Judgment Approved by the court for handing down.

Neutral Citation Number: [2025] EWCA Civ 1118

Case No: CA-2024-002837

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
MR JUSTICE MORRIS, JANE BURGESS AND ANNA WALKER CB
[2023] CAT 70; [2024] CAT 54

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/08/2025

Before :

LORD JUSTICE GREEN
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE ZACAROLI

- -

Between :

SKY UK LIMITED	**Appellant**
- and -	
THE OFFICE OF COMMUNICATIONS	**Respondent**

- -
- -

Tim Ward KC, James McClelland KC and Richard Howell (instructed by **Hogan Lovells International LLP**) for the **Appellant**
Josh Holmes KC and Nikolaus Grubeck (instructed by the **Office of Communications**) for the **Respondent**

Hearing date : 29 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 22 August by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Zacaroli:

1. The issue in this appeal concerns the true construction of s.32(2) and (2A) of the Communications Act 2003 (the "**2003 Act**").

2. It is an appeal from the decision of the Competition Appeal Tribunal (Mr Justice Morris, Jane Burgess and Anna Walker CB) (the "**Tribunal**"), reached for reasons explained in its judgment dated 15 November 2023 (the "**Judgment**"). The Tribunal (in a further Relief Judgment dated 13 September 2024, after hearing submissions on remedy) dismissed an appeal from the confirmation decision of the Office of Communications ("**Ofcom**") made on 19 August 2022 (the "**Decision**").

3. By the Decision, Ofcom concluded that the appellant, Sky UK Limited ("**Sky**"), was required to provide end of contract notifications ("**EoCNs**") to certain of its customers. That was because the services, in respect of which the EoCNs were said to be required, constituted "electronic communications services" ("**ECS**") within the meaning of s.32(2) of the 2003 Act.

4. I am grateful to both Mr Ward KC (representing Sky) and Mr Holmes KC (representing Ofcom) and those appearing with them for their clear and succinct written and oral arguments.

The facts in outline

5. Sky provides a variety of services to its customers, including pay TV, broadband and fixed and mobile telephony services.

6. In respect of Sky's pay TV services, some rely on digital satellite transmission services and a set-top box to receive content, others rely on a combination of digital satellite transmission and an internet connection (which may or may not be provided by Sky) to deliver content to customers (e.g. Sky+HD and Sky Q). I will refer to these together as the "**Sky Pay TV Service**". The key issue raised by the appeal is whether the Sky Pay TV Service is an ECS. Sky also provides other pay TV services delivered using an internet connection. These are known as over the top ("**OTT**") services. It is common ground that Sky's OTT services are not an ECS.

7. The Sky Pay TV Service comprises seven different elements:

> (1) TV content (which includes Sky's wholly-owned linear television channels, where content is delivered according to a fixed schedule, linear television channels which Sky licenses from third parties, and on-demand content from Sky and third parties);
>
> (2) Hardware (such as set-top boxes, satellite dishes and remote controls);
>
> (3) Software (including user interface, electronic programme guide and video recording technology);
>
> (4) Conditional access services (including viewing cards);

(5) Customer service (including call centres and online support);

(6) Installation and repair services delivered by Sky's large engineering workforce which undertakes installation and repairs of viewing equipment in customers' homes;

(7) Transmission of Sky and non-Sky content (here "transmission" refers to the conveyance of signals).

The statutory provisions

8. Section 32(2) and (2A) of the 2003 Act provide as follows:

> s.32(2): "In this Act 'electronic communications service' means a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, except so far as it is a content service."
>
> s.32(2A): "Those types of service are–
>
> (a) an internet access service;
>
> (b) a number-based interpersonal communications service; and
>
> (c) any other service consisting in, or having as its principal feature, the conveyance of signals such as a transmission service used for machine-to-machine services or for broadcasting."
>
> (It is (c) alone that is relevant here.)

9. A "content service" is defined by s.32(7) as follows:

> "a 'content service means so much of any service as consists in one or both of the following–
>
> (a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;
>
> (b) the exercise of editorial control over the contents of signals conveyed by means of such a network."

10. An 'electronic communications network' ("**ECN**") is defined by s.32(1) as follows:

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

> (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals–
>
> (i) apparatus comprised in the system;
>
> (ii) apparatus used for the switching or routing of the signals;
>
> (iii) software and stored data; and
>
> (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active."

11. The short question of construction is whether, in determining whether the Sky Pay TV Service consists of or has as its principal feature the conveyance of signals within the meaning of s.32(2)&(2A), it is necessary to disregard such part of the Sky Pay TV Service that consists of content services. Ofcom contends it should be disregarded. Sky contends it should not.

12. The true construction of s.32 is important in this case because Ofcom's power to set a condition that applies generally applies only to a person that provides an ECN or an ECS: see s.45(1) and (2)(a) and s.46(2) of the 2003 Act. The requirement to provide an EoCN to customers derives from s.51(1)(a) of the 2003 Act which specifies that "conditions making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services" are among those that can be set as general conditions.

The Judgment in outline

13. The Tribunal found that the Sky Pay TV service is a single, unified service, as opposed to a bundle of services provided under a single contract (in fact this appears to have been common ground before the Tribunal). There is no appeal against that finding.

14. The Tribunal nevertheless concluded that in determining whether the Sky Pay TV Service consists of, or has as its principal feature, the conveyance of signals, it is necessary to exclude that part of the Sky Pay TV Service that comprises content services before carrying out that determination: see §133 of the Judgment. This was based principally on the wording of the legislation (§134 to §137), the EU law context (§138 to §143), and the fact that on Sky's approach the content exclusion was given very limited effect (§144 to §149).

15. The Tribunal considered that Ofcom had not clearly carried out a consideration of whether, leaving out of account the content services, the Sky Pay TV Service consists wholly or mainly in the conveyance of signals (see §167 of the Judgment). It therefore carried out that analysis itself, concluding (at §168 to §175) that the principal feature, among the 2nd to 7th elements listed at §7 above, is the conveyance of signals.

Grounds of appeal

16. Sky appeals, with the permission of Green LJ, on the grounds that (1) the Tribunal erred in law in holding that the content service forming part of an overall service is excluded before determining whether the service consists of, or has as its principal feature, the

conveyance of signals and (2) as a consequence of that error of law, the Tribunal erred in determining that the Sky Pay TV Service is an ECS.

Discussion and analysis

17. This appeal turns on a question of statutory interpretation, the object of which is to discover the objective meaning of the words used having regard to the statute as a whole, its historical context and its purpose: see for example *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, per Lord Bingham at §8.

18. There are important areas of common ground between the parties in this respect:

    (1) First, the 2003 Act was enacted to implement Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "**CRF**") which came into effect at the beginning of the 21st century.

    (2) Second, the regime for communications regulation in the 2003 Act has the status of EU-derived domestic legislation within the meaning of s.1B(7)(b)-(c)(i) of the European Union (Withdrawal) Act 2018.

    (3) Third, the definition of ECS in the 2003 Act is to be construed consistently with the equivalent provision in EU law.

    (4) Fourth, the 2003 Act was amended – including to introduce s.32(2A) – in 2020 to reflect the updated framework in Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the "**EECC**").

19. Accordingly, the starting point in this case is to ascertain the meaning of the words used in s.32(2)&(2A) by reference to the 2003 Act as a whole, in light of the fact that its purpose was to implement the EECC.

20. Electronic communications service is defined in Article 2(4) of the EECC as follows:

> "'electronic communications service' means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:
>
> (a) 'internet access service' as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;
>
> (b) interpersonal communications service; and
>
> (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting."

21. It is also agreed between the parties that "consisting in, or having as its principal feature" in s.32(2A) has the same meaning as "wholly or mainly" in Article 2(4)(c).

22. The clearly better reading of Article 2(4), as Mr Holmes submitted, is that content services need to be excluded from the analysis before the "wholly or mainly" test is applied. That is because it defines an ECS, relevantly, as a service which *encompasses, with the exception of services providing, or exercising editorial control over, content*, services consisting wholly or mainly in the conveyance of signals. In other words, the test requires an enquiry as to whether – leaving out of account content services – the service is one which consists wholly or mainly in the conveyance of signals.

23. Mr Ward KC did not challenge that reading head-on, but submitted that s.32(2)&(2A) do not use the same order of words as is found in Article 2(4), and that it is common ground that the changes made by Parliament so as to implement the EECC did not make any difference.

24. As to the first point, the ordering of the words in s.32(2)&(2A) is at best ambiguous, so far as Sky's argument is concerned. As applied to paragraph (c) of s.32(2A), the ordering of the words is: *any service consisting in, or having as its principal feature, the conveyance of signals, except so far as [that service] is a content service*.

25. Sky's case is that one starts by identifying the service to be assessed: is it any of those specified in s.32(2A)(a), (b) or (c)? Paragraph (c) contains the test of preponderance: the actual service (not a constructed service) qualifies if it is wholly or mainly for the conveyance of signals. It is only after that step that the content carve-out applies.

26. Mr Ward submitted that the word "it" in "except so far as it is a content service" in s.32(2) is important, because it is referring to the type of service identified (i.e. (a), (b) or (c) within s.32(2A)). He agreed with Ofcom that the words "so much of" in the content carve-out in s.32(7) show that the service can be split up, but submitted that this was for the purpose of securing that the content is not regulated as if it were a mere transmission service.

27. Mr Ward's interpretation is a possible reading of the wording, but the wording is also consistent with a test that requires an enquiry as to whether – leaving out of account content services – the service is one which consists of, or has as its principal feature, the conveyance of signals. Interpreting s.32(2)&(2A) consistently with Article 2(4), which it is common ground is the correct approach, indicates that it should be read in that way.

28. Mr Ward's reliance on the fact that the amendment to s.32 was not intended to effect any change only assists if the legislation prior to its enactment clearly required content services to be disregarded only after the principal feature of the overall service (including its content element) had been identified. In my judgment, however, that was not the case either by reference to the original wording of s.32 or by reference to the pre-existing European legislation.

29. In its original form, s.32(2) was in the following terms:

> "In this Act 'electronic communications service' means a service consisting in, or having as its principal feature, the conveyance

> by means of an electronic communications network of signals, except in so far as it is a content service."

30. That is equivocal to the same extent as the amended version. If the phrase "except in so far as…" is inserted after the word "service" in the first line of that quotation, which makes sense because "it" refers to the "service", then the section can as readily be understood as requiring the content service to be excluded before determining the principal feature of the overall service, as requiring the content service to be excluded afterwards.

31. The pre-existing EU legislation has a somewhat complicated history, and is addressed in the next section of this judgment.

The European context

32. Before turning in detail to the evolution of the EU legislation, I note that Mr Ward relied on it to support five propositions:

    (1) The boundary of ECS regulation has changed over time, and has never provided that *all* services that include the conveyance of signals are regulated as ECS; importantly, with the introduction of the CRF the test was raised from services which "wholly or partly" included the conveyance of signals to those which "wholly or mainly" did so.

    (2) The legislator has made a deliberate decision to include transmission services used for broadcasting, but only if they satisfy the "wholly or mainly" test.

    (3) It is a core feature of the regime that it does not regulate content; content has a separate regulatory regime.

    (4) The content exemption was added to ensure that content would be outside the scope of communications regulation.

    (5) The content exemption does not serve to increase the scope of transmission regulation.

33. I did not take the first four of these propositions to be controversial. Nor, however, do they provide much assistance in answering the question whether the content exemption operates before or after the "wholly or mainly" test is applied. If anything, as developed below, they point towards Ofcom's interpretation.

34. The fifth proposition also does not assist, because it begs the question as to what is the intended scope of transmission regulation. If it is intended to capture any service which comprises (apart from content services) services consisting wholly or mainly in the conveyance of signals, then the purpose of the content exemption is to ensure that content is not regulated as an ECS, and no more. If, on the other hand, transmission regulation is intended to capture any service which comprises any overall service (including any content services component) consisting wholly or mainly in the conveyance of signals, then the content exclusion has a dual purpose: (i) to ensure that content is not regulated as an ECS; and (ii) to ensure that the transmission element of a mixed service is not regulated as an ECS if, overall, the service consists wholly or mainly of content services.

35. The story begins, relevantly, in 1990, with a package of Directives which formed the precursor to the common regulatory framework. One of these was Directive 1990/387/EEC, which established an internal market for telecommunications services through open network provision. This defined, by Article 2(4), telecommunications services as "services whose provision consists "wholly or partly" in the transmission and routing of signals on a telecommunications network, with the exception of radio broadcasting and television".

36. Content in broadcasting was first regulated by Council Directive 1989/552/EEC. This included provision regulating television advertising and sponsorship (e.g. Article 12 prohibited television advertising which prejudiced respect for human dignity or included discrimination on grounds of race, sex or nationality) and protection of minors (by Article 22).

37. The CRF introduced a fully harmonised framework for electronic communications networks and services. It was introduced together with four other measures: Directive 2002/20/EC (on licensing and authorisations); Directive 2002/19/EC (on access and interconnection); Directive 2002/22/EC (on universal service and users' rights); and Directive 2002/58/EC (on telecoms data protection).

38. The CRF was intended to be technologically neutral, as explained in Recital (5): "The convergence of telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework."

39. Recital (5) also referred to the need to "separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over [ECNs] using [ECSs], such as broadcasting content, financial services and certain information society services…" It further stated, however, that:

> "The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection."

40. Recital (41) to the CRF provided: "In accordance with the principle of proportionality … this Directive does not go beyond what is necessary for [its] objectives." Those objectives are as stated in Article 1(1): to establish "a harmonised framework for the regulation of [ECSs], [ECNs], associated facilities and associated services".

41. The critical provision in the CRF, for present purposes, was the definition of an ECS, at Article 2(c):

> "electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks

> and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks."

42. This effected three principal changes. First, a service would now only be an ECS if it "wholly or mainly" consisted of the conveyance of signals on an ECN, a material change from the previous test of "wholly or partly". Second, transmission services for broadcasting were now explicitly included (having previously been excluded). Third, the exemption for content was introduced.

43. As Mr Ward submitted, the last two points would appear to be connected. Broadening the scope of the regulation to reflect a multimedia universe that includes broadcasting means that it now encompassed media that was far more likely to include content, which was subject to its own regulation. The intention to keep the regulation of content separate from that of communication was repeatedly stressed in the CRF.

44. That, however, provides no assistance in understanding whether the "wholly or mainly" test is to be applied before or after content services have been excluded. The range of telecommunications options in 1990 was vastly inferior to those that began to emerge at the end of the 20th century (the internet did not start to come into general use until the early to mid-1990s). Moreover, the type of technology available in 1990 that was most likely to have any material content element – broadcasting and radio – had been excluded altogether at the time that the "wholly or partly" test had been applied. The recitals to Directive 1990/387/EEC had expressly excluded these, particularly cable television, because they needed "special consideration".

45. In particular, I reject Mr Ward's submission that Ofcom's case "collapses the wholly or mainly test back into the wholly or partly test." Rather, it applies the wholly or mainly test to that part of the overall service which remains having excluded the content element. Mr Ward's submission might have had more traction if the "wholly or partly" test had previously applied in a regime in which the regulation of communications services extended to those technologies which were likely to be content rich, such as radio and television, and in circumstances where there was a specific exemption for content, but it had not.

46. Although the definition of ECS in the CRF did not have the same clarity of language as Article 2(4) of the EECC, there is nothing in the legislative materials I have quoted above which provides any significant support to Sky's case as to the intended meaning of the content exclusion before the enactment of the EECC. There is certainly nothing which clearly pointed to that being the proper interpretation of the definition of an ECS in Article 2(c) of the CRF.

47. Sky also places reliance on the European Commission's Communications Review, *Towards a new framework for Electronic Communications infrastructure and associated services*, published on 10 November 1999 (the "**Review**"), which preceded the CRF.

48. The Review laid the foundations for the principles which underpin the CRF, including that: regulation should be the minimum necessary to meet the CRF's policy objectives; it should enhance legal certainty; it should aim to be technologically neutral; and it

should be without prejudice to regulatory obligations (whether at EU or national level) which apply to the content of broadcasting services or other information society services.

49. Mr Ward placed particular reliance on the definition used within the Review of "communications services", as "services normally provided for remuneration, the provision of which consists wholly or mainly in the transmission and routing of signals on communications networks". This was important, he submitted, because it showed that the "wholly or mainly" test was initially proposed without the content exception, even though at that stage the intent was nevertheless to exclude content. I do not find this persuasive. The Review was a proposal for legislation, but did not purport to contain a draft of that legislation. The defined terms for the purposes of the Review were not the equivalent of defined terms in legislation, and are of little significance, when compared with the CRF, in seeking to construe the 2003 Act consistently with the CRF.

50. Mr Ward relied on the Review to support the proposition that the change from "wholly or partly" to "wholly or mainly" was deliberate. That is not, however, in dispute and without any further explanation for why the change was made, does not take either party's case any further forward.

51. Mr Ward also referred us to a report on OTT services from the Body of European Regulators for Electronic Communications ("**BEREC**") dated January 2016, proposing reform for how the existing definition of ECS should apply to OTT services.

52. BEREC was established by EU Regulation No.1211/2009, to act as a forum for cooperation among national regulatory authorities. Its aim was to ensure the consistent implementation of the CRF, including by assisting and advising those national authorities, the European Parliament, the Council and the Commission on any technical matter regarding electronic communications within its competence. It is a statutory body whose views are not binding, but might be persuasive.

53. At paragraph 3.2 of BEREC's January 2016 report, it recited the definition of ECS (being the version contained in the CRF), and continued:

> "Thus, according with the previous definition, there are three basic criteria according to which an ECS should:
>
> 1. normally be provided for remuneration;
>
> 2. consists wholly or mainly in the conveyance of signals; and
>
> 3. exclude services providing, or exercising editorial control over, content.
>
> Although this definition has been transposed by all Member States in equal or very similar terms, those criteria are, nonetheless, interpreted differently by NRAs when assessing whether specific types of services qualify as ECS. The analysis of the interpretation of these criteria is focused on the first two, the third being a "negative" one, that excludes services providing

> content but does not indicate which services are qualified as ECS."

54. Mr Ward submitted that this supported Sky's contention that the content exclusion was to come last in the analysis. When pressed, however, that was based on little more than the ordering of the criteria. There is nothing, in my judgment, to suggest that the ordering of the criteria was intended to be taken to identify a staged process by which an ECS was to be identified. Of more relevance is the last sentence of the quoted passage, to the effect that the exclusion of content services did not indicate which services qualified as ECS. On Sky's case, the exclusion of content services *does* define the services that qualify as an ECS, because a service consisting of conveyance of signals forming part of a mixed service (i.e. one that includes both a content and transmission element) will on Sky's case only be regulated where the content service is sufficiently small, relative to everything else, to mean that the transmission element is at least 50%.

EU Case law

55. We were referred to certain decisions of the European Court of Justice. Both parties accepted that none of them dealt with the issue raised in this appeal. They are of peripheral, if any, relevance and I address them only briefly in this section. All were decided under the CRF regime.

56. Mr Ward referred us to the decision of the European Court of Justice in *Google LLC v Federal Republic of Germany* (Case C-193/18) [2019] 1 WLR 6044 ("*Google*"). This case concerned "Gmail", an e-mail service operated by Google. Gmail is an OTT service, as it operates over the internet without the participation of a traditional communications operator. Google's participation in the process is to provide its users with a service enabling them to send and receive emails over the internet. To access the service, users have to open an e-mail account, whereupon they receive an email address from which emails can be received and sent. Google uses email servers to identify the target server, by means of the *Domain Name System* and to send the data – broken down into several packets. Those packets are then routed through the internet operated by third parties, over which the sender of the packets has no control.

57. The question for determination was whether Gmail was an ECS within the meaning of Article 2(c) of the CRF. The Court held that it was not. It was common ground (see §34 of the judgment of the Court) that the provider of a web-based email service, such as Gmail, conveys signals. Google did so by uploading the data package to the open internet, or receiving that data package where it is the recipient of the email who holds the Gmail account. The service operated by Google does not, however, constitute a service consisting "wholly or mainly" of the conveyance of signals, because it is "(a) the IAPs of the senders and recipients of the e-mails and, as the case may, the web-based e-mail service providers and (b) the operators of the various networks of which the open internet is constituted which, essentially, convey the signals necessary for the functioning of any web-based e-mail service, and it is they who bear responsibility in accordance with *UPC DTH*, para 43": see §36 of the judgment. Google's participation in the sending and receiving of emails was not sufficient to enable its service to be regarded as being wholly or mainly in the conveyance of signals: see §37 of the Court's judgment.

58. The reference to *UPC DTH* was to another decision of the ECJ cited to us, *UPC DTH Sàrl v Nemzeti Média-és Hírközlési Hatóság Elnökhelyettese* (Case C-475/12) (2014). It established the proposition relied on in *Google*, that if the provider of the service was responsible to end-users for transmission of the signal carrying the service for which they have subscribed, it did not matter that the transmission of signals was carried out by someone else. Otherwise, the decision did not advance either side's case.

59. *Google* is a straightforward application of the "wholly or mainly" test, balancing the relative importance of that technical aspect of the Gmail service which consisted of conveying signals, with the remainder of its technical aspects.

60. Despite Mr Ward's submission to the contrary, the case says nothing about whether any content element should be taken out of account before the "wholly or mainly" test is applied. Mr Ward relied on the Court's description of Article 2(c) at §27 to §29, in particular the fact that it said that it defines "first" an ECS as "a service … which consists wholly or mainly in the conveyance of signals…" and "secondly" that the concept of ECS excludes content services. He submitted that if Ofcom's case is correct, the Court would have reversed the order of those points. This submission makes the same mistake as that in relation to the BEREC report. The Court was here simply recording the order of the words in Article 2(c), which itself (as already noted) does not dictate any particular order in which the steps involved in the enquiry must be taken. The Court can hardly be taken to have been saying anything about the stage at which content services should be left out of account, as the point was simply not in issue.

61. Mr Ward also referred us to *Skype Communications Sàrl v Institut belge des services postaux et des télécommunications* (Case C-142/18) (2019), but this says nothing more than can be found in *Google*. It is a similar case to *Google*, but with the difference that the service in question ("SkypeOut", enabling calls to be made between a computer and a telephone) was found to be an ECS. That was because the transmission of the voice calls was made pursuant to agreements between Skype and the telecommunications providers, and it was those agreements that made transmission to the public switched telephone network technically possible. That made Skype responsible to subscribers for the 'Voice over IP' service, which was enough to bring the service within the definition of an ECS.

62. Mr Holmes referred us to *UPC Nederland BV v Gemeente Hilversum* (Case C-518/11) (2013). He accepted that it was different from the present case, as it did not involve a pay TV provider like Sky that made any of the content it provided. The relevant regime was again the CRF. The question posed for the Court was whether the service provided by UPC consisting of a basic cable TV package, for the delivery of which both transmission costs and an amount relating to payment to broadcasters and copyright collecting societies in connection with the transmission of programme content are charged, falls within the scope of Article 2(c) of the CRF. The Court (at §38 to §41), having referred to the recitals to the CRF, acknowledged that content regulation and transmission regulation were effected pursuant to separate and parallel regimes.

63. At §42, the Court recorded that UPC had confirmed at the hearing that it did not produce the programmes included in the basic cable TV package or exercise editorial control over them. The Court concluded, at §43, that the fact that UPC's customers take out a subscription, for the purposes of accessing that basic cable package, did not mean that the service provided by UPC was taken out of the scope of Article 2(c) of the CRF. On

the contrary, it said at §44-§45 that UPC's service fell within the CRF so far as it included the conveyance of signals, as any other interpretation would considerably reduce its scope, undermine the effectiveness of its provisions and compromise the achievement of the objectives pursued by it. At §46, it said:

> "On the same grounds, the fact that the transmission costs charged to subscribers incorporate the payments made to broadcasting channels and the royalties paid to copyright collecting societies in connection with the transmission of programme content cannot preclude the service supplied by UPC from being characterised as an 'electronic communications service' for the purposes of the NRF."

64. Mr Holmes submitted that, while *UPC Nederland* was clearly not directly on point, it was at least consistent with Ofcom's approach: UPC provided content (albeit produced by others), but the Court proceeded on the basis that insofar as its service included conveyance of signals, that was enough to render it an ECS.

65. Such support as *UPC Nederland* might lend to Ofcom is limited by the fact that the Court proceeded on the basis that UPC did not itself provide content services. That meant that the question in this appeal, whether content service should be taken out of account before applying the "wholly or mainly" test, did not arise. There is no mention of it in the Court's judgment. The case nevertheless reinforces the importance of the separation between the regulation of transmission services and the regulation of content services, and that this demands that a service which consists of the conveyance of signals must be regulated, notwithstanding that the charges for that service include the cost to UPC of the acquisition of the content which it is transmitting. To that, limited, extent it provides some support for Ofcom's case.

66. Mr Holmes submitted that UPC should in fact have been regarded as providing content services – a point to which I return briefly below. But that does not help since the Court in *UPC Nederland* did not analyse it in that way.

Conclusions

67. In my judgment, Ofcom's case is to be preferred. For the reasons I have already given, it is the clear meaning of Article 2(4) of the EECC that the content exclusion is applied before determining whether the service consists "wholly or mainly" of the conveyance of signals, and there is nothing in the earlier EU legislation or pre-legislative materials to indicate that Article 2(4) should be read otherwise than it clarified the existing position.

68. Standing back from the detail of the legislative language, that conclusion is supported by a number of factors.

69. First, it is supported by the clear separation between the regulation of transmission and the regulation of content. I have already observed that the CRF broadened the scope of communications regulation by encompassing a broad range of new forms of technology, ensuring that regulation was technologically neutral, and that in doing so it established separate, parallel regimes for regulating services providing for the conveyance of signals, and for the content of what is conveyed.

70. The fundamental purpose of each regulatory regime is different. Regulation of content is to do with matters such as freedom of expression, plurality, impartiality, diversity, respect for human dignity and protection of minors: see for example Directive 2010/13/EU relating to audiovisual media services. Regulation of transmission on the other hand has a competition focus, ensuring customers have a fair choice between competing providers of the services.

71. Excluding content services in s.32(2) before applying the "principal feature" test best ensures that both the transmission element and the content element are subject to effective and proportionate regulation. Sky's case, in contrast, would result in the transmission element of its overall service escaping regulation altogether, and would take the transmission element of any mixed service out of the scope of regulation wherever the content element reduces it to 49.9% or less of the overall service. The fact that the overall service remains regulated by reference to its content, to ensure the protection of the public from harmful content and the like, provides no comfort against the fact that the transmission element escapes regulation whose purpose is protection of the public in an entirely different sense, focusing on competition.

72. I therefore reject Mr Ward's submission that Ofcom's case is flawed because it causes a service that is mainly content to be regulated. Nor do I accept his submission that Ofcom's case uses the content exemption to define the scope of the regulation of the rest. It simply leaves it out of account – consistent with what the parties accept is common ground, that the CRF does not regulate content. It is not (as Mr Ward put it) "the content exception that drives a service like Sky's into the field of regulation": that is achieved by the fact that the non-content element of the service consists wholly or mainly of the conveyance of signals. As I have observed above, in connection with the BEREC report, it is Sky's interpretation that would cause the extent of content to be used to determine whether conveyance of signals falls within regulation. That is counter-intuitive, to say the least, when the regulatory regime as a whole is intended to keep the regulation of content and of transmission separate, given the fundamentally different aims of the two regulatory regimes.

73. Second, it better accords with one of the key aims of the CRF and the EECC, namely to bring the transmission element of broadcasting networks within the regulatory framework applicable to communication services. We were not presented with any evidence as to the proportion of an overall service provided by any other broadcaster as between transmission and content, but viewed (as Mr Ward accepted it must be) from the perspective of the end-user, it is not difficult to see that the element of most interest will usually be content, rather than how that content is transmitted. Sky's approach would – to put it at its lowest – create a significant risk of thwarting that key aim. Ofcom's approach achieves that key aim, whilst ensuring the separate regulation of content and of transmission services.

74. Third, and contrary to Mr Ward's submission, the "wholly and mainly" test, on Ofcom's interpretation, still performs a valuable function: that of ensuring the regulation is proportionate, by balancing the various technical components that make up the service and enquiring whether that which consists of conveyance of signals, by the entity to be regulated, is the principal feature. Mr Ward gave, as an example of a service that would escape regulation because the conveyance of signals element was less than the principal feature, an electricity supply service that included a smart meter.

Another example is Pay TV content carried over the open internet: on a purely "tech on tech" balance, this does not qualify as an ECS.

75. Fourth, Ofcom's approach also better accords with the objective of legal certainty. I have already observed that if the wholly or mainly test is applied to the service as a whole including content services, then it is likely to take most broadcasting services out of the definition of an ECS, which cannot have been the intention. Even if that is not correct, however, then seeking to balance the relative importance of content and transmission services from the end-users' perspective involves inherently difficult value judgments. As Green LJ put it in argument, transmission services and editorial control are almost philosophically different. The test could not be answered simply by identifying the amount spent by the broadcaster on different elements.

76. While it is true that a value judgment is still called for if the test is to be applied to what remains after exclusion of content services, it is a much more straightforward exercise, likely to lead to greater consistency in application and thus greater legal certainty.

77. This would point even more strongly in Ofcom's favour if "content service" were to be construed as extending to the provision of content by its transmission, even where that content was produced by third parties, as Mr Holmes suggested. In that case, identifying whether the content or transmission element was the main or principal element would be even more difficult. That, as I have noted above, was not the approach adopted by the ECJ in *UPC Nederland* and Sky did not develop any argument on the point before us. Mr Ward said that in an effort to invite the Court to decide no more than was strictly necessary it had not made submissions on that point. In those circumstances, and since my conclusion does not depend on it in any way, I need not address the point in this judgment.

78. For the above reasons, I consider that the Tribunal came to the correct conclusion, and I would dismiss the appeal.

Lord Justice Popplewell

79. I agree.

Lord Justice Green

80. I also agree.