IN THE COMPETITION Case No. 1280/3/3/17

APPEAL TRIBUNAL 26 June 2018

Victoria House,

Bloomsbury Place,

London WC1A 2EB

Before:

THE HON. MR. JUSTICE MANN

(President)

DR CLIVE ELPHICK

ANNA WALKER CB

(Sitting as a Tribunal in England and Wales)

BETWEEN:

VIASAT UK LTD AND VIASAT, INC Appellants

- and -

OFFICE OF COMMUNICATIONS Respondent

-supported by-

INMARSAT VENTURES LIMITED Intervener

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HEARING

A P P E A R AN C E S

Michael Bowsher QC, Fiona Banks and Khatija Hafesji (all of Monkton Chambers) appeared on behalf of the Appellant .

Josh Holmes QC, Julianne Kerr Morrison (of Monckton Chambers) appeared on behalf of the Respondent.

Tim Ward QC and Anneli Howard (both of Monkton Chambers) appeared on behalf of the Intervener.

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Tuesday, 26 June 2018

(10.30 am)

Housekeeping

THE CHAIRMAN: Yes, Mr. Bowsher.

MR. BOWSHER: May it please the Tribunal. I appear again today for Viasat, the appellant, with Fiona Banks and Khatija Hafesji. Ofcom are represented today by Josh Holmes QC and Julianne Morrison and Inmarsat by Tim Ward QC and Anneli Howard.

Just a few introductory matters. I hope that the Tribunal now has all of our various skeletons in their various confidential and non-confidential forms and so forth.

THE CHAIRMAN: Yes.

MR. BOWSHER: I was not going to run through all the bundles as I trust that they are received, unless there are any issues about what is in them or the arrangement that needs to be addressed to start with.

THE CHAIRMAN: We will find out if there are any problems with the bundles when they happen.

MR. BOWSHER: There are always some.

There is, obviously, a general issue around confidentiality of the content of some of the materials in the bundle. Broadly speaking, the documents that are on yellow paper are said to be wholly confidential.

Other documents with some confidential material are identified in the index. My approach today in opening was simply going to try and work around that and if necessary, perhaps direct the Tribunal's attention to material without specifically reading it out.

THE CHAIRMAN: Yes.

MR. BOWSHER: We will have to see how far that goes. Whether that approach will work with witnesses I suggest may be something that is best left to that occasion, and I hope that will work. We may have to adapt as we go along.

THE CHAIRMAN: Yes, I hope the witnesses will be briefed that they should not refer to them openly while we are in open tribunal, as it were, to material which is marked confidential and which I am sure they will know is confidential. Looking at the witnesses, they will all be able to identify that which is not said to be confidential.

MR. BOWSHER: The difficulty I can foresee is that for any witness in responding to a question, without having the document in front of them it may not be obvious in their recollection, may be not quite as obvious to them as to us as they may not have lived through the excitement of the confidentiality battles in this matter as to what they should or should not be saying.

THE CHAIRMAN: We will cross that bridge when we come to it. I would want to try to avoid going into private as much as possible. If we have to, we will. I have to say that having now seen, I think for the first time, some of the allegedly confidential material, I can see that some of it is obviously confidential, but I think some of it, for my part, is slightly excessively confidential. So unless there is the accidental slip, I do not think it will do much damage, but I will say NO more than that at this stage.

MR. BOWSHER: Yes, I was not going to comment on the nature of it. We have been over that ground in the past. I was not going to go over it again.

In terms of housekeeping, on the timetable that we had discussed at the pre-trial review, the intention was that I would carry on until 3.30 today. That was my plan, to see -- it may be that I have to adapt as I go along. I was not clear whether the Tribunal had any particular intention about timing breaks or whatever for transcribers within that. I will plough on unless I am told otherwise.

THE CHAIRMAN: I will tell you now, Mr. Bowsher, that there will be a break for our transcribers, which will be about halfway through the morning, of about five minutes or so, at some point between 11.30 and 11.45. That is

a convenient moment. They will have their five minutes or so, and similarly at some point between 3.00 and 3.15.

MR. BOWSHER: Thank you.

THE CHAIRMAN: Mr. Bowsher, let me, in order to assist you by way of housekeeping coming from here, let me tell you about the nature and extent of our reading. I may be slightly the lowest common denominator, so I will tell you what I have managed to read and not read and the depth of it. I think it will coincide by and large with my colleagues, but I think they will have read slightly more widely in the sense of going into pleadings.

I have basically read everything on your reading list except the pleadings which I, with respect, never find particularly informative by the time you get to a final hearing unless there is a row about the pleadings. So I personally have not read those. I have read them in the sense of reading them, but not mastering all the detail, particularly some of the detail of the witness statements.

By and large, I have not gone into the exhibits to any of the witness statements. I have confined myself to witness statements. So for my part, and I suspect for my colleagues if they will allow me to do so, if you need to go to exhibits, then you will need to go to

exhibits, as it were. That applies to all of you, obviously, as far as that is necessary. That is the extent and level of my reading. I have read the skeleton arguments for my part, I think, twice now. So I hope I have the overall picture of the argument.

In one sense, that is not very helpful because you do not know the depth of my understanding, but at least you know it is not complete. I do not know if my colleagues want to add to that, but I think if they have read more than I have, I am still the most common denominator and you are going to have to play to me.

MR. BOWSHER: I was not proposing to open the witness statements in great detail, with one or two exceptions, on the basis that they would be re-read by the Tribunal at the appropriate time in any event. So I was going to focus the opening by reference to, as it were, a few key exhibits that are exhibited to them rather than by the content, but that is not necessarily the only way we will deal with the matter.

THE CHAIRMAN: Yes.

MR. BOWSHER: But it may be that I need to double back in some cases.

THE CHAIRMAN: Can I just at this stage indicate something on which we would like a bit more fleshing out assistance in terms of fleshing out a bit of detail of

points which have interested one or other of us.

You and/or your brethren can deal with this as and when you think fit, but we note that you have said, I think it is you have said in your skeleton argument, that Viasat have raised various of its complaints with the Commission recently and the Commission have not intervened and have not taken action. I am paraphrasing. I think it is your skeleton argument, is it?

MR. BOWSHER: Yes, I think it is mentioned certainly by us and Inmarsat.

THE CHAIRMAN: Right. Nobody tells us what their reasons were or what their position was. Unless there is some reason why it would be improper or unhelpful for us to know, in general terms, we think we would like to know what the Commission's attitude was in broad terms. We do not want to be swamped with documents, but we would like to know in broad terms what the Commission's views were, why they decided to do what they did not do, as it were, or what they did do.

DR. ELPHICK: Yes, and in particular it was paragraph 12 of the Inmarsat skeleton was where I was particularly getting that sentence.

THE CHAIRMAN: Right. Dr. Elphick has identified the particular point. I do not know whether Inmarsat --

I do not think we mind who gives us a bit of information on that, but if we can be supplied with some information, we might find it at least interesting, if not helpful.

Second, there is a -- we do not think that we have got any indication of what the general nature of Inmarsat's original application was back in 2007 or 2008, or whenever it was. By way of background, if nothing else, we would find it helpful to understand what that was.

I think our present understanding is that Inmarsat's general application when it was applying was for -- I am just putting it very broadly, I am prejudging nothing for the moment -- a broadband satellite, sort of broadband service filling in gaps in terrestrial mobile service, that sort of thing, and did not in any way feature the sort of specific application which they now have.

That is the impression we have, and if that is a wrong impression, we would like to be disabused of it. It may or may not matter, but at least by way of general background one of us would like to know the nature, at least, of Inmarsat's original application. It may be that Inmarsat will deal with that; as long as somebody can tell us that.

MR. BOWSHER: Can I just briefly --
THE CHAIRMAN: Yes.
MR. BOWSHER: I will try -- I will see if I can weave those points in as we go along. If I do not, it may be something I have to come back to later.
THE CHAIRMAN: It ought to be -- the answer to those points ought to be expressible in a non-contentious way. So maybe one of your colleagues or brethren can do that. As long as we are informed, in general terms, of those issues, then I do not think we care much who does it.

So those are the only two initial points that we have, Mr. Bowsher. You may have your head.

MR. BOWSHER: It may be, given those questions, that I am now saying things which are already obvious to the Tribunal, but are worth saying anyway.

Opening submissions by MR. BOWSHER

MR. BOWSHER: At the very highest level, Viasat sees the matter as follows: the EU wanted to promote a satellite system for this -- it wanted to promote a satellite system generally. This spectrum was available and it specified a specific type of satellite system for exploitation of this spectrum and made that selection on the basis of what that applicant could provide. The assessment of the applications was not made in any way by reference to the ground-based element of the proposed

solution.

Again, to put matters loosely, EU told Ofcom who should have the opportunity to put in place the satellite system, having identified who that person was within its own procedures and which system they were authorised to use. They did not say that whatever that person subsequently chose to put in place, regardless of its existing commitments, should be authorised.

Inmarsat designed a system which uses a satellite. We say only a little, and there is some debate about words about how much the -- and we have had this at previous hearings as well, as to how much the Inmarsat system does actually use the satellite. We will come back to that in detail, but at the very best it seems to be common ground that the satellite system is not the primary part of this system. It is only relevant in marginal or incidental respects.

The satellite is not the main purpose of this system. It would be sensible to say, we say, that a mobile satellite system is only a mobile satellite system if its main purpose is to provide satellite communication between earth and space, and that refers, of course, to the definition in the EU decision, Article 1(1).

Inmarsat's system is very far from that. We know

that in a significant portion of cases in the system there will be communication without any involvement of the satellite, and where users will be using the service without even any ability to use the satellite. They will be in a position where they are using their system and simply will not, given the equipment that they have, be able to access the satellite.

Inmarsat effectively say, "You have to let us use it because it has a satellite". The national regulatory function called for by legislation is, on that argument, just reduced in scope such that the national regulator has no meaningful function to check that what is being proposed was that which was authorised by the EU, and we say that must be wrong.

Just pausing there, and having gone through that narrative, I was not going to go through the glossary in any detail. In a case about definitions, necessarily the whole process of definitions and agreeing them becomes a little bit controversial, but I hope the glossary was helpful, at least, as a guide.

Can I just highlight one important matter which I get wrong all the time, and I am sure I will get wrong, but needs to be -- there is a distinction between MSS and mobile satellite systems. They are not the same thing. When we come to the legislation, I will point it

out.

MSS is short for mobile satellite services. That is not the same as mobile satellite systems. Mobile satellite systems provide MSS, but they obviously are not the same thing and they are not interchangeable phrases. You can get into a bit of a mess if you do not keep that in mind, as I have done on more than one occasion.

A number of sort of general cross-cutting points are made by Inmarsat and Ofcom. I was proposing to deal with some of them before going into the bundles and opening the legislation which is really at the heart of the matter. So I was going to address four or five of these cross-cutting themes before getting buried in the legislation.

First, the whole question of the extent of the discretion that Ofcom enjoyed or the extent to which it was subject to operating subject to obligation under the legislation. As I say, we will come on to the legal constraints in due course, but when we look at the authorisation process, we can see that whatever Ofcom says about it now, they certainly were not behaving as an authority that just thought we were obliged to rubber-stamp.

They were involved in an interaction, at least to

start with, and it is plain that they were involved in an interaction in an area which is not harmonised. If you want a simple illustration, and it is no more than that, of the lack of harmonisation in the area of complementary ground components and their authorisation you can see that very simply by taking E1/18. I do not need to go through the content of this. This is a European Commission document updating the position as of some time. I think it is around about 2014, although the date has been taken off this. I think we established the date in the index as being some time in 2014.

But as at that date, it is plain that the process of reviewing and authorising the operation of complementary ground conditions was very much a matter of separate and individual concern by each member state. I am not quite sure why some of the material is being suppressed as irrelevant now, but that does not matter. This is not an area where the EU Commission as of 2014 -- and this has been put forward -- was actually simply leaving -- simply controlling. It was -- a considerable part of the process was for the member state to act upon it.

THE CHAIRMAN: Sorry, I am not understanding the point you are making on this. I thought you were making the point that Ofcom now say they do not have a discretion, but

they act as though they did.

MR. BOWSHER: Exactly. They act as though they did have a discretion. They clearly acted as if they did have that discretion. They are now saying, "No, it was an automatic process".

THE CHAIRMAN: But this is a Commission document.

MR. BOWSHER: All I am saying, it is from the Commission's perspective. It is clear that the member states were very much in control of the process in 2014. It is simply to illustrate that from the Commission's perspective in 2014, this was very much a national process.

THE CHAIRMAN: Would you like to take us to a passage in this document which shows that?

MR. BOWSHER: Well, it is illustrated simply by the fact that each member state is dealt with separately and it is treated as a compilation, as it says on the front of the page, of the national legal provisions -- it is in the third paragraph on the front page -- applicable to complementary ground components and the different uses for how that is to be dealt with.

Each member state's process is an entire and distinct process. Insofar as we can see them when they are not blanked out, they are separate and distinct. But they are not -- I do not think any of them -- when

you read through them, I have not found any -- simply say, "We apply what we are required to apply by the EU Commission. We simply process the requirement." It is a separate discretionary assessment by each national authority.

Inmarsat understood that and on a number of occasions during 2014 was putting a lot of pressure on the member states through COCOM, the communications committee, to, as it were, hurry up with the process of authorisation. We do not need to look at the detail of it, but the references are at tab 30 and tab 40, where Inmarsat have, as it were, raised the pressure on member states to get on with the approval processes.

Again, I am not sure why most of these documents are suppressed now as, we were told at the PTR, irrelevant because if it is in the confidential file and still suppressed, it must be irrelevant. Anyway, there it is. A great deal of those two documents is not known. Those are Inmarsat putting pressure on member states to hurry up and proceed with this authorisation process.

THE CHAIRMAN: Mr. Bowsher, if these are important points, I am afraid it is not satisfactory for you just to point to these documents and expect us to extract in due course what you want. Can you point us to passages which you say make your point as far as this goes

somewhere?

MR. BOWSHER: Yes. Tab 30.

THE CHAIRMAN: Yes.

MR. BOWSHER: This is December 2014, the letter. Inmarsat has submitted this current report to member states:

"We are pleased to provide the same report to all other member states to give full transparency to our continued commitment."

It tells those member states that they are proud of their significant progress and set out the opportunity to describe what they have done.

If you go then, please, to the penultimate page under "Regulatory developments", that letter at tab 30, there is a heading "Regulatory developments: licensing". Then just after the grey passage they say:

"We urge those member states who have not yet done so to finalise national CGC licensing conditions in a way which does not impede upon Inmarsat's ability to fully realise its Aero CGC plan. The further support of member states in the form of written confirmation is urgently now needed to give us comfort and retire the remaining, still significant, regulatory risk. The retirement of regulatory risk is crucial to further incentivising respective S-band customers and partners throughout Europe to benefit from the highly innovative

aviation services Inmarsat plans to offer."

Real concerns though were being addressed by member states regarding the approach being taken. If you go back to E1/20, it is a few months previously, you have the meeting of the working group of the ECC, which is a committee within CEPT. So that is the broader committee dealing with telecommunications coordination in Europe, not just in the EU, but beyond.

This is a meeting on 7 -- it is a meeting between the 3rd and the 7th and the minutes are produced on the 7th. If you turn to what is paginated as page 37, there is a heading "Aeronautical CGC". They turn to discuss exactly this issue and they talk about -- you can see that there is a discussion about the implementation of the Aero CGC system in the spectrum that we are dealing with.

THE CHAIRMAN: You want the bit at the top of 38, do you not?

MR. BOWSHER: Exactly. Inmarsat speak to the meeting at paragraph 33. Then you have the passage, which is Germany's expression of concern, and it is the penultimate passage particularly:

"Excessive use of CGCs and at the same time a potential increase in the data transmission capacity of the actual MSS system is not within the scope of the

current regulatory framework. Furthermore, different interpretations, especially on the scope of a CGC/DA2GC usage within CEPT could lead to a fragmentation of future air to ground implementation and would therefore be in contradiction with the pan-European character of such a broadband service."

We say that the German regulator seems to have been looking at matters correctly in that regard and expressing proper concerns. It is surprising then, perhaps, to see how matters developed in Germany. The neatest way to look at that is at tab 47 in the same file where we have the response of the federal -- the German agency, the Bundesnetzagentur, a response to that to a consultation on Inmarsat's proposed EAN solution.

THE CHAIRMAN: This document at 47 is the response of the German regulator; is that right?

MR. BOWSHER: It is a translation, as I understand it, of the German regulator's response to the consultation that it conducted regarding the Inmarsat proposal, and there are some introductory matters dealing with the various legislative issues. The passage I wanted to take you to is on page 2:

"The Bundesnetzagentur finds that Inmarsat's proposed EAN is not directly reflected in this underlying EU legislation. However, the decision

suggests there is scope that enables the EAN to be authorised under certain conditions. In addition, the European Commission has indicated that to date it does not see any legal or competitive problems with respect to the EAN."

This is, to some extent, relevant to the question that has already been raised. In our submission, the German regulator is on the right track here. This is not -- the first part of that is correct: this, the EAN, is not consistent with the EU legislation.

I am not sure what the next two sentences mean, "Decisions suggest there is scope for EAN to be authorised under certain conditions" or, "The European Commission has indicated that it does not see any legal or competitive problems," because that does not actually explicitly say what -- how it is that -- what those conditions are or what the basis is upon which those -- the legal difficulties identified by the German regulator are to be resolved.

DR. ELPHICK: But if I can just clarify: is your principal point here that this is demonstrating that the national regulatory authority do have some discretion?

MR. BOWSHER: Two points. That is the first point, exactly. The second point is that for some reason clearly, which is not stated here, a national regulator seems to have

been prevailed upon to decide this is not consistent with EU law, but we are going to authorise it nonetheless. I mean, because there is really no -- it is a pretty -- those two paragraphs are pretty stark. They are saying, "It is not consistent with EU law, but we can see that it might be possible to authorise it nonetheless."

THE CHAIRMAN: Well, under certain conditions, which are not specified.

MR. BOWSHER: Which are not specified.

MR. WARD: Just to assist the Tribunal and Mr. Bowsher, below where it says, "The European Commission does not see any legal or competitive problems", it says below:

"For these reasons, it considers the EAN can be authorised, subject to the following conditions ..."

So there are the conditions.

MR. BOWSHER: Well, if that is all they are. I mean, I am not -- we are back to the same point: if those are the only conditions that are supposed to cure the problem, those do not actually cure the issue which the regulator was concerned about in the COCOM meeting. I mean, we challenge -- we address those points in our appeal. It seems to us that what this is showing is that the regulator is concerned that the legal compatibility of EAN is in question.

In our submission, the question for this tribunal therefore must be is there, in fact, a proper legal basis for these complementary ground components to be authorised as such? We say it is not.

Ofcom in its case also tries to get around the difficulties, and perhaps to some extent adopt this conditions approach, by saying it is enough for something to be a complementary ground component if it can be shown that it might be capable of meeting the complementary ground component common conditions, which we will come on to. We say that cannot be right. That is not the definition. You first have to decide whether something is or is not a complementary ground component and then whether it meets the conditions that are put in place for a CGC to be implemented.

Both that approach taken by Ofcom and the approach set out here in E1 puts matters the wrong way around. You have to first decide is something permitted to be a complementary ground component, and only then if you decide it is do you then decide: well, what conditions do I apply to allow it to proceed? To simply say: well, we can apply these milestones or this coverage requirement can apply, you can apply the coverage requirement to anything. It does not have to be a complementary ground component for the coverage

requirement to be met.

MR. HOLMES: If it assists Mr. Bowsher, it is not Ofcom's case that this definition of CGCs does not need to be met. Of course it is the case that the regulator must ensure that the definition of CGCs is met and must then consider whether the CGCs would be capable of meeting the Article 8 common conditions before authorising particular CGCs.

MR. BOWSHER: That is helpful. I had understood there to be a different slant being put on that in the skeleton on that, but anyway, that is a helpful clarification. The point must be to start is it or is it not a complementary ground component?

We have heard at previous hearings that Inmarsat is concerned that it has been brought here against its will. I do not know whether that will come back again. We say that nothing really turns on that. They have had this spectrum or the -- they have sat on this spectrum for many years beyond the period that was originally allowed for it. The question as to whether or not there is some sort of emotional heart string to be pulled, which has been attempted in the past, is an entirely circular argument, as seen from Inmarsat's own letter to the Commission. I am not going to go into it any further, but if we are right, we are right. It is

a simple question of law.

Let me turn then -- I will come back to a couple of the other themes once I have dealt with the legislation. Can we go to put E1 away, and take file F. File F is the legislation bundle, tab 1. I do not think we need to go to the relevant treaty provisions. It is plain that we are dealing with a matter that arises under the treaty and that the principles underlying European treaty law apply.

We can go immediately to F/3, the framework directive, which is at tab 3, which sets out the common regulatory framework for electronic communications. The only passage I wanted to take the Tribunal to there was at Article 4 in that directive, 2002/21, under the heading "Right of appeal".

Again, I was not proposing to read it all out. There is a description in Article 4, paragraph 1 regarding the nature of the review mechanism which is to be applied, because this is the applicable framework to these proceedings, and the key passage here is about two-thirds down, starting:

"Member states shall ensure that the merits of the case are actually taken into account and that there is an effective appeal mechanism."

That appeal applies to this process.

THE CHAIRMAN: What does that mean? I understand, and my colleagues understand, what is meant by the judicial review test. There is an additional test of taking the merits into account and, if so, what does that mean?

MR. BOWSHER: I think it must mean that there is a greater intensity of review. It will reinforce, when we come to it, our point that this is in the context of EU-based review. This is a more intense judicial review test. One must look at the merits of --

THE CHAIRMAN: As opposed to the normal flabby standards applied by English courts to their own review.

MR. BOWSHER: There is some authority on this. I was not proposing to deal with this in opening. That may not be necessarily the way I would put it, but yes, this is a judicial review requiring an intensity of analysis of the relevant facts.

THE CHAIRMAN: Right. Well, we will be intense then.

MR. BOWSHER: Good.

Someone, I cannot remember who, has asked in the last few hours that the directive 2002/20 be added to the bundle, but I am not -- the authorisation directive, but I am not certain what point is being taken by whom on that, so I will leave it to someone else to take the point on that. It has been inserted in the bundle just before that.

This process regarding the operation of mobile satellite services arises out of the regulatory framework for radio spectrum policy, which flows from the decision at tab 2 in file F, decision 676/2002. There is a useful commentary in the recitals as to what the various relevant bodies are in this field.

Recital 13, I am not going to read it out, describes what the CEPT is. In short, it drafts the technical measures which are then taken on board by the EU, but it is not an EU body. It is broader than the EU.

There is then a reference later at recital 15 to need for EU allocation of radio spectrum to complement existing community and international requirements for publication of information on use of radio spectrum, and again further reference in recital 19 to the need for the EU to collaborate with other international bodies in dealing with the allocation of radio spectrum.

The active part of the legislation starts at Article 1:

"The aim of this decision is to establish a policy and legal framework in order to ensure the coordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum."

That includes -- the goals to be achieved are

identified in paragraph (2) of Article 1, including:

"Ensure the effective coordination of Community interests in international negotiations where radio spectrum use affects Community policies.

3. Activities pursued under this Decision shall take due account of the work of international organisations related to radio spectrum management, e.g. the ITU and the CEPT."

That is important, we say, when it comes to this case and these definitions. As a matter of law, the place to look for additional guidance as to the meaning of the relevant definitions is the material produced by the ITU and the CEPT. This legislation provides that and that serves an obviously important purpose. It is important that if bodies such as the EU or national regulatory authorities are to act in this field that they should act in a manner using the same definitions as other international bodies, particularly where they are dealing with cross-border resources.

The background to this legislative initiative is perhaps most clearly seen in the document at tab 4, which is a report from the CEPT to the European Commission. You get from the executive -- it is at tab 4 and at page 3 the first paragraph tells you what it is.

There has plainly been a mandate from the European Commission asking the CEPT to describe or propose the way in which the regulatory regime would deal with innovative mobile satellite services consisting of systems with a satellite component only or based on a hybrid platform relying on complementary ground components.

We have already seen the relevance of CEPT documents, their legal import significance as they feed into the EU law requirements. This document that you will see is, in fact, the genesis for a number of the definitions which then get embedded in EU legislation.

The introduction on page 4 summarises the mandate. I want to draw attention to the fourth paragraph:

"The report also provides elements for mechanisms to address situations where the frequency requirements exceed the available spectrum and to avoid so-called paper satellites."

That would refer -- the "paper satellites" reference is a reference to people making applications and then not using the -- applying for a satellite but not using it, as it were. That is perhaps a rather loose way of putting it.

There is then a discussion under "Services provided by MSS operators" as to the general context for why

these MSS systems might be useful, and we can see it is a very general discussion in the first paragraph. Perhaps we can then go to the second:

"The importance of the mobile satellite industry has been well-recognised by the EU. Space developments have been recently referred to by the European Commission as strategic to the interests of the European Union because they promote economic growth, the knowledge economy and security. European space policy is currently being developed by the European Commission, the European Space Agency and EU member states [and so forth]."

There is then, two paragraphs down, a long passage talking about why mobile satellite services would be useful within the EU because they would enable you to get broadband communications and the like to parts of the EU which are not -- at least were not at that point well connected, and you can see references to that.

So there is a number of policy requirements which this -- which are being addressed by the CEPT. Firstly, that there is no specific outcome or use being required for MSS, mobile satellite services. It is envisaged, though, that this spectrum would be used to deliver such services, and there is a clear --

THE CHAIRMAN: I am sorry, which services?

MR. BOWSHER: Mobile satellite services in general terms.

THE CHAIRMAN: Right.

MR. BOWSHER: There is a clear -- while it is not said that you should use it for communication with aircraft or for communication with farmers in remote parts of eastern Poland or whatever, there are a number of possible uses, in particular the broader possible imperative to expand availability to telecommunications services across the EU.

THE CHAIRMAN: But the paragraph to which you did not take us, which precedes the one to which you did, actually refers in terms to aeronautical use, including communications for passengers.

MR. BOWSHER: Yes, that is one possible use, but it is not the only possible use --

THE CHAIRMAN: Right.

MR. BOWSHER: -- certainly because at that point this was a contemplated use. But the point is it is not that this spectrum was being contemplated as reserved for communication to passengers to enable them to watch Netflix. There are a number of broader social goals which were under consideration, and those social goals would require a broad coverage.

But also there was an industrial -- effectively an industrial policy goal that promoting the satellite industry was, in itself, a good thing. We will see that

again in further documents; that it was necessary for Europe to do what it could to promote its satellite industry.

It is not the case that this policy was at all neutral from the outset: this was a satellite-directed policy. It was intended that this spectrum should use a satellite and that it was important that, for example, paper satellites should not be put up. This should not be a mechanism were people were able to get spectrum and then not put up a satellite or not properly use it. The promotion of satellite as a means of delivering these systems was an essential part of the process.

THE CHAIRMAN: Presumably you would want us to look at the third paragraph, beginning "in the context of ..." on the next page, page 6.

MR. BOWSHER: Yes, I was going to say that and the following one, including -- up to and including "satellite system beyond the rural areas" and then:

"Satellite systems are inherently capable of reaching a larger population of users. Very suited for multi-casting applications ... [and so on and so forth]."

The meaning and use of a complementary ground component must be seen in that context: that the specific discussion about what is to be a complementary

ground component comes at page 11 of that document under the separate heading "complementary ground components". 4.2.1, "Elements about CGC". Again, I am not going to read all of this out. There is too much to cover in one day, but there is a long discussion here as to some of the things that a complementary ground component might address. But when you look at them, for example in the middle of this first paragraph under 4.2.1 where they talk about things like urban canyons and satellite shadows in topography, those all may be concerns if we are talking about a service that is going to be received on the ground, and it is sensible that they are covered by the legislation.

But in my submission, it is important to see that those concerns are raised because this service might apply to a service that is going to be received on the ground. It does not mean that, of course, those are matters which are even relevant if one is communicating to an aircraft. One would not expect an aircraft to be in an urban canyon, for example, and looking to receive air services. Indeed, if one is receiving services from a satellite, in principle it is quite hard to see what the obstruction would be.

So the sorts of matters which are addressed here as being the reasons why you might have a CGC, because

someone in a rural area who should be getting the service cannot get it because the satellite is in the wrong place, the sort of problem that people have with their house is wrongly oriented to pick up Sky, the dish cannot point at the satellite, if they are in -- that might need a CGC because there is a mountain in the way and they cannot receive the satellite because of where they are. That is obviously not a concern if you are dealing with the sort of aviation service that we are dealing with here.

Furthermore, they may play -- 4.2.1:

"They may play an important role in enhancing the efficiency use of the radio spectrum. Some types of CGCs can transit traffic from one end user to another without passing through the satellite component of the system, reusing spectrum used by the satellite in another geographical area. Such direct routing would temporarily bypass the satellite component to provide communications services which are identical to and fully integrated with the service offered throughout the whole MSS system footprint. Such bypass would allow increased spectrum efficiency."

If you then turn to page 14 there is then the definition which gets taken into the EU legislation, so this is the definition of complementary ground

components. Its analysis starts in this CEPT report. In fact, it is the whole of page 14.

Can we then turn to the document at tab 5. This is the harmonisation -- we are now running through the sequence of EU measures which lead to the decision we are dealing with here. This is the decision taken by the EU Commission to harmonise the 2 GHz band on a pan-European basis. It is important just to note, as far as we are aware, the only pan-European measure of this type. It is done for the specific purpose of facilitating the development of a competitive internal market for mobile satellite services and to ensure gradual coverage in all member states.

It is not a technology-neutral harmonisation framework. It is intended to direct this to the use of satellite services, and you can see that in recital 3:

"Systems capable of providing MSS are seen as an innovative alternative platform to enable various types of pan-European services."

We have seen some of these referred to before:

"These services could improve coverage of rural areas thus bridging the digital divide. The introduction of new systems providing MSS would potentially contribute to the development of the internal market and enhance competition by increasing

the offering and availability of pan-European services and end-to-end connectivity."

Then the next recital:

"Space systems capable of providing MSS should include one or more space stations."

That is a satellite, as we will see:

"They could include complementary ground components in order to improve the availability of the mobile satellite service in zones where communications with one or several space stations cannot be ensured with the required quality."

Then recital 9 refers back to the CEPT report and is dealing with the question of how MSS and systems providing terrestrial only services might affect each other.

THE CHAIRMAN: The first reference to CEPT is in 7.

MR. BOWSHER: Yes, but I think that is just the reference to the report we have just seen.

THE CHAIRMAN: Yes. Well, it shows the centrality of this report to this document.

MR. BOWSHER: Yes, exactly.

The distinction, or the need for a distinction between MSS and terrestrial only systems, is emphasised by recital 9. It is in the middle, nine lines down, I think:

"This means that where 2 GHz bands are used by systems which are not capable of providing MSS these other systems should not case harmful interference nor claim protection from systems providing mobile satellite services. According to the CEPT, CGCs would not cause harmful interference as long as they are an integral part of the system providing MSS, are controlled by the resource and network management mechanism or are operating on the same portions of frequency band as the satellite components of the system. Under these conditions, subject to an appropriate authorisation regime, CGCs could also be utilised even if signals are not transmitted through the satellite components."

That is a reference back to the material we have just seen from the CEPT report.

Then the active part of the legislation, Article 2, there is a definition of systems providing mobile satellite services in Article 2:

"They are systems capable of providing radiocommunication services between a mobile earth station and one or more space stations or between mobile earth stations by means of one or more space stations or between a mobile earth station and one or more complementary ground-based stations used at fixed locations."

Now, we come back to that presently. The key point for ground 1(a) is what is a mobile earth station for this purpose? The space station we know is a satellite and that is why we come on to look at the ITU definitions presently.

Article 3(1) requires the relevant spectrum to be designated for this use. Then Article 3(2) sets out as a matter of legislative requirement:

"The complementary ground-based station shall constitute an integral part of the mobile satellite system, be controlled by the satellite resource and network management. It shall use the same direction of transmission as the associated satellite components and shall not increase the spectrum requirement."

THE CHAIRMAN: One thing I have never understood reading this, and I am sure the fault is mine, is what is meant by "shall use the same direction of transmission". We see it once or twice. What does "direction of transmission" mean in this context?

MR. BOWSHER: That you are using -- so if you are uplink -- that the uplink -- so you have got a downlink and an uplink.

THE CHAIRMAN: It refers to downlinks and uplinks, does it?

MR. BOWSHER: That is my understanding. That the downlink uses -- you do not have someone trying to downlink where

the uplink is going and vice versa. So you have one -- and it is in the document somewhere. There is a particular frequency allocated for downlink and a particular for uplink, and you make sure that the CGC and the satellite are using the same frequency so they do not get in each other's way.

THE CHAIRMAN: It does not mean literally geographical direction. It means direction in terms of uplink and downlink.

MR. BOWSHER: Up and down.

MR. WARD: Sir, there is an explanation of this that I think is uncontentious in Mr. Sharkey's first witness statement.

THE CHAIRMAN: Yes, I think that is what I did not understand. I am sure the point is mine. Has Mr. Bowsher just got it right?

MR. WARD: Yes.

THE CHAIRMAN: Thank you. I am sure Mr. Sharkey should assume the fault is not his: I am sure it is mine.

MR. BOWSHER: Then the next stage is the decision on the selection and authorisation of systems providing mobile satellite services. That is at tab 6.

Before we go there, can we go to -- can I just show you recital 3. That refers to the communication of 26 April 2007 on European space policy.

THE CHAIRMAN: Sorry, tab?

MR. BOWSHER: Tab 6 is the decision.

THE CHAIRMAN: Yes.

MR. BOWSHER: I just wanted for you to see -- we are going to come back to this.

THE CHAIRMAN: Yes.

MR. BOWSHER: Recital 3 refers to a Commission communication. That Commission communication should be behind -- immediately behind that at tab A.

THE CHAIRMAN: This does not open as a traditional Commission document, does it? The words in italics and the first sentence not in italics; it does not sound like a Commission document at all.

MR. BOWSHER: Quite poetic. It starts poetic. It does not get better though.

THE CHAIRMAN: No.

MR. BOWSHER: Anyway, it is very taken with space policy. The relevance, I rather clipped over it, is simply that this is explicitly referred to in the decision that we will come on to look at.

So the procedure we are dealing with is having regard to the strategic mission of the European space policy, which is described at page 4, and that includes, again, if I can give, rather than read all of it out, the second paragraph:

"Europe needs an effective space policy in order to exert global leadership."

If I can then go -- it tells you how large the space sector is, including the satellite manufacturing sector. Then to start at the next paragraph, starting "to respond":

"The strategic mission of a European space policy will be based on the peaceful exploitation of Outer Space by all states and will seek:

To develop and exploit space applications serving Europe's public policy objectives and the needs of European enterprises and citizens.

Skipping over the next:

"To ensure a strong and competitive space industry which fosters innovation, growth and the development and delivery of sustainable, high quality, cost-effective services."

Then again under the next page, page 5, heading 3, "Applications":

"The key to securing the maximum political, economic and social return from investment in space technologies lies in the development and exploitation of space applications, meeting the objectives of EU policies and the needs of European enterprises and citizens. The evolution of European user needs requires the

development of integrated space systems, seamlessly linking satellite and terrestrial telecommunications, positioning and monitoring in areas of strategic, economic and societal value."

Sorry, one more reference from here on page 7 under "Satellite communications" -- sorry, page 6 has a heading "Satellite communications" and it tells you there how important that is as a sector. It is the box at the end of "Satellite communications" at the top of page 7:

"European policies will facilitate the introduction of innovative services, including aggregating demand in remote and rural areas in order to permit satellite services to be as viable as terrestrial solutions. The space industry's technical capabilities need to keep pace with global competitors, many of which are underpinned by defence investments. The EU will invest in advancing technology developments to achieve convergence and interoperability between terrestrial and satellite-based networking sectors."

So closing that and going back to the decision which we are actually dealing with in this case, it is important, and in recital 3, that the EU is placing its space policy and, as we see, its concern to encourage and promote satellite solutions for a range of social

and industrial policy reasons. The need for there to be a satellite solution is embedded in the legislation.

This is the piece of legislation I need to spend the longest on. Perhaps that would be a convenient point to have a break, because I probably will be more than five minutes on it.

THE CHAIRMAN: Yes, very well. Five minutes.

(11.34 am)

(A short break)

(11.43 am)

THE CHAIRMAN: Yes.

MR. BOWSHER: So what is referred to as the EU decision, file F/6 --

THE CHAIRMAN: Yes.

MR. BOWSHER: -- and I have taken you to recital 3 and the reference it takes us to. This then takes us to the common regulatory framework in recital 4, which we have also looked at. Again, I am not going to read it out, but if I could refer to recitals 5 and 6.

THE CHAIRMAN: Do not you want recitals 2 and 3?

MR. BOWSHER: Well, yes, 2, 5 and 6. They all make -- they are referring to the general policy issues. This spectrum is being dealt with, as it were, in a special way to meet certain particular perceived needs in the hope that certain perceived needs will be met, and so in

terms of outcome, there is a specific goal, but also in terms of method, method is satellite. That is the method that is being required by this legislative process, and we get that from 2, 5, 6.

Recital 11 talks about the need for harmonisation and common selection process in recital 12. Recital 13 is the qualification to that:

"Since authorisation of the selected operators of mobile satellite systems involves attachment of conditions to such authorisations and a broad range of national provisions applicable in the field of electronic communications must thus be taken into account, the authorisation issues should be dealt with by the competent authorities of the Member States. However, in order to ensure consistency of authorisation approaches between different Member States, provisions relating to the synchronised assignment of spectrum and harmonised authorisation conditions should be established at the Community level, without prejudice to specific national conditions within Community law."

Compatible, sorry:

"Compatible with Community law."

Recital 14 emphasises the particular appropriateness of MSS, mobile satellite services, because they can generally reach geographic areas not well covered.

Again, coming back to the same policy goal, recital 16 again goes back to the need for coordination of frequencies.

Recital 18 is then particularly significant because it comes to turn to complementary ground components:

"Complementary ground components are an integral part of a mobile satellite system and are used, typically, [and typically is important] to enhance the services offered via the satellite in areas where it may not be possible to retain a continuous line of sight with the satellite due to obstructions in the skyline caused by buildings and terrain."

So the typical problem, we would say, is not in fact a problem that is typical of EAN at all, because you would rather hope that your planes are not flying in a location where any of that was an issue.

Jumping over the next sentence because we have seen it many times before:

"The authorisation of such complementary ground components will therefore mainly rely on conditions related to local circumstances. They should therefore be selected and authorised at national level, subject to conditions established by Community law. This should be without prejudice to specific requests made by competent national authorities to the selected applicants to

provide technical information indicating how particular complementary ground components would improve the availability of the proposed mobile satellite services geographical areas where communications with one or more space stations cannot be ensured with the required quality, provided that such technical information has not already been provided in accordance with Title II."

So that, we would say, envisages an analysis by the national authority as to why a particular CGC is needed in a particular place.

The operative part starts then on the next page. Article 1, point 1:

"The purpose of this decision is to facilitate the development of a competitive internal market for mobile satellite services ..."

THE CHAIRMAN: Sorry, what are you reading now? I am making a note.

MR. BOWSHER: Sorry, Article 1, point 1 over the page:

"The purpose of this Decision is to facilitate the development of a competitive internal market for mobile satellite services (MSS) across the Community.

This Decision creates a Community procedure for the common selection of operators of mobile satellite systems that use the [relevant band] for space to Earth communications."

I mean, this is the point, or related to the point, that you were raising earlier. You have got two different bands for different directions, as it were, but the point is it is for earth to space and then space to earth communications. Then it sets out that there shall then be a process for identifying the operator of these systems.

The definitions include -- well, they refer to previous definitions from the regulatory framework, but the two key definitions that are added in by this provision are the definition of mobile satellite system and complementary ground components. We will come back to them, if I may, when we come to look at the definition of the specific arguments, but again, the importance is that we are dealing here with the licensing of a -- or, rather, what has been identified is the operator of a mobile satellite system, which is a system involving communication with a space station. We have seen this definition before. There may be complementary ground components of the mobile satellite systems, which are ground-based stations at fixed locations in order to improve the availability of those satellite services.

The question is whether or not this is, what we are dealing with here, in fact a complementary ground or

what is being sought here is an authorisation for complementary ground conditions.

The point we will come back to again when we look at the argument is that it is a central part of the definition of a mobile satellite system that there be a mobile earth station in each route of communication.

You get that from the definition of "mobile satellite systems". So if you go through the definition, you will see it is communication between a mobile earth station and one or more space stations, between two mobile earth stations or between a mobile earth station and one or more complementary ground components at fixed locations.

So we say it is part of the definition that there must always be that mobile earth station. We will come on to what that means later.

It is not enough, we say, just pausing there, for Inmarsat to be able to say, "Well, we have been authorised to use this spectrum for mobile satellite services. As long as we can comply with conditions set out in this legislation, we are permitted to provide mobile satellite services." That misstates the position in at least two significant ways.

Firstly, the first question is: is what they are now doing the provision of a mobile satellite service? Are

the complementary ground components actually complementary ground components? The link to that, of course, is if they are not mobile satellite services, then there is nothing for them to be complementary to. You cannot have a complementary ground component if what is now being provided is no longer a mobile satellite service.

There is -- then the further question is has there been a change from that which was originally proposed, such that the EU principles of transparency were infringed and so Ofcom should not be permitting a continued operation in this -- by granting the CGC in these changed circumstances --

THE CHAIRMAN: Is that different from a construction point? By "construction point" I mean what they are now proposing is not within that which was originally authorised by this document? Is that different?

MR. BOWSHER: It might be broader because it might include, for example, in theory, the change in the identity of a subcontract operator might be relevant. I will come back to it when we look at the case law. So the starting point is certainly the definitional question, and there is certainly an overlap there, or more than an overlap. If it is no longer a mobile satellite service so there is nothing for the ground component to

be complementary to, then plainly the principles of transparency will not have been complied with. But there may be other circumstances where, pursuant to EU law, a change has been made to what is going to be provided which also infringes the principles of transparency.

THE CHAIRMAN: So what is the comparison that we make in deciding whether a change has taken place? A change between what they are now proposing and what they were originally proposing?

MR. BOWSHER: Yes.

THE CHAIRMAN: Why does that matter if what they are now proposing is within the authorisation? How can that matter?

MR. BOWSHER: Well, because they obtained the authorisation on the basis of a particular application, which we will come on to in a moment. Their application was made. They were granted the authorisation. Others were not granted the authorisation on the basis of a particular application. Principles of EU law would require in such a competition that if there has been a change that that outcome cannot be relied upon if the basis of that competition, or the basis on which they won that competition, has varied.

THE CHAIRMAN: So in order to decide that you will have to

be providing one of the things that I asked for at the beginning of this hearing, which is a clear picture of what it was that they originally asked for.

MR. BOWSHER: We are going to come on to that. There is a limit to what we can do in that area because there is only a limited amount of information we have as to what the original application was for. But, yes, I will take you to what we do and do not have in that area.

THE CHAIRMAN: Is there whatever exists in our papers?

MR. BOWSHER: Yes.

THE CHAIRMAN: Right.

MR. BOWSHER: We say there is enough to make our case on what is in the papers. It is not a comprehensive answer to your question, though; to your question as to what was the full technical application, because a lot of that material is not available to us.

THE CHAIRMAN: Well, how can you take this point, then, without knowing --

MR. BOWSHER: Because we know enough to be able to take the point, we say. We know enough about what the application was to be able to take the point.

THE CHAIRMAN: Right.

MR. BOWSHER: Sorry. (Pause)

I have got it wrong again. I am reminded I keep saying satellite service when I should say system and

the other way around. A complementary ground component of a mobile satellite system, and that is what is the important definitional issue.

The reason why this works -- and I will come on to the relevant case law presently, but the reason why this works is because this was all -- Inmarsat obtained its authorisation to provide mobile satellite services pursuant to a selection procedure which is set out in this decision -- system. Article 3 and Article 4 sets out that process and the selection phase, the different selection phases, by which that is done. We will see in a moment the criteria which were then applied and the way in which it was done.

THE CHAIRMAN: Will we be able to see -- in the material that you say is available about Inmarsat's application, will we be able to see what they said or proposed or demonstrated in relation to Article 4(1)(c)(ii)?

MR. BOWSHER: I do not believe so. I do not think we have that. Yes, it was treated as admissible, so presumably we do not know what they put forward to meet that requirement.

THE CHAIRMAN: Is the answer to the question "where is this material going to lie", "in volume such and such, so many tabs, this that and the other"? Is that going to be the short answer?

MR. BOWSHER: The short answer, yes. I have got three or four references which I was going to come to.

THE CHAIRMAN: I wonder if your junior would be good enough to jot down on a piece of paper which could come to each of us where those -- where that material -- not now this minute, but at some point during the day so we have got them and we can go away and read them.

MR. BOWSHER: I will give you the references before, probably as we go. Yes.

THE CHAIRMAN: All right.

MR. BOWSHER: We will come on to the guts of the selection process in a moment, because that is set out in a further document. What is set out in this decision is then the conditions which are to be applied to the entity which receives the relevant authorisation. Article 7 is often referred to -- is referred to in the glossary as "MSS common conditions" and those are the conditions set out in Article 7.

Then Article 8 are the conditions that apply to complementary ground components. So the first stage is that Inmarsat would have had to comply with milestones 6 to 9, which are all set out in that annex and they are all to do with a setting up of satellite and so on and so forth, you can see that on the last two pages of the document, and honouring any commitments which they made.

When we come on to the history we will see that what they did not do was meet those satellite-related milestones within the 24 months specified in Article 7 of the decision.

The complementary ground components conditions are the matter for this national authorisation, and they -- this is the passage that provides for this process, or the process which we are appealing against:

"Member states shall, in accordance with national and Community law, ensure that their competent authorities grant ... the authorisations necessary for the provision of complementary ground components of mobile satellite systems on their territories."

That is done after the selection procedure which we have just seen is conducted. Then 3:

"Any national authorisations [again skipping a few words] ... shall be subject to the following conditions:

Operators shall use the assigned radio spectrum for the provision of complementary ground components of mobile satellite systems;

Complementary ground components shall constitute an integral part of a mobile satellite system and shall be controlled by the satellite resource and network management mechanism; they shall use the same direction of transmission and the same portions of frequency bands

[and so forth]."

We have seen that before. Then:

"Independent operation of complementary ground components in case of failure of the satellite component of the associated mobile satellite system shall not exceed 18 months."

I will come back to that in a moment:

"Rights of use and authorisations shall be granted for a period of time."

Again, we have seen that. That goes back to the CEPT report and was referred to there as being an important requirement:

"It is an important requirement to ensure that we are dealing with the operation of a mobile satellite system."

Now, in our submission, it is clear when you read these conditions together that a complementary ground component must be operating only as part of a mobile satellite system. It is the operation of the satellite that is crucial to the operation of this -- of the system. There is an express limit for the amount of time that a complementary ground component is permitted to be operated when -- in any circumstances in which the mobile satellite system is out of action, and there is a specific time limit put on it.

What that does not deal with, in our submission, probably because it is already covered inherently in the legislation, is what you do if, in fact, someone is using the service without any mobile satellite component. It does not even contemplate -- or rather, the nature of the mobile satellite system and the service which it provides is that it should include the use of the satellite.

By derogation, if the satellite breaks down or fails or whatever, there is a short window in which another satellite presumably is to be put up there, failing which the service cannot be -- the system cannot be authorised. The service cannot be provided. There is simply no provision in here which says you can have periods where you do not use the satellite at all, you simply run this service as a complementary ground component only service, or even a primarily complementary ground component service. This is a satellite service with CGCs which are there, as envisaged by the legislation, to deal with specific issues because of the mountain or the urban canyon or whatever it is.

There is, therefore, a general characterisation question. The fundamental issue in looking first at whether or not this is -- the Inmarsat solution is

a mobile satellite system providing a mobile satellite service, or whether the authorisation which is now being sought actually is an authorisation for complementary ground components, we say stumbles fatally on the same problem, which is that what is now being put forward is not properly characterised as a satellite system. It is a system based on ground stations which can be supplemented by satellites. That is an important distinction which ought properly to be, like any question of characterisation, must be, grappled with as a matter of analysis.

Now, the process by --

THE CHAIRMAN: Is your point that it is not a satellite system, therefore, cannot be a mobile satellite system, therefore, you do not get as far as the definition? Is that a point which you take separately from the points you take about the definition of mobile satellite system?

MR. BOWSHER: Yes, because it cannot be a complementary ground component if there is no mobile satellite system for it to be complementary to.

THE CHAIRMAN: So you have two points: one is that it is not truly a satellite system because it is truly a ground-based system.

MR. BOWSHER: Yes.

THE CHAIRMAN: Secondly, an associated point that it relies heavily on the ground "complementary".

MR. BOWSHER: Well, not just the word "complementary", the many layers of analysis going back in the legislation as to what was to be a complementary ground component. It is not just a question of words. It is a question of real substance: this was about ensuring that this be a satellite-driven solution.

So we say there is not a -- just to reiterate, there is not a sort of broad, flexible discretion to decide whether something is or is not a mobile satellite system. That is a matter of analysis and definition. When you look at the facts in this case, we say it is clear that this is not -- and the clarity of that definition was put in place for a clearly apparent reason: to prevent services being put forward on the basis of authorisations in this space which were not, in fact, delivering real satellite systems.

THE CHAIRMAN: Sorry, I do not want to misunderstand, but you say there is a broad -- discretion is not quite the right word, but an assessment question of whether this is a satellite system at all. I thought you told me that was separate from your point on compliance with the definition of MSS.

MR. BOWSHER: Yes, it is a separate question, but it is

a question of assessment. But there is not a broad discretion to say -- well, it is a question of law. When you look at the facts of this case, one has to define is this or is this not a mobile satellite system? You cannot say broadly, for example: well, it has got a satellite in. Therefore, it is a mobile satellite system. One must look at the substance of the definition and what its main purpose is: is this, in fact, a mobile satellite system delivering a mobile satellite service? To do that, one must grapple with the point purpose of what is, in fact, now delivered.

THE CHAIRMAN: I still do not understand you, Mr. Bowsher, I am afraid. We have the definition of MSS.

MR. BOWSHER: Yes.

THE CHAIRMAN: You have a point in relation to that about where the earth station is. The other side's answer is you can combine the two. We will come to that. That is a question of definition.

Do you say there is a prior question as to whether it is -- never mind the mobile, whether it is a satellite system at all which does not depend on the definition; it depends on the question, the broad questions of construction? Is your point you cannot have a mobile satellite system until you first of all have a satellite system, and this is not one?

MR. BOWSHER: Sorry, you are quite right. I see how I have confused you and I apologise. It is my fault entirely.

In my own mind there is a -- when we come on to look at the definition of a -- this is really in the area of ground 1 being -- when we come to look at the definition of a complementary ground component, a complementary ground component has to be complementary to a mobile satellite system. It is not complementary if it is, in fact, the system.

If what, in fact, we are dealing with is a system of ground components to a system which happens to have a -- a system of ground components providing a service, which is in some cases supplemented by a satellite service, that is not a mobile satellite system of the type that was required by this process and it is not a complementary ground component because the ground components are no longer complementary; they are the service.

THE CHAIRMAN: Right. So those are questions of assessment. I think you used the word "discretion" as I pointed out, but leave that slightly contentious word aside. There is a question of assessment of the overall concept here which is different from the pure definition, almost.

MR. BOWSHER: Yes. Yes. Yes, the definition is ground 1(a). Ground 1(a) is our definitional point. In

ground 1(b) we look at the point: what is a complementary ground component and what does it mean to be a complementary ground component?

THE CHAIRMAN: Emphasis on the word "complementary"?

MR. BOWSHER: Yes, and that is not just a matter of word -- that involves looking back at ... sorry, it is in the definition of complementary ground component, exactly.

THE CHAIRMAN: Sorry, exactly what?

MR. BOWSHER: I am getting my letters and numbers mixed up. When you look at first the definition of mobile satellite system, you look definitionally at what is a mobile earth station? When we come to look at what is in the same part of our ground 1, we look at what is a complementary ground component. When we do that, you have to look at what is this CGC complementary to or is it, in fact, capable of being complementary to anything? Is it, in fact, the main system?

That is a separate point, we say, but it involves looking at what is the nature of what has been put forward as the mobile satellite system and the MSS being delivered, or whether it is a MSS at all, whether it is, in fact, just a ground service rather than a satellite service?

We then come on to the selection process, which is in E1. Can I just put F to one side? We will come back

to it in a moment. But the introduction to -- do not put F away because we will be back there in a second. E1/5.

This in 2008 was the call for operators of pan-European mobile satellite services. A lot of the language we will see here is much the same as before. It is telling you that today is the day that they have called for candidates to come forward to apply for an authorisation to deliver MSS.

On page 2 there is, again, a reiteration of the importance of this being a mobile satellite service opportunity. Then a description, a very general description here under "What are the next steps", third paragraph:

"During the first phase technical and commercial ability of the candidates to launch their systems in time will be assessed using five pre-defined milestones."

Then:

"If more candidates pass the first stage than can be accommodated within the spectrum available, they shall be assessed in a second phase."

They go through what is to be done. We will see the detail of that in a moment. The importance here is that all of those factors are satellite-related factors, and

this again emphasises --

THE CHAIRMAN: Sorry, all what factors? The milestones?

MR. BOWSHER: The criteria, the selection criteria. When you look at all the technical material that we will come on to in a second, we will see that is all a satellite-based assessment.

We can put that away and come back to file F, where we see the detail of that in F/7. This repeats a lot of material which we have seen before and fleshes out some of what we have seen in the EU decision which we were just looking at, repeats the definitions and so forth.

But, again, we are still dealing with the Commission's process. It is the Commission's decision. This is their call for applications. The selection procedure is then described from page 7.

THE CHAIRMAN: Sorry, what was the last document you looked at? This is a formal document. What was the last one?

MR. BOWSHER: That was a press release, as it were, a news announcement to the public also by the Commission. This is the more detailed --

THE CHAIRMAN: So this was in the OJEU.

MR. BOWSHER: Yes. So page 7, there is -- the process is described as a time line on page 8. Then you get into the detail on page 9 under the heading "First selection phase", which starts:

"In this selection phase, the Commission shall assess whether applicants have demonstrated the required level of technical and commercial development of their respective mobile and satellite systems. Such assessment shall rely on the satisfactory completion of milestones 1 to 5 set out in annex 2 to this call."

So the detail then is what you see in annex 1 and annex 2. So the first stage is "General information on the applicant". Annex 1:

"Applicants shall demonstrate their experience and expertise in the satellite telecommunications market [and so forth]."

References there to financial strength and stability and legal structure.

Then the milestones, which we have already seen, and I was going to take you here to them. So you will have to show at this point that you have completed milestones 1 to 5 on page 13. Obviously it is all of the key steps, and they are not just abstract steps. They are key, concrete steps towards having a satellite which can be built and which can be launched. Then the conditions 6 to 9 are what will follow on thereafter.

Then the second selection phase, if there is more than one that gets through that phase, deal with the detailed selection criteria, which we have seen referred

to in outline in that notice. The headings were there on page 14. So, for example, "Consumer and competitive benefits", you have number of end users and range of MSS. Date of commencement of MSS. So, again, it is all about the ability of the satellite service to achieve the requirement. There is the coverage, the efficiency, and then the coverage requirement is stated as being something which is a selection criterion. The -- some other material around security.

Important to note, though, under the introductory notes, that these criteria are to be measured by reference to the point in time at which milestone 9, that is the provision of MSS, must be met. So presumably that is at the end of the delivery timetable:

"Since, according to the decision, applicants will have to meet milestones 6 to 9 within 24 months of the selection decision, the date of which is not known at this stage ..."

They give you an indicative date. Then the next paragraph:

"The criteria/sub-criteria shall be measured on the basis of the mobile satellite system excluding any complementary ground components."

THE CHAIRMAN: I am lost as to where you are reading.

MR. BOWSHER: My fault, sorry. The foot of page 14.

THE CHAIRMAN: Introductory notes which they have put at the end of a document.

MR. BOWSHER: Yes, no idea why. It is the introductory note to the detail, the technical detail of the different criteria we have just seen.

THE CHAIRMAN: I see.

MR. BOWSHER: The most important factor here is the second of those notes:

"The criteria ... shall be measured on the basis of the mobile satellite system excluding any complementary ground components."

So it will have been necessary to demonstrate compliance with all of this technical material, including, for example, the pan-European geographic coverage and so forth, by reference only to the satellite performance without regard to CGC performance.

So they need, for example, to be able to meet the targets, which are on page 17 and 18, from the satellite.

THE CHAIRMAN: 17 and 18. Well, basically 18. I see.

MR. BOWSHER: I was hoping not to work through all the detail of that, but ...

THE CHAIRMAN: I am just trying to see. So the real requirements come on 18, whatever they may mean.

MR. BOWSHER: Well, you get -- we are now in a competition.

I mean, the point is once you are in this second phase, you are now supposedly in a competition. So there is more than one applicant so that the different bids are being assessed by reference to what is put forward, and they are getting different scores.

So depending what geographical coverage you are able to show by reference to your satellite, you are going to get a different number of points that are then accumulated forward as to who the winner is of the competition.

THE CHAIRMAN: Yes.

MR. BOWSHER: That is what the system was to require, but because of the -- when we look at the actual decision we see that the other competitors never got there. So that scoring process never happened, as it were. It never needed to happen. But that is what would have been required from the submission, so that the submission which Inmarsat made, in our submission, has to be able to meet a requirement -- would have had to, as it were, participated in that competition. They could not have changed their bid during the competition, and that is -- there was the target which they had to be meeting, a coverage requirement measured only by reference to their satellite component, or, to put it more clearly, without any top-up from the complementary ground

component.

Part of that assessment -- sorry, the only actual point at which the complementary ground component is any part of the assessment is in the assessment of the business plan that is part of this competition. Sorry, you are quite right. It is not an assessment. It is only for information and is not part of the selection.

That is at page 21. So this is, presumably, to ensure that applicants are committed to what they are putting forward. The business plan is to, we can see from paragraph 1 on page 21, "Introduction", last sentence of the first paragraph:

"Data on complementary ground components is requested for information purposes and will not be ..."

THE CHAIRMAN: Where are you?

MR. BOWSHER: Page 21, first paragraph, just under "Introduction". Last sentence, "Data and complementary ground components."

THE CHAIRMAN: Yes.

MR. BOWSHER: I think the only actual reference to it is under satellite and CGC system. What you see is in the description under 2, there is a long description of the satellite system and any CGC to be used, a technical description of the satellite system including, for example, specific details of the satellite surface area

and then the CGC-specific bit is the last three items.

The outcome of the process set out in that document is narrated in the document at F/8, and this is the decision in which Inmarsat and Solaris are identified as eligible applicants. Others are not. Therefore, Inmarsat and Solaris, who are now EchoStar -- when you see references to "EchoStar", that is actually Solaris. This is where Inmarsat and Solaris are allocated or, rather, authorised to use frequencies.

As I say, the narrative as to what happened is set out in the recitals, which essentially shows you how other applicants fell away along the process. The only specific point that I wanted just to identify there is in recital 25, the specific reference which goes back to the previous references:

"The frequencies should be identified on the basis of objective, transparent, non-discriminatory and proportionate criteria."

It is simply observing that, patently stating the obvious, the general principles of EU law in this area apply. As time marches on, I am going to take the next few documents fairly swiftly.

F12 provides for the coordination of enforcement decisions by member states. We do not need to look at the concessions directive, I do not think.

14 and 15 are the background UK legislation within which Ofcom is operating, and include all the various general obligations which we have identified in grounds 2 and 3.

Then the UK provision, which brings into effect all that we have just seen, is that which is at tab 16, "The Authorisation of Frequency Use for the Provision of Mobile Satellite Services". What that provides for, therefore, under regulation 3 is that:

"Ofcom shall grant an authorisation to the selected applicants".

They are selected by means of the process, the EU process:

"For use in the UK for the frequency specified for that selected applicant in Article 3 of the permission decision, subject to the conditions set out therein".

Regulation 4, the common conditions are applied, and then that then leaves, jumping ahead to regulation 13 --

THE CHAIRMAN: Regulation?

MR. BOWSHER: 13.

THE CHAIRMAN: Tab?

MR. BOWSHER: Regulation 13 in tab 16.

THE CHAIRMAN: I am sorry, yes.

MR. BOWSHER: "Ofcom shall carry out their functions under the Wireless Telegraphy Act 2006 so as to give effect to

the obligations under the EU decision and the permission decision insofar as those obligations have not been given effect by these regulations. Ofcom shall in particular, pursuant to their powers under that Act, grant a selected applicant, if requested, the authorisation necessary for the provision of complementary ground components of systems providing mobile satellite services subject to the common conditions specified in this regulation. "Common to complementary ground components" means ground-based stations at fixed locations in order to improve the availability of mobile satellite services in a geographical area covered by those services."

That is the provision which launches, obviously, the authorisation which we are challenging.

DR. ELPHICK: Can I just ask one point, Mr. Bowsher. So when Inmarsat were submitting their business plan, did they at that stage make clear that their intention was to have only one satellite, do we know?

MR. BOWSHER: Well, I am going to explain what we do and do not know in a moment about the Inmarsat application. We know that there was one satellite put forward and I think we know that from the recital. (Pause)

They must have passed milestone 2 in the document we were just looking at. That is at tab 7, page 13. We do

not know the technical details of what was put forward. I am about to give you some references which are the limit of what we do and do not know what was applied for. We know what was applied for is not what actually was going to be operated as part of this MSS.

DR. ELPHICK: It may be you are the wrong person to ask the question, but they had to have one satellite to be eligible.

MR. BOWSHER: Yes.

DR. ELPHICK: I wonder if they thought, "We are going to have five satellites". But at the moment, we cannot answer that question from you.

MR. WARD: Sir, I can confirm that the original application did indeed involve a satellite, just the one.

DR. ELPHICK: Just the one, right.

MR. BOWSHER: That will have been put forward as part of compliance with milestone 2 in the selection process we were just looking at, presumably.

DR. ELPHICK: Right.

MR. BOWSHER: Before we turn away from the UK regulations and regulation 13, this is as good a place as any to highlight an important distinction in regulation 13(3) between "availability" and "coverage" so:

"'complementary ground component' means ground-based stations used at fixed locations in order to improve the

availability of mobile satellite services in geographical area covered by those services."

It is in regulation 13(3) and that will be important when we come on to our issue about compatibility with the coverage condition because what we say is that the MSS being provided falls very far short of the relevant condition. We will need to draw a distinction between "availability" and "coverage" when we come to look at that, in short just because the satellite in principle covers an area does not mean that it is actually available to service all the people in that area.

DR. ELPHICK: Do we know if in -- but one satellite alone could provide the 50 per cent, 60 per cent coverage that is required, could it?

MR. BOWSHER: Yes, indeed. There will be a beam which covers. It may not actually provide a service which is available to people, that is the problem.

I am jumping ahead. When we come on to ground ... if we look at the decision at tab 6, the requirement which we say they fall foul of in our appeal is that which is set out in Article 4(1)(c)(ii). You can see the contrast between (i) and (ii):

"The mobile satellite system proposed shall cover a service area."

So you can have a satellite which covers 60 per cent

of the aggregate ground area of the EU states, but there is a difference between coverage and availability:

"The MSS shall be available to at least 50 per cent of the population and over at least 60 per cent of the aggregate land area."

So you could have a beam which covers, but that does not mean it is available to the population.

DR. ELPHICK: But one satellite would be enough to be available to 50 per cent of the population?

MR. BOWSHER: Well, EchoStar does it. Mr. Sharkey says, I believe, in his statement, I will have to find a reference, that the EchoStar satellite meets both the coverage and the availability requirement.

DR. ELPHICK: With one satellite?

MR. BOWSHER: With one satellite, I believe. Yes, I believe EchoStar -- but I will check the reference.

DR. ELPHICK: Thank you.

MR. BOWSHER: It is about -- I think you have the point. It is about the difference between coverage and service availability, is the distinction.

DR. ELPHICK: You are saying both of those can be met with one satellite.

MR. BOWSHER: That is our understanding, yes. But we just say that the Inmarsat one does not.

DR. ELPHICK: Yes.

MR. BOWSHER: I want briefly to -- so that was a canter through the legislation, and it is a canter through rather dense thickets of legislation.

What I want to do particularly is cover the relevant EU case law on change, which addresses changes, about what the relevant EU case law is that would address -- that governs what someone may or may not do in departing from that which they have put forward in a bid process, and then to go through our specific heads -- to look at the authorisation and then look at the particular arguments that we make.

Perhaps this would be a convenient point for me just to go and look at what we know about the Inmarsat EAN and its history, and the limits of what we do and do not know.

I think nearly all of our knowledge is set out in Mr. Baldridge's witness statement, and certainly the intention of that witness statement is to set out either in narrative form or to exhibit the material from which one could draw our knowledge to what had happened. That is in D1 -- you can put F away for the moment. D1, paragraphs 28 to 45.

Before we look at the detail of that, let me answer directly what we do and do not know about the nature of the Inmarsat system and the context of what we know.

We asked the Commission for access to Inmarsat's original application from 2008/2009, and the Commission refused access to that, claiming it was confidential. One of the claims which we have brought, which you have some materials from in the bundle, is our appeal to the general court.

The court, as I understand it, in the course of those proceedings has ordered that those materials, the Inmarsat application, presumably, be produced to it, the court, for its evaluation. So the court has those materials, we do not. We currently do not have access to that which is held by the court for its evaluation.

What we do have is the following, specifically, E1/6.

THE CHAIRMAN: You say E1?

MR. BOWSHER: E1, yes, E1/6 which is an Inmarsat SEC filing by Inmarsat, announcing its contract with Thales Alenia Space. The third paragraph is probably the clearest statement. That is:

"An Authorisation to Proceed for the development of the "EuropaSat" satellite to provide mobile broadcast and two-way telecommunications services in the S-band throughout Europe. Thales Alenia Space will commence work on the satellite design ... and develop it through the Critical Design Review to support a fully compliant

application for an EC-wide S-band spectrum allocation."

We have no more technical information in that than what is there. Then we have some published details about that solution in the next tab.

This is the Thales, presumably, press release of the same time, 22 August 2008:

"Thales Alenia and Inmarsat signed today an Authorization to Proceed."

You will get the technical detail in the second paragraph. It starts out being much as we have seen before. The last sentence:

"The spacecraft will carry a payload at 2 GHz generating 9 [that is the key number] S-band user spot beams in 2 polarizations, using a large S-band Tx antenna of 12 meters diameter."

We know that is not what currently exists and the basis of the current operation of the EAN is a solution which we will come on to, which has three beams, not nine beams. Then it tells you:

"Designed with a lifetime of 15 years, the EuropaSat ..."

Then there are more details overleaf there, but I do not think we need to cover any of that.

Then E3/93 -- we can put E1 away. I think the only thing that this adds to our knowledge is the picture,

because the rest -- I mean, this is obviously a public domain blog, and I think we can infer that the author is relying on the same public domain information as us.

THE CHAIRMAN: Does the picture actually add anything useful?

MR. BOWSHER: Not as far as we are aware, but it is different from -- I mean, it confirms what is said elsewhere. But that is the limit of what we know. It is consistent with the nine-beam solution, which is what I have laboured already.

THE CHAIRMAN: Is the power figure significant, 8.5 kilowatts payload power? That is, I think, an additional fact, is not it?

MR. BOWSHER: It is.

THE CHAIRMAN: Yes, the power of the transmission is relevant to something.

MR. BOWSHER: It is, because that, of course, is then power dedicated to those nine beams, whereas under what is now being put forward, what is now being used is three beams on the Hellas Sat satellite where the power of that satellite is being shared to the three beams for EAN and the other transponders on the satellite for other purposes. So, yes, there is less power.

I do not propose to read out the whole of Mr. Baldridge's witness statement. The passage -- it is

not been controverted, as far as I am aware, in any meaningful way, and certainly this history has not, and I would invite the Tribunal to take particular account of that history from, as I say, 28 to 45.

What one gets in summary from that is clearly a somewhat conservative approach taken by Viasat to its use of the authorisation. We have a reference in E1/11 where they make the point, again this is a public domain blog:

"Although the European S-band spectrum allocation process is well underway, it’s looking increasingly possible there might never be more than one satellite system actually built to use this spectrum, namely the Solaris payload to be launched on Eutelsat W2A later this year. Amongst the other three entrants to the spectrum allocation process, ICO and TerreStar's financial situation already makes it difficult to see them being able to fund construction."

Then, if you look at the next paragraph:

"On Inmarsat's results call today, the company was explicit about its intention not to "put its balance sheet at risk" to build its proposed EuropaSat S-band satellite, and when the CEO was asked about whether he would adopt a "build it and they will come" approach, he replied "absolutely not". Inmarsat instead plans to

seek external investors to fund the project, and ultimately to spin it off as a separate company. The contrast between Inmarsat's description of its Alphasat project as bringing more capacity in the EMEA region, more spectrum and more redundancy to support future growth, and EuropaSat as a "non-core" project, was particularly striking."

So although on the one hand it is being required by the regulator to meet quite a strict timetable, which we have seen in the milestone time on the 24-month timetable and so forth, what it is actually saying to investors is: this is not our core business, we are going to wait until we have got the money to do it. To put it colloquially, we are not going to adopt the "build it and they will come" approach.

What you get, and there is nothing to suggest -- no one is suggesting we have got this wrong, in paragraph 32 of Mr. Baldridge's statement he notes that about half a year after being awarded the spectrum, Inmarsat put its plans on hold. It missed, paragraph 33 of Baldridge, the original 2011 deadline which we have already seen referred to for commercial reasons, and not until five years after being selected through the process we have looked at did it publicly announce its plans to deploy an ATG network in the 2 GHz band. That

is paragraph 38.

So he then at paragraph 44 notes that -- reiterates the point we have already covered: that Inmarsat would have had nine beams under the original solution. Then in September 2015 we see at E1/37, as it were, the crucial commercial change in the solution. We are now in 2015, so many years after the original process:

"Deutsche Telekom and Inmarsat partner to deliver European aviation network".

Again, I am not going to read it all out, but the short point you get from the beginning of the press release, 21 September 2015:

"Deutsche Telekom and Inmarsat today announced a strategic partnership bringing unprecedented passenger connectivity ... a new innovative combined LTE-based ground network and satellite network delivers travellers in Europe the advantage of in flight high speed internet access."

Important point to note there is "LTE" is the language that operates between the complementary ground components and the ground-facing terminal in the EAN. LTE is not the language that speaks to the satellite. When you talk about a LTE-based system, you are talking about a system that is inherently the ground-based limb of the system. That is not surprising, because

I believe that LTE is, as it were, a Deutsche Telekom -- if they did not actually write it, it is certainly the language their system is based in.

Yes, sorry, that is in the next paragraph. I knew I knew it from somewhere. It actually says it in the next paragraph, that:

"The LTE-based ground network developed and run by Deutsche Telekom ..."

We get a bit more from that, although I am not going to read it out because it is confidential. In E3/123 is the Inmarsat description of what is now to be EAN.

THE CHAIRMAN: Sorry, this is said to be confidential?

MR. BOWSHER: No, sorry, this is not. The next reference is confidential. I will show you in a moment.

This shows the picture of what is now to be the three beams, and on the second page it is perhaps useful as it illustrates. You will see this picture again and again. This is the three-beam system which EAN is now delivering from the Hellas 3 satellite. What we see under "Ground stations":

"Existing satellite ground stations will be used to expand the required infrastructure for the Inmarsat S-band network."

In fact, we can get a bit more from that, and that is the point that is confidential, and it is in B --

I will stop in a minute and we can finish this athletics with the bundles -- B/13. I will come to this after the break, but this is Inmarsat summarising the position on the use of MSS to COCOM.

If you go to page 11, you have the description of the development of the CGC network. The first paragraph on page 11 is useful. This is all confidential, so I am not going to read it. Well, some of it may be confidential, so I am not going to read it out, but those two paragraphs on page 11 under the heading "CGC network development" are important, particularly the second one. I am not sure that it adds much to what we just read, but I think from -- do you have that? It is page 11, file B/13.

THE CHAIRMAN: Yes.

MR. BOWSHER: Page 11, bottom of heading "CGC network development", description a bit more about what we have just seen of the CGC network. It is that last paragraph on page 11, and I believe there is a sensitivity about that content.

THE CHAIRMAN: I must say I find it hard to see why.

MR. BOWSHER: I will not comment.

THE CHAIRMAN: It is not your confidentiality.

MR. BOWSHER: There is -- what we do know in the UK, there is reference in public domain material to 300 or so

CGCs. As far as I can tell, the number in the UK is something which always is covered in confidential splodge, so I am not allowed to mention the number in the UK. I will show it to you later, but it is obviously a lot smaller than 300.

DR. ELPHICK: You have put quite a lot of emphasis on moving from nine beams to three beams, but in the diagram at tab 3 you took us to, it appears as though the three beams are nevertheless providing very broad coverage. It is covering the whole of Europe.

MR. BOWSHER: Yes.

DR. ELPHICK: So ...

MR. BOWSHER: The question then is what power can each beam deliver? We get into this when we get to the evidence of Dr. Webb and Mr. Sharkey. The power and capacity of each beam becomes relevant.

DR. ELPHICK: So you move on to an availability dilemma.

MR. BOWSHER: So that becomes relevant to availability because only a certain number of -- if we are talking -- if I take planes as a measure --

DR. ELPHICK: Yes.

MR. BOWSHER: -- then there is a debate between Mr. Sharkey and Dr. Webb as to how many claims can these three beams service at any given time? The number that is put forward is either between 2 and 20.

DR. ELPHICK: Right, I remember now.

MR. BOWSHER: That comes from the number of beams and the power and the capacity of those beams.

DR. ELPHICK: Good. Thank you.

MR. BOWSHER: Now, the distinction, what Dr. Webb comes on to say is, well, look at the EchoStar beam pattern, which is attached, which he refers to. There is more than 100 beams there, 180-odd, and given the power there, that would enable you to service very many more planes. Indeed, given the numbers of planes that we hypothesised would be flying above Europe at any time basically, EchoStar can service those planes. Well, there may be occasional moments where they cannot, but basically, the EchoStar system, it is self-evident that if all you can service at any given time with these three beams is -- whether it is two planes or 20 planes frankly does not matter: you are falling spectacularly short of actually delivering a satellite service to anyone, aircraft or otherwise. You are simply providing a service which the satellite component is, as we have said, marginal, whatever. There are many words we have chosen. It is not primarily a satellite service.

What becomes important when we look at some of the pictures is the satellite -- much is made of by Mr. Sharkey but look, there are times when the plane

goes out of the beam. Well, you can see where those might be. We will see in due course after the break. If you are flying to the Canaries, you fly out of the beam. Well, we have got some numbers as to how many flights actually are within the beam or not within the beam, but the point I will come back to is when you look at this particular solution, it is not actually delivering a satellite service.

DR. ELPHICK: Thank you.

THE CHAIRMAN: Yes. Well, we will break there and we will resume at 2.05 pm.

(1.03 pm)

(The Luncheon Adjournment)

(2.05 pm)

THE CHAIRMAN: Yes.

MR. BOWSHER: Can I -- I addressed the question about what we have in the files about what Inmarsat originally intended to do, and we will give you a note of the references, but that is the limit of what we have.

THE CHAIRMAN: You have just taken us to all of the documents. If there is not a separate note, we can just use our own notes or the transcript. That is it?

MR. BOWSHER: That is the limit of it. That is it, there is nothing put forward by Inmarsat.

The only other thing we can say is we can infer, and

I have made this point but we can make it again, that they got through the first six milestones with their original proposal. I think we have to infer that, although we do not know how. We do not know the basis on which that was done.

Can I address the other question that was raised at the outset? The proceedings against -- our proceedings against the Commission against its decision not to act.

THE CHAIRMAN: That was not quite the question. The question was what did the Commission say?

MR. BOWSHER: Well ...

THE CHAIRMAN: Was it not? I think that was the question I meant to ask. I thought I had.

MR. BOWSHER: Yes. I can show you the references for the exchanges.

THE CHAIRMAN: Dr. Elphick will read out the precise thing of which we wanted particularisation. He has it marked.

DR. ELPHICK: This is the Inmarsat skeleton, and it is paragraph 12, last sentence:

"The Commission has rejected Viasat's complaints."

We were saying what were the complaints and what was the form of the rejection?

MR. BOWSHER: Can I give you all the references and I will point out the answer to that question, but put it in the context of other references. Can I do it at a clatter

slightly? They are all marked in yellow, I think largely because there is this issue about whether or not we should be disclosing general court documents in these proceedings, so a lot of these documents are marked yellow, lest we disturb the serenity of the proceedings of the general court. I will give you the references which I will refer to.

We wrote to the Commission on 2 August 2016, that is E1/49, asking for the Commission to prevent the NRA from authorising Inmarsat EAN in breach of EU law. Our request --

THE CHAIRMAN: Sorry, what page?

MR. BOWSHER: E1/49, page 18. I was not going to turn them all up now.

THE CHAIRMAN: If you just rattle through the story and give us the references, I think we will then decide whether we want to have a quick look at them now or later on.

MR. BOWSHER: Certainly.

We issued a formal notice for the Commission to act on 22 December 2016, which is E2/57.

THE CHAIRMAN: E2/57. Sorry, E2/57 is a notice of?

MR. BOWSHER: A formal notice to the Commission asking the Commission to act, asking them to take the action which we have previously asked them to take.

THE CHAIRMAN: Yes.

MR. BOWSHER: E2/58 is the Commission's rejection of that. So that, I think, is, technically speaking, the answer to your question. Sorry, E2/58 is the response of the Commission, so that is the answer to the question, and the first full paragraph on the second page is their formal answer to their position. So E2/58, second page bottom.

THE CHAIRMAN: Beginning, "In response to your request ..."

MR. BOWSHER: Yes.

THE CHAIRMAN: I see.

MR. BOWSHER: While you still have the file there, let me then take you to what happened next.

MR. HOLMES: Could you take them to 59, please.

THE CHAIRMAN: Did you say 59?

MR. BOWSHER: 59. You are quite right, 58 is the response to the first letter, 59 is the response to the formal notice.

THE CHAIRMAN: So we should be looking at 59, not 58.

MR. BOWSHER: You need to look at 58 for the substance. You get the substance in reponse at 58. 59 I think is the formal response to the formal letter, but the substance is in whatever I said first. (Pause)

THE CHAIRMAN: I am not sure that that paragraph you referred to makes much sense without looking at the prior documents. Not your fault. We can do that. You

have limited time for your opening and that is our request, so unless Dr. Elphick wants to go back and do them with you --

DR. ELPHICK: No, that is okay. At least we know where they are.

MR. BOWSHER: Can I finish the trail? E2/69 is then our application to the general court in that regard. If I can just direct you, it is a longish document, but if all you want is a summary of what we say in our application to the general court, that is at paragraphs 10 and 11 on pages 4 and 5 of that application at E2/69.

THE CHAIRMAN: Now, this application to the general court is --

MR. BOWSHER: Our application.

THE CHAIRMAN: -- in the nature of a pleading, is it?

MR. BOWSHER: Yes.

THE CHAIRMAN: So this is how you start proceedings in the general court. Could you explain to me why it is yellow, then? Why is this effectively not a public document or why cannot it be safely treated as a public document? As you will gather, Mr. Bowsher, and I have probably said before, I tend to be rather allergic to obsessive claims for confidentiality and I am itching slightly.

MR. BOWSHER: The issue here -- at the beginning of the confidentiality saga, one of the issues which was thrown up was a concern that we were misusing -- you may remember -- there is no reason why you should remember, and it is buried in the files that are underneath here because --

THE CHAIRMAN: Let's assume I do not.

MR. BOWSHER: But there was a letter which you did see some months ago in which one of the concerns was it was said that we were using information that we had derived from pleadings in the general court, and that this --

THE CHAIRMAN: I do remember, yes, it has come back to me.

MR. BOWSHER: -- was a concern. I think we may be being over scrupulous here, but as far as I am aware, there is nothing exactly confidential here, but our concern was to identify matters which are in the general court, lest it be said that we were improperly bringing into these proceedings matters from the general court. It may be that we have been over scrupulous here.

THE CHAIRMAN: But the document you have just referred to is not somebody else's document provided to the general court. It is your document.

MR. BOWSHER: It is our own document, exactly.

THE CHAIRMAN: It is your document provided to the general court.

MR. BOWSHER: Certainly the paragraphs I have referred to are not in any way confidential. I do not want to waste any more time on it.

THE CHAIRMAN: Well, we will have a look at these documents but anybody who cares about the confidentiality of the particular documents to which reference has just been made should be alerted to the fact that I shall -- we shall review very carefully whether those particular documents in those respects really do fall to be treated as confidential.

Mr. Ward?

MR. WARD: Sorry, Mr. Bowsher has kindly given me the opportunity to clarify. There is a reference that is wrong in our skeleton and as Dr. Elphick asked what we were saying in our skeleton, could I ask you to turn it up at page 5. The skeleton numbering is pages 10 and 11, and it is paragraph 36 where we quote from some of the correspondence, which is how we say we make good the proposition that Dr. Elphick identified earlier on in the skeleton.

THE CHAIRMAN: Sorry, I should be in your skeleton.

MR. WARD: Which is hopefully green, and it is under tab 5.

THE CHAIRMAN: Right.

MR. WARD: We have conscientiously characterised the text as confidential.

THE CHAIRMAN: Sorry, I am not sure I am on the right page.
MR. WARD: Paragraph 36. The page numbering is in the bottom left-hand corner of the pages.
THE CHAIRMAN: Ah, yes, thank you.
MR. WARD: The documents we refer to there, the first one is correctly cited at the bottom as E1/49, which is one of the ones Mr. Bowsher drew your attention to.
THE CHAIRMAN: Yes.
MR. WARD: Then the letter of reply which is then quoted is E2/58, which he also showed you one paragraph of a moment ago. So that is on the next page. A quotation from two paragraphs they are quoting from the Commission, that is document E2/58 and the footnote is wrong. These two documents we would respectfully urge you to read -- they are both fairly short -- to see the tenor of the exchange between Viasat and the Commission.
THE CHAIRMAN: Thank you.
MR. BOWSHER: 10 and 11 I would ask you to go back and read because that summarises what we are saying in the general court proceedings. For completeness, E2/83 is our reply in those proceedings. What I wanted to do was to go through the authorisation and then go through our grounds of claim.
THE CHAIRMAN: Yes.
MR. BOWSHER: I am conscious that time is rattling against

me. So the authorisation is in file B. The version we are using is at tab 1. That is the most unredacted version currently in existence. It should not be necessary to look at the other versions, but they are only there because occasionally some confusion arises because different versions get referred to at different times, depending what has been available in the proceedings.

You will, I am sure, have studied this already and picked up. Much of the material here is copied from elsewhere, so I wanted to jump into the operative part of the authorisation. This is the -- as it says, it is the reasons for authorising ground stations of Inmarsat as CGCs. We say they are not properly regarded as complementary ground components. The question is: are they? This is the authorisation which is the subject of attack in this case.

I am not going to go through all of it now. There is, from section 3, a description of Inmarsat's EAN which starts with some of the history, although not a great deal, and tells you how the EAN works.

What it tells you on page 9 under the "Terrestrial" segment is:

"When it is completed the terrestrial segment of the EAN will comprise around 300 ground-based systems. As

at June, 41 have been completed."

Well, that statement I think has to be seen in the light of what we read just before the break as to what "completed" actually means. I do not think there is any suggestion -- I am not sure there is any suggestion that anything has actually been built from new, if I can put it that way.

So this is Deutsche Telekom using, as far as we can see, its network to build upon the existing network, presumably just to put some additional equipment on its existing network, to a considerable degree.

"Satellite segment" starts at 3.11 and you can see that there is a reference to its new satellite being launched. There is then a description of the two different terminals, Cobham and CSM, and essentially, you have a large terminal and a small terminal. The CSM is the smaller terminal, and there are parts here which I cannot read out.

The key point, the key summary is at 3.19:

"Inmarsat confirmed that the EAN network functionality can technically be provided without the satellite-facing EMAAS terminal installed on the aircraft."

You can see what it then says in the second sentence, which we say is important.

They then say, 3.20:

"The terrestrial segment carries more traffic than the satellite segment. While the satellite segment can provide full coverage, it has lower performance."

Well, we would agree with that as a matter of fact, but that is the way this system has been designed. It is a ground system. Technically speaking, the satellite covers geographically much, if not most, of the European area. It does not, however, perform so as to -- it has significantly lower performance, as it says, particularly in dense areas.

THE CHAIRMAN: Does that mean dense physically, closely impacted physical features, or does that mean dense in population?

MR. BOWSHER: I think in this case it must mean density in users, which will be a function of -- it is not clear. But from a functional point of view, density would relate to where aircraft are. It would be density of use, because if this is a service only going to passenger aircraft, it would be a function of where there are a lot of passenger aircraft. So density would be over a place where you will have a lot of people trying to watch Netflix at the same time in their aeroplane seat. It would have nothing to do with either urban -- not necessarily anything to do with urban

density or geographical features.

A key point is installation time, 3.22. I am not going to take all -- I think you will take it as read that this is always significant, but 3.22, Ofcom understands that where the satellite terminal is installed, it is likely to be installed after the ground-facing terminal, and this is all to do with installation times. So there will be a period in which planes have the ground-facing terminal and not the satellite-facing terminal. It is the expectation for this system. There is no indication as to how long that would be, but it is clear from 3.22 that even Ofcom thinks it could be up to a year. But we have no particular assurance one way or the other as to whether it is shorter or longer.

Then we have the key question: is the EAN offered and marketed as a hybrid system? This is, of course, Ofcom's -- this is the raft that Ofcom hang on to. It may be that the terrestrial segment is the strong part of the -- is the functioning part of the network, but they call it a hybrid because, they say, it is being offered to airlines without exception, so that you get both terminals. It is not considering offering a CGC-only EAN. Essentially, all of these points are saying: well, we are offering both to everyone. We are

not going to be selling just the CGC, what they call the CGC terminal.

They seem to rely on expectation, Ofcom does, (e), again, which I am not going to read out but this comes from some marketing material, there seems to be an expectation as to how Inmarsat's customers will operate, and on the basis of that expectation reflected in (e), that is somehow thought to be sufficient.

THE CHAIRMAN: It does not come from marketing material. It came from a letter which Inmarsat wrote.

MR. BOWSHER: Yes, which I think is itself ... yes, okay. You are right, sorry.

THE CHAIRMAN: I would not expect that to be in marketing material.

MR. BOWSHER: Sorry, not marketing material: survey material. There is a survey which is referred to. I misspoke. It is not marketing.

Then the next paragraph we can see that there is a reference to a large European carrier under "Negotiation". I do not think we need to be too secretive about that, because it is clear from other documents that the first customer is IAG.

What then follows I am not going to read out, but the key point there is 3.26:

"Inmarsat said the contracts do not deal with the

specifics, so there is no obligation to install the satellite."

3.27 ...

"However, Inmarsat informed Ofcom that customers will be obliged to install the integrated aircraft communications manager."

Then 3.27, again the highlighted part is important because while they have entered into a contract with their launch customer, the terms in which they ensure the CGC terminal -- sorry, the satellite terminal is installed is rather odd.

There is then 3.28, a reference, again, to what airlines wish for. What you can see from the highlighted passage on 3.28 is that, again, there is a particular note as to what airlines are looking for, which, again, I will not read out. But what is particularly important is perhaps what the second 50 per cent are interested in at the top of page 14.

That feeds into the conclusion on the next page. We are talking here about the ground stations, and Ofcom's conclusion, which they say gets them home, the ground-based stations will be used at fixed locations. This is page 4.4 on page 15. Ground-based stations will be used at fixed locations. The EAN, this is (b), will use both satellite and terrestrial. The ground stations

will, therefore, be complements to the MSS.

We say no, that is not right in -- it is not right as a matter of language. It is not right as a matter of function. The ground stations are the system; they are not complementing the satellite segment. This is a ground-based service with a satellite supplement:

"(c) The ground-based will improve the service of MSS because the satellite segment alone would have a lower performance."

That is the way it has been designed. We will come on to this, but this is purely a question of the design of this particular system. But they say:

"The ground-based system has improved the availability because the satellite segment would have a lower performance, particularly in very dense areas, than an integrated system. Inmarsat's intention is, therefore, that the terrestrial segment will be used as complements to the MSS."

We say, again, this misstates the true nature of the system. The satellite segment has coverage. It has low performance, as we have already seen. That is the way it has been designed, that is the way in which it actually performs, but just by providing a low performance satellite you cannot then justify and say: well, having put in place all this ground segment to

supplement it, they do not become implements. On the contrary, what you have actually done is put in place a low performing satellite system, but it is not -- the actual end product is a ground system with a small measure of satellite supplement to cover those areas where there is no ground coverage.

Then they turn on to the common conditions, 4.6(a) to (d). They say, 4.6(b):

"The CGCs are an integral part of the EAN system controlled by the satellite resource and network mechanism ... use the same direction of transmission, same proportions of frequency bands."

We will come on to that in our claim. We say that is not the case:

"Inmarsat's satellite has been launched, is currently operational, no reason to suppose that the component will be unavailable for any period."

Well, that is a misuse of the word "unavailable", because yes, it may be that the satellite is there and it may be that it is providing coverage, but availability, as we said already, involves an ability to actually receive and use that service.

The satellite system is not available. The satellite component is only available to a very small number of aircraft. As we have seen from the decision,

it may not, in fact, be available. There may be a number of aircraft for whom it is actually functionally unavailable for some time because they will not have the satellite-facing terminal, so they will actually be incapable of receiving the satellite segment.

Even if they are capable of receiving the satellite segment, the satellite itself is only capable of meeting the demand of a small number of aircraft, depending how one looks at the evidence, between 2 and 20. That we will come on to in ground 1 of our claim in the definition of a complementary ground component.

The only reference in the decision to that last point is in paragraph 4.9 where they say:

"Ofcom notes that the EAN service technically be provided without the satellite terminal being installed, and there may be incentives not to install those, despite having purchased the integrated system."

But our key point there is we actually know from what one has seen in the authorisation that there will be a period where the satellite terminal is not in place.

MR. HOLMES: Can you read on?

MR. BOWSHER: "Being used as complementary components... and that use is being made of the MSS, including of the

Satellite Terminal, by aircraft which utilise Inmarsat's service, despite having purchased an integrated system from Inmarsat."

Or the next paragraph:

"Ofcom therefore intends to monitor carefully the deployment of the EAN in order to ensure that ground-based stations are indeed being used as complementary components of the EAN and that use is also being made of the MSS, including the satellite terminal by aircraft which utilise Inmarsat's service."

In our submission, to say: well, in the circumstances -- in the facts of this case just to say "we are going to monitor going forward" does not answer the case. It is plain when you look at the design parameters of this system, what we are able to deduce and what has been said about it, that this system is not going to operate as a mobile satellite system properly defined because it is, as I say, a ground system.

We put that two ways and we get on to that in ground 1 of our appeal.

THE CHAIRMAN: Just before you move on, can you just clarify one thing for me which I have lost sight of? This covers authorisation of CGCs only.

MR. BOWSHER: Yes.

THE CHAIRMAN: They also need an authorisation to operate

the satellite, the MSS, do they not?

MR. BOWSHER: Yes.

THE CHAIRMAN: Do they get that from the European authorisation or is there a separate authorisation?

MR. BOWSHER: No, there is a separate authorisation.

THE CHAIRMAN: We have not seen that, have we?

MR. BOWSHER: We have referred to it in our skeleton.

THE CHAIRMAN: Just tell me what and where it is, just for the sake of completeness. I am pleased that the length of time it has taken you to find it means that it is not such a foolish question.

MR. HOLMES: Tab 13 of E1.

MR. BOWSHER: Thank you. E1/13, there we are.

THE CHAIRMAN: Thank you, and it is an authorisation by?

MR. BOWSHER: Ofcom.

THE CHAIRMAN: Ofcom. Thank you very much.

MR. BOWSHER: That is an authorisation from 2010.

THE CHAIRMAN: Right.

MR. BOWSHER: The error of thinking, in our submission, what Ofcom has essentially done is having given that authorisation for MSS, it has then moved on and looked at the ground stations, and considered, "Well, how do we deal with the application for ground stations?" There is a period of years in between.

What they have not, in our submission, gone back and

done is considered, "Well, what now is the system to which these ground stations are said to be complementary?" In that time, there has been the change which we have already discussed before lunch.

So whether or not -- it is an idle question. Whether or not these ground stations would have been complementary to the originally proposed system we are not able to tell.

What we have -- the two points are, firstly, that they got their authorisation on one basis and there has been no reassessment as to whether there is simply an assumption that what is now being put forward is an appropriate satellite service, and you judge complementarity, as it were, by reference to what is now being put forward.

But that is a fundamental error if what, in fact, is a system which is not complying with the essential requirements of the legislation and if, in fact, the system as now designed is of such low performance that it is simply an abuse of language to call the function of the ground stations "complementary", because what you now have as a matter of design is a ground station system with some satellite supplement.

"The vast network", which is referred to, the vast network of 300 towers across Europe is the ground

network.

Now, in terms of the definition, in terms of our challenges, we attack this in a number of ways. Ground 1, we say, first, that the EAN is not a mobile satellite system, and we say that as a matter of definition.

Then we go on to say that the terrestrial segment is not a complementary ground component of a mobile satellite system. Of course, that is based on two points: firstly, it is not a mobile satellite system. It follows on from the first point. But, secondly, the nature of the system is such that the terrestrial segment, the ground stations, cannot be regarded as a complementary ground component.

The whole purpose of this legislation to establish and promote a satellite solution is completely undermined by the change of design and the change of solution under which Inmarsat puts forward a low-performing satellite which simply cannot meet the function which it is intending to market. It goes out to market and says, "Look, we have got this great new solution, a vast network of 300 towers". That is how, in fact, they are going to meet their commercial requirement, and the satellite, as I say, is a supplement on top.

If anything is complementary to anything, it is that the satellite is complementary to cover those small -- that small portion of service where the ground network cannot function.

THE CHAIRMAN: Now, does this point turn on the use of the English word "complementary" or does it turn on the definition of CGC in the relevant documentation? There is a difference between those two and I am struggling to understand which is the point that you are making.

MR. BOWSHER: Both. Can I go through them in sequence, because there are three points in sequence. Is this a mobile satellite system? Is it complementary? Then a definitional question about complementary ground components.

DR. ELPHICK: Could I just ask another question for clarification. Are you making the case that the decision that Ofcom has taken here, are you arguing it is irrational or it is illegal or both?

MR. BOWSHER: We are saying that it is wrong in law because it fails to apply the EU legal requirements.

DR. ELPHICK: Yes. That is the phrase you choose?

MR. BOWSHER: It is wrong. It is as plain a judicial review ground as you can have: it is wrong in law, they have no jurisdiction to --

THE CHAIRMAN: It is virtually ultra vires, if you like.

MR. BOWSHER: Virtually, yes --

THE CHAIRMAN: The vires is given by the European legislation, and it is more than vires, it is a direction. But you say that this system falls outside of that which they are obliged and therefore entitled to do.

MR. BOWSHER: Yes.

THE CHAIRMAN: So it is pretty close to a vires point, is not it?

MR. BOWSHER: Yes.

So the first point is that the system that is now in play, or is now being marketed, does not qualify as a mobile satellite system, and this is a definitional issue. For this, you take the definitions of the relevant entities -- of the relevant concepts in the EU decision in file F. The definition, it is tab F/6, page 22A.

THE CHAIRMAN: Sorry, page?

MR. BOWSHER: Sorry, the second page, my fault. It is page 18, internal page 18.

THE CHAIRMAN: Yes.

MR. BOWSHER: 2(a), mobile satellite system:

"A mobile satellite system shall include at least one space station."

A space station -- I forgot to take us through this

before when we were going through the legislation. The definition of a space station comes from the ITU. It is at the very end. I will read it now and take you to it later:

"A space station is defined as a station located on an object which is beyond or is intended to go beyond or has been beyond the major portion of the earth's atmosphere."

In this term, it is a satellite.

MS. WALKER: May I ask a question?

THE CHAIRMAN: Yes, please.

MS. WALKER: This question about where the definition for a mobile earth station comes from is one that, as I understand it, is disputed.

MR. BOWSHER: Yes.

MS. WALKER: Is there anything in the EU framework which definitely points us to the ITU definition of mobile earth station?

MR. BOWSHER: There is nothing which specifically points us to that definition. There are the various references which I took time to go through this morning as to why you would refer to the activities of the ITU, specifically the provision about how in conducting this exercise one should have regard to the definitions of the ITU. I will get the reference for that earlier.

There is a general reference, not a specific reference, to that definition.

MS. WALKER: But it is having regard to rather than something which is definitional within the EU framework.

MR. BOWSHER: Exactly, it is not saying this definition from the ITU is to be applied here. Thus we say to constitute a mobile satellite system, there must be a satellite and a mobile earth station, which is essentially something on the earth that is moving, and a plane would count as one of those because it is within the atmosphere: a plane, a car, whatever. There must be a space station and a mobile earth station in each path.

THE CHAIRMAN: Sorry, it is not -- forgive me, it is not the plane or the car which is the mobile earth station, but the receiving apparatus. If you like, the analogy is the hand-held device.

MR. BOWSHER: The hand-held device. The receiver, the moving receiver, exactly.

THE CHAIRMAN: Right, and the moving receiving equipment.

MR. BOWSHER: Yes. Therefore, in instances where complementary ground components are deployed, those stations must be able to provide 2 GHz band radiocommunication services with mobile earth stations. Sorry, I was reading my own note.

THE CHAIRMAN: In that case, you are certainly reading

something I am not reading. Thank you.

MR. BOWSHER: The term "mobile earth station" is not defined, but in the absence of any other definition and given the context which we covered this morning, we would suggest that it must be right that primacy must be given to the ITU definitions.

I can just give you the references to where we take all of that from. The harmonisation decision in Article 1(3) says activities must take into account the work of international organisations. The framework directive says that Article 9(1) says that member states must act in accordance with ITU radio regulations. The EU decisions says that the use of the 2 GHz band is subject to ITU processes which apply to satellite systems providing mobile satellite services.

So we would suggest in that context, where this whole regulatory framework is within an ITU process and has been governed by it and is referred to therein, it would be perverse not to use the ITU definition.

One gets that definition from, again, file F18, 1.68.

DR. ELPHICK: Sorry, which tab was that?

MR. BOWSHER: Tab 18. Definition 1.68:

"An earth station in the mobile-satellite service intended to be used while in motion or during halts at

unspecified points."

You have to accumulate fuller -- you can pull together more detail from that by pulling together what is a station, which is 1.61, what is an earth station, which is 1.63, and what is a mobile satellite service, which is 1.25, a couple of pages before. We have set this out in writing in our skeleton.

THE CHAIRMAN: Sorry, 1.25, you say?

MR. BOWSHER: 1.25.

THE CHAIRMAN: Yes.

MR. BOWSHER: We have set this out in our skeleton, but I re-state it here. If you pull together those different definitional components from this text, you identify the following features: that a mobile earth station must comprise one or more transmitters or receivers at the station including necessary accessory equipment. That you get from the definition of a station. Those transmitters or receivers must be necessary for carrying and must be intended to carry a radiocommunications service with one or more space stations, and you get that, again, from the definition of "station" in 1.61.

THE CHAIRMAN: This ITU document is dated 2016. Can we conclude that it is -- the same definition was in existence at the time of the decisions in question,

because that is significant?

MR. BOWSHER: Yes, we have checked that. I will double-check if necessary. I will see if I can find the then-prevailing document.

Sorry, so the transmitters must be necessary for carrying and must be intended to carry a radiocommunication service with one or more space stations. That comes from the --

THE CHAIRMAN: What paragraph of your skeleton do we see this? You have set it out in your skeleton. That is the easiest way to follow this through, I think. Nobody has challenged the knitting you have done in order to achieve it, so I think we can just safely work from that.

MR. BOWSHER: Paragraph 32.

THE CHAIRMAN: Thank you.

MR. BOWSHER: I have covered 33(a):

"The mobile earth station must comprise one or more transmitters at the station, including accessory equipment. They must be necessary for carrying and must be intended to carry a radiocommunication service with one or more space stations and it must be intended to be used while in motion."

I should just add to that note that the station, each station is classified by the service in which it

operates permanently or temporarily.

THE CHAIRMAN: I do not understand what that means.

MR. BOWSHER: I think it is a functional test, so you look to see what something is by what it is actually doing.

THE CHAIRMAN: How does that translate in this situation?

MR. BOWSHER: If what the ground-facing terminal is doing is talking to the ground, it is a ground-facing terminal. It is not a -- it is not functioning as a satellite -- something that is communicating with the satellite. It is not, therefore, meeting the requirements of the mobile earth station because it is not carrying or intended to carry a radiocommunication service with one or more space stations.

THE CHAIRMAN: Right.

MR. BOWSHER: In this case, that really lies at the heart of the error. This was an important requirement. The harmonisation decision tells us that this whole regime is about earth to space, not terrestrial applications. For reasons which I have perhaps laboured before, it is necessary to ensure that there is a mobile earth station in every path to prevent what one might call "flags of convenience" we have seen referred to in the CEPT document, to impose a functional requirement for there to be an effective satellite system to further the goals.

What you have here, taking Ofcom's findings as to the operation of the EAN's estimate, is the satellite terminal equipment that is necessary for carrying out a radiocommunication service to or from the satellite. It is the satellite terminal that amounts to a mobile earth station.

The ground-facing terminal cannot be a mobile earth station. It cannot speak to the satellite. The primary reason why it cannot speak to the satellite is it does not speak the right language. It speaks LTE, not a language which can communicate with the satellite.

Now, there is an issue which may be debated by Dr. Webb and Mr. Sharkey and we will come back to where that goes. Where the common ground between those witnesses is now, it seems to be that yes, you can have a system in which one language is used to communicate both with the satellite and the ground. There exists such a language. It is called DVB-SH.

Now, this EAN system does not do that. It has one language going up and a different language going down. So simply as a matter of language, this ground-facing terminal is not intended and cannot function as something that speaks to the satellite. It cannot qualify as a mobile earth station, and if that is right, the service cannot qualify as -- the system cannot meet

the definition of a --

THE CHAIRMAN: What is the system for these purposes?

MR. BOWSHER: Mobile satellite system. The EAN cannot meet the definition of a mobile satellite system because it is not -- sorry, you need to go back to the definition of mobile satellite system, because a mobile satellite system involves communication between a mobile earth station and one or more complementary ground components.

Well, if the communication between the ground-facing terminal and -- sorry, if the ground-facing terminal is not a mobile earth station, its communication with a complementary ground component does not qualify within the definition of mobile earth station. We can take that again.

THE CHAIRMAN: Take it when I have turned up the definition again if you would, please. Right.

MR. BOWSHER: If you have the EU decision, Article 2(2), which I do not, but anyway --

THE CHAIRMAN: I see. So all the talking has to be done by either a satellite or a complementary ground station and a mobile earth station as defined, which means one which is capable of talking to a satellite.

MR. BOWSHER: Exactly.

THE CHAIRMAN: So you imagine a unit which is capable of talking to a satellite, but which pro tem is talking to

the ground for various reasons. It has to be the same box. You say the EAN has two boxes, one above the plane and one below the plane, and therefore, what the CGC is talking to is not a mobile earth station.

MR. BOWSHER: Exactly.

DR. ELPHICK: Are you saying an aeroplane can only have one mobile earth station on it?

MR. BOWSHER: Yes. Well, I suppose it could have two mobile earth stations, but what is talking to the ground must be capable of talking to the satellite.

DR. ELPHICK: It could have two, one of which talks to the satellite and one of which talks to the ground.

MR. BOWSHER: It could have two -- the reason why the ground-facing terminal absolutely cannot speak to the satellite is a question of language, not necessarily -- there is -- I am not sure that there is a clarity as to whether or not the fact that one is above and one is below makes it impossible for the ground-facing terminal to speak to the satellite.

After all, you know, there will still be a communication. The plane is not so solid that there will be no possibility of communication. It may be better for the terminal to be on the top, but that is -- the evidence does not go into that sort of technical detail.

The reason why a ground-facing terminal -- this ground-facing terminal in the EAN cannot be a mobile earth station is a question of language. You could have two mobile earth stations, one on top, one on bottom, both of which are capable of talking to a satellite, or if you are able to physically configure it, either because of the nature of the mobile earth station or the location within the plane, or you found a location in the plane where the mobile earth station would work, then you could have one mobile earth station as long as you satisfied yourself technically that it was able to speak to both satellite and ground.

But the reason here why it does not work is the language problem.

THE CHAIRMAN: So if you could contrive a piece of equipment which had the aerial on top, the kit on top, so it had a line of sight to the satellite and it had a piece of string going round the aircraft, and no more than a piece of string, to an aerial, and a no more than an aerial underneath which connected back up to that same system and they were all talking the same language, that would be all right, would it not, on your analysis? You would have one box capable of talking to the satellite, also capable of talking to the ground where necessary, but crucially, capable of talking to the

satellite and only one box.

MR. BOWSHER: Leaving aside the piece of string.

THE CHAIRMAN: Yes, I informalise it deliberately.

MR. BOWSHER: Either you design the plane so that one or two stations will work, or whether -- it is not the case that the communications path, you know, cannot reach a terminal underneath the plane. There may be limits as to what can and cannot be done. But that is a question of aerodynamic design, but that is not the essential limit.

In any event, this limitation was put in place specifically and this legislation did not specifically require that it be used for this purpose. I mean, yes, it was one of the things which people had in mind, but what was required was that the mobile satellite system involved the use of a mobile earth station and it required that for a good policy reason; to demand effectively that this spectrum was used for satellite. It was not technology neutral. This is a non-technology neutral demand and you either meet it or you do not.

MS. WALKER: May I just ask one point?

THE CHAIRMAN: Yes, of course, please.

MS. WALKER: I may have misread the papers, but I had thought that the connection -- the key issues were not the satellite on the top of the aircraft and the

satellite below, but I think it is called a network connection manager between the two. That does not invalidate the point you are making about whether both do or do not speak the language, but technically, I thought the link was in the piece of equipment in the middle of the aircraft.

MR. BOWSHER: That is the next point I was just coming on to, which is also -- what Inmarsat say is the two terminals are connected by a string, more than a string, within the aircraft to an on board server, and they say that this, therefore, means the whole thing is a single terminal.

Now, we say by that leap of logic, all of the different pieces of communications equipment would somehow become a mobile earth station, and that is exactly the point which you picked me up on a moment ago. It is not the car. The earth station is the terminal itself, and one has to look at each terminal.

The key here is that the server is not necessary to provide radiocommunications, and this comes back to the ITU definitions we were just looking at. What is a terminal is defined by reference to what is necessary to make the satellite communication. The server is not that.

What the server does, as I understand it -- again,

you have got two terminals speaking different languages. They will take communications into a modem. Those two modems will then have to translate, if I can put that loosely. What they do is take those two paths and take it to the server and it is the server that dishes out the communications within the aircraft to the passenger who wants to watch Netflix.

The server is not an essential part of speaking to the space station. It is simply the means by which the product is delivered within the aircraft, and you can test that easily. The satellite terminal can provide radiocommunications with the satellite on its own, just as the ground-facing terminal can provide radiocommunications with the ground-based station on its own. That is what you need to make the communication.

So the server, Inmarsat's argument that you can somehow lump it all together and treat it as a -- and call it all a great big mobile earth station is just wrong. The plane is not the mobile earth station. The server's role is limited to providing a switching function, and that was consistent with what was said by Ofcom.

There is an error by Ofcom in not necessarily misunderstanding what the server was doing, but in failing to reach the correct legal analysis because what

they said was that there was a separate routing engine on the ground which determines whether services are provided by the ground-facing terminal or the satellite terminal, but that does not really take the matter further. The real point is that each satellite and ground-facing path are separate and work separately.

Even if the server were necessary -- and this is, again, the further level. Even if the server were necessary for conducting radiocommunications, which cannot be right for the reasons we have already said, that would not justify extending the scope of the mobile earth station definition to encompass the ground-facing terminal because, again, that terminal cannot communicate with the satellite. So there is a third level to it.

Even if you can include the server as part of the terminal, the ground-facing terminal still cannot communicate with the satellite. So the best you can say is: well, the mobile earth station is terminal plus server. You do not get the ground-facing terminal into the mobile earth station. If you do not get the ground-facing terminal within to the mobile earth station, you fail to comply with the essentials of the definition of a mobile satellite system.

Just to take a practical approach, it cannot be

sensibly argued that the ground-facing terminal amounts to a mobile earth station in instances where the satellite terminal has not even been fitted. As we have seen, it is clear that Ofcom knew and took into account that there would be a significant period of time where satellite terminals would not be fitted at all. There could not, therefore, be any satellite segment.

If the ground-facing terminal at that stage cannot be a mobile earth station -- so you have an airline flying backwards and forwards between London and Edinburgh for month after month after month using only the ground-facing terminal and then some maintenance period months and months in advance, they decide: now is the time we will put the CSM terminal on top, how is it that suddenly what has been a ground-facing terminal, which is plainly not a satellite service up until then, suddenly becomes -- this ground-facing terminal suddenly becomes a satellite terminal because something new has been stuck on the top? That, in our submission, makes no sense. Indeed, if the aircraft has been happily using the ground network all that time up until then, it seems surprising that its function will change at all.

So simply as a matter of fact, when you look at the way in which this service is going to be delivered, it seems highly unlikely that -- or, sorry, it seems very

likely that on many aircraft there will for a long period be terminals which could not on any view be a mobile earth station because there is nothing on the plane speaking to the satellite.

If that is right for any significant period, how can those ground-facing terminals suddenly become mobile earth stations overnight? That really is the first part of our argument, and that is sufficient for us. That is the end of the story if we are right on that point, because as a matter of definition, these ground stations could not meet the definition of complementary ground components because they are not part of mobile satellite system.

THE CHAIRMAN: Or because there is not a mobile satellite system.

MR. BOWSHER: Or because there is not one.

THE CHAIRMAN: Yes.

MR. BOWSHER: Then the second definitional attack we make is to go to the definition of complementary ground components in Article 2(2)(b) of the EU decision. I do not know if you have it in front of you still.

THE CHAIRMAN: Yes.

MR. BOWSHER: It is F6, page 18. Article 2(2)(b) defines ground-based stations, and I am picking words a little bit:

"To improve availability of mobile satellite services in geographical areas within the footprint of the satellite where communications with one or more space stations cannot be ensured with the required quality."

Then you need to go on to the common conditions in Article 8(3) of the same decision. Article 8(3) says, 8(3)(b):

"Complementary ground components shall constitute an integral part of a mobile satellite system and shall be controlled by the satellite resource and network management system."

Well, that is the first stage. There is no mobile satellite system, it falls away. That is why we say the first part is the definitional question. The definition of complementary ground conditions is not complied with.

We then say but further, there is then the linguistic question that these ground stations cannot sensibly be regarded as complementary. So this is not looking at the words of the definition so much, but are they complementary?

There is, as we have seen, a legislative priority to the use of satellite in this system. That was intentional. The EAN does not meet that. It is almost a flagrant defiance of it. It does not make this

a satellite system to say there is some satellite here as the cherry on top of what is fundamentally a ground-based network.

Complementary means that something else is the primary or main purpose, and we say what the Tribunal must do in deciding whether or not these ground stations are truly complementary ground components is decide whether or not you can properly say that the plain purpose of the system of which they form part is something else, because if the main purpose of this system is a ground network, it is an abuse of language to call them, and therefore just wrong as a matter of definition, to call them complementary ground components. What was intended, what was the purpose, what is intended?

The actual purpose of the EAN, Ofcom recognised that it was necessary to consider whether the terrestrial segment is to be used as a complement, but seems to have considered that it followed from the fact that Inmarsat had stated that its EAN would make use of both satellite and terrestrial that the ground-based could be treated as a complement, but that cannot sensibly be right.

I am not going to expand all the factual detail, because we will get to that with the evidence of Dr. Webb and Mr. Sharkey. On either view, on the view

of the evidence you will see that the satellite in this system, as designed within the EAN, can never produce any more than some marginal improvement to the overall system. There are specific locations where the EAN depends on the satellite, essentially somewhere over the Bay of Biscay and somewhere between Spain and the Canaries.

THE CHAIRMAN: Also Serbia.

MR. BOWSHER: Also Serbia. Thank you.

THE CHAIRMAN: I am not quite sure what is so special about Serbia. I suppose Deutsche do not have any ground stations there.

MR. BOWSHER: So there is a geographical area where the only coverage is by satellite, but for everywhere else, what this network is, and what it is being promoted as being, is a vast network of 300 towers providing a service.

It is, as I say, an abuse of language to call that -- to call these ground conditions complementary in those circumstances.

It also is at the very least surprising, given that the whole approach taken by the Commission, the European Commission, when it was assessing operators and Inmarsat in particular was to look at their satellite expertise and the satellite performance of their product. We have seen that done and there is a limit to how far I can

take that from our knowledge.

THE CHAIRMAN: Would you choose a convenient moment for our break, Mr. Bowsher?

MR. BOWSHER: Yes, shall we break now? I am conscious I am running out of time.

THE CHAIRMAN: It is up to you when you do it. Do you want to do something else first?

MR. BOWSHER: No, that is fine.

THE CHAIRMAN: We will take five minutes.

(3.15 pm)

(A short break)

(3.26 pm)

THE CHAIRMAN: Mr. Bowsher, we are aware we have been a bit longer than five minutes. Your timetable is extended, if you need, until 3.50.

MR. BOWSHER: I am obliged. Can I pick up on those quantitative points. I am not going to go into the quantitative test now, but it is for the Tribunal to establish whether or not the system -- whether or not these can properly be regarded as complementary ground conditions. Are they complementary to a mobile satellite system?

When we look at the evidence, we will see that there are a number of ways of looking at that. One is to look at the power and capacity of the satellite being

provided, and that is covered by Mr. Sharkey and Dr. Webb in some detail. There will be exchanges about it.

In short, however you cut it between that exchange, the EAN is going to be able to meet the demand of between 2 and 20 aeroplanes. That is the long way short of this being a satellite service.

Another way of looking at it is how many aircraft are actually in the space where they need the satellite service? Mr. Dorman's evidence, Mr. Dorman's witness statement, covers that. He has done an analysis on some flight data which I will not explain now. You no doubt will look at that.

The key document is, in fact, the document at E3/114. I am not inviting you to get it out now, but at the end of that he has some statistics which he has drawn from this data which, depending how far from the coast you think the ground network will penetrate, to take it at one level, at the end of E3/114 he reached a conclusion that, for example, if you are dealing with UK origin flights and a ground network that can reach 150 kilometres beyond the coast, then of all flights, UK origin flights, 6.7 per cent of the flight time will be in the satellite only region. It is referred to as the S-band-only region.

Now, there are a number of different statistics because we do not know a number of the variables. But on any of the statistics in E3/114, the short point is the predominant, the bulk of flights, whether they are EU flights or UK origin flights, are going to be within the ground network. One can speculate when one looks at the drawings, in fact many flights will be 100 per cent within the ground network, plainly.

So that is, as it were, the quantitative back-up to the general point we have made before. Can I make one other definitional point on complementary ground components, and for this one needs Article 8(3)(b). The short point is that an essential part of the complementary ground component is that it shall be composed -- 8(3)(b). F6, page 21, 8(3)(b). It is in the common conditions in 8(3)(b).

THE CHAIRMAN: Yes.

MR. BOWSHER: But it is part of the common conditions that a CGC shall be controlled by the satellite resource and network management mechanism. There is none as far as we are -- I mean, there is no reference to one. There is no evidence that there is such.

THE CHAIRMAN: Well, I thought that Mr. Sharkey, is it not, provides some information about that and says there is something, which is satellite resource and network

management system which switches from one to the other?

MR. BOWSHER: Yes, but the satellite is not controlling the ground, and we say that therefore it fails to fulfil that definition. Again, it is an essence of a satellite system that it is a --

MR. HOLMES: If it assists, Ofcom specifically found that there was such a mechanism as part of the network.

THE CHAIRMAN: I think this is a bit grammatical. It depends whether satellite controls the rest of the description, so it all has to come from the satellite, or whether it is a more composite description with satellite -- with two adjectives, one satellite and the other network, will provide the function of a network, or network management.

It is quite a difficult thing. I do not think you need take your time in opening, Mr. Bowsher.

MR. BOWSHER: We have the point. We will deal with that in submission.

THE CHAIRMAN: Yes.

MR. BOWSHER: The third element of the complementary ground component definitional issue is related to the rest of the argument, but it is the short point that a complementary ground component must improve the availability of MSS. Again, that is part of the definition of CGCs in Article 2(2)(b).

THE CHAIRMAN: Yes.

MR. BOWSHER: Improve the availability, skipping a couple of words:

"Where communications with one or more space stations cannot be ensured with the required quality."

So what you would expect in order to meet that is that there would be a system saying: oh, gosh, for some reason I cannot -- you are looking at the satellite. To make logical sense of that, you are using a satellite system which is looking for the satellite signal, which is using the satellite signal. That is its primary direction. For some reason, Mont Blanc gets in the way and it says: I will look for a ground terminal. It is a satellite system. Only when the space station -- communcation with the space station cannot be ensured at the required quality does it flip. It is looking towards the satellite and looking towards the operation of the satellite, and it is improving the availability because of the lack of availability of a satellite signal.

That is not what the EAN is doing. Indeed, it is positively designed to do the opposite. There is something, we say, and we have said in our skeleton, something oddly perverse about the arguments by Inmarsat and Ofcom that by purposefully procuring

an under-performing satellite that falls well short of apparently what they originally submitted to the EU Commission, let alone what, for example, EchoStar is producing, Inmarsat now argue: well, we need the terrestrial segment to provide a viable service.

We say it really compounds the problem. It becomes not just a purely legal problem. It becomes a serious economic and commercial issue because what they are doing is procuring a purposefully under-designed satellite so that they can -- and presumably for commercial advantage, and are therefore able to put in place what, in fact, is a ground network. That is exactly the vice which this whole system was designed to prevent.

THE CHAIRMAN: Putting your point simply, you say the satellite communications with this space station can never be ensured with the desired quality. It always has to be supplemented.

MR. BOWSHER: Certainly on any given flight, yes. I mean, yes, if you are flying around and around in circles in the Bay of Biscay.

THE CHAIRMAN: In practical terms, if you have the number of aircraft in the sky you expect to have, you can never -- the ground station should always be kicking in because there is never enough bandwidth, putting it shortly.

MR. BOWSHER: Yes, and I have not taken you to all the marketing material, and that is how it is sold. This is sold as a wonderful new innovative network speaking LTE using the existing Deutsche Telekom network. Is it not a great thing? We can throw the word "satellite" in here and there because it sounds good and also ticks a regulatory box.

THE CHAIRMAN: We have the point.

MR. BOWSHER: Those are our various definitional points in various forms around mobile satellite systems and so forth. Can I put -- go very quickly through our other heads.

We say that Ofcom by authorising these ground stations as complementary ground components is acting in breach of the general legal principles of transparency and equal treatment which it is subject to by virtue of being a UK public body, by acting as a UK regulatory body. These are principles, general principles of EU law, and they are applicable to any circumstance where there is some state or publicly-run opportunity to compete for a business right, a commercial right.

The case law is in file G. I am not going to take you to it in great detail, but I was going to take you for the moment just to the decision in *Costa*, which is G16.

This is all to do with the licensing of betting and gaming in Italy. It is not specifically a public procurement situation. It is the imposition of a licensing requirement on an economic activity. If you turn to page 11, paragraph 70, you get the key proposition:

"It is common ground that national legislation, such as that at issue in the cases before the referring court, which makes the exercise of an economic activity subject to a licensing requirement and which specifies situations in which the licence is to be withdrawn constitutes an obstacle to the freedoms thus guaranteed by Articles 43 EC and 49 EC."

It then says there can be special restrictions to that. Then 72:

"It follows that when licences are awarded the licensing authority has an obligation of transparency consisting inter alia of ensuring for the benefit of any potential tenderer a degree of advertising sufficient to enable the licences to be opened up to competition ... [and so forth]."

Then paragraph 73:

"In that context, the purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any

interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing 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, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way [and so forth]."

That is a general proposition which applies regardless of whether we are talking about the procurement of a public contract for services or any other state grant of a right to conduct economic activity. It is not simply a question of public procurement law. It is a question of general EU law regarding the grant of licences and rights.

The *Belgacom* decision which is also in here at tab 17 reinforces the same point. If I can just give you the references, the references would be paragraphs 15, 25 -- *Belgacom* is at tab 17. We will develop this all in submission, obviously, but the starting point is not whether this grant would or would not be a public procurement contract either then or now. It is maybe an interesting

question which we touch on in our skeleton. That is not the point. The point is that we are dealing with the grant of a right to conduct economic activity, an exclusive right, and that is governed by general principles.

THE CHAIRMAN: Well, what you have just read us governs the circumstances in which people tender to make sure they tender on an equal footing. That has all happened. That all happened nine years ago.

MR. BOWSHER: Next case.

THE CHAIRMAN: Next case, right. You are going to apply that to the subsequent moving of goalposts.

MR. BOWSHER: Subsequent moving of goalposts. We were talking about the principles of transparency and equal treatment. Those principles apply -- tab 15 case called *Wall*. It is a public procurement case.

THE CHAIRMAN: Tab which?

MR. BOWSHER: 15, sorry. It is a case which would now be covered by public procurement legislation. It was not then. It was outside the public procurement regime. It was, therefore, only governed by general principles. It was actually a case all about the procurement of toilets, public toilets in Frankfurt. The foundational point is made from paragraph 32 at page 2872, and it makes the point that there is no legislative -- 33, 34

tells you that there is no legislative regime applying. Then 37:

"In order to ensure transparency [and so forth] they require the award of a concession of contract if they are materially different ..."

Sorry, I am making a bodge of this.

"In order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract."

So what that is saying is once you have a contract, if you then amend it, that in itself is a breach of those principles.

Now, in this case, the amendment was actually the change in identity of a subcontractor. Mr. Wall was identified as the subcontractor, Mr. Wall was dropped. Mr. Wall brought the challenge and it was said: well, you cannot, by changing the subcontractor, Mr. Wall, you have changed the terms on which you were awarded that contract.

The conditions in which it is not permissible to

continue with the contract without a retendering are then set out in 38. 39 it says, again:

"A change of contractor, even the possibility of a contractor, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract."

Again, 43 sums it up:

"Where amendments to the provisions of a concession contract are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be conducted."

Now, in this case, we say that the changes that have occurred are such that Ofcom should not be granting an authorisation which enables those changes to, as it were, be brought to fruition. That by rubber-stamping the original MSS authorisation and authorising the ground stations in the way that it does, it has itself breached transparency and equal treatment by allowing those changes to be brought into an operating system.

It is not a case of renegotiating the contract, but they should take such steps as they are able to take to not to continue and embed the infringement of EU principles. They should certainly not just grant the authorisation, which involves itself a separate breach of those principles.

THE CHAIRMAN: This point arises if you lose on all your construction points and if, technically, Inmarsat are within the decision back in 2000 and whenever it was. 2009?

MR. BOWSHER: We say there might be circumstances in which we are wrong on the construction points we have made, but all the same, the changes are so significant, and we have seen the satellite changes. There is the change in operator. That is in itself plainly a material change.

THE CHAIRMAN: You have gone back to the Commission and you have tried to convince them something funny is going on and they have said no. So you have another go in front of Ofcom, is that right?

MR. BOWSHER: What the Commission choose to do is a matter for them. Ofcom must itself decide whether or not it is acting in breach of law or not. They are not governed by the Commission and the Commission's decision as to what they should or should not do in response to our correspondence does not govern what Ofcom does. They

are governed by legislation, but not by decisions taken in litigation by the Commission.

Ofcom should not have granted an authorisation which enables the EAN to be put in place if the EAN itself involves a breach of transparency and equal treatment because to do so would -- particularly having regard to the change in satellite and the change in the nature of the network and the change in ground operator. Ofcom is then itself in breach, and one cannot tell -- but Mr. Baldridge addresses this in his statement: if, to put it one way, one had known that this was going to be an opportunity to put in place a primarily ground-based network in this spectrum, not just Viasat but no doubt many others would have looked very differently at this opportunity.

That really is, in its simplest, the case we make on what is ground 1(b). It is obviously related to but not -- but slightly broader than the construction points that we make.

Then there is the third --

THE CHAIRMAN: It only arises if your construction points fail.

MR. BOWSHER: Yes. We could be right as well, but yes, it is only material if it supports our construction points, not least because it shows why they are not just

construction points. They are construction points with real consequences.

Then the next point, quickly rattling through, but we have laid the ground for this, it is simply not the case that Ofcom could authorise Inmarsat to treat its ground components as complementary ground components where it was not able to meet the coverage requirements which we have now looked at on more than one occasion. It is Article 4(1)(c)(ii), tab 6 of file F.

I think we probably have this because I have already covered it, but we should tick this box now, ground (c)(4)(i)(c). (1)(c)(i) is the coverage requirement. That we are not complaining about, but it is important to note because it highlights the distinction I have already drawn between coverage and availability. We are not saying we cannot cover the land area. What we say is MSS is not available to at least 50 per cent of the population. Something is not available to the population simply because it is in the space around them. It has to be available in the sense that receivers are available.

There is a means by which they can be actual users, and that is simply not complied with. The best that one can say with EAN is that that proportion of the population that at any given time is in the air in

a plane that receives the EAN has this MSS available to it. Those are the only people to which the MSS is available. That does not fulfil this availability requirement.

So Ofcom was simply wrong, in our submission, to allow the licensing to go forward in that way.

THE CHAIRMAN: So this is not a compliance point, this is a pre-application condition. It is an admissibility requirement.

MR. BOWSHER: Yes, it is a admissibility requirement.

THE CHAIRMAN: So it is as bad as if, for example, Inmarsat were not established in the community. To take the first one, that is what you say.

MR. BOWSHER: Yes. Then can I just highlight the nature of our ground 2 -- I will leave ground 3 for submission -- but ground 2 we say even if the --

THE CHAIRMAN: Sorry, this is the admissibility for the original application and not Ofcom.

MR. BOWSHER: Yes. Yes, sorry, but they have to comply with those conditions under the Article 7 authorisation conditions because the rights are subject to the conditions in Article 7(2) that they honour the commitments that they gave.

THE CHAIRMAN: Sorry, let's start again. I want to understand this. It is an admissibility requirement for

the original application that they show this degree of coverage and availability.

MR. BOWSHER: Presumably they did.

THE CHAIRMAN: Let's assume they did.

MR. BOWSHER: Yes.

THE CHAIRMAN: Right, then that carries on, and how did that get translated into some objection in Ofcom?

MR. BOWSHER: Our objection to it is that the EAN as it is does not meet that requirement.

THE CHAIRMAN: So what?

MR. BOWSHER: It cannot -- having said that this would be a -- that they would be able to achieve that as part of their original admissibility application. They are now unable to fulfil that and to an extent, that either supports our position that this is another change. It supports our point that there has been a change and that they are not a change which Ofcom should not endorse by allowing these CGCs to be authorised because they are not able to meet the MSS condition that was an admissibility requirement.

They were not able to meet it. When they made the application, they obviously were not able to meet it then. The point is that this was an obligation that they said they would be able to meet when they put in place their service. They said that at the time when

they applied for admissibility to the original competition.

THE CHAIRMAN: So this is not really an original admissibility requirement. This is an obligation which they undertook which you say means, what, they come -- you can attack this under Article 7(2)(c)?

MR. BOWSHER: Yes.

THE CHAIRMAN: But 7(2)(c) deals with the rights covered by paragraph 1, that is the rights that they get. It is not a prerequisite of the application.

MR. BOWSHER: Well, it is, because Article 1(3) says:

"The selected operators of mobile satellite systems shall be authorised by member states in accordance with Title III."

THE CHAIRMAN: Just a minute. Article 1(3).

MR. BOWSHER: Sorry, I jumped over a couple of links.

THE CHAIRMAN: Right. So "we have chosen these people, they will be authorised".

MR. BOWSHER: Yes.

THE CHAIRMAN: They are authorised then in accordance with 3. So they apply and the member state shall ensure that they get what they want. That is what -- that is putting it shortly.

MR. BOWSHER: Yes.

THE CHAIRMAN: That is what 7(1) says.

MR. HOLMES: Sir, I hesitate to interrupt, but I am concerned that there is a slight confusion here. There are two separate provisions dealing with authorisation. Article 7 deals with the authorisation to provide mobile satellite systems.

THE CHAIRMAN: Oh, yes, quite right.

MR. HOLMES: It specifies particular conditions which must apply and among those is a condition that national authorities require operators to respect the commitments that they have given during the prior Commission selection process.

THE CHAIRMAN: We are in the wrong Article. You are quite right, I can see we are in the wrong Article.

MR. HOLMES: It is Article 8, of course, which governs complementary ground components. There are a separate set of conditions which apply there which do not include any requirement to honour the commitments given during the original process.

THE CHAIRMAN: Yes, we are barking up the wrong tree. So we are really in Article 8, not Article 7. That is the point.

MR. BOWSHER: We are in Article 8 in this process. That is why we have it all as part of ground 1 because this -- it goes to whether or not this can properly be treated as a mobile satellite system and then it goes to whether

or not these can properly be regarded as ground components, because if they have obtained an authorisation in 2010 for a MSS, mobile satellite system, they have obtained that authorisation on the basis of an admissibility requirement and commitments which they have made to continue to meet that. The EAN as it comes to be post-2014 when Deutsche Telekom gets on board and they change the satellite and so forth, does something different.

In our submission, this can no longer be a complementary ground component of the mobile satellite system which has been authorised and which they committed to producing. You only get into the system under Article 8 if these are complementary ground components of mobile satellite systems. In our submission, if this is simply failing to meet that coverage requirement, this cannot be regarded as an operating mobile satellite system.

Alternatively, the very fact that they are not able to meet that coverage requirement and are not able to honour the commitment that they make is the plainest possible indicator that there has been a fundamental breach of the principles in transparency and equal treatment in this process because the basis upon which this original selection was made has been completely --

has been eliminated. This was a fundamental admissibility requirement and it would be a breach -- any state entity, Ofcom included, that endorses the breach of transparency or equal treatment and allows an entity to as it were, check, to bring forward the MSS authorisation and say, "Look, here's a MSS which we have had previously authorised, we want a CGC authorisation now", it is a breach of transparency to allow that to happen, for Ofcom to participate in that, if what in fact they are doing is rubber-stamping a CGC to a system which is no longer the MSS that was originally the subject of the original authorisation system and is no longer able to meet the fundamental ongoing requirements of that mobile satellite system.

THE CHAIRMAN: Is it not -- do you need to invoke transparency to take this point? Article 8 says that:

"Member states shall ensure their competent authorities grant the applicant [and so on and so forth] to people and those who are authorised to use the spectrum pursuant to Article 7. The authorisation is necessary for the provision of CGS of mobile satellite systems on their territories."

The assumption behind that is that you will have authorised mobile satellite systems and then you will be asked to authorise some CGSs in respect of what you have

previously authorised.

What you say, presumably, is that what they previously authorised is now not what they are asking for the CGS. It is nothing to do with transparency. It is just a complete mismatch between what they are asking for now and what they have had before. You do not need to invoke the slightly waffly notions of transparency. Is that not what your point is?

MR. BOWSHER: Yes, change is our fundamental point. It is, exactly.

THE CHAIRMAN: For which purpose, you would need to demonstrate what it was that they got authorisation for back in 2010 and how they got it, as to which I assume we have got no documents.

MR. BOWSHER: We do not have any -- we are entitled -- in the absence of any evidence from anyone else, we are entitled to infer that they were able to meet that requirement at the time that they applied to the Commission, because there is a Commission decision which says as much.

Now, we do not know what led to that -- we are now getting back to where we started -- but we are entitled to infer, and the Tribunal is entitled to infer, Inmarsat have not come back on ground 1(c) and said, "This is a bad point, we never did comply." They must

be presumed to have complied and we say now clearly cannot with what they are now putting forward.

MS. WALKER: Just one thing I would like to ask you. There was an auction, bids for applications, and Inmarsat was successful, in fact, on certain conditions.

Given it was successful, as I understand it, the law then says that Ofcom shall authorise, as long as certain conditions are met, but as I understand what you are saying, if -- you are saying that if there was a material change between what was agreed initially and the authorisation that took place in 2010, the authorisation, then there should have been a sufficient transparency to open that up, transparency because that is what a regulator has to do. Sorry, I am not sure I am making my point clear.

MR. BOWSHER: You are making yourself very clear. No, that is right, but it does not stop there, and this is where the point goes two ways. To take the simpler point about the analysis, just relying on Article 8, there is not a basis for relying on the Article 8 power on the analysis we have just been through because the system has changed, not up to 2010, but actually after 2010. The changes have been happening around about -- well, as far as we can tell, around about 2013/2014.

To go to the waffly bit, if you were to look at that

from a transparency angle, what you would say is that the obligation to comply with transparency and equal treatment continues to be an obligation on the public sector body, on the public body.

When the matter comes before Ofcom again, they are still under an obligation to have regard to that. If they are called upon to do something, namely to implement the authorisation which you have just referred to regarding CGCs, if that would be to endorse a material change, that itself would be a breach of transparency and equal treatment.

So you get there either by means of hard-edged legislative analysis under Article 8 or by means of more generally stated principles.

What Ofcom cannot do is say -- and it highlights very neatly the point. What Ofcom cannot do is say, "It was all right in 2010. It was MSS in 2010. We do not need to look at that again. They come to us now with what they call a satellite service. We are not going to check whether that satellite segment was the satellite service we previously authorised. If they say they need CGCs for that service, we will give them the authorisation and we will test the compatibility of CGCs only by reference to this new system, not by reference to what was originally put forward."

Sorry, my junior is quite right. We cannot just infer; it is a matter of record. F8, recital 5. It is a matter of record that they complied with the relevant requirements, the admissibility requirements.

I should sit down. Ground 3 I was not going to cover. I was only going to say something about ground 2. It is an important ground. We can come back to it.

The short point, as we develop in ground 2, is that the approach taken by Ofcom has material effects in giving an unfair advantage to Inmarsat. It picks up a point which we have just made: this was not an auction in exchange for certain requirements. Inmarsat got this for free, which is really spectacular.

MS. WALKER: I understand that, yes. I understand that point.

MR. BOWSHER: We will come back to many of these points. Can I assist for the moment on any of that?

THE CHAIRMAN: No. Thank you.

Mr. Holmes.

Opening submissions by MR. HOLMES

MR. HOLMES: Thank you. Good afternoon, sir.

At the risk of taking myself out of turn, I cannot resist attempting in the time remaining this afternoon to try to deal with the point which has been made about

a material change of circumstance and the alleged failure to meet conditions and commitments relating to the authorisation, the selection of Inmarsat to provide a mobile satellite system.

We will need to go back tomorrow carefully and systematically through the legislation because there are a number of points I want to make by reference to that, but if I could ask you, sir, to take up the EU decision at tab 6, and the point I want to make is this: there are effectively four separate stages identified in this EU decision in connection with the selection and authorisation of operators to use mobile satellite systems and CGCs.

The first stage is the Commission selection procedure and, as one sees from Article 3, that selection procedure is directed at the selection of operators, and I attach significance to that. It is operators and not particular mobile satellite systems.

In the course of that selection process it was envisaged that those applying to become an operator of a mobile satellite system would offer certain commitments about, for example, the speed with which they would launch a service and the coverage that the service would achieve by particular dates, and one sees that from Article 4(1)(c), which requires certain

minimum commitments to be offered but it is open to operators to exceed those commitments. So one sees from 4(1)(c)(ii) that:

"MSS [that's mobile satellite services] shall be available in all Member States and to at least 50 per cent of the population and over at least 60 per cent of the aggregate land area ... by the time stipulated by the applicant but in any event no later than seven years ..."

That is an example of a commitment that could be made going beyond the minimum commitment that they would achieve those targets by some earlier date.

Had this selection process reached the second selection phase, which is described in Article 6, one could envisage that further commitments might emerge from what the operator was proposing to do as part of its rolling out of a mobile satellite system. So that is the first stage.

When operators have been selected in accordance with that procedure, the show then moves on to the member states, and under Article 7 the second stage is for the member states to ensure that the selected applicants have the right to use the specific radio frequency identified in the Commission decision adopted pursuant to Articles 5(2) or 6(3), that is to say the selection,

and the right to operate a mobile satellite system, and we place emphasis on that word "a": it is not any specific satellite system for any specific purpose in connection with the selection of the operator; it is a mobile satellite system within the definition set out in Article 2(2)(a).

The way in which operators are held to their commitments, the way in which the commitments are crystallised, if you like, that emerge from the selection process, is as a result of Article 7(2)(c), which requires member states to authorise, to attach to the authorisation to operate a mobile satellite system, a condition that the selected applicants shall honour any commitments they give in their applications or during the comparative selection procedure. So that is the link between the selection and the authorisation process.

As you apprehended, sir, this authorisation of a mobile satellite system was done by separate decision some years back by Ofcom and was subject, among other conditions, to this particular condition, and I can show you it if it would assist. But back in 2010, I believe it was, one can see it at tab 13 of bundle E1, an authorisation was given which required Inmarsat to meet its commitments.

The third stage is then the authorisation of complementary ground components, and that is the stage that we are currently involved in. At that stage member states are, again, required to ensure that their competent authorities grant to the applicants selected in accordance with Title II by the Commission and authorised to use the spectrum pursuant to Article 7, the authorisations necessary for the provision of complementary ground components of mobile satellite systems on their territories. Again, an authorisation in general terms, not relating to any particular use of complementary ground components that might have been proposed as part of an original application to the Commission for selection.

A separate set of conditions is specified in Article 8, and under a separate ground, as we know, there is an allegation that at least one of those conditions is not met.

But the point that Mr. Bowsher has just been discussing with you is whether conditions in a separate authorisation for mobile satellite systems have been met, and in my submission had the legislator intended to make compliance with the commitments relating to the authorisation to provide a mobile satellite system a condition for authorisation of complementary ground

components, it could and would have specified a condition to that effect in Article 8(3) of the EU decision.

The final stage of the process is monitoring and enforcement, and one sees in Article 9(1) that operators are responsible for compliance with any conditions attaching to their authorisations and for paying of the applicable fees. So as a result of that there is a requirement to meet the conditions specified in Article 7(2) upon the operator, and Article 9(2) then specifies that:

"Member States shall ensure that rules on enforcement, including rules on penalties applicable in the event of breaches of the common conditions provided for in Article 7(2), are in accordance with Community law, in particular Article 10 of [the authorisation directive, and that] Penalties must be effective, proportionate, and dissuasive."

Provision is made for monitoring of compliance and the Commission is empowered to examine alleged specific breaches of the common conditions and, indeed, that is what Viasat has invited the Commission to do.

Article 9(3) also provides that:

"The measures defining any appropriate modalities for coordinated application of the rules on enforcement

..."

... may be brought forward by the Commission and, as we will see, the Commission has brought forward rules providing for coordinated enforcement of the conditions in Article 7(2).

In our submission the correct route for dealing with failures to meet the commitments given in Article 7 that are enshrined as conditions of the mobile satellite system authorisation by virtue of Article 7(2)(c) is through this enforcement process.

So pulling the threads together, I say on the basis of that submission firstly that the selection process was not about selecting a particular system which Inmarsat was then bound to implement. The process, rather, was about selecting operators, and we shall see that the focus was on two things, really: one was the credibility of the operator to get a satellite up into the sky, given the scale of that endeavour; and the second focus was upon testing the speed with which that could be done and the coverage that could be achieved.

So these are all generic considerations relating to any mobile satellite system. I will make this good -- I think tomorrow, sir, realistically now -- by showing you in more detail how the selection process was intended to unroll.

The operator having been appointed, the task of the national authorities was then without discretion to authorise both MSS and CGCs subject to specified conditions. The MSS conditions were then to be enforced through a common enforcement procedure, and there is no secret that Inmarsat failed to meet commitments. If you see the minimum commitments set out in Article 4(1)(c), they expected particular things to be done by particular dates including, for example, 4(1)(c)(ii), to have achieved something within seven years from the date of the publication of the Commission's selection decision.

Now, the selection decision was on 13 May 2009. Seven years on from then was 13 May 2016. It is clear that by that date Inmarsat did not have a satellite up in the sky, and we can infer that the developments in international financial markets may have intervened in relation to the projects of both of the satellite operators that were selected.

But an enforcement process was set in train which involved the Commission and it involved the member states and it involved discussion in COCOM, and that is ongoing and positions have been taken in that process. None of that, in my submission, has anything to do with the authorisation of complementary ground components pursuant to the categorical obligation set out in

Article 8 of the EU decision.

THE CHAIRMAN: So if you are right, Mr. Holmes, let us suppose a starker case than you say the present is, in which Inmarsat come along to Ofcom and say: here we are, we are Inmarsat and that is all you need to know, we want you to authorise complementary ground systems, or complementary ground components, for this scheme here that we are proposing, and supposing that the scheme shows that it is a million miles away from the definition of mobile satellite systems. Does that mean that Ofcom simply to say: all right, rubber stamp, we will get you on enforcement.

MR. HOLMES: Absolutely not, sir. I fully accept that Ofcom's decision must correctly apply the definitions set out in Article 2(2), and insofar as it authorises something which is not a CGC within that definition, or it authorises a CGC in relation to something that is not a mobile satellite system, it is outwith the scope of Article 2(2)(b), and it would lack the vires to issue --

THE CHAIRMAN: So the point you have just been making for the last quarter of an hour is designed to see off those bits of Mr. Bowsher's submissions which relate to non-compliance with original specific conditions?

MR. HOLMES: Sir, my intention was precisely that: to clear away the brushwork.

THE CHAIRMAN: Brushwood.

MR. HOLMES: Brushwood, indeed, sir.

In my submission, the heart of this case lies partly in those questions of statutory construction.

THE CHAIRMAN: Yes.

MR. HOLMES: And partly in the evidential questions which have been raised about the nature of the contribution which the satellite is capable of making, which ...

THE CHAIRMAN: Which comes down to construction again.

MR. HOLMES: It is a slightly broader construction point, though. It is not like the -- and I think that this is where, if I understood correctly, you arrived at with Mr. Bowsher in discussion this morning. On the one hand there are some quite hard-edged questions of statutory construction, for example the mobile earth station point. Either it means what Mr. Bowsher says or it does not, and if it does mean what Mr. Bowsher says, then the system that Inmarsat is proposing does not comprise a mobile earth station capable of connecting with the satellite and, therefore, the ground terminals are not part of a mobile satellite system. I accept that that is a hard-edged question.

There are other, more evaluative questions about in particular whether the CGCs can be said to improve the availability of MSS in geographic areas within the

footprint of the system satellite where communications with one or more space stations cannot be ensured with the required quality.

Now, sir, I have begun at the tail-end of the case, so to speak. Where I propose to go tomorrow, to give you a road map of my submissions, is to begin with the tribunal's jurisdiction and the standard of review applicable in this case. This is, as the tribunal will have noted, the first case to be determined under new statutory provisions concerning the standard of review, and it is therefore appropriate to spend a moment clarifying or considering what that standard is for the purposes of this case.

THE CHAIRMAN: If the issues are as you have just described them, it is hard to see that the new position makes any difference over the old one: it is either ultra vires or it is not. I am using "ultra vires" slightly loosely but you know what I mean.

MR. HOLMES: I fully accept that in relation to the hard-edged points of statutory construction. There is, in my submission, an evaluative element as well in relation to the application of the more open-textured aspects of the definition, if I might call them that.

THE CHAIRMAN: But that comes down to a question of definition as well, does it not, of what is meant by

"available" and what is meant by the other adjective?

MR. HOLMES: In my submission there are also questions of assessment and evaluation of a technical kind in relation to whether this particular satellite -- sorry, the particular components comprising the system --

THE CHAIRMAN: Oh, I see what you mean.

MR. HOLMES: -- properly improve the availability.

THE CHAIRMAN: I see. First of all, before you can start construing what "available" and the other word means, you have to work out what this system does.

MR. HOLMES: Indeed, sir.

THE CHAIRMAN: I understand.

MR. HOLMES: That is certainly an aspect of it.

THE CHAIRMAN: I still do not see why there would be any difference between the previous jurisdiction and this, but I wait to be entertained tomorrow, Mr. Holmes.

MR. HOLMES: My submission will not be --

THE CHAIRMAN: Entertaining?

MR. HOLMES: Well, sir, I always do my best, but rather like Commission documents I have been known to disappoint in the past.

The submission will be that there is quite well developed, defined and settled case law about the standard of review which applies in Article 4-compliant judicial reviews because there have, in the past, been

judicial reviews in the High Court that are within the scope of Article 4, and that is because there are some decisions by Ofcom which fall within the scope of the framework directive and the common regulatory framework and are therefore required to take due account of the merits but which are not within the statutory jurisdiction of this tribunal to entertain appeals from Ofcom.

So those types of decision go by way of judicial review under the court's inherent jurisdiction, and the Court of Appeal has opined as to how the principles of judicial review should be applied so as to achieve conformity with the requirement to take due account of the merits, and in my submission that is the case law to which the tribunal should fasten itself.

THE CHAIRMAN: Right. Well, we will look forward to that tomorrow.

When you have both had your openings, we then move on to witnesses. Can you remind me which witnesses we are likely to hear from tomorrow, so I can re-read probably just those for the moment?

MR. HOLMES: Subject to time, sir, the first witness in the box will be Viasat's Dr. Webb, and we do not envisage that there will be time to hear any other witnesses, I think, during the course of tomorrow. The time

estimate for Dr. Webb is two to four hours, so he may very well spill into Thursday morning. Then the remaining witnesses for Thursday are Ofcom's Dr. Harrison and Inmarsat's Mr. Sharkey.

THE CHAIRMAN: The other witnesses not being cross-examined; is that correct? Or their witness statements are not being used at all? It is simply not being cross-examined.

MR. BOWSHER: Not being cross-examined. So Mr. Baldridge and Mr. Dorman, our other witnesses, are in evidence but not cross-examined.

MR. WARD: And the same is true of Mr. Pearce.

MR. BOWSHER: Just, if I may, to remind the tribunal that when Mr. Sharkey put in his second statement, the terms of our not objecting to his statement going in was that we would sweep up matters arising on Sharkey 2 in-chief with Dr. Webb. So it might be sensible to have a look at Sharkey 2 because I am going to try to deal with it fairly swiftly in-chief, and it will arise out of Sharkey. My examination-in-chief will relate to Sharkey 2 and it will make more sense if you have read that as well.

THE CHAIRMAN: Thank you very much. Very well, in that case we will adjourn until 10.30 tomorrow morning.

(4.28 pm)

(The hearing adjourned until 10.30 am on
Wednesday, 27 June 2018)

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