IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1280/3/3/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15 April 2019

Before:

THE HON MR JUSTICE MANN
(Chairman)
DR CLIVE ELPHICK
ANNA WALKER CB

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) VIASAT UK LTD
(2) VIASAT INC — **Appellants**

- and -

THE OFFICE OF COMMUNICATIONS ('OFCOM') — **Respondent**

- supported by -

INMARSAT VENTURES LIMITED — **Intervener**

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HEARING
(CONSEQUENTIAL MATTERS)

A P P E A R AN C E S

Mr Michael Bowsher QC (instructed by Latham & Watkins) appeared on behalf of the Appellants.

Mr Josh Holmes QC and Miss Julianne Morrison (instructed by Ofcom) appeared on behalf of the Respondents.

Mr Tim Ward QC (instructed by Jones Day) appeared on behalf of the Intervener.

THE CHAIRMAN: Mr Bowsher?

MR BOWSHER: May it please the Tribunal, I am going to address two matters today. Today I appear alone, as it were, save for with those instructing me. Mr Josh Holmes and Julianne Morrison appear for Ofcom, and Mr Tim Ward for Inmarsat. The applications today are my application for permission to appeal, and Inmarsat's application for costs, which of course has a couple of applications bound within it. I am in the Tribunal's hands, but I am very happy to deal with both in one hit to try and get it dealt with expeditiously. I would hope to be able to deal with both in one go in about 40, 45 minutes.

THE CHAIRMAN: I think what we would find helpful, Mr Bowsher, we have thought about this, is that if we deal with permission to appeal first, in terms of submissions, and then we will hear submissions on costs, and then we will rise and we come back and give decisions on everything in one go. So we would like to hear from you on PTA, and then your opponents on PTA, and then on costs and go back up the line. In relation to that, Mr Bowsher, what we would find particularly helpful - and you may have been going to do this in any event - is this: we have read your fairly extensive submissions on permission to appeal, but you have not, as I understand it, provided draft grounds of appeal in the formulated way in which you would if you were putting this before the Court of Appeal. So what we would like to do, because we have occasionally not perhaps, in fairness to you, quite isolated what point of law you say has arisen, and what error of law we have made. Sometimes it is clear, but we are not wholly clear. We would find it particularly helpful if you could, in relation to each of your seven, is it, heads - however many it is - articulate clearly for us in a sentence or two the point of law and the error of law that we have made. That will help us to isolate where we are going, and I think will help us to work out which of your grounds are linked to which. Some of them are rather bound up one with the other, some with others, and some of them are less so, and it would help us to do that as well. So if you would be good enough to do that we would be grateful.

You can all assume that we have read your various submissions on your various things but, at least so far as I am concerned, you cannot necessarily assume that I have mastered absolutely every bit of detail in there, nor do I think I need to, but you should assume that we have not read any of the authorities, because actually it is true. We have actually glanced at the Belgian decision, but only glanced at it.

MR BOWSHER: Very well. That is helpful.

THE CHAIRMAN: Do you want to do your first thing by reference to your written submissions, Mr Bowsher? We can turn those up.

MR BOWSHER: Yes, they are in the application bundle at tab 3. I am just pausing to think how I can most efficiently address the various points you have just put to me. Where I was going to start with this is that you have our submissions in writing and I was not proposing to review all the material before you either.

THE CHAIRMAN: No, I was not proposing you should, Mr Bowsher.

MR BOWSHER: I was not necessarily going to focus on all of the grounds, because some of them are fairly closed points, but it may be that in the light of your indication, Sir, I may come back to them just to say a little bit more than I had anticipated. I was going to focus really on the general point as to why we say, as a group of points, they represent grounds of appeal which individually and together have reasonable prospects of success, particularly when one sees that a number of them do interlock; and further, that there are, in the words of the Rules, other compelling reasons for an appeal, given the need for coherence of the regime and the importance that the Court of Appeal has the opportunity to consider a rather tricky point about the interaction between the two levels of this regime, and the points of law that drive it, particularly given the situation which is presented by the reference made by the Belgian court which starkly points out a potential inconsistency between different approaches taken to that regime, and we will come on to that in one particular ground.

THE CHAIRMAN: On the Belgian one, I have looked at the actual question referred, to which you did not take us in your skeleton. The only point that is taken there is the timing point. The other sort of moving the goal posts and coverage of the population, all those sort of points, whether they are still the same sort of thing, do not seem to be covered by the question that is referred. Perhaps I should let you come on to that in due course, but that is what struck me when I had a brief look at that.

MR BOWSHER: We will come to that in a moment.

THE CHAIRMAN: All right, we will come to that later.

MR BOWSHER: The general point in ground 1, which is a recurring issue - my only concern in trying to be certain that I have characterised the errors we identify, I am not sure that I will necessarily identify orally each and every point on which we have said there is an error, but I will try and summarise the nub of what we are saying, even if I do not deal with each of the details. We, as we have said in ground 1, say that the Tribunal erred in the approach it took to the application of the general principles of law. This is a point we developed from pp.53 to 55 of our closing submissions, and is dealt with from para.150 of the judgment. Perhaps the core error here, in our submission, is the way in which the judgment accepts the general points, but then qualified them at para.157, in effect by saying those are these three

factors identified in para.157, the parameters which underlie the complaints, the appropriate method of enforcement and Ofcom's limited functions, somehow qualify or limit the application of the general principles. The general error is, in other words, the failure to give full force and effect to the principles of equality and transparency, and if and in so far as that is tied back to those factors, that is also part of the general error.

There are then a number of associated points which we identify in ground 1, but that, in our submission, is the core point that we make in ground 1. When I say "associated errors", I note, if drafting this out as a ground of appeal, in para.9 we would identify the error in concluding that what was authorised was not a particular satellite system, and so on and so forth. That, of course, all focuses on the same error because it is the error of application in the way the failure to apply the principles in the manner in which is required, namely to ensure that both the applicant and the system and services which are being authorised are authorised in the requisite terms, and that the application of that authorisation at the national level is done in a manner which respects those principles.

We say that if one goes to the authorities - and I was only going to take you to one of the authorities now, the *Succhi di Frutta*, which is in the authorities file at tab 4.

THE CHAIRMAN: Which case?

MR BOWSHER: *Succhi di Frutta*, which is in the authorities file at tab 4. This is not, as such, a public procurement, it is a tendering case. It is a case all about a scheme under which tenderers were entitled to take fruit out of intervention stock for the purposes of the manufacture of various products, and it was all to do with the meeting of the requirements of Georgia and Azerbaijan. At p.3837 you get a description of what this concerns. It is all to do with a scheme for improving the food supply in those States by allowing people to take fruit out of the EU's intervention stocks for certain purposes. It is described in some detail. The point of it was that the currency of this process was fruit - in other words, as you can see, the offers that were being made, if you go to p.3842, each tenderer was being asked to supply certain amounts of juice and jams in that case under that particular provision, and in order to get the right to supply that you were going to withdraw a particular a product - apple juice, apples, and so forth. Tenderers therefore had to tender for effectively their payment the quantities of specified fruit, so that at para.17, p.3843, the tenderer Trento Frutta put forward its offer, but it put forward a differing qualified offer. Instead of saying it wanted apples, it put in alternative ways in which it could be paid by reference to peaches.

The decision that ended up being made allowed for payment being made on a varied basis in which literally the currency of payment had changed, and you get that at the bottom of p.3847.

The facts are, therefore, rather different from this case. The basic point is the same, in our submission. It is this, and it is the point we made in our closing submissions, and it is, in our submission, a point that is not displaced by the factors in para.157 of the Tribunal's judgment. If one goes to p.3879, these principles remain true as a matter of EU law, not just as a matter of public procurement legislation. It is true that they have been forged particularly around public procurement, but as the Tribunal has recognised in the judgment they have a broader recognition. The *Belgacom* case, for example, demonstrated that they apply outside the public procurement field where one has a competition for an exclusive commercial right, and that is what this case is about. What one gets on p.3879 of the *Succhi di Frutta* case, para.108, is the statement:

> "The Court has consistently held, in cases concerning public procurement …"

and I would interpolate, not just limited in its application to that field -

> "… that the contracting authority is required to comply with the principle that tenderers should be treated equally.
>
> … [that] principle implies an obligation of transparency in order to permit verification that it has been complied with.
>
> Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.
>
> The principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.
>
> In view of their significance …"

and this is important because it broadens it beyond public procurement -

"… objective and effectiveness these principles must also be observed in the case of a special tendering procedure such as that at issue, while any special features of that procedure can be taken into account if necessary."

Then bouncing across the page to para.105:

"Against that background, it consequently falls to the Commission, in its capacity as contracting authority, strictly to comply with the criteria which it has itself laid down on that basis not only in the tendering procedure *per se*, which is concerned with assessing the tenders submitted and selecting the successful tenderer, but also, more generally, up to the end of the stage during which the relevant contract is performed."

So those principles are, in effect, right up to the very end of the performance of the contract. If we were talking about a works contract they might be in play for many years.

"Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender."

I am not going to read any more from the judgment there.

Those are the principles that I draw from that judgment. Obviously they are written around the facts of that case, but that is the case that has been taken by many appellate courts, both within the EU and in this country, as being, as it were, the classic statement of those principles. What one gets from that is that in a special tendering procedure such as this, it is an essential consequence of the principles that what is asked for remains constant that the law requires that throughout the process and throughout the performance of the process. In this case, that must mean that those principles continue to apply at the stage when the selection is made by the Commission, at the stage of national authorisation, and during enforcement. In our submission, it is an error to qualify or limit the effect of those principles at that intermediate stage, at the national authorisation stage. By seeking to limit that, the effect of those principles at para.157, the Tribunal has made an error which, in our submission, is a cardinal error, and at the very least that is a point on which we have reasonable prospects of success. In our submission, the way one should apply those principles is that there must be some role for the national authority to be subject to those

principles and to consider whether or not what it is that it is authorising is, in fact, that which was being selected. That is the core error in ground 1.

DR ELPHICK: Can I just clarify one point of that? Your argument is that the Tribunal has erred in law in regard to all seven grounds. Is your argument that we have made discrete errors of law, or is it rather more generic than that, those errors of law pertain to all of them?

MR BOWSHER: I think it is probably true that a number of them are closely related, and that error certainly is related also to ground 2 and ground 7. By starting with that error in application of the general principles, that affects the way in which all of these matters should be interpreted. So they are related errors. In each of these grounds, we have identified a number of specific errors which we rely upon, so there are a number of independent errors, but some are connected.

DR ELPHICK: And your principal ones are these errors in regard to equal treatment and fact?

MR BOWSHER: That is the core starting point for that head of error, yes. There are then some interpretation errors which we say the Tribunal has made, which are self-standing. They would be sufficient in themselves for us to succeed in these proceedings, but they are - and we will come on to them in a moment, but, for example, in our point about the use of the word 'complementary'. That is just a point about the use of the word 'complementary', it is a self-standing point about what the word does or does not mean.

DR ELPHICK: That is more secondary to this.

MR BOWSHER: It is not secondary in that, in itself, that might be a winning point, but it is discrete and separate from an overall approach to interpretation.

DR ELPHICK: Thank you.

MR BOWSHER: The general principles point goes to the more general point which the Tribunal expresses at the beginning of the judgment, as to why, to put it colloquially, Viasat feels hard done by, and why Viasat's position is that this is a process which should at every stage hold the applicant, Inmarsat, the successful applicants, to that which they initially put forward in each respect. That, of course, relates not only to the service that they originally applied to put forward, but also to their ability to comply with the common conditions.

THE CHAIRMAN: That is error number one for ground 1, is that right?

MR BOWSHER: Yes.

THE CHAIRMAN: Right.

MR BOWSHER: Most other errors in ground 1 are different ways of putting that same point, I think.

THE CHAIRMAN: You say that we erred because we held that it was not for Ofcom to determine whether goal posts had moved. They simply had to decide the application from an authorised person rather than authorised scheme?

MR BOWSHER: Yes, and we say you did not, therefore, give any, or any sufficient, weight to the general application of those principles and the specific instruction in article 7 of the Selection Mechanism Decision that that process should be done in accordance with Community law, as it was then described. In any event, we say those are points on which we have reasonable prospects of success.

THE CHAIRMAN: Right.

MR BOWSHER: We say that it would be distinctly odd that a national authority should be regarded as compelled to authorise something that cannot be performed in accordance with its performance requirements, because the effect of what this leads to, in our submission, is an odd gap in the overall regulatory process, where it is dealt with by the Commission and then by the authority for enforcement, but on this interpretation the authority is effectively compelled to authorise something which it will have to come back and stop happening when it comes to enforcement.

THE CHAIRMAN: Well, it will not, because somebody else takes the enforcement decision, do they not, under the regime?

MR BOWSHER: Sorry, yes, that will have to be the subject of an enforcement decision.

THE CHAIRMAN: Right.

MR BOWSHER: And that leads to the oddity that if the enforcement process is fully effective all it does is provide for futile or nugatory authorisations, and if the enforcement is not fully effective it allows for the system to be undermined by compelling the authority to authorise non-compliant systems which could have been filtered out at that national authorisation stage.

Indeed, the judgment itself at para.167 explicitly seems to allow for the possibility that the individual authorities should consider those points, it is just that the Tribunal thinks it unlikely, but it is not excluded as a possibility. I am not quite sure how one is to read that paragraph, but it seems to allow for the possibility that authorities could do just this, but that it is unlikely.

THE CHAIRMAN: No, on a reading that this is just a factor which we consider in reaching the final conclusion as to where the relevant responsibilities lie. It is how one expresses oneself, “It is unlikely that Parliament intended this result, therefore it did not.”

MR BOWSHER: In any event, we say that this interpretation necessarily leads to a measure of regulatory incoherence, and that is, in itself, something which we say should be looked at again by the Court of Appeal. That would be a compelling reason, another compelling reason, for an appeal.

Turning then to ground 2, this----

THE CHAIRMAN: Does the Belgian decision feed into ground 1? Is that where the Belgian decision is said to come in?

MR BOWSHER: It is not where we have placed it.

THE CHAIRMAN: Right, in that case we will come to it where you have placed it.

MR BOWSHER: I was just coming on to place it in ground 2.

THE CHAIRMAN: We will come to it then.

MR BOWSHER: The focused premise of ground 2, which does follow on from ground 1, is that, having found that the EAN service is not to be made available to 50 per cent of the population, and the error is stated, I would suggest, perhaps most neatly in para.15 of our application:

> "Having found that the EAN service is not to be made available to 50% of the population of each Member State in terms of their being able to access it on the ground … the Tribunal erred in concluding that it did not have to decide whether the common condition at Article 7(c) of the Selection Mechanism Decision was capable of being met by the EAN … because this is a matter of enforcement …"

THE CHAIRMAN: Your cross-reference does not work, does it? It is not 156(v), it is somewhere else, which I have not filled in.

MR BOWSHER: Does it not?

THE CHAIRMAN: 156(v) seems to refer to delays.

MR BOWSHER: I see that. I had not spotted it before.

THE CHAIRMAN: I have in my mind's eye the paragraph you mean, but of course I cannot now find it. You mean the one where we say that the views differ amongst members of the Tribunal, I think, do you not?

MR BOWSHER: Yes, and it is not a small faction.

THE CHAIRMAN: Is it 179?

MR BOWSHER: Yes.

THE CHAIRMAN: Should that be the reference? 156(v) does not work. I wondered whether you meant 179?

MR BOWSHER: That would certainly be the---

MR WARD: If I can assist, I have read at 156(iii) - forgive me if that is not helpful.

THE CHAIRMAN: We can all have fun with Mr Bowsher's skeleton argument? Yes, that makes more sense. Thank you.

MR BOWSHER: Much obliged, that's the finding. The Belgian court reference, we deal with that in para.19 of the application, and the Belgian court judgment is tab 9 of the authorities. In the reasoning to that, which leads up to the question - I think the context is clear enough, given that we have all read a lot of the background material ourselves, I think we can just leap straight into para.51 of the judgment at p.94. This is the condition concerning the deadline, but, in our submission, it could apply just as well to any other common condition, the same principle ought to apply:

> "In the particular situation which is that of the present case, it is established that the common condition concerning compliance with the imposed deadline has not been complied with and that it is no longer possible to ensure compliance, as the deadline has lapsed. It is thus not possible to remedy the non-compliance."

THE CHAIRMAN: Sorry, I was reading something else, Mr Bowsher, it is my fault, not yours. Can you tell me where you are, please?

MR BOWSHER: Paragraph 51, p.94 of the Brussels court judgment, tab 9.

THE CHAIRMAN: Thank you. The second para.51, is that right?

MR BOWSHER: You are quite right, sorry. It is clearly not going to be my day for references, apologies. The second 51, indeed. It might be if I invited the Tribunal to read the whole of para.51.

THE CHAIRMAN: (After a pause) Yes.

MR BOWSHER: The paragraph deals with more than one of the common conditions. The question obviously focuses on the time limit, but the general principle and approach which is being asked about, in our submission, it is plain that the court is concerned not just with the timing but also with the coverage condition, and the outcome of these proceedings pursuant to the question raised by the Belgian court will be of general relevance to the impact of the common conditions on the national authorisation process.

THE CHAIRMAN: Just give me a moment. (After a pause) Do they not go on to deal with the coverage point in the following three paragraphs within para.51?

MR BOWSHER: They deal with it, but not in a manner that supports our position that the coverage condition should be dealt with at the national authorisation stage. They are effectively saying that the coverage condition cannot now be dealt with. I am not entirely clear myself why the question is linked to timing, given the terms of what they say in

para.51, because they seem to deal with both timing and coverage and seem very plainly to make clear that there must be some sanction, The only reason I can suppose is because they are focused on the timing obligation, because without a sanction on the timing there is not then a time for the coverage obligation to come into effect, so that it is a sequencing issue. They need to see that the timing obligation is complied with first, before considering whether the coverage application applies.

THE CHAIRMAN: Paragraph 52 seems to proceed on the importance of the coverage obligation. You are right, it is then a little puzzling why they do not then raise that as a question, unless it is a sequencing point.

MR BOWSHER: I think it is some sequencing point, but it is not fully expressed. I think what is plain from 51, and perhaps informed by 52, is that they are saying that there is a general issue.

Going back to an earlier point - far be it for me to presuppose what the Court of Justice might say in Luxembourg in response to those questions - but there is a likelihood that the response to those questions will bear not only on our ground 2, but also on ground 1, because it is likely that, in answering that question, the court will have to make some more general observation about the way in which the continuity of regulation through the process operates.

THE CHAIRMAN: You are not asking us to make a reference?

MR BOWSHER: I am not asking you make a reference.

THE CHAIRMAN: On the basis that it is *acte clair* your way?

MR BOWSHER: If the matter gets to the Court of Appeal, the Court of Appeal can decide whether it is or is not *acte clair*. I am not instructed to ask for a reference, no. There already is a reference, so I think the short point is that my clients already have a reference on foot, and I am not sure any additional purpose will be served given the fact that the issues will already be ventilated on that point.

That is ground 2. It is quite a focused point, but it is a focused and highlighted example of our general point at ground 1, and if we are right on ground 2 then that is likely to inform the outcome on ground 1.

Ground 3 is a series of discrete errors in respect of which we say we have reasonable prospects of success. I would suggest that the error is summarised in the sub-headings in our application. It starts at para.21, p.13 of our application. We say, firstly, that an error of law in the interpretation of the word 'complementary' as part of the concept of a CGC.

There is an error in construing references to MSS, a significant error because it is important

that MSS refers to mobile satellite services, and I will come back to that. That error has an important significance because if one reads MSS as mobile satellite systems, that is likely to lead one, as, in our submission it did lead the Tribunal, into error in not acceding to our submission that there is a prioritisation of the satellite element of the services to be authorised.

If one understands the acronym MSS to refer to mobile satellite services then, as we have set out in some detail in our application, in our submission, it is unarguable that there was a legislative prioritisation in favour of the satellite solution, and that informs more broadly the way in which the scheme should be interpreted. That leads to the various errors which we have identified from (a) to (k) in para.27. They are all specific errors or, in our submission, failures to give sufficient weight to specific provisions in the legislation in the judgment. They are also separate and distinct points on which we say we have reasonable prospects of success but they are all tied together by, in our submission, the general misapplication of the term 'MSS', and the prioritisation issue.

That then leads to the two further errors, (d) and (e). They are expressed there. I was not going to say more about them than is already said, but the error is expressed in (d) and (e).

THE CHAIRMAN: One of the complaints you make is that we did not look at various other language definitions or formulations of the word 'complementary'? You do that in para.22.

MR BOWSHER: Yes. We identify another language version, yes.

THE CHAIRMAN: I have reminded myself of what happened, but I want to be sure that I have not misunderstood. Our judgment presupposes that there was some argument on the use of the word 'complementary' in the English language, and it seems to suggest that you had relied on the use of that word 'complementary', in the sense that 'complementary' means in some way subsidiary. I have been back to look at your written submissions. I have not got the paragraph flagged, but perhaps you might agree this, you do seem to have made that submission in your written submissions. So you were relying on the English use of the word 'complementary', and what it meant.

MR BOWSHER: Yes.

THE CHAIRMAN: And you now say that we made an error in actually looking at an English definition, because we should have gone broader and looked at all sorts of other words, when you, yourself, did not refer us to any other words in other languages - is that correct?

MR BOWSHER: It is factually correct that we did not take you to other language versions because we said that the meaning of the word 'complementary' was clear - that is correct, yes.

THE CHAIRMAN: I just wanted to make clear what the scope of the argument below on that was. You say it was an error of law for us to go off and provide a dictionary definition of something which you are providing for argument without bothering to go to a dictionary definition? Is that an unfair characterisation, Mr Bowsher?

MR BOWSHER: What we say is that the dictionary definition on which the Tribunal relied does not reach the conclusion which the Tribunal drew from it.

THE CHAIRMAN: You do not just say that. You say we should have looked at other languages as well.

MR BOWSHER: We do say that. We say that if you are going to go down that path you should have looked at other languages as well, yes.

THE CHAIRMAN: But you do not direct that criticism at yourself?

MR BOWSHER: I do not direct that - the applicants' application is not the place to do that.

THE CHAIRMAN: Right, carry on. Have you dealt with ground 3?

MR BOWSHER: We have dealt with ground 3, I was just double-checking.

Ground 4 again is expressed, I would submit, clearly as an error on which we have a ground of appeal that the error is as stated in the first sentence of para.31, and it is the issue as to the definition as to what comprises the mobile earth station. I was not proposing to say any more about that than what was said in writing. We spent a great deal of time on it at the hearing. We say that that is a point of definition again on which there are reasonable prospects of success. The error is simply that error as set out in 31.

DR ELPHICK: You call that an error of law not an error of judgment?

MR BOWSHER: It is an error of law, because it is an error of definition of a term which is then used in the application of the regulatory system.

DR ELPHICK: Thank you.

MR BOWSHER: If it is not that, it is a mixed error of law and fact, because it involves a mixture of law and judgment. It is one or the other.

Then 5, it follows from ground 4, this is an associated ground of appeal: we say that the Tribunal erred, as we say, in para.37 in not concluding that the ground based stations are not an integral part of the mobile satellite system because they are not capable of communicating with a mobile earth station. That is really an immediate consequence of ground 4. It is a separate error but the next stage.

Ground 6, the error is the error again identified in para.38. The Tribunal erred in finding that the facts - perhaps we have been a little bit summary in condensing or referring to the facts, but it was the facts as appear in the judgment that the installation of these components

is not going to all be done at one time. It will take place over time, so there will be a period of phasing in of whatever the EAN is, and we say that the Tribunal erred in finding that those facts were irrelevant to the lawfulness of Ofcom's authorisation of the EAN.

Then ground 7, the final error is to some extent a reconstitution of the error in ground 2, but phrasing it more crisply around the Belgian court's question. The error is again as stated in the ground. We say again this is a point on which we have reasonable prospects of success particularly if the decision of the CJEU goes in the direction that the Belgian court might suggest was to be indicated.

On all of these points we say we have reasonable prospects of success and we should have permission to appeal.

THE CHAIRMAN: Thank you, Mr Bowsher. Who is going next? Mr Holmes?

MR HOLMES: Sir, we say that permission should be refused. The test is the same as in CPR 52.3(6), namely whether the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard.

As regards prospects, we say that the grounds advanced by Viasat have no real prospects of succeeding. Ground 1 of Viasat's application was ground 1(b) of the original appeal and is the argument that general principles of EU law required Ofcom to refuse to authorise the CGCs, and that the Tribunal was wrong to hold otherwise. Mr Bowsher took you to para.157 of the judgment, and perhaps we could just return there briefly. The point I wanted to make, Sir, is that the Tribunal did not hold that the general principles were altogether inapplicable under the statutory scheme. The point made by the Tribunal in 157 is that they do operate in relation to aspects of the overall Selection Mechanism, but not in relation to the disputed authorisation in the manner suggested, and the three reasons which are given we say are correct and that no error has been shown with those.

First, as the Tribunal held, the selection process was to select operators and not systems. Secondly, national authorities have only a limited role at the authorisation stage. Articles 7 and 8 of the decision require them to authorise selected operators subject to specified common conditions, and the aim is to avoid fragmentation with operators being authorised in some Member States but not others. Thirdly, failures to comply with the Article 7 common conditions are then addressed under a co-ordinated enforcement procedure, again with the aim of avoiding fragmentation.

So, within this scheme, the general principles apply at each stage respecting the particular institution or division of competence under the legislation. The selection procedure must respect the principles, self-evidently, and that is clear from the legislation. The

authorisation process must ensure the commitments are enshrined as common conditions of the authorisation. Those are the fruits of the selection process.

Thirdly, the enforcement process must hold selected operators to the commitments that they have offered. That respects the general principles of EU law. What those principles do not require is that each national operator is either required or entitled to reopen the selection process and to block the roll-out of a system, or any part of it, on its territory, because the result of that would be exactly the patchwork of authorisation that the legislation strives to avoid. We say that is fully consistent with the general principles of EU law, and that there is no error of principle or of law in the Tribunal's analysis in relation to ground 1(b).

There was brief reference to para.167 of the judgment by Mr Bowsher, but that paragraph simply states a view as to the intention of the legislature when interpreting a statutory scheme. It was not any expression of doubt in the Tribunal's view, and it does not amount to an error of law. Sir, those are my submissions on ground 1.

Ground 2 revisits ground 1(c) of the original appeal, and the argument, as summarised as para.15 of the application for permission to appeal, is that the Tribunal erred in failing to determine whether the EAN, implemented as intended, would breach the coverage obligation. I must say, Sir, I read para.179 as the right reference for that finding, the one to which you referred Mr Bowsher, for what that is worth. That seems to be where the Tribunal reaches a view as to whether----

THE CHAIRMAN: We do not reach a view.

MR HOLMES: You do not need to reach a view, indeed, Sir. For essentially the same reasons as I have already rehearsed in relation to the first ground, these are matters for the co-ordinated enforcement arrangements. They are not appropriate considerations at that the authorisation stage, and to make them such would drive a coach and horses through the particular statutory arrangements for enforcement.

Viasat refers here to the reference for a preliminary ruling to the Court of Justice that has been made by the Belgian court. I must say, Sir, that I, like you, read this as concerned with the timing aspect, the deadline in 4(1)(c)(ii), not with the underlying coverage obligation, and as such the reference appeared more relevant to ground 7 of the grounds, if it is relevant to any, rather than to ground 3.

Perhaps we could take up the reference again. Tab 9 is the translation. Paragraph 51 on p.94, the second para.51, the nub of the reasoning.

THE CHAIRMAN: Yes, because what seems to have peaked their interest is the fact that once time has passed, it has passed.

MR HOLMES: Yes, indeed.

THE CHAIRMAN: So the sequencing does not really come into, whether they have done it by the time or not.

MR HOLMES: Quite, and I think that is not peripheral to the reasoning, I think it is central to the reasoning. The argument is that there is no doubt - there can be no doubt - that a breach has occurred. It is 'definitively established', to use the language of the fourth line of the paragraph, and for that reason it would be preferable "for the sake of procedural economy, that the NRA should or may refrain from authorising the CGCs." The train of reasoning seems to be that this is not a case where there is any doubt as to a breach, because it is a deadline which everyone accepts was not met, and that, in itself, makes it more procedurally efficient for the NRA to withhold any further authorisation of CGCs because----

THE CHAIRMAN: Then para.52 is puzzling, is it not?

MR HOLMES: The reference to coverage obligations, Sir. I think that that is simply a shorthand, as I read it, that the court was using to refer to the requirements of 4(1)(c)(ii), and was not intended to modify the specific focus of the court's judgment on the lapse of the deadline. That is also my reading, Sir, of the third sub-paragraph of para.51----

THE CHAIRMAN: Where is 4(1)(c)(ii)? I have lost track of all the numbers.

MR HOLMES: It is set out conveniently at p.94. You see it within the body of the Court's order.

THE CHAIRMAN: Yes, thank you. That is definitely the coverage obligation.

MR HOLMES: In each case you will note that the court includes the time limit by which the coverage is to be achieved, so in (i) by the time the MSS coverage commences, and in (ii) the date is inserted in square brackets at the end, 13 June 2016. I had taken it that the reference to coverage obligation is just an abbreviation of the obligation as a whole, but the specific focus, as you put it, what had peaked the interest of the court, was the fact that the time limit had elapsed, and therefore a breach had been definitively established.

To go back to para.51, you referred to the third sub-paragraph. I agree that the reading is not absolutely clear.

THE CHAIRMAN: Sorry, just give me a moment. (After a pause) We are helpfully told that the French version might be slightly different.

MR HOLMES: This translation was provided by Viasat.

THE CHAIRMAN: "… *la question du respect ou non de l'obligation de couverture* …" That is 52.

MR HOLMES: I am so sorry, Sir, this is in 52 of the French translation at p.95?

THE CHAIRMAN: Yes.

MR HOLMES: I do not see that the French language version differs from the English, does it, Sir?

THE CHAIRMAN: With respect to the coverage or not, they have put in brackets "(non) compliance", yes. Perhaps we do not get much out of that. Let us just see if the question is the same.

MR HOLMES: I had read the question as focusing on the date as well.

THE CHAIRMAN: Just in case it matters I am going to get the official translation of the reference, which was made in French, but there is an official English translation. I do not know if it will take us anywhere, but rather than groping around with my very rusty A-level French, it is probably best to do that.

MR HOLMES: I am sure it will be helpful to us all, Sir, to see the official translation.

The submission I was making was that in para.51 of----

THE CHAIRMAN: (Same handed) Give one to Mr Holmes and one to Mr Bowsher. Mr Ward, you will have to contain your excitement for a moment! I do not think it takes the case any further, but I am grateful for being supplied with that. Thank you.

MR HOLMES: Yes, indeed, as am I, Sir.

THE CHAIRMAN: It is the right thing to do. Thank you.

MR HOLMES: The submission to make is simply that the focus is clearly on the deadline in the questions, as in the official translation, as in the certified translation.

Paragraph 51, third sub-paragraph, does refer to the coverage obligation, but it is linked in the final sentence to the due date, by the due date, so the focus is again on timing rather than on potential non-compliance with the coverage obligation *per se*. Sir, that is the first point.

In so far as the Belgian court was concerned with the fact that the infringement had been definitively established as the reason why one could short-circuit the enforcement process, there are two points to make. The first is that that does not apply when one goes beyond the simple question of the deadline, the limitation period, and one starts to consider the meaning of the underlying substantive obligation. There opinions may very well differ, and indeed they did differ within this Tribunal. It is precisely for that reason that that obligation is not one which, on the court's own reasoning, would be appropriate for application if the court were right at the authorisation stage. It would be precisely that type of matter in relation to which views may differ between national authorities, but it would be inappropriate for a national authority to form its own view and to block the deployment of part of a mobile satellite system, rather than going through the careful and co-ordinated process set out in the enforcement decision. So that we say is an important and a relevant point of difference

between the issue under ground 3 and the matter that gave rise to the reference, and the subject matter of the reference in this case, not to do with the underlying coverage obligation, just to do with the time limits, and on the express premise that that would put the existence of a breach beyond doubt.

Now, separately and independently of that point, in my submission, this Tribunal's analysis should be preferred - it is clearly correct - by comparison with that of the court, even were the court's to be interpreted as extending to the question of timing but also to the underlying coverage obligation. The reason for that is that the reasoning of the court in making the reference, in so far as it is clear, is plainly wrong and does not provide a good basis for granting permission, or any reasonable prospect of an appeal succeeding.

The reasoning is that it would, *a priori*, seem preferable for the sake of procedural economy that the NRA should, or may, refrain from authorising the CGCs rather than to decide that the NRA could not take account of that failure in its decision to authorise CGCs, but could only do so at a later stage under the procedure provided for in the enforcement decision, which may lead in most serious cases to the withdrawal of the authorisation. The effectiveness to be given to the provisions and the consequences to be derived from the established and definitive violation of a common condition support that view.

We say, Sir, with respect, no, procedural economy would not be well served by giving to one authority the ability to veto the deployment of a part of a system based on an infringement, whether definitively established or otherwise, of the common conditions.

THE CHAIRMAN: You mean it is not well served by giving 27 or 28 NRAs. Not just one, 27 or 28 NRAs is bad.

MR HOLMES: Yes, Sir, you have hit the nail on the head, that was the point I was intending to make.

THE CHAIRMAN: I am sorry.

MR HOLMES: No, no, I think you expressed it better. If one looks at the enforcement decision, it covers not only where there has been a breach - it requires not only a consideration together by all of the authorities whether there has been a breach, which would allow, for example, a discussion of what the coverage obligation means in its substance. It also covers what remedies are appropriate to impose, and those remedies are not confined to revocation of an authorisation, the authorisation of a mobile satellite system. They also extend, for example, to financial penalties. Indeed, revocation is the most extreme penalty to be imposed under the arrangement only as a second stage of the process. So not only does the approach taken by the Tribunal short circuit the question of whether there has been a breach

in relation to questions where there is any doubt about that, such as in relation to the underlying substantive coverage obligation, it also short-circuits the question of what remedy it is appropriate to impose, because it leaps to the most extreme conclusion, and it basically prevents a portion of the satellite system from being deployed at all in circumstances where national authorities might form a different view and, as you say, there are 28 of them.

In our submission, the reasoning is not good in the Court of Appeal's order for reference. Mr Bowsher, himself, I think accepted the reasoning was unclear, and we say it does not form a basis for allowing any part of the appeal to proceed, and certainly not for allowing ground 3 to proceed, which relates not to timing at all, but rather to the underlying coverage obligation as is clear from para.15 of the application to which Mr Bowsher took you.

Ground 3 of the application covers the same ground as ground 1(a)(ii) of the original appeal, and that is the allegation that the ground stations in the EAN are not CGCs and that the Tribunal erred not to hold otherwise. Viasat advances three arguments under this ground and we say they are all without merit.

Firstly, Viasat complains at the fact that the Tribunal considered the dictionary definition of 'complementarity' when considering the reliance that Viasat had itself placed upon the meaning of the English word. The Tribunal has my point about this, but just for completeness para.53 of Viasat's skeleton argument before the Tribunal----

THE CHAIRMAN: Is that the final submissions or the----

MR HOLMES: No, Sir, it is the opening skeleton argument. I am afraid I do not have the final submissions, but the reference in the skeleton that I have is para.53, which complains at the very use of the word 'complementary' in the definition of 'complementary ground components'.

THE CHAIRMAN: I think the same point was made in the final submissions. I have flagged it up in my version which has not actually made it into the room, but never mind. There is a similar reliance on the word.

MR HOLMES: Yes, I do not need to detain the Tribunal with the point then. It was an obviously reasonable place to start, and it was in any event only a starting point. As the Tribunal noted, CGC is a defined term and the primary focus should be on the definition and not on one individual word.

THE CHAIRMAN: I think you can assume, Mr Holmes, we do not think that is Mr Bowsher's best point.

MR HOLMES: I am grateful. Secondly, Viasat contends that the Tribunal misunderstood its case based on a reference to mobile satellite systems in para.123. We say on that that there is nothing of substance to the point. It is clear that the Tribunal understand full well and fully addressed Viasat's case that the legislation required priority to be afforded to the satellite component of the system.

Thirdly, Viasat repeats a large number of points previously made under this ground, but the reiteration of those points does not show an error in the Tribunal's approach.

Ground 4 was not opened, so I do not need to respond to it orally. I rely on my written submissions.

Ground 5 is entirely derivative of ground 4.

Ground 6 was only lightly touched on by Mr Bowsher. This is the complaint that the Tribunal erred in not acceding to an argument that Ofcom should have imposed a specific condition on Inmarsat to ensure and make clear that the EAN could not be operated to provide a service to aircraft in the absence of a satellite terminal. We say that that was adequately dealt with at para.183 of the judgment and there is nothing to show any error in its approach.

Finally, ground 7 is where, if anywhere, we say the reference for preliminary ruling would sit. This is the complaint that the Tribunal erred in treating a failure to meet the deadlines in Article 4(1)(c)(ii) and milestone 9 as matters to be considered only as part of the enforcement regime. Well, you have my submissions on that already, I think, in relation to ground 2.

So we say that none of the grounds has any real prospect of succeeding.

There were two other compelling reasons identified by Mr Bowsher: first, it was said that the judgment raises important points of principle regarding European legislation, which are currently under scrutiny in other Member States' courts and before the European courts. The fact that Viasat has exercised its rights to commence numerous proceedings does not provide a compelling reason for an appeal to be heard by the Court of Appeal on points with no realistic prospects of succeeding.

Secondly, Viasat argues that the judgment is inconsistent with the Commission's letter of 14 February 2017, which is not appended, so far as I could see, to the application for permission to appeal. The point is, in any event, a bad one. The letter simply notes that NRAs may take enforcement action in accordance with the co-operation procedure laid down in the Enforcement Mechanism Decision, and is in no way inconsistent with any aspect of the Tribunal's judgment.

One further and final point on the reference: we say, in addition to the other points that I have made, that a further point against allowing an appeal merely on the strength of the Belgian court's reference is that Mr Bowsher has never at any previous stage of these proceedings suggested that the case requires a reference, nor has any other party to the proceedings, and to prolong these proceedings on the basis of an order which Mr Bowsher, himself, recognises to be unclear is not well founded.

The appropriate course is for the Tribunal to refuse permission and to leave this to the Court of Appeal to decide whether they have any interest in considering these points further. I am grateful.

THE CHAIRMAN: Mr Ward, there is not much more you can add, is there?

MR WARD: No, I do not think I can. I gratefully adopt Mr Holmes' submissions, and the Tribunal has my written observations on this as well.

I was going to simply make one point: the proposed grounds of appeal are not arguable. They are not rendered arguable by the ruling of the Belgian court. That, in my submission, is the end of this matter, but if there is an appeal to the Tribunal's discretion and a consideration of other compelling reasons, in my respectful submission it is important to bear in mind the nature of this case. This was a challenge brought to a decision last January by a commercial rival seeking to hobble, if not take out, my client's competing products. The reality is the delay and prolongation of these proceedings in London is, itself, detrimental. That, of course, is not in any sense a factor that overrides the legal test. Either there is a an arguable ground of appeal or there is not. In my submission, there is not, and there is not scope here for somehow giving Viasat the benefit of the doubt.

Sir, that is all I wish to add.

THE CHAIRMAN: Thank you. We are going to just rise for a few minutes to consider our decision on this point.

(Short break)

(For ruling, see separate transcript)

THE CHAIRMAN: Now, costs, this is essentially your application for costs?

MR HOLMES: Sir, in fact, it does not involve Ofcom.

THE CHAIRMAN: It is not your application for costs.

MR HOLMES: It is Mr Ward's application. If I might trouble with two points: firstly, today's hearing was at the request of Viasat, and I would, therefore, seek my costs of attendance today?

THE CHAIRMAN: The costs of today will be costs in the overall hearing, will they not? Why should they not be, which means that, since there is no dispute but that you should have them, you will have them. Mr Bowsher?

MR BOWSHER: We have not disputed them.

MR HOLMES: I am grateful.

THE CHAIRMAN: So the costs of today are simply part of the costs of the hearing.

MR HOLMES: Thank you, Sir. Given that this does not involve Ofcom, meaning no disrespect to the Tribunal, might we be excused from attending the costs application?

THE CHAIRMAN: Yes, of course.

(Mr HOLMES withdrew)

THE CHAIRMAN: Yes, Mr Ward?

MR WARD: Thank you, Sir. Inmarsat applies for its costs against Viasat. The general principle which I apprehend is not in dispute is that although generally interveners are neither liable for or able to recover costs, there is a discretion to depart from that position in appropriate circumstances.

Mr Bowsher has put about nine authorities in the bundle dealing with the Tribunal's approach to costs. In my submission, it is not necessary to open any of them. What they do show is that where an intervener's interests are sufficiently closely affected by a challenge, the Tribunal has awarded costs, but of course everything depends on the facts. If one wants an example of where an intervener was awarded costs, it comes in *Aberdeen Journals* where the intervener was the victim of an abuse of dominant position. I will not open any of the cases unless Mr Bowsher does and it is necessary for me to address the Tribunal upon them. It is obviously a matter of discretion.

THE CHAIRMAN: The *Aberdeen* case, looking at the brief citations of the authorities we have seen, is your best case, is it not?

MR WARD: Yes.

THE CHAIRMAN: It might be helpful to us to see your best case, because you have two problems, although that is not quite the right word. One is getting an order in the first place, and the second is getting an order for as much as you want.

MR WARD: Yes, absolutely, Sir.

THE CHAIRMAN: I do not think we are aware of any cases where 100 per cent, which is what you are after, has been awarded, and 60 per cent is the best you can do on the authorities, is it not, which is *Aberdeen* - is that correct?

MR WARD: *Aberdeen*, it is 60 per cent in one case and 100 per cent in the other.

THE CHAIRMAN: There was 100 per cent, was there? Can we see it then?

MR WARD: It is at tab 12 of Mr Bowsher's authorities. We can see - I can take it fairly briefly through the facts, but starting at para.1, the Tribunal dismissed the appeal in case 1009/1/1/02 by Aberdeen Journals Limited against the decision of the Office of Fair Trading ("the OFT") that Aberdeen Journals had abused its dominant position in the market for the supply of advertising space in free and paid-for local newspapers in the Aberdeen area. It was an abusive pricing case.

Then at para.2 it says:

> "The costs to be dealt with included not only the costs of the appeal disposed of on 23 June 2003 ('the second appeal') but also the costs incurred in Aberdeen Journals' earlier appeal in case No. 1005/1/1/01 … against the first decision of the OFT in this matter …"

The result of the first appeal in the judgment was a remittal to the Director in certain respects. So it was initially a remittal and then there was an outright rejection of the appeal.

Then you will see at para.4 that Aberdeen Independent intervened, and at para.5:

> "Aberdeen Independent requests that its costs of both the first and second appeals should be paid in full by Aberdeen Journals, on the grounds that the case which Aberdeen Independent supported through its intervention has been entirely successful."

and it assisted the Tribunal.

Then at para.6, Aberdeen Independent points to the wide discretion of the Tribunal, and the discretion includes interveners.

Then there is some argument that perhaps we can avoid, and turn to para.19 where the Tribunal's analysis begins. You will see it says:

> "In this relatively new jurisdiction …"

as it was then, this was an early case in the Tribunal -

> "… the Tribunal is developing its case law on the exercise of its discretion to award costs. While that discretion must be exercised judicially, we think it important to avoid rigid rules …"

Then costs are always in the discretion of the court.

Then 21:

> "Turning to the position of interveners, the Tribunal's case law to date indicates that interveners may fall into various different categories. In *GISC: costs*, the unsuccessful intervener represented most of the United Kingdom insurance

industry, and had promoted an agreement held to contravene the Chapter I prohibition. The intervener was ordered to pay the costs … In *Freeserve: costs* BT, the intervener, an allegedly dominant company, did not have costs awarded in its favour, in a case where its intervention had been partially successful and partially unsuccessful.

22 The present case constitutes a different situation, which the Tribunal has not yet considered. In particular, the intervener in this case is the company which had been the victim of the abuse of dominant position found in the decision, namely predatory pricing by Aberdeen Journals, which was intended to drive the intervener out of business …"

Then the Tribunal refers to five circumstances:

"First, in our view it was entirely reasonable and proper for Aberdeen Independent, who was the complainant in the administrative procedure, and the target of the abuse of dominant position … to intervene in both the appeals. Secondly, Aberdeen Independent has ultimately been successful on the substantive case being made to the Tribunal."

THE CHAIRMAN: Before you go any further, it described "the target", so that was the only target, was it, there was nobody else?

MR WARD: It was a local newspaper market, and the predatory pricing was, I think from recollection, essentially aimed at driving it out of business.

THE CHAIRMAN: And that was the only other newspaper in the market?

MR WARD: Again, from recollection, but I confess it has been a while since I have looked at the substance of the case.

THE CHAIRMAN: Right.

MR WARD: Then:

"Thirdly, Aberdeen Independent's submissions were of assistance to the Tribunal, particularly on the issues of market definition and abuse, including the treatment of newspaper production costs. Fourthly, Aberdeen Independent's submissions did not, to any material extent, merely duplicate those of the Director. Fifthly, and of particular significance in the present case, a large part of Aberdeen Journal's defence consisted of a specific attack on Aberdeen Independent as an 'inefficient market entrant' or 'fireship'. That attack culminated in what became, in effect, an attack on the integrity of Aberdeen Independent's proprietor, Mr Barwell."

There has been no attack on the integrity of Inmarsat in this case, but as I develop my submissions I am going to say that otherwise these factors are largely applicable.

Then, picking up the point already made, in the end it received 100 per cent of its expenses on the substantive appeal.

Just while we have the bundle of authorities in any event it is perhaps helpful to just look at one other case where the case law is summarised, and that is under tab 6, and that is *National Grid*, and you will see at para.5 the Tribunal summarised its own jurisdiction, including *Aberdeen Journals*, and said:

> "The general practice is that interveners bear their own costs … [They] are not generally held liable to pay costs if they intervene in support of the unsuccessful party … There have been cases in which the Tribunal has departed from this practice, for example in cases where the intervener has been the target of the abusive behaviour (as in *Aberdeen Journals (No. 2)* [2003] CAT 21 …) or where the intervener is a party to the contract which was alleged by the appellant to be void under Article 81 EC …"

See *Independent Media Support*. There a smaller percentage of costs was awarded.

Then I was just going to say, if one turns the page at para.10, the CAT also makes the very important point in the four lines:

> "There is no general presumption against making costs orders against unsuccessful appellants in cases involving penalties. On the other hand, the Authority does not assert that there is any presumption in favour of making such orders. All will depend on the facts of the particular case."

This is not a penalty case, but of course I accept the obvious point, it all depends on the facts.

So that is all I was going to say by way of introduction on the authorities, and I would like to make six submissions as to why an award of costs would be appropriate in this case. The first point is an obvious one, that the sole target of this litigation was authorisation specifically granted to Inmarsat, and its object was to prevent Inmarsat from offering the EAN in the UK, which would of course have seriously damaged its ability to offer it elsewhere. So there is no doubt that its interests are as much affected as if it had been the formal respondent to the challenge, and indeed the Tribunal referred to Inmarsat and Ofcom jointly as "the respondents" for convenience - para.1 of the judgment - and in my submission that does reflect the reality of this litigation.

Secondly, this was part of a commercial strategy to knock out Inmarsat's competition, not in any sense a public interest challenge. So Inmarsat said in its statement of intervention that it had no option but to intervene to protect its very substantial investment and commercial commitment to the EAN. It warned that it would seek to recover its costs at the end if the appeal was unsuccessful.

Thirdly, the Tribunal will recall that at the outset of the proceedings Viasat made an application to Ofcom for disclosure of the material that had been provided to Ofcom by Inmarsat in confidence. Ofcom essentially stood back from the application, and it was contested as between Inmarsat and Viasat. In the end, a significant amount of redaction was retained. In my respectful submission, that also underlines the importance of Inmarsat's participation in this case.

Fourthly, in this appeal, Viasat was able to put forward a large amount of fresh evidence, including the expert evidence of Dr Webb. That evidence contained a series of misapprehensions about the technical functioning of the EAN, the role of the satellite in providing the service and the way it was marketed. All of those were matters on which Inmarsat was able to assist the Tribunal - just by way of examples, how the EAN operated, which was important to the Tribunal deciding whether there was a mobile earth station. There was evidence from Mr Sharkey about that.

There was a debate about whether the satellite made a meaningful contribution at all to the service and Dr Webb argued that essentially the satellite was irrelevant, Viasat almost went as far as to say it was a sham. Mr Sharkey gave evidence explaining what role it did perform, and that evidence is indeed reflected in the judgment.

Then commercial evidence was given by Mr Pearce. He was not cross-examined, but his evidence was important, because there was a repeated assertion by Viasat that Inmarsat would sell the ground facing element of the equipment alone, and Mr Pearce said the opposite.

Fifthly, we would submit this was not just duplicative of Ofcom. It was matters that Inmarsat was particularly well placed to assist on, and the Tribunal will recall that at the hearing there was a careful division of labour between myself and Mr Holmes, both in oral submissions, but also cross-examination.

It is right that Inmarsat's written submissions responded at least briefly to the full scope of Viasat's appeal. We put in a 23 page statement of intervention, as compared to Viasat's 43 page notice of appeal. Given the importance of what was at stake for Inmarsat, it was, in my respectful submission, very likely, if not inevitable, that Inmarsat would want to say

something about these points. They were very wide ranging indeed. Our answers were very similar to Ofcom's, but that is because the points were bad and Ofcom and Inmarsat did give the same answer, ultimately reflected in the Tribunal's judgment.

Sixthly, and finally, the appeal has failed in its entirety essentially for the reasons Inmarsat as well as Ofcom gave in their intervention. We do submit that Viasat ought to have accepted at a much earlier stage that this appeal was without merit after the defence and statement of intervention had gone in. Instead what they did was double up, so there was a second statement from Dr Webb, and a 71 page skeleton argument. Even the submissions on consequential matters are 23 pages long, longer than a skeleton argument is allowed in the Court of Appeal on a substantive hearing.

So, in our respectful submission, in a situation where Inmarsat's vital commercial interests have been directly challenged and an appeal has been brought on a very, very wide ranging and complex basis, it was appropriate for Inmarsat to become involved, it was able to assist the Tribunal, and it ought to have an order for its costs. As we say, we do seek the entirety of those costs, although I accept that is a matter for the Tribunal's discretion. Should we get that far, I will address you separately on the question of a payment on account, if I may.

THE CHAIRMAN: Yes.

MR BOWSHER: Sir, we set out the applicable principles in the note that is at tab 1 of our application bundle, the written submissions on consequential matters, and they are from para.10. That is where we set out the various submissions and provide the various citations. Just reminding oneself of them----

THE CHAIRMAN: Tab which?

MR BOWSHER: Tab 1, p.4, para.9, the position in this Tribunal has evolved to that set out in the *BSkyB* case there cited.

> "The general position is that the costs of an intervention should be allowed to lie where they fall, and then the following factors have been found to be relevant by the Tribunal.
>
> (a) Success of the intervener not to be taken into account when considering whether to award the intervener its costs, because the general position that the intervener does not obtain its costs is predicated on the success of the intervener.
>
> (b) Whether there is an unnecessary or unreasonable duplication of effort.
>
> (c) Even where no duplication of effort, it must be assumed that interveners intervene in their own commercial interest. Unless there is a reason to depart from

that general position, the Tribunal will always expect interveners to seek to avoid duplication.

(d) The Tribunal does not wish to encourage unduly interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties.

(e) Exceptional circumstances will be required to depart from the general position, such as where the intervener has been the target of abusive behaviour.

(f) Notably where the party is particularly and directly affected by the outcome of the appeal is not sufficient to displace the general position, as made clear in *BT v Ofcom …"*

The ethernet determinations, again referenced in our authorities. In that case, the Tribunal accepted that the intervener had a very significant and direct interest in the outcome of BT's appeal, but did not think that this, in itself, will necessarily justify departure from the general approach.

"(g) Whether the intervening party put forward factual evidence which materially assisted the Tribunal and which would not otherwise have been available."

The starting position is, therefore, that the intervener's costs lie where they fall, and the reason for that is made clear in the more recent authorities. If I may take you to two of them in the authorities bundle, the first is tab 5, and this is another of these telecoms cases, the plurality case, *BSkyB v Competition Commission & Others*. Virgin intervened. Their interests were plainly engaged, and if one goes to para.22, one has the statement by the Tribunal, chaired by Mr Justice Barling:

"Although Virgin's intervention was helpful to the Tribunal and did not merely duplicate the submissions of the Commission and the Secretary of State, it must be assumed that Virgin intervened in its own commercial interest. The Tribunal has stated on several occasions that there should be no general expectation that a successful intervener is entitled to its costs. Virgin's reliance on *Aberdeen Journals* is misplaced since the circumstances in that case were very different to the very different to the present. The Tribunal sees no reason to depart from the general position."

THE CHAIRMAN: What were the facts of this case, what was the review very briefly?

MR BOWSHER: Paragraph 2.

THE CHAIRMAN: Right, so it was a challenge to an acquisition. It was not a direct challenge to Virgin's business activities?

MR BOWSHER: Not directly to Virgin, but Virgin obviously saw it as affecting their position. Then if one goes to tab 13, this is an infringement case, described in para.1, two decisions by Ofcom concerning contracts entered into by the intervener for the exclusive provision of access to the BBC. So the intervener is the directly affected party, because it is a party to the agreement that has been held to be unlawful, and the Tribunal, there chaired by Vivien Rose, as she was then was, para.15, the general position is identified.

> "There is a public benefit in not discouraging legitimate intervention, either in support of a contested decision or in opposition to one. Equally, the Tribunal recognises the public benefit in not unduly encouraging interventions. Accordingly, the Tribunal's approach to interveners' costs to date has generally been neutral, i.e. that interveners should be neither liable for other parties' costs nor able to recover their own costs, although that approach may be departed from in appropriate cases."

In this case, the intervener did get some of its costs, because this was a challenge to closing the file, and the intervener would have been the target of the regulatory proceedings to which this related - in other words, the intervener was potentially going to be found to have acted wrongfully and in breach of competition law. That, in my submission, is the cardinal distinction between cases where the intervener is in a different situation - the *Aberdeen Journals* case, for example - where the case concerns a breach of competition law, and the target of a breach of competition law is in a different position because it is seeking to pursue, in a sense, its legal rights in connection with wrongs that have been committed against it. That is, in my submission, entirely different from the sort of regulatory case, which this falls into - most of the telecoms cases fall into that category - where we are dealing with situations where no doubt competitors have vigorously held positions which they wish to defend, and they will be more or less affected by those decisions.

The starting point for the proceedings is not that the claim is brought arising out of a breach by the person bringing that challenge. This is not a case where Viasat has been found to do something unlawfully and is seeking to overturn that decision. On the contrary, Viasat is seeking, or has been seeking in these proceedings to pursue a position which it was entitled to do. The Tribunal has disagreed with its position, but it was pursuing a commercial position legitimately, pursuing its argument as to how the law should be applied. It was not

seeking to defend a position where it had been found to have abused or acted contrary to competition law.

In my submission, that is a key difference. The reason why the Tribunal has applied this general approach to let costs lie where they fall is because, as the Tribunal has been seen to say in those judgments, it is of the nature of this Tribunal's work that it deals with situations involving competitors. The Tribunal seeks to be neutral as to either encouraging or discouraging interveners to participate. The regulator and the party who either bring the challenge, or are affected by the challenge, are the primary parties. The interveners are entitled to intervene and may be expected to intervene as vigorously as possible, but where, as here, a competitor seeks to use the procedures of this Tribunal to supplement what the regulator has done, there is no reason in principle to depart from the general approach, which is that the intervener's costs should lie where they fall. This is not a case where we, Viasat, are appealing from some finding against us.

There is in this case no particular reason why Inmarsat should be entitled to any of its costs from Viasat. It is not the target or the victim of conduct by Viasat. Viasat and Inmarsat are in competition, and Viasat is entitled to take such steps as are available to it to compete vigorously against it.

THE CHAIRMAN: Sorry, you are saying Inmarsat was not the target of Viasat?

MR BOWSHER: It is not a target in the sense that it is not the target of anti-competitive behaviour. Viasat is bringing these legal proceedings against an authorisation given to Inmarsat, but it is not the target of any unlawful conduct, it is not the target of any breach of competition law or some such. Viasat is entitled to exercise its legal rights, and Inmarsat is, in that sense, in no way a victim in the way that is characterised in the authorities. They are competitors who will go to some lengths to vindicate their respective positions, but the fact that they have rights to participate in those contests involving regulators does not in and of itself entitle them to recovery of costs.

In fact, in this case, we say Inmarsat's involvement did not substantially advance matters beyond that taken by Ofcom. The legal position found by the Tribunal against that fought for by Viasat was largely that contended for by Ofcom. Self-evidently, Inmarsat knows more about the operation of the EAN than Viasat does, and as was to be expected Inmarsat took some steps to protect its information. Given the fact that Inmarsat knew so much more about the EAN operation than anyone else in this Tribunal, perhaps one might think that its contribution on the facts was surprisingly sparse. It took great care to control the availability of information to the Tribunal.

Its approach to the redaction process which went on over many weeks and led to a gradual collapse of the position in one case on the night before a PTR in this Tribunal - it is set out in the evidence, I was not going to open it now, but there has been a progressive process which was noted by the Tribunal at the PTR that Inmarsat was making rather grand assertions of confidentiality which, on enquiry and investigation, in many respects collapsed. While they may have a role in protecting their confidentiality, the approach they took was not constructive. It added to the costs, as we have set out in para.8 of our written submissions on costs in our reply submission.

On the evidence, the core facts turned out to be more as stated in the judgment in para.80, describing the operation of the EAN, and were very much as described by Mr Webb and Mr Harrison, the witnesses from Ofcom and Viasat. Again, in my submission, Inmarsat's involvement, as it turned out, did not really take matters very much further. The Tribunal may not have agreed with the way we characterised those facts, but they arose out of the evidence to a considerable degree as we had contended that they would be. On that factual analysis, we have been proved largely to have been correct, in my submission.

So, in my submission, not only is Inmarsat not in the special position that, for example, *Aberdeen Journals* was in, where it was the target and victim of abusive conduct and could be expected to have a rather special role in an appeal brought by the abuser. In fact, in this case, Inmarsat's role and contribution to the proceedings, while plainly very expensive now that we have seen the schedule, has not, in our submission, added greatly to the sum of the knowledge and the basis upon which the Tribunal reached its judgment.

THE CHAIRMAN: Thank you.

MR WARD: May I just respond briefly?

THE CHAIRMAN: Yes.

MR WARD: That was a very partial reading of the authorities and, in my respectful submission, portrayed a very inaccurate picture. It is well illustrated by the citation of the *BSkyB* case, which is at tab 5 of the authorities, which, as you put to Mr Bowsher in argument, Sir, was a case about Sky's acquisition of a stake in ITV, and in those circumstances Virgin was not allowed its costs.

The *BT* case at tab 8, which was also one in which interveners' costs were not allowed, is a case about the wholesale telecoms market where there is no doubt that the practice has emerged in this Tribunal of a large number of operators appearing and contesting each other's appeals. This is a factor that was picked up by the judgment of the Tribunal at paras.18 and 19, at para.19 the Tribunal quoting an earlier case, *Freeserve*:

"In the specific case of a sector such as a telecommunications where there may be interveners who are likely to be regularly appearing before the Tribunal, we think the general practice is to allow the costs of the intervention to lie where they fall."

That is very far indeed from this case, which we very much hope is something of a one off. Sir, I will not go through all of the others, but the general principles that I opened this application with are correct still in the Tribunal's practice.

Turning to the points of substance made by Mr Bowsher, he said there is a big difference here because Viasat itself is not in breach of competition law, but even so, these proceedings are a fundamental attack on Viasat's commercial interests, it is an attempt to take down a competing product. The challenge has proven to be unwarranted.

Next Mr Bowsher said that Inmarsat's intervention was in certain respects sparse on the facts, but the Tribunal will recall there was a contested process by which the level of redactions was considered. Inmarsat certainly was pragmatic to a great degree in that, but ultimately there was very sensitive commercial information, and Viasat is its head to head competitor, not only that, a competitor litigating against it in various *fora* around the world, which you will recall was also a concern.

Then, finally, the suggestion that Inmarsat's evidence was of no assistance on the facts is simply not borne out by the judgment. Mr Sharkey was able to help with some important matters, including, for example, giving an authoritative explanation of how the satellite worked, and indeed dealing with some technical raised by Dr Webb, such as the merits or otherwise of using a multi-beam satellite of greater capacity than that which Inmarsat in fact had launched.

So, in my respectful submission, the appropriate order would be for the entirety of Inmarsat's costs to be paid by Viasat.

Unless I can assist further, those are my submissions.

THE CHAIRMAN: No, thank you. We will rise briefly.

(Short break)

(For further ruling, see separate transcript)

MR WARD: Yes, Sir, indeed, a very brief application. May I hand up a two page extract from the White Book which deals with the practice in the Supreme Court. (Same handed) You will be aware that there is no specific provision in the Competition Tribunal Rules for a payment of costs on account. Rule 104(2) permits the Tribunal to make "any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings".

I do not understand it to be disputed by Viasat that that at least gives the Tribunal a jurisdiction.

The White Book exercise that I have provided, I just want to highlight a couple of short paragraphs from the notes. 44.2.12 refers to rule 44.2(8), which is not the same as the position in the Tribunal, and it is important to draw that to your attention. It says:

> "The rule provides that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account unless there is a good reason not to do so."

I do not seek to rely on that presumption, but I do submit that the rationale for that presumption is equally applicable in this case, which is essentially to ensure that the party who has been awarded costs gets a payment reasonably expeditiously rather than waiting for detailed assessment.

If I just may take you to the next page, 1365, between the two hole punches the position is summarised in the second paragraph below the hole beginning "Necessarily":

> "Necessarily the determination of a reasonable sum involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in detailed assessment. In a case of any complexity the evidence and submissions arguably relevant to that exercise may be extensive. The court has to guard against the risk that it may be drawn into costly and time consuming satellite litigation. There is no rule. The amount ordered to be paid on account should be the irreducible minimum of what may be awarded."

We have not burdened the Tribunal with detailed evidence about the costs that have been incurred, but there is a schedule of costs which was attached to - it is in Ofcom's bundle for today under tab 3, and it is attached to the intervener's application for costs. It is at paginated 7 and 8. The Tribunal will see - really the point that I am going to seek to advance - that the overall level of these costs was justified. You will see the total sum at the bottom of p.8. That reflects both the complexity of these proceedings, but also their importance to Inmarsat.

For the reasons that have just been reflected in the Tribunal's ruling on costs, this was a critical matter for Inmarsat, a wholesale attack on its business case. In my respectful submission, Viasat has advanced this case on a somewhat profligate basis. The submissions it has made have been lengthy, diffuse and repetitious. It has also put in extensive expert evidence. Its skeleton argument for the main appeal was over 70 pages long. So it does not

lie well in its mouth to complain that its direct competitor that was under challenge spent too much money in seeking to defend its position.

Those are the only submissions I was going to make unless I can assist further.

THE CHAIRMAN: Yes, thank you. Mr Bowsher? First of all, do you dispute the jurisdiction?

MR BOWSHER: No.

THE CHAIRMAN: Good, thank you.

MR BOWSHER: We say that the principle is that in making any payment on account you should err on the side of awarding less than is ultimately likely to be recovered on detailed assessment. That is the basic proposition which most recently is set out in the *Dana Gas* case, which we have put in the file but I do not think it needs authority. That is just----

THE CHAIRMAN: Can I just go to the bottom line, Mr Bowsher, it is sometimes helpful to do this. Are you going to say at the end of all this, "Therefore you should award no more than £X"?

MR BOWSHER: Well, the number we put in our note was 10 per cent. That would be £87,000.

THE CHAIRMAN: I thought that 10 per cent was how much of their overall bill they should have, subject to taxation. Did I misunderstand your submissions on that? Perhaps I read your submissions too quickly. I thought the 10 per cent was - yes, if they get their costs they should only have an interim payment of 10 per cent of whatever proportion of the costs they get. Is that what you said?

MR BOWSHER: I think we have said it somewhere else, but in para.25 of our note in reply we said:

> "In the premises should the Tribunal be minded to award Inmarsat a payment on account, Viasat contends that any payment on account should be significantly less than 10 per cent of the costs sought by Inmarsat in its summary schedule calculated by …"

I agree that it does say "calculated by reference to a significant discount".

THE CHAIRMAN: I did misread your submissions too quickly on the point, so you say 10 per cent.

MR BOWSHER: Ten per cent of £870,000 I think is £87,000, so that was the number we put forward. It should err, as I say - the number is, on any view, a large number, particularly for an intervener which was not bearing the brunt of this claim. Any payment on account should certainly err significantly below the amount that would be likely to be paid upon a detailed assessment.

THE CHAIRMAN: What do you say that is?

MR BOWSHER: Well, certainly I would suggest that, given the sorts of points we made in our note, the numbers of partners, and so forth, that it would be unlikely they would recover much more than 50 per cent of what is in their summary schedule. On the basis that the summary schedule reflects what they put into detailed assessment, detailed assessment can be anywhere between 50 and 70 per cent perhaps. I would suggest that it should be less than 50 per cent of the summary schedule.

THE CHAIRMAN: So it should be less than £435,000?

MR BOWSHER: Yes.

THE CHAIRMAN: A number less than £435,000. Did you want to do any further dissection? It is always an unrewarding activity which nobody enjoys, but I am not going to stop you, Mr Bowsher, if you want to do it?

MR BOWSHER: We have done the dissection in writing. I would simply highlight - I do not want to be drawn too much in by such - and I do not take that as an encouragement, as it were, simply an identification!

THE CHAIRMAN: I think it is a reluctant concession, Mr Bowsher! I think that would be the appropriate characterisation. I have to sit through it a number of times.

MR BOWSHER: Well, exactly. I think all I would say is that, given the very substantial sums that are being paid here for a number of lawyers, senior lawyers. Junior counsel is, herself, very senior, leading counsel, then we have two partners participating to a greater or lesser extent during the hearing. There are a number of significant discounts if one starts at the big numbers - work on documents, NPC and CS are both partners, attendance at court hearing, NPC and CS are both partners. When you add it up, there are four lawyers involved at every stage. I would suggest that there is certainly scope for quite a lot of fat to be cut out of that schedule on a detailed assessment - I would put it that way.

THE CHAIRMAN: Thank you. Do you want to say anything else?

MR WARD: No thank you,

THE CHAIRMAN: I did not think you would.

(For further ruling, see separate transcript)

THE CHAIRMAN: Do we have to specify a time within which that is payable. In the High Court there is a default position of 14 days. Is there one in the Rules?

MR WARD: I do not think there is a default position in the Tribunal Rules, so we would be grateful for an indication.

THE CHAIRMAN: In that case we had - these are substantial commercial organisations, 14 days?

MR BOWSHER: I hesitate to ask for longer, but because the holiday is coming up, I do not know whether----

THE CHAIRMAN: Ah, the holidays!

MR BOWSHER: I have not checked.

THE CHAIRMAN: I do not suppose it will make a difference if we say 21 days, although I am not particularly sympathetic in relation to holidays for sums of money payable by these people, but there we are. We will say 21 days.

Is there anything else, Mr Bowsher?

MR BOWSHER: No, I do not think so.

THE CHAIRMAN: Mr Ward?

MR WARD: No, thank you.

THE CHAIRMAN: Thank you all for your help in what has been an interesting and not wholly easy case at times. Thank you.