I just show you the approach of the Advocate General in this case and in particular his approach to the construction of the Directive. We start at p.2145. He starts by saying that once again the court has been asked to give a ruling on this Directive. He says:

"What is new and certainly no small matter is the fact that a transsexual is seeking to rely on the Directive". Then he says: "Can a transsexual if he or she is dismissed because he or she is a transsexual successfully rely on the Directive?" He then discusses transsexuality and the law. Turning to p.2152, he acknowledges at para.16:

> "Whilst it is quite true that the Directive prohibits any discrimination whatsoever on grounds of sex it is equally indisputable that the wording of the principle of equal treatment which it lays down refers to the traditional man/woman dichotomy."

This was the problem that the transsexual faced here that the Directive explicitly referred to discrimination between men and women, so on the face of it impossible to see how it could relate to discrimination against a transsexual. Then he discusses various matters and then at p.2155, para.21:

> "It remains to be determined whether a Directive whose purpose is to ensure the elimination of discrimination between men and women may also cover unfavourable treatment afforded to transsexuals. In other words, in the absence of specific

> legislation which expressly takes transsexuals into consideration it must be concluded that transsexuals once they have suffered discrimination are deprived of any legal protection whatsoever."

Then at para.23 at 2156 he acknowledges that the Directive, which dates from 1976 took account of what might be defined as normal reality at the time of its adoption. It is quite natural it should not have expressly taken into account the question and reality when only just beginning to be discovered.

"However, as the expression of a more general principle on the basis of which sex should be irrelevant to the treatment everyone receives the Directive should be construed in a broader perspective including all situations in which sex appears as a discriminatory factor."

Then at para.24 he says:

> "I am well aware that I am asking the court to make a courageous decision. I am asking it to do so in the profound conviction that what is at stake is a universal fundamental value ..."

and so forth. Then he says it ought to be the law basically. Then at the top of the next column:

> "I am quite clear that in Community law there is no precise provision specifically and literally intended to regulate the problem, but such a provision can readily and clearly be inferred from the principles and objectives of Community social law, the statement of reasons for the Directive underlining the harmonisation of living and working conditions and the case-law of the court itself ever alert and to the fore in ensuring that disadvantaged persons are protected."

and he then concludes that it should be extended and the court agreed with him.

I am not showing you that because it really reflects the arguments that we are making because of course the arguments that we are making on the construction are not remotely as radical which those succeeded in the *P v S* case, but what it demonstrates is that it is very, very difficult for a national court to conclude that it really can be absolutely confident and that is the standard in *Else*, it can be absolutely confident as to what approach the ECJ would take to the wording of the Directive, particularly so in a case such as this which we submit does engage basic policy objectives and in particular, as I have said, the objective of not distorting competition unnecessarily whilst maintaining consumer protection, and in the absence of any case law and, of course, in the presence of the other factors that we have identified. So for all those reasons we do submit ----

THE CHAIRMAN: It is quite an extreme submission.

MISS ROSE: What ...

THE CHAIRMAN: These Europeans, we do not really know what they mean when they pass legislation. There is always going to be a doubt, there is enough doubt about English legislation which we do have a better approach for and of course, I would have thought that any lawyer worth her salt would be able to point to a different construction and say "Therefore it must be referred", but I do not think that is quite ----

MISS ROSE: No, that is not the way I am putting it, and to start again: we have a situation here where we have engaged – I do not think anybody disputes this – we have engaged the basic questions of the policies underlying the CRF and, in particular, the question of where the appropriate balance is to be drawn between consumer protection and promotion of competition. We have a Directive which, in my submission, is less than clear and you have my detailed submissions on its construction. We have divergence between the different language texts, we have divergence between State practice, we have a harmonisation Directive so the aim is to achieve a common approach throughout the Community and we have no relevant case law at all.

THE CHAIRMAN: In my observation I was not being critical of those very clear submissions, it was of the final submission based on a plea that says "and by the way, you never know what the ECJ will do". I see the real issues of meaning that you address.

MISS ROSE: Yes, but the submission that I make on *P v S* does not just apply to *P v S*, I have been in a number of cases myself where I have had a national court tell me that they are absolutely clear I am wrong but they will give me the benefit of the doubt and refer it and then one wins in Luxembourg, and it happens regularly. It happens because the ECJ has a completely different perspective from the perspective of the national court.

This Tribunal has seen the way that Ofcom and BT put their cases, and they are essentially textually based analyses of the Directive. They are based on the wording of the particular Articles, but we submit that when it comes to the ECJ the ECJ is going to be much less concerned about the precise wording of the Articles, and much more concerned about seeking to reach a result which furthers the policy objectives of the CRF.

MR. BLAIR: You raised a puzzle in my mind and I am sorry I cannot give you notice of it, but s.60 of the Competition Act 1998 requires this Tribunal, unlike many other Tribunals in the United Kingdom, to have regard to the way the European Court actually functions.

MISS ROSE: Yes.

MR. BLAIR: Is that provision applicable in this jurisdiction?

MISS ROSE: It is not going to assist you on this question.

MR. BLAIR: We are not actually operating under any of the legislation to which s.60 applies, is that right.

MR. VAJDA: The short answer is "no" because s.60 is dealing with Chapter I and Chapter II of the Competition Act and we are not concerned with that.

MR. BLAIR: This is an allied jurisdiction but not related. So we are restricted to looking at things the British way?

MISS ROSE: Of course you have to look at things the European way when you are construing European legislation, the problem is, as is so clearly explained by Mr. Justice Bingham (as he then was) that it is simply that any national tribunal is at a disadvantage because you do not have the advantage of submissions from the European Commission, you do not have the advantage of a multi-national panel of judges each with a different national perspective. You do not have the advantage of interventions from other Member States which may have an interest in this issue. You do not have the advantage of submissions from advocates who are fluent in the various languages of the Directive, and there is nothing that you can do to supply that and that is why we have a reference process.

THE CHAIRMAN: We are not fit for purpose! (Laughter)

MISS ROSE: You are fit for many purposes ----

THE CHAIRMAN: But not this one.

MISS ROSE: -- but for giving an authoritative interpretation of a crucial provision in a completely untried Directive there is another court that is better qualified.

THE CHAIRMAN: So you would say logically our only way out to give a decision without a reference would be to say that it does not matter because which ever way the Euro legislation is interpreted you lose or you win?

MISS ROSE: Yes, and that is not a possible solution in this case because the case turns on the question whether the Universal Service Directive prohibits a condition of this type.

THE CHAIRMAN: Okay, well can I ask you then – I do not know if it is jumping off the fence, but it is telling me clearly – is your primary submission that it is clear, or that it should be referred?

MISS ROSE: You might be detecting that we are pretty strongly in favour of a reference. I will be clear about the reason for that. The reason for that is that we have a business to run and there is a real concern about the continuing uncertainty of the regulatory position. With respect whatever decision this Tribunal makes there is a very high prospect of an appeal, and it is very hard to see how permission to appeal could be refused by the Court of Appeal, because it is a novel point, it is a pure point of law, it is a point of principle. In that situation if a reference is not made now from this court the likely result from the perspective of my clients is going to be six months or a year of additional delay before we get certainty.

THE CHAIRMAN: The Court of Appeal would have to refer it unless they regarded it as acte claire, or not?

MISS ROSE: No, the awful truth is that it could go to the House of Lords and then the House of Lords would be under an obligation to refer it unless they considered it to be acte claire, so we could be looking at two and a half years of additional delay before we went to the House of Lords because we would only be at the point at which a petition to appeal to the House of Lords was dismissed.

THE CHAIRMAN: So it is going to go to Europe at some stage you are saying and you would rather not win today or tomorrow?

MISS ROSE: We would rather have certainty in a cost effective way. The other aspect of this, of course, is the legal costs. One of the great advantages of a reference from our perspective is that it is a cost effective process. It is largely conducted in writing with a short oral hearing in Luxembourg, and then we get a result – whether we like it or not it will be a final result.

THE CHAIRMAN: Did anyone help you formulate the question?

MISS ROSE: Yes, of course, and that I would anticipate would be a collaborative process between the parties and the Tribunal, and of course it is important that we get questions that are clear and that will determine the issue. But the alternatives for us are, frankly unpalatable.

Unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: Thank you, Miss Rose. Mr. Vajda, are you able to say in a nutshell where you stand on reference?

MR. VAJDA: Yes, in fact what I thought I would do is deal with that first. The position of Ofcom is that this Tribunal should decide this. This case is no more difficult than I think 10 of the other telecoms cases that this Tribunal has grappled with and in no case has this Tribunal made a reference, and we see no reason for departure in this case.

THE CHAIRMAN: Has it ever been asked to?

MR. VAJDA: I do not know whether it has been asked to, but a reference, as you know, is in the discretion of the court, it does not have to be asked for by the parties.

The important point from Ofcom's position is that it has a consultation paper out as to what is to happen in the future and it is very concerned to ensure that the world can move on and forward, and a reference would lead inevitably to delay – 18 months to two and a half years. Miss Rose, of course, with her customary forensic skill dangles the prospect of years and years of litigation – "What happens if we appeal and it goes to the House of Lords?" Well of course many parties say that they are going to, but let us just wait and see what happens. We say the correct course that this Tribunal should follow is to decide the case and then there may or may not be appeals, and I certainly would urge the Tribunal not to be swayed by *in terrorem* arguments as to whether or not there will be appeals.

I also observe, I do not know whether this has been the effect of our skeleton argument on Miss Rose and her clients, but in answer to the question that you, Sir, put to her a moment ago, whether her primary position was that it was clear or reference, and she said – as I understood her – "a reference". If I could just invite the Tribunal to pick up p.36 of her skeleton argument her primary position was the opposite, it was that "The appellants submit the point of EC law is clearly in its favour and a reference is unnecessary." Do you have that, Sir, the first sentence of para.135 at p.36. So there may be a degree of forensic manoeuvring going on here.

I should say perhaps in relation to the question that Mr. Blair put to Miss Rose about s.60 of the Competition Act, because I perhaps did not give as complete an answer as I should have done, the significance of s.60 of the Competition Act is that it requires all courts effectively to follow European Law in interpreting a UK Act, namely the UK Competition Act. In other words, you do not give one meaning to restriction of competition in the Competition Act which would be different from the meaning given by the European Court in the equivalent provision of Article 81, there is no need. If there was no s.60 in the Competition Act courts in this country could give their own meaning to our own Competition Act, but Parliament has said "No, you should give a European meaning to our own domestic legislation". All parties agreed in the present case, given that we are dealing with a Directive, that there is only one meaning which is the European meaning. We say that this is a specialist Tribunal and is well able to form a view as to what the correct meaning of this Directive is.

I also will say a little about the "sky is falling in" argument about which you have heard a bit from Miss Rose this morning if USC7 goes. I fully appreciate, as Miss Rose quite rightly points out, this is an issue of law and whether or not in a sense the sky falls in is neither here nor there, but plainly the Tribunal is interested in that and I will say a word or two about it.

Can I just begin by saying this that so far as Ofcom's position here is concerned, Ofcom is here acting in its role as a dispute resolution body. Ofcom is not here acting under any policy guise, and when this dispute came to Ofcom, Ofcom considered that there was a *vires* issue and it considered it appropriate, as a public authority, that it consider that and it do something which was advised was lawful. It is not a question of policy, it is a question of whether or not Ofcom was entitled to proceed in the way that it did, and Ofcom took the view, having taken advice, it did not and obviously it is for this Tribunal then to determine whether that is right or wrong.

In a nutshell the position of Ofcom is that the USD, which obviously we will come to, the Universal Service Obligations, what they are focused on and what they are giving are rights to end-users, people like all of us in this room as end-users, that is what it is concerned with. It is not, we say, intended to be used as a lever by one commercial party against another in a

commercial dispute about the terms of access. That is what dispute is about, because The Number has come to Ofcom and said, "We are paying BT too much, please intervene on our behalf".

We say, and I will obviously expand on that, that is a fundamental misconception of what the USD is concerned about. The USD is concerned to ensure that certain services are available to the end-user at an affordable price. That is the target. Ofcom's position is that so far as that target, that result, to use Miss Rose's expression, is concerned, that is met in the United Kingdom. Could I just invite the Tribunal to go to the core bundle at flag 9, this is the Consultation document that was put out on the same day as the Determination. Can we go, first of all, to p.500. It looks at the target, first of all, in relation to provision of directories, what you, sir, called "The Book", which is the obligation under 5(1)(a), and we see the conclusion so far as affordability is concerned is at 502, at 3.21 and 3.22. It sets out at 3.21 what the Universal Service Order requires, and points out:

> "The Universal Service Order does not define what is meant by the term 'affordable'. However, the Universal Service Directive's preamble defines an 'affordable price' to mean 'a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure'."

Pausing there, and I will come back to this, this is a fundamental point, the concept of affordability is effectively what the consumer can pay and is a completely different concept from the concept of cost orientation which is the concept that is used at the wholesale sale, which is effectively, "It has been provided at cost plus a certain profit". There are two different concepts.

At 3.22, Ofcom note that BT and Kingston:

> "… currently supply their local directories free of charge to all end-users. Equally, online directories are available with free access …"

Then there is an add-on offered by BT. The conclusion that Ofcom reach in relation to affordability of directories is the last sentence:

> "There is, therefore, no evidence to suggest that affordability is an issue for directories."

So that is what they have concluded in relation to directories.

If we then look at directory enquiry services, which for a reason I can never understand, is called DQ, and that is at p.507. You will see in bold just below the first hole punch,:

"**Access to DQ services in the future**

The 'universal service' criteria for DQ services

3.53 We next deal with the 'universal service' criteria in relation to DQ services. As with the case for universal service directories, we will consider whether existing services meet the universal service criteria and consider the robustness of the market in terms of continued provision."

We then have something called "Comprehensiveness" that I will not go to, but if we go to p.508 we see that there are two pages on the issue of "Affordability". At some point perhaps the Tribunal might read this to themselves, but perhaps I could just look at one or two passages. 3.60 makes the same point about what is meant by "affordable".

What Ofcom do is then look at the cost prior to liberalisation and what has happened since. You will see:

"Prior to full liberalisation … the cost of calling 192 …"

For those that remember, that was the good or bad old days where with a BT line it was 40p, which entitled the caller to request two numbers, and they set out what the call rates were.

Then at 3.62 we see:

"Since Ofcom's most recent report on the DQ market, the charges of the two main DQ services have increased significantly. As at June 2007, the cost of an average duration call to 118 118 [which I think is The Number] from a BT fixed line is around 80p. compared to 60p. in November 2005."

So Miss Rose's clients have increased the cost of their calls at the retail level very substantially. However, the conclusion that the Office reaches at 3.66 is that despite increases in prices for people like The Number:

"… for the large majority of people, DQ services represent a very small or negligible part of their total expend on telecommunications, suggesting that they are affordable for these people. Even for the small minority of frequent users, the proportion of total spend on DQ services is fairly small."

Putting that in context, what effectively Ofcom are saying is that there is not a problem at the retail level, that the target of affordability has been met. That has been met even though, and there may be some irony in this, and this is why we say that what this dispute is about, it is not about universal service, the complaint of Miss Rose's client is that they are paying BT too much for what is called OSIS, the comprehensive database.

The position of the Office is that it really is irrelevant for the purpose of the affordability criteria whether or not that is right or wrong, because Ofcom have taken the view at the retail level that these services are affordable, and they are affordable even though, in fact,

Miss Rose's client has increased the cost of the service quite substantially. I have been instructed that, in fact, since 2001 the basis price from BT has remained the same. So the price that is being complained about that is too high has remained exactly the same since 2001, but the retail price, as we have seen, has increased substantially.

I wish to stress that so far as the Office is concerned, what is happening at the moment at the wholesale level is irrelevant in universal service terms. However, we fully accept that at the wholesale level one needs to consider whether or not there needs to be a form of regulation, and that is what the Consultation paper is all about. There are effectively – and again without going into the detail and we, in fact, summarise the position in the Consultation paper at the end of s.5 of our skeleton for the Tribunal, and the Tribunal have probably read that – three things that can be done. One is a do nothing option, have no regulation at all. That, of course, would be wholly in line with the whole thrust of the EC legislation, and I will come to that in a moment.

We have heard a lot about the sky falling in. Let us just think about this for a moment. The largest two users of the OSIS database are BT, itself, and Miss Rose's clients. It is a fundamental principle of competition law that an undertaking in a dominant position should not price discriminate – in other words, BT cannot charge The Number more than it can charge its own downstream operation. Because that is in general competition law it is not a fanciful suggestion to imagine that without any regulation at all there will not be a problem, because the moment that BT said, "We are going to charge The Number more", they are going to run into discrimination problems. BT, itself, has its own operation which it wants to run profitably. So there would not seem to be, on the face of it, much incentive for BT to interfere with those basic principles of competition law.

However, competition law is there, and that is one of the two options that is available.

THE CHAIRMAN: It is the same provisions that would make BT supply OSIS at all? They could say, "Good afternoon".

MR. VAJDA: Yes, there is a question in Article 82 and Chapter II of what is called "refusal to supply" ---- I say this, even though BT is sitting next to me. If they said, "We are not going to supply OSIS at all to The Number but we are going to continue to supply it to ourselves", they would be in real difficulty on the question of discrimination.

This is very important in the context of the common regulatory framework. We have heard a lot this morning about regulation. One thing we have not heard about which is fundamental to this case and the whole concept that was introduced in 2002 is the different *ex ante* and *ex post* regulation. It does not need a rocket scientist to tell you that *ex ante* regulation is more intrusive than *ex post*. I will obviously need to make good this point, but the basic thrust of

this new regime is that we want the Community wants to move away as much as possible from a system of *ex ante* regulation to, if there is regulation, on an *ex post* basis, normal competition law, because that is obviously going to be less intrusive. It is also going to be less burdensome, because one also has to bear in mind in this context that regulation does not come free, you have to have people sitting there who have to be paid for by the industry. So it is not a no cost option.

The other option that would be available – as I said, there is do nothing, there is having an *ex post* competition case – would be a different form of *ex ante* regulation, which is regulation which is based on a finding that BT has what is called "SMP" or significant market power, and I will take the Tribunal to that in due course. That is a mechanism under the Directives where you have to go through various hoops, and you have to get the approval of the Commission. The reason that you have to go through those hoops and get the approval of the Commission is because, as I said, the zeitgeist, the move, is to go to *ex post* rather than *ex ante*. This is, in a sense, one of the important changes that took place in 2002, that we want to have less *ex ante* regulation and we want to have more targeted regulation and, where appropriate, *ex post* rather than *ex ante*.

My final point at the outset is picking up a point that Miss Rose made this morning about Article 3.2 of the USD, which I will come back to, but the words that she used were "conditions which depart from normal commercial conditions". I will just read the Tribunal the passage, I will come back to this. The words are:

> "They [the Member States] shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conversation discuss which depart from normal commercial conditions …"

There can be no doubt that the imposition of *ex ante* wholesale price regulation at a cost oriented price is a departure from normal commercial conditions. So they say this all is of a piece, but what one is looking at is to minimise *ex ante* regulation. One has it in certain cases and where there are problems one looks at *ex post*.

MR. BLAIR: Could I just ask a question about that. You describe the three policy options that might be pursued if the consultation went ahead. All of them, I think, would involve revoking or getting rid of USC7.

MR. VAJDA: Yes.

MR. BLAIR: Why do you not cut this Gordian Knot completely and just revoke it now, get rid of this litigation, get rid of any European reference, just proceed? The Appellants could not object. You might have a scruple about revoking something you believe to be void, but that is a very small price to pay, is it not?

MR. VAJDA: If I recall, there was a dispute about this as well. The actual dispute relates to a period in the past, and there is, in fact, also an issue, I think, about whether or not, if Ofcom were to find in The Number's favour, there should be any order in terms of money back from BT. So even if USC7 was revoked today that still would not resolve the point that at the time The Number came to Ofcom and Ofcom accepted this as a dispute resolution matter, USC7 was there and has not been revoked.

MR. BLAIR: I can see there is a tail behind you but you would have resolved to narrow the issues very considerably, would you not?

MR. VAJDA: Yes, and certainly if the Tribunal endorsed the Determination then of course USC7 will go and there will be no more determinations.

MR. BLAIR: Not until the European Court has finished with it in X years time, whereas if you revoke it now no one can attack you.

MISS ROSE: We can, we can appeal, of course.

MR. BLAIR: How do you appeal against an instrument revoking something else?

MISS ROSE: We would either have a right of appeal here or we would have a right of judicial review to the Administrative Court.

MR. BLAIR: You might have judicial review.

MISS ROSE: The grounds would be precisely the same as they are being presented to this Tribunal, which may be the reason why Ofcom has agreed not to do such a thing until this litigation is over. It would be quite an extraordinary course for a regulator to take.

MR. BLAIR: It is an extraordinary course as it is now.

MISS ROSE: Of course. It is fairly extraordinary to say its own condition is *ultra vires*, but it would be remarkable when there is litigation pending on that very issue of law for the regulator to then proceed to take unilateral action before the matter had been finally determined.

MR. VAJDA: Indeed, I am reminded by Mr. Peretz that, in fact, Miss Rose's clients wrote to us asking us not to revoke it, not to revoke USC7 and we have not done so. I agree with her that one way or another this issue has to be determined by a court, though I do not think we could simply, if we revoked it, remove it from the arena of tribunal or court. Our submission is that we should not be getting into this exercise at all. That is the consequence of what I am saying and what the Determination set.

With those opening remarks it seemed to me that it might be helpful to look at, first of all, the Commission communication which Miss Rose took us to for some small passages after lunch. This is, if you like, the *fons et origo* of the regime, because obviously it is quite important to see what the policy was. Could I just tell the Tribunal for its note in case there is concern as to whether or not one can rely on this in terms of interpretation, the Commission Communication

is in fact referred to in terms at recital 2 of the Framework Directive, and the reference is authorities bundle 1, flag 5, 67; and it is also referred to at recital 1 of the Authorisation Directive, authorities 1, flag 3, 41. That is to be found at tab 7 of authorities bundle 1. Can we pick it up at p.98. There is a heading, "The cornerstone of Europe's transition to the Information Society", and I will just look at the first paragraph below that:

> "Since 1990, the European Commission has progressively put in place a comprehensive regulatory framework for the liberalisation of the telecommunications market. By allow competition to thrive, this policy has had a major impact on the development of the market, contributing to the emergence of a strong communication sector in Europe, and allowing consumers and business users to take advantage of greater choice [etc]."

Then if we go to 99, virtually opposite, we have a paragraph:

> "The present Communication initiates a Review of the current telecommunications regulatory framework."

It sets out both, if you like, the good and bad and what it says at the bottom of that paragraph is:

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

Then if we go to 101, "Policy Objectives":

> "The policy objectives that underpin the existing regulatory framework and that will be made explicit in the new regulatory framework for national regulators are as follows:
>
> - To promote and sustain an open and competitive European market …
> - To benefit the European citizen …"

- and this is again a target at the end-user –

> "… by ensuring that all have affordable access to universal service specified at European level …"

Then we have "Principles for regulatory action", and then we see over the page at p.102, and this is quite an important change, the minimum necessary to meet those objectives:

> "… removing obligations in the existing framework which are no longer necessary, and building mechanisms into the new framework to reduce regulation further where policy objectives are achieved by competition …"
>
> <u>Design of the new regulatory framework</u>

The Commission sees the new regulatory framework structured along the following lines …"

And then we have at the second paragraph of the first diamond:

"This represents a substantial simplification of the current framework, reducing the number of legal measures from twenty to six."

Then importantly the third diamond:

"**Competition rules**

Greater reliance on the general competition rules of the Treaty …"

As I said the competition rules, that is *ex post* not *ex ante*, so that is what they are saying:

"… allowing much of the sectoral regulation to be replaced as competition becomes effective."

Could we back to p.101, Mr. Peretz reminds me I should have drawn the Tribunal's attention to the third policy objective:

"To consolidate the internal market … by removing obstacles to the provision of communications networks and services at the European level so that, in similar circumstances, similar operators are treated in similar ways …"

Then 104:

"**Licensing and authorisations**

The current framework for telecommunications allow Member States to insist on the use of individual licenses … This degree of control on market entry creates administrative barriers which may be disproportionate, and has contributed to large variations in licence regimes in the EU.

The new framework would require operators providing communications services to be licensed using general authorisations …"

Pausing there, although this is a Commission proposal, you will see that this was, in fact, adopted in the legislation.

Then p.105, "Universal service", Miss Rose took us to that so we do not need to read that again.

Can we now go to p.122. If we go to 120 we see this is in a chapter, "Objectives, guiding principles and design of the future regulatory framework". This builds on the points that were made in the executive summary. 3.2, p.122, "Regulatory principles", and the second diamond:

"*Regulation should be kept to the minimum necessary to meet those policy objectives*. An unduly restrictive regulatory system risks acting as a brake on investment or may fail to stimulate sustainable investment. Much of the current regulatory framework addresses the need to create a competitive market, for example by requiring

incumbent operators to meet all requests for access to and interconnection with its network. Once a competitive market is effectively established, many of these provisions should no longer be necessary and it would therefore be sufficient to rely mainly on the application of the competition rules of the Treaty …

"Wherever possible, the new framework should rely on existing horizontal regulation rather than sector-specific legislation. New regulation at EU level should be proposed only where absolutely essential, for example where there is market failure to meet a particular public interest objective."

Pausing there, that is, of course, at the retail level if there is market failure. If I could just have a short digression at this point: true it is that, if you like, competition is an important objective, but the point about universal service, and this is, if you like, what makes the European model different from what I might call the American model, the US model, is that in Europe it has been recognised that there are cases of market failure where competition alone will not, in fact, universal access. That is what universal service is all about. In the field, say, of telecommunications it is to ensure that the crofter in the Shetlands, who might not benefit from competition because it is expensive to provide a service to him up in the Shetlands, gets the same deal as somebody who is living in Central London. That is, if you like, the European take on all this and why we are different from the United States.

Going back to the Communication:

"Market players should be encouraged to take self-regulatory initiatives, for example to develop codes of practice in those areas where a common approach is necessary, so as to minimise the need for formal regulation."

Then if we go to p.125, this is the architecture the new regime, and if we look at 3.3.1:

"*Binding Community measures*

Binding Community measures would include a new Framework Directive based on the five regulatory principles, combined with four specific directives."

Then we have the Framework Directive and you see the third bullet that will:

"… guarantee specific consumers' rights …"

Again, the focus on guaranteeing consumer rights. Then we see over the page at 126 the four specific directives. Again, all these have come into force. The first one is the Authorisation Directive. We then have what is called the USD, the Universal Service Directive, and then we have the Access Directive and then we have the Privacy Directive. If and in so far as the Tribunal is interested in the legislative history there is a useful flow chart on p.127 which shows what is going on.

Then if we come to 131,

"*Individual licenses and general authorisations*

The current Licensing Directive gives a large degree of flexibility to Member States to require individual licenses for telecommunications services. In particular, Member State are permitted to require individual licenses for voice telephony, a service which is provided by almost all telecoms operators. Many Member States have exercised this option, with the result that individual licenses have become the rule rather than the exception in their territory. In a minority of Member States voice telephony services are licensed under general authorisations, with individual licenses restricted to use of limited resources.

Requiring an operator to seek an individual licence gives regulators a large degree of control over market entry. As such it is a tool which should be used only justified cases. Some Member States have been able to regulate effectively a market in which general authorisations are used for all wired telecommunications services. In this context, the Commission does not believe an approach based primarily in individual licenses can be justified. The variation described above can also prevent the deployment of pan-European service … to the same service. Moreover, in a market increasingly characterised by mergers and joint ventures, use of general authorisations would avoid the requirement to seek new individual licenses in Member States.

It is essential that national licensing systems should be both predictable and place the minimum possible burden on applicants."

Then if we go to p.149 we get to "Universal service". Again Miss Rose took us to a passage here.

"The current regulatory framework requires NRAs to place obligations on network operators to ensure that a defined minimum set of services of specified quality are available to all, independent of their geographical location …"

That is the second point that I have made, that is what is meant by universal –

"… at an affordable price."

Then if we go to the bottom of the page:

"<u>Affordable access to all – a Commission priority</u>"

When it says "all" it means all consumers, and we see that in the first sentence:

"A major priority for the Commission is to ensure that all consumers have the opportunity to reap the benefits of the Information Society."

Then over the page, the second paragraph:

"In the context of the new regulatory framework, there a number of policy tools available to the Community in seeking to achieve this objective. The first is

liberalisation itself. Liberalisation of the telecommunications sector has brought benefits to consumers in terms of more reliable, higher quality services at lower prices."

Just pausing there, obviously in the United Kingdom we have had a liberalisation of directory services, because in the days which are long gone when BT or its predecessor had a monopoly we had all the problems that one associates with monopolies. So liberalisation has already been of benefit to consumers, and the Commission says:

"This is an encouraging trends that demonstrates that competition is leading to a reduction in tariffs for communications services. The proposals in this Communication on licensing, access and interconnection, etc. should reinforce development of competition, leading to even lower prices.

But it is clear that competition is not sufficient to achieve the Community's policy objectives. In an unregulated market, there would be consumers on low incomes, or who live in remote areas, who would not be served by operators, because they would be uneconomic. It is therefore essential that the new regulatory framework continues to ensure all are provided with those services considered essential for participation in society and already available to the great majority of citizens. This is the origin of the concept of universal service."

That is very important, because that is the point that I made to the Tribunal earlier, that you can have a situation of vigorous competition that is not going to benefit the Shetlands crofter. It is not enough to say, "We will rely on competition".

Then how does one pay for this? That is dealt with at 151 between the two hole punches:

"Universal service relies on a cross-subsidy from one group of users to another. The current framework has ensured that a basic level of telephony is available to all, by obliging the universal service provider to ensure that consumers who would be counted as uneconomic (e.g. those on low incomes or who live in remote areas), have access to a basic set of telecommunications services at an affordable price. For basic telephony, such a cross-subsidy does not constitute an undue burden because the infrastructure already exists and most people already have a telephone. So the number of people that need to be cross-subsidised is quite small."

We then have a section on affordability at 4.4.3, which is at 153, which, in a sense, has been taken up in the Consultation Paper that I showed the Tribunal earlier on:

"The current rules require universal service to be available at an affordable price, but do not define affordability in quantitative terms. This is sensible given that affordability is relative concept, largely dependent on national conditions. But it is

proposed to set out clear principles at European level to ensure affordability of telephone services.

Member States have devised various means to fulfil the obligation to publish rules and criteria for ensuring affordability at national level. Most Member State operate some form of price control on service defined as part of universal service. Some require special schemes for particular categories of users (low incorporate, disabilities), and require arrangements to facilitate payment and to allow better management and control of customer expenses, including the payment of bills. There also exist special provisions on disconnection for non-payment. Often these schemes are tailored to particular problems or consumer issues that have arisen Member States. Such schemes are working well in general and the Commission therefore sees no need to amend the framework, but will continue carefully to monitor developments, in particular to ensure that such schemes are targeted squarely at those disadvantaged groups for whom they are designed."

Of course, what we have seen is that Ofcom say that we in the United Kingdom have satisfied the affordability criteria. You will see in this section that I have just read out some of the matters that are required, "facility for payment, better management and control of customer expenses, including paying the bills". Those are some of the things that we find in the annex to the USD because these are matters which are directed to consumers.

Then if we go over the page to 154:

"The interests of users and consumers

The concept of universal service is one way in which the current framework has sought to protect consumers in society by ensuring they have access to those services deemed essential to avoid social exclusion."

It is all directed to the consumer.

Could I then invite the Tribunal to go to 161. The Commission looks at specific competition issues:

"The communications market is still dominated by incumbent vertically integrated market players who still have massive market share in their national market, and who seek to leverage that market power into related markets. Nevertheless, specific markets in the communications sector are seeing vastly increased levels of competition, such as in the mobile markets, and new entrants to the market are making inroads into the market share of incumbent operators in all market segments, to a greater or lesser extent. The task for the Commission, the national competition

authorities and NRAs is to ensure that the trend towards effective competition continues."

We can then go straight to 163:

"*Dominant position and Significant Market Power*

In the early stages of competition, access by new entrants incumbent's network is an essential pre-requisite for sustainable competition, and the concept of Significant Market Power (SMP) is currently used as the trigger for application of specific obligations. Operators with more than 25% market shares in specified markets are presumed to have SMP, but NRAs have discretion to take other factors into consideration and to deviate from a simple 25% market share threshold.

Studies undertaken for the Commission, drawing on experience with the current regime, suggest that a more appropriate trigger for certain *ex ante* obligations …"

So that is the reference to *ex ante* –

"… would be the competition law concept of 'dominant position'. A complementary measure would be to remove from specific directives the definition of the relevant market on which market power is assessed, in order to ensure that the regulatory framework is technologically independent. In principle, the Commission favours the use of the concept of dominant position in particular markets, calculated in a manner consistent with competition law practice, as a trigger …"

– and then these words are important given the force that has been put on how unintrusive *ex ante* obligations are –

"… as a trigger for the heavier *ex ante* obligations (e.g. obligations to supply unbundled, cost orientated, interconnection services) …"

They are saying *ex post* is a lighter touch than *ex ante* –

"… while foreseeing a need to retain the current threshold of significant market power for other obligations …"

You will see that all this made its way into the legislation.

That is all I need take the Tribunal to in this document, and what I would now like to do is go to the next flag, flag 8. We are now moving from 1999 to July 2000 and this is the Commission proposal for what became the Authorisation Directive. Helpfully it comes with an explanatory memorandum which begins at p.180. We can pick it up at "Aims and Objectives" at 2:

"In line with the policy objectives and principles of the new regulatory framework, the present proposal to revise the existing authorisation and licensing regimes is based on the need to stimulate a dynamic, competitive market for communications services,

to consolidate the internal market in a converging environment, to restrict regulation to the necessary minimum and to aim at technological neutrality and accommodate converging markets."

If we skip to the bottom paragraph:

"Licence categories created by Member States varies from only two to no less than eighteen, each with its own conditions, procedures, charges and fees attached. To sustain the segmentation created, Member States require many different kinds of information from service providers ranging from nothing at all under the lightest regime, to 49 items under one of the heaviest licensing schemes. As a consequence, the regulatory workload involved in managing the authorisation and licensing regime varies from relatively light to extremely heavy with the result that administrative charges imposed on operators are zero in some Member States and excessive in others."

That is making the point that there is no such thing as free regulation.

At 181, the last paragraph before we get to "Proposed Remedies":

"An efficient and effectively functioning single European market can be achieved by rigorously simplifying existing national regimes using the lightest existing regimes as a model."

Then "Proposed Remedies", and this follows exactly what they proposed in 1999:

"General authorisations instead of individual licenses

Although the existing Licensing Directive gives priority to general authorisations, it still leaves a wide margin to Member States for the use of individual licenses. A majority of Member States has made ample use of this margin to the extent that individual licenses have become the rule rather than the exception in most national regimes. This makes entry in the national market cumbersome and creates a barrier to the development of cross-border service.

The present proposal intends to cover all electronic communication services and networks under a general authorisation and to limit the use of specific rights to the assignment radio frequencies and numbers only."

That is the general rule if you are moving over to a system of general authorisation.

Then if we go over the page to p.182, it goes on:

"*The proposed Directive would further limit …*"

and this is what we see in 6.2 –

"*… the number of conditions which may be imposed on service providers and requires a strict separation between conditions under general law, applicable to all*

undertakings, conditions under the general authorisation and conditions attached to rights of use for radio frequencies and numbers."

Radio frequency, that is where you have only got a limited amount of spectrum and obviously you have to give an individual licence.

Then if we drop down two headings, we see:

"Reducing fees and charges and their range of divergence within the EU …

The proposed directive would reduce administrative charges considerably by simplifying the authorisation regimes as described above, thereby reducing the regulatory workload and the attendant administrative costs."

What we then have at p.183 ----

THE CHAIRMAN: Where do we see what is reflected in 6.2 other than in relation to radio frequencies and numbers? Where do we have the allowance of particular conditions?

MR. VAJDA: We do not have it in terms in the passage that I have read. What we then have is a description of the proposed articles, and then if we go over the page to 184 we have Article 6, which is "Maximum list of conditions attached to the general authorisation and to the rights of use for radio frequencies and numbers". Perhaps the easiest thing is to go to p.192 where they set out their version of Article 6, which one can see is pretty similar to the version that was actually adopted by the legislator, because we have 6.1, which is effectively the general rule. Do you have that, sir?

THE CHAIRMAN: Yes.

MR. VAJDA: Then we have 6.2, which is:

"Specific obligations which may be imposed on providers of electronic communications services and network …"

Then there are various categories and we see the relevant to us is:

"… or on those designate to provide universal service under Directive …"

That is where that comes in, so there was already in the proposal a provision for derogation there.

Before going to the legislation, can we go to flag 9, we have something similar in relation to the USD, another Commission proposal. We see "Introduction":

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

The first chapter sets out the scope and aims of the Directive. The second chapter focuses on traditional universal service obligations, and includes provisions for designation of operators by Member States for the provision of universal service …"

That, in fact, is a novelty, which was not in the RVDT regime. Then we see in II:

"Aims of proposed Directive

- to adapt and modernise existing measures on universal service …"

Turning to the legislation in the form as it is on the statute book, can we go first to the Framework Directive.

THE CHAIRMAN: Just before you do that, is there any material difference in the wording of the draft at the back here?

MR. VAJDA: I have not checked that. Article 5 is at p.220.

THE CHAIRMAN: It is pretty much the same.

MR. VAJDA: I am sure if there is some difference that Miss Rose spots she will mention it tomorrow and perhaps we will look at it on our side. I am afraid I have not done that exercise. Can we then go to the Framework Directive, which is flag 5. You will see there at recital (2) reference to the Commission proposals that we have looked at. That now becomes a formal recital to this Directive. I want to take the Tribunal, if I may, to two provisions in the recitals at p.70. The first is (25):

"There is as need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market. The definition of significant market power …"

– that is the Licensing Directive –

"… has proved effective in the initial stages of market opening as the threshold for *ex ante* obligations, but now needs to be adapted to suit more complex and dynamic markets. For this reason, the definition used this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities.

(27) It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem."

There are two pre-conditions there. First of all, there has got to be SMP; and secondly, you have got ordinary competition laws.

If we then go into the body of the Directive, Miss Rose took us this morning to Article 8, which are the tasks of the NRAs. What I would just like to remind the Tribunal of, Miss Rose took you to 8.2, which is the task of promoting competition. Of course, "promoting competition" there means not just *ex ante*, but also *ex post*. It is effectively using competition.

As I say, one must not forget that *ex post* is a less burdensome and intrusive way of competition than *ex ante*.

I apologise, the reference to 97/33 at recital (25) in the Interconnection Directive, it is not the Licensing Directive.

THE CHAIRMAN: It was which?

MR. VAJDA: Recital (25) on p.70 is the Interconnection Directive, it is not the Licensing Directive.

So that is the point I would make on promotion on competition at 8.2. Then, of course, at 8.4, which Miss Rose also drew our attention to, we have the objective of promoting the interests of the citizens, and as I pointed out, competition law alone may not assist the crofter in the Shetland and that is why you have USO.

The only other bit that we need to look at is in Chapter IV, which is at p.78. These are the general provisions dealing with "Undertakings with significant market power". This is quite a complex procedure, but effectively the NRAs have to involve the Commission in establishing whether or not an undertaking has SMP. The reason for that is effectively to stop 27 Member States all going off and doing their own individual regulations. It is effectively to keep control on any regulation that goes beyond the minimum that is laid down by the CRA. Could we just look at Article 16, which is what is called the "Market analysis procedure", we see at 16.2:

> "Where a national regulatory authority is required under [the] Directive … to determine whether to impose, maintain, amend or withdraw obligations on undertakings …"

and these are *ex ante* obligations –

> "… it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive."

That is a pre-condition for imposing such obligations. Then 16.3:

> "Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article."

Then 4:

> "Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 …"

and that is the procedure it has to follow, and the NRA:

> "… shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 …"

So the NRAs can impose *ex ante* regulation on undertakings with SMP, but they have got to involve the Commission in that, and this is all part of a piece of trying to reduce to the minimum the amount of *ex ante* regulation.

I am very happy to call it a day whenever is convenient to the tribunal. What I was proposing to do, and I will not be very long, is to deal with the Authorisation Directive, which will probably take about ten minutes.

THE CHAIRMAN: Let us do that.

MR. VAJDA: That is at flag 3.

MISS ROSE: Before we turn to that, could Mr. Vajda perhaps identify the provisions involving the Commission that he was referring to?

MR. VAJDA: Yes, if we go to Article 14. The NRA has to assess whether or not an undertaking has a dominant position. That is effectively Article 14. Then Article 15:

> "After public consultation and consultation with national regulatory authorities the Commission shall adopt a recommendation on relevant product and service markets. The recommendation shall identify in accordance with Annex 1 hereto those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law."

Then if we go back to Article 7:

> "Consolidating the internal market for electronic communications
>
> 1. In carrying out their tasks under this Directive and the Specific Directives, national regulatory authorities shall take the utmost account of the objectives set out in Article 8 …
>
> 2. National regulatory authorities shall contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of this Directive and the Special Directives. To this end, they shall, in particular, seek to agree on the types of instruments and remedies best suited to address particular types of situations in the market place.
>
> 3. In addition to the conversations referred to in Article 6, where a national regulatory authority intends to take a measure which
>
> (a) falls within the scope of Articles 15 or 16 of this Directive, , Articles 5 or 8 of the [Access Directive] or Article 16 of the [USD], and

(b) would affect trade between Member States,

it shall at the same time make the draft measure accessible to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based, in accordance with Article 5(3), and inform the Commission and other national regulatory authorities thereof. National regulatory authorities and the Commission may make comments to the national regulatory authority concerned only within one month or within the period referring to in Article 6, if that period is longer. The one-month period may not be extended.

4. Where an intended measure covered by paragraph 3 aims at:

(a) defining a relevant market which differs from those defined in the recommendation in accordance with Article 15(1), or

(b) deciding whether or not to designate an undertaking as having, either individually or jointly with others, significant market power …

and would affect trade between Member States and the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8, then the draft measure shall not be adopted for a further two months. This period may not be extended. Within this period the Commission may, in accordance with the procedure referred to in Article 22(2) take a decision requiring the national regulatory authority concerned to withdraw the draft measure. This decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted together with specific proposals for amending the draft measure.

5. The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities and the Commission and may, except in cases covered by paragraph 4, adopt the resulting draft measure and, where it does so, communicate it to the Commission.

6. In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, by way of derogation from the procedure set out in paragraphs 3 and 4, in order to safeguard competition and protect the interests of users, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures with full reasons, to the Commission and the other national regulatory authorities. A decision by the national regulatory

authority to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4."

The Authorisation Directive, which is at flag 3, I should say that the 1999 document that I took the Tribunal to was, in fact a consultation document, but the reality is that, as one has seen, everything that was in there was effectively adopted.

Then recital 15 on p.42, and here we are concerned obviously simply with authorisation:

"The conditions, which may be attached to the general authorisation and to the specific rights of use, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law."

We then come to the text which is at 45, and we see the aim at Article 1.1 is:

"… to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community."

We then see in the Definitions section how a general authorisation is defined:

"(a) 'general authorisation' means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services …"

Then Article 3.1:

"Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive."

That is the basic rule. You have the freedom to provide subject to the conditions in this Directive. Then 3.2:

"The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 692) or rights of use referred to in Article 5, only be subject to a general authorisation."

That is, we would say, the general rule. Then they go on to say that you can be required to submit a notification but there is no authorisation required, you do not need to get a licence. In other words, it is not a criminal offence, as I understand it, to start providing services without a licence.

Then we get to 6.1, which is on p.46:

"Conditions attached to the general authorisation …

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and the rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C …"

The relevant parts that we are concerned with are A and C, because we are not concerned with spectrum, and if we go to p.51, the annex, we have part A. It says there:

"The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations … and rights to use numbers (Part C) …"

which I shall come to in a moment. Then we have:

"A. Conditions which may be attached to a general authorisation …

8. Consumer protection rules …"

You see the emphasis on consumer, but that is the Universal Service Directive. You are looking at rules which protect the consumer.

Then although we are not directly concerned with C, if one looks over the page at 52, there is reference made at C4, these are people who issue numbers to provide directory subscriber information for the purposes of Articles 5 and 25.

If we then go back to the body of the Directive, and I am coming very much to the end now, 6.2:

"Specific obligations which may be imposed on providers of electronic communications networks and services under …"

We are not concerned with the Access Directive here. Articles 16 to 18, those are what I call the SMP provisions in the USD. We are not concerned, at the moment at least, with those:

"… or on those designated to provide universal service under the said Directive …"

That is the limit of the conditions that can be imposed those in part A. That raises the point that you, sir, raised with Miss Rose earlier today, which is how can it be said that one can use Article 6.2 to impose an obligation on BT if BT has not been designated to provide universal service under the USD. I think there is no dispute that so far as directory enquiries is concerned, BT has not been designated to provide that. The obligation is a wholesale obligation. That is important because let us assume for the moment that there was vigorous competition as a result of that wholesale obligation, it does not necessarily follow that the retail, private and affordability, say, in the Shetlands has been made. In that sense USC7 is effective.

As I understand it Miss Rose's riposte to that, it is to say, well, provided you can designate it for some universal service, even if it is not D2, 6.2 permits the Member State to impose a condition relating to A if you can give them universal service. We say that is simply wrong

and that flies completely in the face of what I have been reading out for about the last hour, which is that one is looking at the minimum degree of regulation and one is looking to see whether one can sort the problem on an *ex post* rather than on an *ex ante* basis.

THE CHAIRMAN: Unless, when you come to it tomorrow, we will look at the US Directive, Article 8 is the elephant's point.

MR. VAJDA: Yes.

THE CHAIRMAN: Thank you very much.

MR. BLAIR: Can I just ask a point before you leave that. We were shown this morning the actual designation of BT and Kingston as universal service providers at p.584, and it seems to be a completely open designation, not in relation to particular services at all. They just enter the bus.

MR. VAJDA: What we are proposing to do in the light of the concern of the Tribunal is we will have tomorrow the legal instrument that provides the designation. I can deal with that tomorrow.

MR. BLAIR: At the same time you will need to address, you and Miss Rose in reply, my ongoing concerns. The fact that you have a designation of BT in accordance with domestic legislation is only effective for the Euro legislation if that direction is the direction which is contemplated by the Euro legislation. So we need to be satisfied that what has happened in the real world has been a designation for the purposes of Article 8. It may be a different question from the designation for domestic legislation. One would expect the Euro designation to flow from the nature of the UK one, but that depends on what the statutory instrument.

THE CHAIRMAN: So there is a scope point on designation and there is a purpose point on designation, both of which we would like help on tomorrow.

Are we on target for good time tomorrow, because if not we can spend some more time this afternoon?

MR. VAJDA: I would have thought that I have got about another hour or something like that.

THE CHAIRMAN: 10.30 tomorrow.

(Adjourned until 10.30 am on Thursday, 23rd October 2008)

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