



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE No 1280/3/3/17

Pursuant to rule 14(2) of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 8 December 2017 under sections 192(1)(a) and 192(2) of the Communications Act 2003 by Viasat UK Limited and Viasat, Inc. (“the Appellants”) against the Office of Communication’s (“Ofcom”) authorisation under the Wireless Telegraphy Act 2006 of ground-based stations operated by Inmarsat Ventures Limited (“Inmarsat”) for the provision of broadband services to aircraft dated 10 October 2017 (“the Authorisation”)¹. The Appellants are represented by Latham & Watkins, 99 Bishopsgate, London EC2M 3XF (reference: John Colahan and Alexandra Luchian).

The Notice of Appeal states that the effect of the Authorisation is to permit Inmarsat to use the valuable frequency bands 1980 to 1995 MHz and 2170 to 2185 MHz (“the 2GHz Band”) in the UK at a fraction of what could be accomplished to provide a niche service of ground-based communication links to aircraft across its European Aviation Network (“EAN”) to serve at any given time a small number of consumers: (1) despite EU law requiring that the 2GHz Band must be used for mobile satellite systems providing mobile satellite services (“MSS”); (2) without holding Inmarsat to the commitments it gave to the European Commission, by way of consideration, in order to secure the use of the valuable 2GHz Band which included a social commitment to make effective, continuous and commercial MSS available over a mobile satellite system to at least 50% of the population of each Member State by 12 June 2016, at the very latest.

According to the Notice of Appeal and insofar as the Appellants can discern, the basis upon which Ofcom arrived at the Authorisation was that:

1. Ofcom was obliged to authorise Inmarsat’s ground-based stations forming part of the EAN provided they:
 - (a) fell within the definition of Complementary Ground Components (“CGCs”) contained in Article 2.2(b) of Decision 626/2008/EC of the European Parliament and of the Council on the selection and authorisation of systems providing MSS (“the EU Decision”) and regulation 13(3) of The Authorisation of Frequency Use for the Provision of Mobile Satellites Services (European Union) Regulations 2010 (SI 2010/672), as amended (“the Regulations”); and
 - (b) conformed with the common conditions for CGCs laid down in Article 8.3 of the EU Decision (“the CGC Common Conditions”).
2. Ofcom was satisfied that the ground-based stations will amount to CGCs because they will be used at fixed locations; the EAN system will use Satellite and Terrestrial Segments² such that the Terrestrial Segment will complement the Satellite Segment.
3. Ofcom considered that the CGC Common Conditions would be met.

The Appellants contend that the Authorisation was wrong and unlawful. In summary:

1. Ofcom had no power to grant the Authorisation and/or acted unlawfully in granting the Authorisation:

¹ A non-confidential version of the Authorisation is available on Ofcom’s website:

https://www.ofcom.org.uk/data/assets/pdf_file/0014/107015/Inmarsat-mobile-satellite-services.pdf

² See paragraph 3.8 of the Authorisation.

- (a) Inmarsat's EAN, taken as a whole, does not amount to a mobile satellite system and the Terrestrial Segment is not a CGC of a mobile satellite system (as defined in the EU Decision). Further, the EAN does not satisfy the CGC Common Conditions.
 - (b) In granting the Authorisation, Ofcom has acted in breach of general principles of EU law, including principles of non-discrimination, equal-treatment and transparency by authorising a terrestrial network and doing so on terms which represent a substantial modification to the terms upon which Inmarsat was granted the exclusive right to use the 2GHz Band for the provision of MSS from a mobile satellite system.
 - (c) Ofcom has unlawfully authorised a system which cannot deliver the commitments given by Inmarsat in the comparative selection procedure held pursuant to Article 3 of the EU Decision.
2. Alternatively, even if, contrary to the Appellants' primary case, the Terrestrial Segment is in principle capable of amounting to a CGC of a mobile satellite system, Ofcom could not lawfully grant a blanket authorisation for the EAN because the Authorisation went further than was necessary and/or proportionate for the provision of genuine CGCs and/or failed to prevent the independent operation of CGCs without a Satellite Segment.
 3. Further, or alternatively, even if the Terrestrial Segment of the EAN is capable of amounting to a CGC of a mobile satellite system (contrary to the Appellants' primary case), Ofcom fettered its discretion by failing to have proper and full regard to its general duties under domestic law. It was unreasonable, irrational and/or disproportionate of Ofcom to authorise the Ground-based network of the EAN in circumstances in which no commercial MSS has been provided by Inmarsat over a mobile satellite system, in line with the commitments it gave in return for gaining the right to use the 2GHz Band, for the benefit of consumers, as originally envisaged. The Authorisation thereby:
 - (a) permits Inmarsat to use a valuable commodity (which could be used far more effectively compared to how Inmarsat is using it) for the benefit of a small tranche of consumers at any given point in time; and
 - (b) risks creating distortions of competition in the emerging market for the provision of in-flight connectivity in Europe and thereby harming consumers.

By way of relief, the Appellants ask the Tribunal:

- (a) to quash the Authorisation on the basis that:
 - i. the EAN as a whole is not a mobile satellite system;
 - ii. the ground-based stations proposed to be operated by Inmarsat do not constitute CGCs of a mobile satellite system as defined in the EU Decision and the Regulations and do not satisfy the CGC Common Conditions;
 - iii. Ofcom acted in breach of general principles of EU law in granting the Authorisation because the operation of a terrestrial network by Inmarsat represents a substantial modification to the terms upon which Inmarsat was granted the right to use the 2GHz Band;
 - iv. Ofcom acted unlawfully in authorising a system which could not deliver the commitments given by Inmarsat in the comparative selection procedure held pursuant to Article 3 of the EU Decision.
- (b) alternatively, to quash the Authorisation on the basis that it went further than was necessary and/or proportionate for the provision of genuine CGCs and/or failed to prevent the independent operation of CGCs without a Satellite Segment;
- (c) further, or alternatively, to quash the Authorisation on the basis that Ofcom acted unreasonably and/or disproportionately in authorising the Ground-based network of the EAN;

- (d) to grant declaratory relief in the same terms as set out in (a)(i) to (iv) above; alternatively (b); or in the further alternative (c);
- (e) to order Ofcom to redetermine Inmarsat's application in accordance with the terms of the Tribunal's judgment;
- (f) to grant such further or other relief as the Tribunal may consider appropriate; and
- (g) to order Ofcom to pay the Appellants' costs of this appeal.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

Published 18 December 2017