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IN THE COMPETITION

Case No. 1280/3/3/17

APPEAL TRIBUNAL

3 July 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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APPEARANCES

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

Josh Homes QC appeared on behalf of the Respondent.

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

Tuesday, 3 July 2018

(10.00 am)

HOUSEKEEPING

THE CHAIRMAN: Gentlemen, and ladies, I'm sorry we kept you waiting for a few minutes. We had some matters to discuss.

Can I just start by raising one or two housekeeping and general matters before we turn to final submissions? Our attention has been drawn to a case known as *British Sky Broadcasting Ltd v Office of Communications (Pay TV) v Ofcom [2016] CAT 25*, which Mr. Holmes, we think, will know about. It may or may not go to the question of the extent to which Ofcom is entitled to say, "We will wait until enforcement", rather than taking decisions on some of the things that Mr. Bowsher says decisions should be taken. I personally haven't read it, but it may or may not be relevant. If anybody thinks they wish to cite it, or use it, then they should add to their submissions in writing, short written submissions to us. I suggest you talk amongst yourselves. If none of you want to refer to it then we can let the matter lie. If one of you does want to refer to it -- (mobile phone)

Mr. Bowsher, when mobile telephones go off in my court I usually find myself mollified by the thought that the Personal Support Unit at the RCJ will be better off by

1 a significant cheque by the end of the day. Should I
2 feel mollified?

3 MR. BOWSHER: You will be mollified in advance, or maybe by
4 the end of the day.

5 THE CHAIRMAN: If I thought that within a couple of days --
6 should I feel mollified?

7 MR. BOWSHER: You can feel mollified in advance. Indeed so.
8 I will be passing that way tomorrow.

9 THE CHAIRMAN: Thank you very much.

10 If either of you want to refer to this case, then
11 they should communicate with the others, put their
12 submissions in first, let the other side see them and
13 then we will receive any response submissions. I don't
14 know whether anybody will want to refer to it. I think
15 it is mostly, as I understand it, to affect you,
16 Mr. Holmes. Do you know about the case?

17 MR. HOLMES: I do sir. I was in it.

18 THE CHAIRMAN: Are you likely to use it?

19 MR. HOLMES: I'm afraid, sir, there have been so many of
20 these appeals over the years I shall have to refresh my
21 memory about how exactly the point was decided, but we
22 will liaise, as you suggest.

23 THE CHAIRMAN: Right. Thank you very much. Second, there
24 was a flurry of correspondence yesterday. There was
25 some attempt to put in some further material and then

1 a further letter from Latham & Watkins referring to but
2 not making, I think, an application for disclosure.
3 Does anything arise out of that?

4 I have seen this material. I don't think my
5 colleagues have. I have seen this material because I
6 read it de bene esse. Is anybody formally trying to get
7 in further material? If so, is that opposed? Secondly,
8 is anybody -- I think it would be your clients, if
9 I have understood the correspondence correctly,
10 Mr. Bowsher -- making an application for disclosure?

11 MR. BOWSHER: We are not going to make an application for
12 disclosure. I don't think we have time in the
13 timetable. At least one of those items was simply an
14 answer to your Lordship's question about the repair of
15 the Ligado satellite and I would imagine that that is
16 uncontentious, the clarification of Mr. Dorman's
17 evidence, I would ask to be put in on the basis that it
18 ought to be uncontentious, clarification as to what that
19 data meant, given the document made clear that the
20 question that was being put to him wasn't important or
21 wasn't something he had engaged with.

22 MR. HOLMES: Sir, I apprehend that Mr. Bowsher is referring
23 to the witness statement of Mr. Horne.

24 THE CHAIRMAN: Yes.

25 MR. HOLMES: In relation to that statement, we do not oppose

1 its admission but there is an arithmetic error which we
2 would be grateful if the Tribunal could take note of,
3 and which, Mr. Bowsher's team may well be prepared to
4 accept. Do you have the witness statement to hand, sir?

5 THE CHAIRMAN: I do. If my colleagues will forgive me,
6 I don't know who has got it.

7 MR. HOLMES: It's a very short point, sir. You will see in
8 paragraph 3 that reference is made to the 28.1 figure,
9 which is the number of UK flights that will traverse the
10 satellite-only area of the European coverage of the EAN.

11 THE CHAIRMAN: Sorry, which?

12 MR. HOLMES: Paragraph 3. Reference to the 28.1 per cent
13 figure. That is correct and is uncontroversial. It was
14 in Mr. Dorman's evidence but you see in the second
15 sentence it is said that put differently, 81.9 per cent
16 of UK flights measured never leave the terrestrial
17 coverage. That should, of course, be 71.9 per cent,
18 simply a deduction of 28.1 per cent from 100 per cent,
19 but subject to that correction we have no objection.

20 THE CHAIRMAN: Mr. Ward?

21 MR. WARD: We have no objection.

22 THE CHAIRMAN: Mr. Bowsher, if you accept that, the document
23 can go in. If you don't accept that it becomes
24 a contentious document which won't go in.

25 MR. BOWSHER: I think we can put that in. I cannot see

1 anything to correct.

2 THE CHAIRMAN: Right. That will be admitted by consent in
3 that form, with the arithmetic correction.

4 MR. BOWSHER: I'm much obliged.

5 THE CHAIRMAN: What about the document about the Ligado
6 satellite? Are we to receive that?

7 MR. WARD: Yes. There is no objection to that. In fact, in
8 Mr. Sharkey's witness statement he explained that the
9 defect had been fixed, even though that was not in my
10 mind when your Lordship asked the question.

11 THE CHAIRMAN: I see, and it was fixed as early as 2010,
12 wasn't it?

13 MR. WARD: That was new information. We don't oppose.

14 THE CHAIRMAN: Right, and wasn't there a third thing with
15 the correspondence?

16 MR. WARD: Yes.

17 THE CHAIRMAN: What was the third thing?

18 MR. WARD: The third thing was the status of authorisations
19 in other Member States.

20 THE CHAIRMAN: Oh yes.

21 MR. WARD: It is not inaccurate but we would like to add
22 some additional information to that by way of
23 annotation. I can do that now or whenever is
24 convenient.

25 THE CHAIRMAN: Let me just see if I have got enough copies.

1 This is the status of complimentary ground component
2 authorisations from other States?

3 MR. WARD: Yes.

4 THE CHAIRMAN: I think I have enough copies.

5 MR. WARD: We would like to add the following information to
6 this; firstly, of course, there are 28 States in total,
7 so to complete the total of 28, there are 20 other
8 States in which the authorisation has been granted.
9 There are two others where the authorisation is
10 spending, namely Austria and Romania, and then the other
11 point to make is that even with the ones under challenge
12 the authorisation is in force in Germany, Italy, France
13 and Spain. We would also just like to make clear that
14 where the authorisations are being challenged it is
15 Viasat that is bringing those challenges in Belgium, in
16 Germany, as it rightly says, it is Viasat and Eutelsat,
17 another satellite company, in Italy it is Viasat and in
18 France it is Eutelsat. Just additional information.

19 THE CHAIRMAN: Viasat and Eutelsat in?

20 MR. WARD: In Germany. You will see that's actually in the
21 text, so pending proceedings Germany, it says, "Viasat
22 and Eutelsat". Italy it's Viasat, France it's Eutelsat,
23 Eutelsat used to be a commercial partner of Viasat, and
24 then -- yes. That's it for challenges, but --

25 THE CHAIRMAN: Does that mean that in the other States where

1 authorisation has been granted there has not been
2 a challenge, rather than a challenge that has failed?

3 MR. HOLMES: I believe so, yes.

4 THE CHAIRMAN: As far as you know?

5 MR. WARD: Yes.

6 THE CHAIRMAN: So that document -- do you accept that,
7 Mr. Bowsher?

8 MR. BOWSHER: Yes.

9 THE CHAIRMAN: That document, as any ended, can be treated
10 as going in by consent, can it? Thank you.

11 So that deals with, I think, housekeeping and
12 procedural matters. Are there any other housekeeping or
13 procedural matters which we need to deal with before we
14 go any further?

15 MR. BOWSHER: No.

16 THE CHAIRMAN: No? Right. Now, Mr. Bowsher, in accordance
17 with the procedures which I thought would be useful if
18 we adopted, I just have a couple of questions for us.
19 There will, in due course, I think, be questions for
20 Mr. Holmes but they will come before Mr. Holmes makes
21 his submissions.

22 My first question has actually just been answered.

23 Page 2, Mr. Bowsher, paragraphs 2(a) in the middle
24 of the paragraph you embark on A -- you say:

25 "For that reason..."

1 You say, "1", and then, "2", and under 2(a), in the
2 middle of the paragraph, 1 and 2, and under 2 you say:

3 "The commission went to great lengths to carefully
4 assess the specific satellite systems that were
5 proposed".

6 MR. BOWSHER: Yes.

7 THE CHAIRMAN: My understanding of the way the case
8 developed was we don't actually have a very full idea of
9 what was assessed and how the commission went about it.
10 Perhaps I'm misunderstanding. How do we know they
11 carefully assessed the specific satellite systems that
12 were imposed? Is that inference?

13 MR. BOWSHER: It's inference from the -- there are recitals
14 to the Selection Decision, I can take you to it, there
15 is a passage in the Selection Decision where we know
16 that they met certain admissibility criteria, put
17 forward a bid, which must have met the first and second
18 phase selection criteria. If you read the admissibility
19 criteria, the first and second phase selection criteria,
20 certainly we know that certainly they don't get to the
21 second phase, but if one reads what was required of the
22 admissibility criteria and the first phase selection
23 criteria you would say, well, they must have gone
24 through that in order to make good the factual
25 proposition which is set out in that -- in the recital,

1 and you get that repeated in a little bit more detail in
2 the Selection Decision itself. That's tab 8, Recitals
3 15-19, and it tells you what the relevant milestones
4 involved were, and it concludes, at the end of Recital
5 19:

6 "The applications of ICO satellite Inmarsat Ventures
7 and Solaris was supported by clear evidence in this ..."

8 That may only be for Milestone 5. At the end of
9 each one there is a reference that these applicants
10 satisfied this in detail, or whatever.

11 THE CHAIRMAN: So it's an inference from the decision?

12 MR. BOWSER: It is more than an inference, that is formal
13 record that decision has actually happened, so I would
14 say more than an inference, it is probably the best
15 likely evidence that it has happened, and in Recital 11
16 they make the point, before they get into this
17 narrative, they say:

18 "Following a detailed analysis and comprehensive
19 deliberations in meetings a consolidated report,
20 including conclusions on the completion of the
21 milestones was produce which had the experts and
22 communicated to the Commission".

23 So if one reads the whole of that passage, one gets
24 a pretty detailed analysis as to what must have been
25 done.

1 THE CHAIRMAN: Right. Thank you. Paragraph 36. Could you
2 just take a moment to remind yourself of what this
3 paragraph says?

4 MR. BOWSHER: I'm sorry I didn't catch --

5 THE CHAIRMAN: Paragraph 36.

6 MR. BOWSHER: 36, yes?

7 THE CHAIRMAN: You end by saying:

8 "There is no authorisation of the EAN under
9 Article 7 in the UK. The MSS authorisation relates to
10 an entirely separate system".

11 Now perhaps I wasn't paying attention, but I don't
12 detect this point about whether there is a prior MSS
13 authorisation has arisen before. Is this a new point?
14 What is the significance of this?

15 MR. BOWSHER: It's very much arising out of what we have
16 been saying hitherto. The MSS authorisation is --

17 MR. HOLMES: E1, 13.

18 MR. BOWSHER: Thank you very much. E1, 13. Can I take just
19 two steps back before we get into that?

20 What we know, and we actually have a bit more
21 clarity from the Inmarsat closing submission, paragraph
22 124, that the initial proposal by Inmarsat, and this
23 was -- we are told that this is a response to your
24 question, so this is, presumably, Inmarsat telling the
25 Tribunal what the content of its original application

1 was that was the subject of the Selection Decision and
2 the subject of the MSS authorisation, and what they say,
3 in paragraph 124 of their closing submissions is:

4 "Inmarsat initially proposed a variety of both one
5 way and two-way Mobile Satellite Services ranging from
6 voice, data and multimedia, including aeronautical
7 services".

8 It also refers to the use of CGCs, so the proposal,
9 which was the subject of the Selection Decision, which
10 is the subject of all of that detailed review, just to
11 say again, was very much broader than just -- well, we
12 don't even know whether it referred to these services at
13 all. It says, "Aeronautical services", but we don't
14 know what aeronautical services were contemplated, and
15 it is very much broader than that.

16 That is plainly the system which was analysed by the
17 Commission and its experts as we see in the Selection
18 Decision. It can't have been the EAN. The EAN didn't
19 even come into being until after Deutsche Telekom came
20 on board around 2014, and if we go to the Spectrum
21 Authorisation at E1, 13, starting at the first page, I'm
22 not quite sure why:

23 "The authorisation of Spectrum used by the stations
24 of Inmarsat selected under Decision 2009 of the
25 Commission".

1 That is the selection decision:

2 " ... on the selection and authorisation of systems
3 providing mobile satellite services".

4 MR. HOLMES: On the selection of operators.

5 MR. BOWSHER: On the selection of operators:

6 "On the selection of operators of pan-european
7 systems providing Mobile Satellite Services on the
8 selection and authorisation of systems providing mobile
9 satellite satisfies and pursuant to that legislation".

10 But we know that it's the authorisation of the
11 Inmarsat Mobile Satellite System selected under the
12 decision. That is the starting point of the
13 authorisation.

14 So that -- it can't have been -- the EAN cannot have
15 been the subject of this authorisation. It is simply
16 not chronologically possible and it's not consistent
17 with what Inmarsat have been telling the Tribunal as to
18 how their position evolved, and you get more of the same
19 if you go through, then, the following pages.

20 THE CHAIRMAN: Where does that point go? Are you saying
21 that, in fact, they don't have an MSS which covers EAN?

22 MR. BOWSHER: Yes. Yes. That is the effect of this. What
23 becomes apparent is that this MSS authorisation cannot
24 have related to the EAN, because the EAN simply did not
25 exist.

1 THE CHAIRMAN: Sorry, that is true. It cannot have related
2 to the EAN, but it does not follow that this
3 authorisation is incapable of covering EAN, but are you
4 saying -- never mind the arguments for the moment -- are
5 you saying that the MSS, or this authorisation, does not
6 actually authorise EAN?

7 MR. BOWSHER: Yes.

8 THE CHAIRMAN: Now, where does that get you in this case
9 which does not concern any enforcement procedures or the
10 MSS authorisation? Where does it get you in this case?

11 MR. BOWSHER: It gets us to a position that the GCGs cannot
12 be authorised because they cannot be GCGs to an
13 authorised MSS. Mobile system. They cannot be the GCGs
14 to an authorised Mobile Satellite System, so there
15 simply is no jurisdiction forgiving that, and what --
16 or, at the very least, it will be necessary for Ofcom to
17 make that determination, whether or not there is
18 a Mobile Satellite System to which the CGCs can be
19 complimentary. At the moment there is simply no
20 existing authorisation and no finding in the
21 Authorisation Statement regarding the CGCs which links
22 the CGCs for which the application is made back to an
23 authorised system. One can make that good further if
24 one goes to the second page of the MSS authorisation,
25 paragraph 2 -- paragraph 1:

1 "The authorisation is granted to Inmarsat to
2 transmit and receive from a space station operating
3 within the designated frequency bands for the provision
4 of mobile services subject to the terms set out below".

5 Paragraph 2:

6 "The authorised operator must ensure that the
7 spectrum bands are used by the space stations of the
8 authorised Mobile Satellite System only in accordance
9 with the provisions of this authorisation".

10 So they authorised Mobile Satellite Systems. It
11 cannot have been something which came into being in
12 2014.

13 THE CHAIRMAN: Can I just see what that adds to your case?

14 I have always understood your case to be this is not an
15 MSS and therefore this cannot be a CGC.

16 MR. BOWSER: Yes.

17 THE CHAIRMAN: I haven't understood your case hitherto, and
18 the fault may be mine, to be going so far as to be
19 saying, "This is not an MSS and therefore the first
20 authorisation is no good". Do you need to go that far?

21 MR. BOWSER: I do not need to go that far.

22 THE CHAIRMAN: Right.

23 MR. BOWSER: But it is our case that this is -- we put our
24 case in different ways but it is our case that in order
25 for the CGC authorisation to be valid, it must relate to

1 an authorised MSS, and the EAN cannot be -- sorry --
2 system, an authorised Mobile Satellite System, and the
3 EAN cannot be an authorised Mobile Satellite System. It
4 cannot be the thing that is the subject of paragraph 2
5 of that authorisation which -- and that is the limit
6 which is applied to the MSS authorisation.

7 THE CHAIRMAN: I just want to see very, very briefly, where
8 this goes, so I can understand the structure. Supposing
9 that we had not yet got as far as having the CGC
10 authorisation. Would there be a way in which you could
11 challenge the proposal to deploy the EAN on the footing
12 that it is not within the authorisation? I suppose
13 there is not until it actually happens, is there?

14 MR. BOWSHER: Well, this takes one into the correspondence
15 and the exchanges between Viasat and the Commission.

16 THE CHAIRMAN: Well no, that is between the Commission. I'm
17 talking about this as an authorisation. You would
18 need to involve Ofcom, wouldn't you?

19 MR. BOWSHER: Can we go to the --

20 THE CHAIRMAN: Just tell me briefly because I don't want to
21 divert too much --

22 MR. BOWSHER: Just very briefly, what Mr. Viola of the
23 Commission is saying is that these are matters for the
24 National Regulator to assess because we raised these
25 issues about what was authorised with the Commission,

1 and you will recall what he took you to where he
2 says, "Well, that is a matter for the Commission". We
3 can pull it up presently but he says something like, "It
4 is not the Commission's intention to change ..." I must
5 be careful what I say here because I can't remember the
6 precise words, but he says:

7 "It is not yet our intention to change something, it
8 is about what is being authorised and how this regime
9 works. It is a matter for national regulators to look
10 at this". If Ofcom were to conclude that the -- let's
11 suppose that they had -- that it came to their attention
12 that Inmarsat was about to make an application to them
13 with regard to CGCs for a different system from that
14 which they had authorised. One of the points which one
15 would expect that they would pick up would be to say,
16 well, wait a minute, it is part of Article 7 that you
17 meet the various commitments which were attached to the
18 Article 7 authorisation. At the very least one would
19 expect them, at that point, to say, "Well, are you
20 meeting the commitments that were relating to the MSS
21 authorisation if, in fact, what you are putting forward
22 now is a different authorisation".

23 THE CHAIRMAN: But that is a different point. What you are
24 saying is that the EAN simply falls outside the MSS so
25 they do not actually have a valid authorisation for the

1 MSS.

2 MR. BOWSHER: Yes.

3 THE CHAIRMAN: Is there any way in which you could take that
4 point in this jurisdiction? The Commission seems to
5 think you can, but how would you be able to do that?

6 MR. BOWSHER: Well, I think we would have to crystallise
7 a decision by Ofcom which would be a reviewable -- it
8 might be separately reviewable decision -- we would
9 either challenge it through Article 7 through the
10 mechanics I have just briefly alluded to and say --
11 because I think there would be a route through that --

12 THE CHAIRMAN: But that presupposes the -- well, go on.

13 MR. BOWSHER: -- or we would seek to -- effectively we
14 would be bringing an application to -- against Ofcom
15 saying you need to review the MSS authorisation and take
16 that -- but -- sorry there is another thought ...

17 (Pause)

18 The short point is the time for bringing this point
19 is now. I mean, as we know, the MSS authorisation in
20 2010 didn't immediately lead to any immediate
21 implementation. It would have been idle at that point.
22 You do not know what is, in fact, going to be put in
23 place. The time when this MSS authorisation is
24 implemented into an operating system is when you see
25 this CGC authorisation, so, in fact, the time when the

1 point crystallises is this point, because this is the
2 point when, as it were, the system about to be
3 delivered, rather than the system contemplated at the
4 time of the MSS authorisation is actually put forward.
5 That is the point where one can compare the two and say,
6 "Well, is it the same or not?"

7 THE CHAIRMAN: Right.

8 MR. BOWSER: So ...

9 THE CHAIRMAN: So there has to be a trigger point, and in
10 the circumstances it happens to be this one?

11 MR. BOWSER: Yes. This would be a point, and it seems the
12 best point, and the obvious point at which one would
13 have the material to say, "Is this, in fact, capable of
14 falling within the authorisation?"

15 THE CHAIRMAN: That is the same point as to whether it is
16 a Mobile Satellite System. It is the same point.

17 MR. BOWSER: It is the same point.

18 THE CHAIRMAN: The only other point that I have is this; you
19 rely on the European principles of transparency, quality
20 and non-discrimination. I, for my part, am not prepared simply
21 to apply euro words like that without understanding what
22 the principles are that you are invoking in each case
23 and how they actually work to get you where you want to
24 be in relation to your application of those.

25 Now, you have not done those. You have just stuck

1 them down as labels, and I'm particularly concerned
2 about transparency but I'm also concerned that in
3 eurospeak words don't always mean what we think they
4 mean, so somehow or other I shall want to have those
5 principles actually identified and articulated so that
6 I can -- so that we can see how they actually apply on
7 the facts of this case. At least two of the three words
8 do not, just as words, obviously capture what you are
9 trying to -- the work that you want them to do. It is
10 the underlying principle which is important, and
11 particularly transparency. Somehow or other I want you
12 to deal with that. Now, whether you want to deal with
13 that in your submissions, whether you want to take me to
14 some authority which articulates the principles, not
15 just uses these arm-waving words. I don't know how you
16 are going to do that, Mr. Bowsher. By the end of your
17 submissions I would like you to have dealt with that.

18 MR. BOWSHER: I was going to say, when I come to that point
19 I have got some passages which I'm hopeful will address
20 that point.

21 THE CHAIRMAN: Good. Thank you. I have no more questions.
22 I don't think either of my colleagues have questions for
23 you, so you now have your head for the remainder of
24 your -- I think we proposed two hours which will take
25 us -- we started at about 10.15, didn't we, 12.15 plus

1 a touch more. We will have a shorthandwriter's break at
2 some point.

3 SUBMISSION BY MR. BOWSHER

4 MR. BOWSHER: Can I then --

5 THE CHAIRMAN: You can assume, Mr. Bowsher, that we have
6 read your document. You can assume it will be re-read,
7 probably many times before we have written, so it is up
8 to you how much you want to go over and how much you
9 want to elaborate. As I said, what is most helpful to
10 us is if you deal with arguments of your opponents so
11 far as they are not already clearly dealt with, but at
12 the end of the day it is your final be submission.

13 MR. BOWSHER: Can I make one -- there is one preliminary
14 matter I want to come back to, but the nature of the
15 challenges to our appeal is very much a sort of, "You
16 are wrong, you are wrong, you are wrong". Inevitably,
17 therefore, what the way we frame our oral submissions
18 now is a double negative, namely the positive, "No, we
19 are right and we are right for this reason", and we are
20 going to focus primarily on the question of, if I use
21 the term, "Satellite prioritisation", Ofcom's case as to
22 its function and role, the operation and capacity of the
23 EAN, the law of Ground 1(b), if I can use that as
24 a shorthand label, a little on Ground 3 and some wrap-up
25 conclusions. We may, if we have time, touch on one or

1 two of the other crisper bits of claim in Ground 1, but
2 I'm not optimistic that I will have time to cover all of
3 those points.

4 Can I make one preliminary point though which does
5 arise out of the material from yesterday? Throughout
6 this case Inmarsat has been the sort to present itself
7 as being put upon, but we say it is the one which has
8 secured free spectrum on the basis of an offer, as
9 I have just taken you to, a variety of one-way and
10 two-way communications including voice, data and
11 multimedia, and some aeronautical services. It now
12 seeks to take the authorisation and selection that it
13 got for that and use that as the basis of a specific
14 service to airline passengers, a presumably highly -- we
15 have seen from the evidence -- a highly remunerative
16 service. That is the only service to which EAN now
17 seems to refer, and all of the other services which, as
18 we know, were originally intended in this statutory
19 scheme to, at least in part, intended to meet a social
20 goal, and that is why the spectrum was for free, seem to
21 have been dropped along the way, so the fundamental
22 point from our challenge is that this challenge is about
23 upholding the integrity of the process, the process run
24 by the EU Commission and further implemented by Ofcom.

25 It is surprising, in our submission, that Ofcom is

1 not being more vigorous in trying to undertake the
2 protection of the integrity of that system itself, and
3 that is why we bring that challenge.

4 Inmarsat has been careful to restrict the
5 information available on key matters in this case, and
6 I will not go over the history, and we say even in
7 closing it takes that point. We have sought disclosure
8 of material about what the content of the original MSS
9 is. It is material we have never seen. We have
10 applications on foot elsewhere which we referred to
11 a few days ago. It is plainly relevant how the
12 originally-authorized system does or does not match what
13 the EAN now propose to provide, and we find it
14 surprising that we are in this position still.

15 THE CHAIRMAN: There is a disclosure procedure in this
16 Tribunal, isn't there? You could have applied for
17 disclosure, could you not? In theory there is
18 a jurisdiction.

19 MR. BOWSHER: In theory, one can -- we could have done but
20 we have an application on foot elsewhere. In any event
21 it is surprising, we say, that the answer to the
22 question, "Well, what was the original authorisation",
23 is still couched in a way which we are not allowed to
24 see what lies behind a few short words in the skeleton.

25 THE CHAIRMAN: It might be thought to be surprising that if

1 it is so important to this application that you did not
2 apply for disclosure in this application.

3 MR. BOWSHER: We have set out our case on the basis of what
4 one can clearly infer from the dramatic, we say quite
5 dramatic changes that have been made. That is
6 sufficient for our case. It is now -- Inmarsat are the
7 ones who now seek to put forward a case in closing as to
8 what it actually involved. I do not know what that --
9 that is the first time we have seen that form of words.
10 We have set out very clearly the nature of the case and
11 there is evidence which is more than ample to support
12 our case. We will come back to that.

13 So, the remaining issues. It is necessary, in our
14 submission, to look at what the goals of this regime
15 are, because that is how one understands why, not
16 surprisingly, the operation of the language in the
17 regime does, indeed, prioritise and emphasise the need
18 for a satellite function in the system. You might think
19 that was obvious, the word is in the title, but in
20 a number of different ways, and I will not go through
21 all of them now, Ofcom and Inmarsat have repeatedly
22 said, "Well, no, the system does not prioritise
23 satellite. What possible purpose could there be to take
24 such an approach to interpretation?" well, the answer is
25 because at the heart of this framework involves

1 a prioritisation of earth and space communications, and
2 that is key, because that -- it is that prioritisation
3 that the Legislator used that he did in order to ensure
4 that the 2 GHz spectrum was allocated to earth/space
5 communications.

6 The policy reason is plain. The Legislator wanted
7 this band to be primarily used for those communications
8 between earth and space via satellite in light of the
9 specific end user benefits that could thereby be
10 achieved. In considering that goal it is also
11 appropriate to consider what it is that that satellite
12 was going to deliver as contemplated in the 2006-2008
13 period when this regime was in genesis.

14 To make that absolutely clear, we need to go
15 a little bit further back in the history than we have
16 done hitherto, and if I can invite you to take File F,
17 I will be sticking in this file for a little while, can
18 I invite you to go to F17/60? F17 is the proceedings of
19 the World Administrative Radio Conference for dealing
20 with frequency allocations in certain parts of the
21 spectrum. It is referred to in one of the early
22 recitals. It is the meeting of the ITU at which there
23 is -- the allocation is made which this regime is
24 dependent upon. If you go to page 60, the pages are at
25 the top of the page, you can see the structure of this.

1 This is the way in which -- so for each band there is
2 a narrative as to how different services would be
3 allocated. If you go to page 60 you will see that we
4 are dealing with the 1970-2010 band, and it is headed,
5 "Allocation to Services", and that is, there, the
6 allocation in that band for mobile satellite. You will
7 see there under 1980-2010, there is fixed mobile and
8 mobile satellite. That is the first time this appears.
9 There is a corresponding allocation elsewhere for the
10 2107-2200, and if you go to the next page on page 61 you
11 will see note 746(b), you can see that this is new
12 because it says:

13 "The use of these bands, the 2 GHz Band, by the
14 mobile satellite service shall not commence before 1
15 January 2005 and is subject to the application of the
16 co-ordination and notification procedures set forth in
17 Resolution 46".

18 So plainly, in our submission, this is the point
19 at -- and this is to be contrasted with the earlier
20 position, I'm not sure I need to take -- we have the
21 1990 documents in the bundle, and in 1990 there was no
22 allocation. It is actually the very last page in
23 Bundle F, tab 22, and you can see there for the same
24 band there is no mobile satellite allocation.

25 So this band had been available for fixed and mobile

1 services, and then from 1992 it was made available for
2 Mobile Satellite Services with effect from 1 January
3 2005, and it was that allocation that was the impetus
4 for the Harmonisation Decision.

5 If we go, then, to the Harmonisation Decision which
6 is at tab 5, the Commission records in Recital 5 that
7 the designation for the mobile satellite satisfies by
8 the ITU, it says that it is available, that this band is
9 available for Mobile Satellite Services and records that
10 it plans to use a service in accordance with the
11 designation made at Walk 92. That is what I have just
12 taken you to.

13 So the Commission is using MSS, Mobile Satellite
14 Services, in the way in which it has been used by the
15 ITU as a mobile satellite service is fixed or mobile
16 terrestrial. The mobile satellite service is therefore
17 a term used to denote the service between a mobile earth
18 station and the satellite or between mobile earth
19 stations via a satellite and if one needs to make that
20 good one can get on to -- that, again, is in the ITU
21 rules. We have taken you to it before. That is
22 Article 1.25 at F18, but I don't think we need to turn
23 it up.

24 If one then turns to Recital 6, the Commission
25 provided -- referred to the need for a harmonized and

1 efficient use of the 2 GHz Band for systems providing
2 Mobile Satellite Services, said that it was necessary
3 and particular due to the scope of satellite signals,
4 and that is a function of the nature of the delivery of
5 Mobile Satellite Services delivered over satellite as
6 opposed to any terrestrial use.

7 Then we turn to the operative part of the
8 legislation, and, of course, the Recitals are simply an
9 explanation of the reasoning and context, not of the
10 actual legislative effect of the decision. Article 1
11 simply says:

12 "The purpose of this decision is to harmonise the
13 conditions for these bands for earth to space".

14 So that that is the same direction, if we go back to
15 the allocation of Walk 92. They match back. The bands
16 are in the same direction as they were in Walk 92.

17 One can also see, if we then turn to the Sett
18 Report, that the Terms of Reference for this are also
19 framed by the position at ITU. If we turn to the CEPT
20 Report at tab 4, pages 5 and 6, this, of course, is, as
21 we know, from a later recital but it is also explained
22 in this document, it is a document prepared by CEPT
23 pursuant to a mandate from the EU Commission and CEPT
24 itself is not an EU body but it is a body that is here
25 providing material to inform the European Commission's

1 discussion, and what we see on pages 5 and 6 is
2 a longish discussion of the specific advantages of MSS
3 that arise because of the specific nature of Mobile
4 Satellite Services delivered over satellite.

5 The third paragraph on page 5 I would ask you to
6 look particularly:

7 "MSS ..."

8 So that is Mobile Satellite Services:

9 " ... systems provide ubiquitous connectivity
10 through widespread international coverage with
11 simultaneous access to the satellite service at the
12 instant of service commencement in the entire footprint.
13 Such service although not indispensable for the wider
14 public, is an integral part of some niche markets in
15 which MSS has traditionally provided service, including
16 maritime, distress, safety, aeronautical, including
17 communications to aircraft for air traffic management,
18 operational communications, communications for
19 passengers, exploration and public safety".

20 So it is describing the aeronautical component as a,
21 "Niche market", but it then goes on, in the next
22 paragraph, in much greater detail to point out how
23 satellite might also be of use in areas where
24 terrestrial communications do not reach, or service
25 levels are not sufficiently high for the needs of

1 consumers.

2 So what it is saying is, for the past there are
3 niche markets, including aeronautical, where satellite
4 has been used. What we are thinking about -- what we,
5 CEPT, are thinking about is how that might be rolled out
6 more broadly, and it is just interesting to reflect
7 there, of course, that reflects the original offer made
8 by Inmarsat, a blend of aeronautical and other services
9 which might fit quite neatly into the broader social
10 goal, particularly communications and so forth in
11 areas -- in remote areas of Europe. It also fits well
12 with the notion that you might well have niche markets
13 with established revenues which can cross-subsidise
14 other, newer markets, these socially-driven markets, if
15 I can put it that way, which might not immediately be so
16 remunerative. There is bound to be some special
17 economic factors involved, because that must have been
18 why this spectrum is being given away for free. Do not
19 give spectrum away for free unless there is some wider
20 economic context.

21 Page 5, last paragraph, and I now cannot see the
22 reference ... satellite ... there we are, it is in the
23 middle ... eight lines down:

24 "Satellite services provide employ cost effective
25 technology to serve communication areas with low

1 penetration rates where sparse population does not
2 provide the economies of scale to justify the roll out
3 of wire line networks or of land-based wireless network
4 requiring a large number of transmitters. Satellite
5 networks have historically supplied a swift and
6 efficient deployment of services to communities which
7 would otherwise not have access to such services. The
8 position is clearly here being contrasted, we say,
9 between communications over satellite and communication
10 over terrestrial".

11 CEPT obviously does not mandate a specific use, it
12 is not a legislative body, but it is looking at the
13 general broad range of how broad population goals might
14 be balanced with the niche markets.

15 When we turn then, from there, to the EU decision
16 at -- if you go to the Harmonisation Decision first at
17 tab 5, recital 9, references CEPT's conclusion that
18 systems capable of providing MSS and systems providing
19 terrestrial only mobile services in the same spectrum in
20 the 2 GHz Band without harmful interference is not
21 feasible in the same geographical area. So again we
22 have the differentiation between a satellite service a
23 and the terrestrial use of the 2 GHz Band whether
24 through fixed or mobile service allocations, and because
25 of the potential for harmful interference the Commission

1 concludes, a bit further down, six lines:

2 "Consequently, in order to avoid harmful
3 interference to MSS and inefficient use of spectrum, it
4 is necessary to designate and make available the 2 GHz
5 Bands to systems capable of providing MSS on a primary
6 basis".

7 I will repeat that:

8 " ... necessary to designate and make available the
9 2 GHz Bands to systems capable of providing MSS on
10 a primary basis. This means that where the 2 GHz Bands
11 are used by other systems which are not capable of
12 providing MSS ..."

13 Remember, "MSS", refers to services:

14 "... these other systems should not cause harmful
15 interference nor claim protection from systems providing
16 Mobile Satellite Services".

17 In other words, satellite use is prioritised by
18 being made primary. Interference to the MSS from
19 terrestrial networks is what would be inefficient, not
20 the satellite service itself.

21 THE CHAIRMAN: How does that help? Because this is all
22 about interference and the fact that they are allowing
23 the satellite system to trump any ground systems which
24 would otherwise interfere. That is what this is about,
25 isn't it? It doesn't talk about the priority of

1 satellites over anything else, it is talking about the
2 priority of a satellite system over anything else which
3 might muck up their signal.

4 MR. BOWSHER: It is making -- it is plainly -- it is part of
5 a long sequence which, for a variety of reasons, is
6 always placing the primary responsibility for delivery
7 of these services through a system that works from the
8 satellite both for interference reasons, for the
9 integrity of the whole procedure in order to balance the
10 social goals. The recurring theme for a variety of
11 reasons is that satellite is the primary delivery method
12 for whatever comes out of this regime.

13 MR. ELPHICK: Can I just ask one question on that,
14 Mr. Bowsheer?

15 MR. BOWSHER: Yes, please.

16 MR. ELPHICK: In paragraph 93 of your closing statement and
17 paragraph (b), paragraph 93, paragraph (b), towards the
18 end of that paragraph, what you say is:

19 "The routing engine used by Inmarsat is designed so
20 as 'use the optimum use of the available radio resources
21 instead of prioritising the satellite link'".

22 MR. BOWSHER: Yes.

23 MR. ELPHICK: So your contention is that the policy makers
24 then -- the prioritisation of the satellite link is so
25 important that, really, there should be a suboptimal use

1 of the available radio resources? You can either have
2 optimal use of spectrum or prioritise. You would say
3 what the policy makers intended was suboptimal use of
4 the spectrum in order to prioritise.

5 MR. BOWSHER: I'm not going to characterise it as suboptimal
6 because that may be a question of design and I am not in
7 a position to say whether it is suboptimal or not, but
8 yes, the policymaker has narrowed the design parameters
9 here to say that the priority -- the primary link has to
10 be to satellite yes, and if the designer of whatever
11 system is being put forward finds that that is
12 suboptimal, that is, in a sense, their problem. If
13 someone can make that work optimally that is good for
14 them. I mean, this whole process is going to last for
15 20 years. If someone is able to make that a better,
16 more optimal system, so much the better.

17 Indeed, part of the goal -- we have not talked about
18 the space policy goal. Remember that part of this, as I
19 dealt with in opening in some detail, was the, as it
20 were, the carrot to induce developments in the space
21 area, if what this does is induce people to develop more
22 optimal solutions which have not been thought of by the
23 Legislator or by ITU in 1992, so much the better.

24 I don't think the Legislator is deliberately saying, "I
25 want you to do something suboptimal", he is saying, "Do

1 it this way because I want satellite. I want you to
2 prioritise satellite", and the consequences will flow
3 from that.

4 MR. ELPHICK: Thank you.

5 THE CHAIRMAN: Your point is this, is it not, Mr. Bowsher,
6 that if you want to make optimal use of every bit of
7 this spectrum, using it to its full force, you would
8 actually have a ground network because that is probably
9 a better way of using the spectrum. You would have to
10 have a lot of transmitters, but you can still transmit
11 a lot more data over a ground network. That is your
12 whole point about the way the EAN operates, but you say
13 that that is not the point because the European
14 legislatures have said, "We want a satellite system,
15 even if that does not make such broad use of the
16 bandwidth as a ground network would". They do not
17 articulate it in that way, but that is your point, is it
18 not?

19 MR. BOWSHER: That is my fundamental point. I'm not making a
20 particular point as to whether one would be more
21 efficient than the other, we do not have a positive case
22 on that, but yes, if it had not been for this regime and
23 this spectrum had been put out to auction, whether by
24 the EU or by Member States in the more normal way, no
25 doubt revenue would have been raised. There would have

1 been an auction and revenue would have been raised --
2 probably rather substantial revenue. The number which
3 I don't think has been contested by Dr Webb drew from
4 the Irish Regulator -- the references are in Dr Webb's
5 statement, I think it is 7 billion euros -- I'm just
6 stumbling whether it was euros or pounds he said, but
7 that doesn't matter.

8 So this is a very valuable piece of spectrum which
9 has been given away for free. There has to be a quid
10 pro quo. If, over the period from 1992 to whenever
11 designers can come up with something better, then so
12 much the better. It is likely that if you spent however
13 much you would have spent in a normal auction for this
14 spectrum that you wanted to make the most money out of
15 it, you probably would have put a ground network in, I
16 suspect, but that is not our positive case. That is
17 just a speculation. Certainly when you compare what
18 Inmarsat put forward when they were seeking the MSS
19 authorisation which seems to have been a blend of
20 solutions, including -- again, we do not know what
21 aeronautical component was in there, there is no
22 explicit reference to what is now in the EAN, that
23 contrasts very differently from what you now have which
24 one can now see is obviously a very profitable market.

25 Have I dealt with your question, Mr. Elphick?

1 MR. ELPHICK: Thank you.

2 MR. BOWSHER: So the Commission acknowledged, in the Recital
3 9 of the Harmonisation Decision that this difference
4 could be managed if a single operator was use the same
5 parts of the 2 GHz Band for both purposes, hence the CGC
6 Common Conditions.

7 What we then see at Article 2 and this, of course,
8 is the operative part of the legislation, of Article 2
9 of the Harmonisation Decision is the definition of a
10 system providing Mobile Satellite Services but not a
11 definition of Mobile Satellite Services itself. Again,
12 there is at least three different concepts here --
13 a mobile satellite system, a mobile satellite service
14 and systems providing Mobile Satellite Services, so it
15 defines system providing Mobile Satellite Services,
16 Article 2 refers to those systems capable of providing
17 radio communication services between three separate
18 paths, but it does not say that each of those three
19 services is a mobile satellite service.

20 We know from Recital 5 that the Commission intends
21 for this band to be used for Mobile Satellite Services
22 in accordance with the designation from ITU, and from
23 Recital 9 that any terrestrial use will have to be
24 secondary. Mostly, what the Harmonisation Decision does
25 not do is to determine how system operators would be

1 selected, nor to establish the limitations to which
2 those operators would be subject, and for that you turn
3 to the EU decision at tab 6.

4 Consistently with what we have just seen in Article
5 1 in the operative legislation of Article 1 of the EU
6 decision, that Article expressly explains the purpose of
7 the decision. This is a community procedure for the
8 selection of operators of Mobile Satellite Systems.
9 I will repeat that. We are using the 2 GHz Band for
10 communications between earth and space. The imperative,
11 again, of prioritising the satellite-based
12 communications is made clear in the obligation at
13 Article 2.2(a) that a Mobile Satellite System must
14 include a satellite.

15 It is also reflected in the definition of
16 complimentary ground components, 2.2(a) again. They can
17 only be used within the footprint of the system
18 satellite where communications with one or more space
19 stations cannot be ensured with the required satellite.
20 If this legislative regime was intended to be permissive
21 of a generally hybrid use and was not concerned with
22 prioritisation, these limitations would fulfil no useful
23 purpose. That would be the answer to Inmarsat's
24 question, but the legislative regime is not permissive
25 of a hybrid use, it is concerned with prioritisation of

1 earth to space communications.

2 Mr. Holmes sought to suggest in opening that the
3 requirement that CGCs be located within the footprint of
4 the system satellite is about ensuring coverage, but
5 that cannot be right, because if CGCs are outside the
6 satellite's coverage they would be extending coverage.
7 It would just be definitionally wrong. The clear reason
8 where these limitations are within the definition is to
9 ensure that the definition of the band is, again,
10 principally for satellite-based communications.

11 Other articles provide further limits. There is
12 Article 8(c) of course, which limits the independent
13 operation to -- of CGCs -- to situations in which the
14 satellite component has failed and for a period of no
15 more than 18 months.

16 We also see that in the EU decision the Legislator
17 is using the term, "MSS", to denote the service carried
18 between the mobile earth station and satellite and,
19 "CGC", to mean something different.

20 Recital 18 is the only recital --

21 MR. HOLMES: Sir, I hesitate to interrupt Mr. Bowsher, but
22 just to save time and in case it assists, Ofcom accepts
23 on reflection and having reviewed the closing
24 submissions of Mr. Bowsher that MSS, in the Article
25 2.2(b) definition, should be read as referring only to

1 communications with the satellite. We do not think the
2 point is of any significance. Our key point is that the
3 prioritisation is of systems, and those systems can
4 include ground-based components, and not any
5 prioritisation as between satellite services and
6 services from the ground, but we do not take a point, as
7 I did in opening. I went slightly too far in opening
8 and suggested that MSS should be read as services
9 provided only by -- by either the satellite or the GCGs.
10 On reflection I think that is wrong. It is obviously not
11 in a point in either the decision or in our written
12 openings. I hope that helps. It might save a little
13 time.

14 MR. BOWSHER: Thank you. Trying to take that into account
15 as we go, Recital 18 to that decision is notable because
16 it, taking account of the concession just made, it
17 perhaps emphasises the point that Recital 18 is the only
18 recital which discusses the legislative intention as
19 regards complimentary ground components. By
20 implication, in our submission, when you read Recital
21 18, it is obviously a very long piece, they are
22 delivering a different service. They are delivering
23 a terrestrial service provided over ground stations, and
24 similarly Recital 21 to the same decision speaks of
25 authorisations granted in relation to MSS or

1 complimentary ground components. I can perhaps skip
2 over a little bit of that in the light of the
3 distinction just made, but that recital recognises that
4 Article 7 provides for NRAs to assign spectrum for MSS
5 in their territories, and also spectrum for CGCs under
6 Article 8. In other words, there is a bifurcated
7 service, or spectrum licensing process, for these two
8 uses.

9 I think I'm just now reiterating Mr. Holmes'
10 concession. CGCs provide a terrestrial service not
11 a mobile satellite service, consistent with the ITU
12 allocation and definitions, and it seems to us -- just
13 on reflection, I may have to consider this over the
14 break, but it seems to me that if that concession is
15 made then the objections to our relying upon ITU
16 definitions must fall away because I'm not sure there is
17 really any point left in it.

18 Going on to further interpretive material on these
19 definitions and the relevance of the satellite
20 component, we see in Recital 14 that it is the Mobile
21 Satellite Services that can reach geographical areas not
22 well-covered by other electronic communication services,
23 the satellite is -- so it is not the CGC services, it is
24 the Mobile Satellite Services, and for that reason, from
25 the last sentence of that Recital, that the proposed

1 coverage area of Mobile Satellite Services and the
2 timeframe determined by the Legislator to be important
3 characteristics, so it is important that you understand
4 that the extent of the MSS service be taken into
5 account, and it is important that those requirements get
6 transposed into the admissibility requirements in
7 Article 4 which represent the consideration for securing
8 this valuable band for no monetary consideration.

9 So, we say the Legislator plainly intended these
10 admissibility requirements to be met by the mobile
11 satellite service, ie the service between a mobile earth
12 station and the satellite or between two mobile earth
13 stations via a satellite which now seems to be common
14 ground, and that is what they wanted to deliver as
15 a result of priorities in these services. In other
16 words, the Legislator wanted to assign this tranche of
17 the spectrum to be used on a primary basis which we have
18 seen as a legally-significant word for -- in order to
19 affect mobile satellite communications in light of the
20 social policy objectives that only those services were
21 thought to deliver, and it is that public policy
22 objective that then drives the tight definitions in
23 Article 2 regarding the need for a mobile earth station
24 in each radio communication path of a mobile satellite
25 system together with a satellite and also the limited

1 use to which CGCs can be put.

2 In our submissions we have set out how the
3 assessment of operators was consistent with the
4 requirements set out in Recital 14. They were assessed
5 by reference to the satellite element, and what the
6 satellite system could deliver, not only CGC element,
7 consistent with its objective, and that is also -- and
8 that is also made good when one looks at the call for
9 applications, if I can take you to one specific point on
10 the Call for Applications, just to take this further
11 into the availability requirement. You get a little
12 more of that, so the Call for Applications is at tab 17
13 and I think I have already taken you at tab 19 --
14 sorry -- page 19 of tab 7, under the sub criterion --
15 this was in the second phase process, which, as we know,
16 we did not get to, but the proposal that was put forward
17 must have been contemplated that it would have to meet
18 this in due course. We have seen the subcriterion which
19 is the 50 per cent availability criterion, and we have
20 already looked at that, that that is described in a way
21 which involves, if one reads the whole of that
22 description, that availability involves --

23 THE CHAIRMAN: Which description, where?

24 MR. BOWSER: Sorry, the paragraph titled, "Description".

25 THE CHAIRMAN: Right.

1 MR. BOWSER: The sentence:

2 "The availability of MSS is defined as the
3 availability of one or more satellite services on
4 a continuous commercial basis ..."

5 Again, skipping the brackets:

6 " ... including the availability on the market of
7 the relevant user equipment".

8 You get a bit more on that if you turn the page to
9 page 21 and see the content of the required business
10 plan. Again, the business plan will have had to have
11 been submitted regarding the then authorised process,
12 and at the bottom of, "Introduction", just before the
13 heading, "Satellite and CGC system", you will see the
14 last four bullets:

15 "An MSS system will typically be providing service
16 to a Member State when, for that specific country,
17 distribution channels exist and the service can be
18 purchased by customers. Terminals supporting that
19 specific service are available for purchase in that
20 country and the required customer service infrastructure
21 is in place".

22 So that presumably means some sort of after sales
23 service or something, so to take the voice or data
24 service which Inmarsat seems to have originally
25 contemplated, presumably that will be available in

1 a location once customers in that area are able to buy
2 a contract and equipment which enables them to buy that
3 service. It is not that all of them actually do, but
4 that they could do.

5 So jumping ahead, so going back, in light of the way
6 in which the ITU allocations were made, the Legislator
7 could have allowed operators could provide any service
8 specified by the ITU allocation table, by designating
9 the band 4 at selecting operators of systems providing
10 fixed, mobile, for whatever services, but that would not
11 have been consistent with the goals. It would not have
12 prevented the band from being used for a service that
13 was by its nature substantially a terrestrial service
14 like the EAN. Instead, Article 1.1 specified the
15 definition of the MSS as the primary spectrum use and
16 protected from other terrestrial spectrum uses and it
17 required that any complimentary terrestrial uses of the
18 same spectrum communicate to end users through devices
19 that constitute mobile earth stations.

20 We have looked at the CEPT report. Just a couple of
21 remarks about it. A lot of -- there is a lot of
22 commentary on this. It is not in itself legislation, it
23 is a discussion document.

24 THE CHAIRMAN: Well, if one were allowed to apply what an
25 English lawyer would call, "The mischief construction of

1 an Act of Parliament", for the mischief you are looking
2 at the CEPT report, would you not?

3 MR. BOWSHER: Indeed.

4 THE CHAIRMAN: Does a similar rule apply for euro
5 legislation?

6 MR. BOWSHER: It would not be the mischief of law, but you
7 would certainly look at it for the purpose -- you would
8 look to see what the underlying purpose or the context
9 against which the legislation was drawn. Given that
10 CEPT is not itself the Legislator, it helps one
11 understand the terms that are being used and the
12 reason -- and the factual context against which the
13 legislation was being put together.

14 THE CHAIRMAN: Does it count as travaux préparatoires.

15 MR. BOWSHER: I don't think it can do because it is not
16 actually an EU body.

17 THE CHAIRMAN: Right.

18 MR. BOWSHER: If necessary I can look that point up, whether
19 it technically is or is not but it is not, strictly
20 speaking, a pre-legislative act of the EU institutions.

21 THE CHAIRMAN: You are not aware of any european principle
22 which would prevent us from having regard to it as the
23 sort of background which would be -- pass the mischief
24 rule if one were looking in English law?

25 MR. BOWSHER: Obviously I only need to do that to the extent

1 that you are looking -- the starting point is the
2 Article.

3 THE CHAIRMAN: Of course.

4 MR. BOWSHER: You start with the Articles. You only go
5 backwards when you need to say, well, why is this or why
6 is this not. Is there something that explains the
7 ambiguity or something. To the extent the legislation
8 is clear, the legislation is clear.

9 I'm anxious to try and deal with this section, as it
10 is important, in one go, and that will maybe take us up
11 to the break.

12 THE CHAIRMAN: Right.

13 MR. BOWSHER: Even the selection of text made by Ofcom and
14 Inmarsat is somewhat selective because when one does go
15 to the CEPT report, and section 4.2.1 is something they
16 have looked at, it is important to note a couple of
17 parts of that text which are important. Much is made of
18 that sentence starting five or six lines from the bottom
19 starting, "Furthermore they may play an important role",
20 so we are talking about CGCs here.

21 THE CHAIRMAN: Sorry, we are back in tab 4 are we?

22 MR. BOWSHER: In CEPT, tab 4, page 11. Sorry, am I going
23 too fast?

24 THE CHAIRMAN: Yes, you are.

25 MR. BOWSHER: I will slow down.

1 Tab 4, page 11, 4.2.1, five lines from the bottom:

2 "Furthermore they may play ..."

3 It is a sentence of which much has been made by
4 Ofcom and Inmarsat, but it is important to read the
5 whole sentence. They refer to the -- what CGCs can do.
6 They say:

7 "Some types of CGCs can transmit traffic from one
8 end user to another without passing through the
9 satellite component", et cetera, et cetera:

10 "Such direct routing would temporarily bypass the
11 satellite component".

12 That, "Temporarily", must be important. It is
13 a temporary bypass of the satellite. It emphasises that
14 even to the extent that CGC is contemplating a cut-out
15 of the satellite, it is only on a temporary basis.

16 THE CHAIRMAN: How would a CGC operate passing through the
17 satellite component? I can understand the system in
18 which it exists to provide a ground signal,
19 a ground-to-ground signal when there is no satellite
20 signal.

21 MR. BOWSHER: It is traffic from -- I imagine it is positing
22 traffic from one end user to another and it is
23 saying, "This phonecall is a phonecall that should --
24 the primary route should be through the satellite.
25 There may be a temporary bypass through a CGC".

1 THE CHAIRMAN: I understand that, but this sentence says:
2 "Some types of CGCs can transmit traffic from one
3 end user without passing through a satellite", so it
4 goes from phone to ground station to phone, so what
5 circumstances would the satellite be involved in
6 a complimentary ground thing?

7 MR. BOWSHER: Can I think about that over the break rather
8 than just venture a thought?

9 THE CHAIRMAN: It probably was a matter for the experts but
10 I find that a puzzling sentence.

11 MR. BOWSHER: Can I reflect? I'm not sure what the
12 technical purpose of that would be.

13 THE CHAIRMAN: I suppose you could go phone to ground system
14 to satellite to another phone.

15 MR. BOWSHER: Perhaps.

16 THE CHAIRMAN: Provided that at least one phone is in line
17 of sight with the satellite.

18 MR. BOWSHER: I mean, presumably a blockage phenomenon, but
19 I'm not -- but rather than hypothesise, can I reflect as
20 to whether there is an obvious reason?

21 The short point is, whatever that is addressing,
22 which may be clearer to telecoms experts than to myself,
23 it is a temporary bypass. That is the key point. It
24 cannot be permanent, primary default or whatever. It
25 particularly is so because the use of CGCs is restricted

1 to those places where communications with the satellite
2 cannot be ensured. That is reflected in the express
3 terms of -- so notably, one of -- sorry -- none of this
4 precludes the provision of aeronautical services,
5 particularly when you consider that aeroplanes always
6 have a line of sight to the satellite at cruising
7 altitude, and EAN will not operate below 3,000 metres.
8 We know from Inmarsat's evidence that it could have
9 provided aeronautical services from an S Band satellite.
10 The only condition is that Inmarsat first had to ensure
11 that the Article 4 requirements were met.

12 So the only sensible interpretation of this
13 framework is that whatever is delivered is prioritised
14 through an earth-to-space route. This, therefore --
15 this priority makes clear that the purpose of the regime
16 it is intended for, whatever underlying reasons, to
17 prevent circumvention of the use of the systems by
18 putting in place truly ground-based systems under the
19 cloak of this authorisation, it is to prevent the use of
20 a system which is ground-based with a satellite
21 supplement because that would not serve the main
22 purpose. It explains why a mobile earth station is not
23 permissive of separate kit that is unable to speak to
24 the satellite. It explains why CGCs can only be used
25 within the footprint of the satellite. It explains why

1 it is relevant to consider the balance of use between
2 a CGC and an MSS in order to determine whether to
3 designate the band for that MSS, or whether that
4 designation is being respected as a primary use. It
5 explains why CGC cannot be used exclusive to drive
6 a system through despite an inadequate satellite signal
7 being available, in order to provide a level of service
8 that only a terrestrial network can provide and it
9 explains why CGCs can only operate independently in
10 cases of satellite failure and even then for no more
11 than 18 months. Once one understands that, what flows
12 from that is fairly clear.

13 The separate ground-facing station which would
14 comprise the transmitter, receiver antenna, together
15 with its separate modem, that speaks a different
16 language, cannot amount to a mobile earth station. It
17 can't speak to the satellite. The vast network of
18 ground-based stations which dwarf the capacity of the
19 satellite are not complimentary in any way. They do not
20 respect the designation of the 2 gigahertz band as the
21 principal or primary basis for Mobile Satellite
22 Services. Instead the band is being used on a principal
23 and primary basis for terrestrial services with the
24 satellite providing the complimentary or supplementary
25 role to that primary ground use. We know the 2 GHz Band

1 will be used to service aircraft without satellite
2 terminals being installed.

3 MR. WARD: It has been repeated many times but it is just
4 contradicted by the evidence.

5 MR. BOWSHER: We know from the evidence, and we know from
6 the authorisation that there is an expectation that
7 there will be a period where satellite terminals had not
8 been installed after the ground terminals had been put
9 in place. The use of ground-based stations is not being
10 restricted to places where communications with one or
11 more space stations cannot be assured of the required
12 quality. The system does not operate to look to the
13 satellite and then only establish a connection when such
14 a satellite is available, and an aircraft flying at the
15 3,000 metre level will have a satellite available to it,
16 but will still be looking to ground first.

17 Despite, we have this from Mr. Sharkey, despite the
18 signal being available. The aircraft's bulk traffic
19 which will be setting the service levels, will go over
20 the terrestrial network and only use the satellite when
21 it is outside the range of the terrestrial network which
22 is specifically targeted at the EU land mass, to deliver
23 a service to the busy EU flight routes, to the primary
24 routes between the major EU cities. This is quite the
25 inverse of what was required, and this whole legislative

1 context and the definitions are necessary to prevent
2 this system operating in this way.

3 The effect of this authorisation for this Inmarsat
4 solution involves dedication of this spectrum worth over
5 7 billion euros to use on an unpaid for basis in
6 exchange for specific goals, and when we see the
7 priority that has been made, that purpose is undermined.
8 It may be why -- it may be, when you look at what
9 Inmarsat originally offered, that that made sense, that
10 then made sense of the requirement that they would be
11 providing some satellite services which cross-subsidised
12 other particular aeronautical services as part -- in
13 those niche markets, but it does not make sense in this
14 commercial context.

15 I'm going to turn to Ofcom's role next. Would that
16 be a convenient point to move on?

17 THE CHAIRMAN: Yes.

18 MR. BOWSHER: Ofcom failed to consider, in this case,
19 whether the EAN is a Mobile Satellite System. They took
20 that -- they seem to have taken that as read. They
21 acted in full knowledge of the position we had been
22 taking, both with them in our submissions to them, the
23 correspondence is in the file, going back many months if
24 not years. Again, they have seen our correspondence to
25 the Commission and the Commission responds that they

1 have known our position. In the absence of any analysis
2 as to whether the EAN is either a me -- is a mobile
3 satellite system or is the correct mobile satellite
4 system, the authorisation is flawed, fatally so, we say.
5 They have simply taken it that, as we know, that because
6 it's Inmarsat, and Inmarsat were authorised, what
7 Inmarsat wants to do must be covered by the
8 authorisation. That seems to be, at its simplest, the
9 approach that has been taken, and so they have not
10 sought to engage with what must be a clear, hard-edged
11 question of law as to whether or not there is, in fact,
12 a basis for this CGC authorisation, because CGCs can
13 only be CGCs of a mobile satellite system in the
14 corresponding terrestrial segment.

15 There is no -- they are not, therefore, constrained
16 to authorise whatever system that Inmarsat put forward.
17 The cross-cutting theme in Ofcom's case is that it must
18 provide authorisations to the proposal to deliver
19 satellite services because the EU selection decision
20 requires it to do so without further examination. That
21 cannot be right. The regime is intended to harmonise
22 the condition for these systems. Yes, operators are to
23 be selected through the mechanism set out by the EU
24 decision and the Selection Decision but admissibility of
25 those applications turns on the characteristics of the

1 system proposed. It is not a licensing of an operator
2 to do whatever they want, it is maybe a licensing of an
3 operator by reference to the proposal, by reference to
4 detailed analysis of their proposal, and we have seen
5 that in a number of different ways by going through the
6 core applications document. There is a wealth of
7 material which we have referred to, which shows that
8 this is not an open-ended license to put up whatever
9 service you wish.

10 The milestones which are enforceable under Article 7
11 by Ofcom through the commitment condition, they are
12 committed under Article 7.2(b) to meet those milestones.
13 Those are milestones that are related to the content of
14 the submission. There are, therefore, mechanisms by
15 which enforcement can be put forward.

16 It is plain from the Selection Decision -- I can
17 probably jump over this because we have already covered
18 that in answers to your Lordship's questions. All I was
19 going to say is that it is plain that this was done in
20 detail and you get that from the Selection Decision in
21 Inmarsat's paragraph 124. It is also worth comparing
22 the reasons where Terrastar failed on the milestone --
23 it gives you again a sort of flavour of the
24 satellite-specific detail which was being examined when
25 you understand how Terrastar fell away.

1 There was insufficient competition for there to be
2 any competition or assessment of the proposals by
3 reference to the relevant policy goals as would have
4 arisen in the second phase, the lack of that competition
5 perhaps reflects the onerous nature of the social
6 commitments required for the acquisition for free of the
7 highly-valuable band.

8 The entire combined procedure was, therefore,
9 intended to ensure compliance with not just specific
10 satellite and telecommunications requirements, but also
11 with policy requirements to be evaluated. The extent to
12 which that happened was limited by the lack of the
13 second phase.

14 I think, again, that covers -- let me just put
15 a line through bits which we have already covered in --
16 a number of this comes from responses to your questions.

17 None of this, as I have said, can be a surprise to
18 Ofcom. We have set it out, and the Viola letter, E2/58,
19 I may come back to presently, sets out the
20 Commission's -- they are not rejecting our position,
21 they are simply saying it is for national regulators.

22 Can I restate where I was getting to with
23 your Lordship at the beginning in answer to your
24 question, to try and sum up where this error about
25 procedure takes one? Ofcom assumed that the EU

1 selection decision entitled or required it to conclude
2 that the EAN is a Mobile Satellite System. The decision
3 did no such thing. It required it only to grant the MSS
4 authorisation for the system that was then under
5 consideration which it did in 2010, and that is why we
6 have no challenge or quibble with what happened then.
7 We have no reason to challenge that what was being
8 authorised in 2010 was the thing that should be
9 authorised.

10 What we do invite the Tribunal to conclude on the
11 material now before it is that the EAN firstly is not
12 a Mobile Satellite System, but even if the Tribunal
13 concludes that it is a step too far on the basis of the
14 law and the material before it to say that the
15 Tribunal -- to say that -- to go that far, that you
16 cannot conclude that the EAN is not a mobile satellite
17 system, we say that this Tribunal must find that Ofcom
18 has made no finding as to whether the EAN is or is not
19 a Mobile Satellite System, and if it is, is it the
20 Mobile Satellite System that was the subject of the 2010
21 authorisation, and therefore, at the very least, the
22 consequence of this must be that the matter should be
23 remitted to Ofcom for Ofcom to make that determination
24 and determine whether to grant new authorisations for
25 the system now proposed, because otherwise the system

1 breaks down. The integrity of the system breaks down,
2 because Inmarsat is able to effectively put in a bid for
3 free spectrum on the basis of social policy offers, and
4 then not deliver.

5 THE CHAIRMAN: Sorry, which should be reconsidered? New
6 authorisation for the CGCs?

7 MR. BOWSHER: Well, they would have to decide -- indeed --
8 they would have to reconsider their decision for the CGC
9 in light of the question is there, in fact, an
10 applicable MSS -- system -- is there an applicable
11 system to which an authorisation relates. Because
12 without one the CGC process just falls away.

13 I was going -- I have got -- the next two subjects
14 are EAN operation and Ground 1B, the case law that you
15 wanted me to address. Those were my next two ports of
16 call. Would you like me to carry on with them now?

17 THE CHAIRMAN: Do just start the first one, yes.

18 MR. BOWSHER: Thank you.

19 There has been much comment in the written
20 submissions of Inmarsat and Ofcom as to what the EAN
21 comprises. We say -- let's try and put that slightly
22 differently and try and sort of draw it together and get
23 away some of the fog -- what is sold here is the, as
24 Mr. Sharkey called, the, "Chipset", is not a single
25 terminal but two separate terminals, and the

1 ground-facing terminal cannot speak to the satellite.
2 It cannot be a mobile earth station and Mr. Sharkey's
3 reference to a single terminal is, as it were, a form of
4 words designed to obscure the reality. It is a form of
5 words that is not consistent with that which Inmarsat
6 themselves used when responding to Ofcom in this
7 process.

8 If one takes File B, and I'm going to go to some
9 yellow sheets, perhaps what I might do, can I suggest
10 that I actually read these yellow sheets out just before
11 we break, because I would like to read them out but they
12 are all confidential.

13 THE CHAIRMAN: Well, let's just see what they are, first of
14 all, shall we, and see how confidential they really are.

15 MR. BOWSHER: Tab 8 is the -- is part of the material
16 provided by Inmarsat with the letter at tab 7. Tab 8 is
17 headed, "Inmarsat In-flight Connectivity". Sorry, I'm
18 seeing puzzlement.

19 THE CHAIRMAN: It is provided with tab 7, did you say?

20 MR. BOWSHER: Tab 7 was a letter sending material to Ofcom.

21 THE CHAIRMAN: Right.

22 MR. BOWSHER: It was a response to the earlier request. Tab
23 8 is the material that I want to take you to. It was
24 provided to Ofcom under cover of that letter.

25 THE CHAIRMAN: Provided to Ofcom but this is marketing

1 material, basically, is it not.

2 MR. BOWSHER: It is material which was provided -- can
3 I show you the material then I will show you the
4 question.

5 THE CHAIRMAN: Well, it is marketing material. It is
6 directed to an airline whose logos, and so on, are
7 redacted, I'm not going to get excited about that, but
8 this is effectively -- this is not a document, as I
9 understand it, prepared so that Ofcom can understand the
10 proposal. This is a document prepared to be given to
11 airlines so that they can understand what they are being
12 offered, is it not?

13 MR. BOWSHER: Well, yes. Fourth page, question 3, I think
14 probably the introduction to that annex.

15 THE CHAIRMAN: Fourth page of what?

16 MR. BOWSHER: Sorry, tab 7 is the letter.

17 THE CHAIRMAN: Yes.

18 MR. BOWSHER: Third page, question 2:

19 "How will the EAN service be offered to airlines?
20 Is there a commercial Ops to take up only the ground
21 components or only the satellite component? Please
22 provide example marketing materials such brochures and
23 customer presentations".

24 Then jump a paragraph:

25 "The document in annex is an extract of one of our

1 commercial proposals that is currently being
2 negotiated" --

3 THE CHAIRMAN: So it is marketing material. I just wanted
4 to establish the status of tab 8. It is marketing
5 material.

6 MR. BOWSHER: Yes, but it has been produced in answer to
7 a question, "How is this going to be presented and
8 operated".

9 THE CHAIRMAN: Yes.

10 MR. BOWSHER: But yes, it is -- and there is further
11 reference to it under question 3. I think it is
12 referred to there as well.

13 THE CHAIRMAN: It is.

14 MR. BOWSHER: So what is being presented in this material
15 and is being presented to Ofcom is at page 15 of tab 8,
16 under the heading, "6.4", and you see the picture of
17 what is being sold.

18 THE CHAIRMAN: Yes.

19 MR. BOWSHER: Two different pictures, and the paragraph
20 immediately under, "Onboard Equipment", is, we say, very
21 clear as to what is, in fact, being sold, and is
22 inconsistent with the analysis put forward by
23 Mr. Sharkey, and elsewhere, the general notion that this
24 is one single-unit. The underlying functional or
25 systemic reality is confirmed by further material also

1 provided in response to questions which is behind tab
2 12.

3 THE CHAIRMAN: Sorry, which bit of Mr. Sharkey do you say
4 this is inconsistent with?

5 MR. BOWSHER: When he says it is a single satellite
6 terminal. We put it to him in cross-examination.
7 He calls it the -- the unit, a single terminal, and I
8 suggested to him that that was just a form of words
9 designed to conceal the reality. That is the reality.

10 THE CHAIRMAN: Right.

11 MR. BOWSHER: And that reality, that reality in terms of
12 blocks of kit, is -- reflects the true nature of the --
13 sorry, Ms. Banks is just giving me the reference -- it
14 is paragraph 18 of Sharkey 1 --

15 MR. ELPHICK: We have paragraph 55 of the Inmarsat closing,
16 it defines a shipset as an indivisible set of pieces of
17 equipment to be installed on the aircraft so it is not
18 one piece of equipment, it sort of says, "A set of
19 pieces of equipment", which together make up what is
20 needed to make a system work.

21 MR. BOWSHER: Well, that cannot be -- that cannot be right.
22 It may be that it is being sold in boxes, as one unit,
23 maybe the box comes with all of these pieces in it, but
24 we know from Mr. Sharkey's evidence, and let me just get
25 the references, we know from Mr. Sharkey's

1 cross-examination that the two systems will produce
2 a usable signal independently of each other, and in the
3 transcript that is Day 6, page 166, lines 10-12. He
4 accepts Dr Webb's characterisation of the modem, Day 6,
5 page 164, pages 5-10, he accepts that they have been
6 testing the terminals separately on flights and that
7 they have been functioning separately, providing usable
8 service separately and independently, Day 6, page 165,
9 lines 5-10, so -- and he accepts that the two systems --
10 166, 10-12 is the usable signal, so we know that there
11 are, as we have just seen there, two things which
12 function separately. Now, it may very well be that they
13 are being sold in one box, but that is all that it
14 amounts to. They are being sold in one box. We know
15 from what Ofcom themselves found, we know from the
16 evidence that you can, in fact, install one or the
17 other, and each operates independently of the other, and
18 it operates to the best of its capability independently
19 of the other. It may very well be that to provide the
20 full joy of the EAN you might want to have both, but if
21 you are flying backwards and forwards from London to
22 Paris or London to Edinburgh you will never need the
23 satellite terminal. You will get the full service, the
24 full EAN service without ever putting anything or using
25 anything on the top. Indeed, given the fact that the

1 ground-facing terminal will always be there, for as long
2 as the relevant ground stations are working, for most
3 flights, and we have seen the quantitative detail more
4 than enough, for most flights between most European
5 cities, unless you are flying over Serbia you will
6 never -- your bulk service, your EAN luxury service, the
7 service that represents the new innovative sea change
8 will never touch the satellite, because all you will
9 ever have to get is something that goes through the
10 ground-facing terminal.

11 THE CHAIRMAN: But that goes to your point as to whether
12 this is really a ground-based system with a satellite
13 frill, or whether it is a satellite system with some
14 ground-based complementarity.

15 MR. BOWSHER: Yes.

16 THE CHAIRMAN: It does not go to the one box or two point.

17 MR. BOWSHER: Well, it goes to the -- is this really two
18 different terminals or -- Mr. Sharkey used the phrase
19 "one terminal", in his witness statement. What we
20 quibbled with was his use of the phrase -- we did not
21 then quibble, we challenged his use of the phrase "one
22 terminal", because, as I say, this is not one.

23 A terminal is a usable piece of kit: Antenna, receiver
24 transmitter, modem, which produces something at the end
25 of it which you can, if you have got your laptop,

1 whatever, pick up. That is a usable terminal, and what
2 we quibbled with is his -- what we said was by using
3 a terminal and referring to a single terminal, he is
4 maybe making a marketing point but it is not actually --
5 even the marketing point that is being made to airlines
6 or to Ofcom. They are being marketed in a very
7 different way and that reflects the reality.

8 THE CHAIRMAN: Just before we break, I have been musing on
9 this. Can I just ask you this; you say this is two
10 discrete boxes which happen to be joined in the middle
11 by a server which dishes out the end result. Can we
12 take something which I think would probably be close to
13 your paradigm of what they would have been entitled to
14 do, and that is providing a ground-based service with
15 a satellite handset which I have never held in my hand
16 but which I understand to exist, satellite phone
17 handset, right?

18 MR. BOWSHER: Mm-hmm.

19 THE CHAIRMAN: They do exist. One of the expert witnesses
20 talks about three types. There is a hand-held one,
21 there is a vehicle-based one and there is one with
22 a movable dish and they have different capacities,
23 delete you know what I'm talking about.

24 MR. BOWSHER: The sort of thing that the SAS use in funny
25 parts of the world.

1 THE CHAIRMAN: Well, I wouldn't know about that. Not only
2 that, all sorts of people use satellite phones all
3 across the world.

4 MR. BOWSHER: Yes.

5 THE CHAIRMAN: Now, you would be allowed, under the Bowsher
6 view of the world, to have a satellite phone which was
7 capable of picking up a truly complimentary ground
8 signal.

9 MR. BOWSHER: You can have a -- yes -- you can have a user
10 device that is capable of speaking to satellite and
11 ground, yes.

12 THE CHAIRMAN: Right. Right.

13 MR. BOWSHER: Because you judge if functionally. By function
14 and intention that is a user device that as a single
15 thing is intended it do both. Yes.

16 THE CHAIRMAN: And we know from the expert evidence that
17 even though you could have one protocol for talking to
18 different bits, in fact, the optimal way of addressing
19 the communication between the three elements is to have
20 one type, LTE, I think, was one of the preferred
21 options, LTE for the ground-based and DVBS for the
22 satellite-based communication.

23 MR. BOWSHER: Well, we know that of the options in play in
24 this case, that was the best. It has not been an issue
25 in this case as to what would be the best way of

1 delivering that. That has not been a pleaded issue. It
2 is certainly that --

3 THE CHAIRMAN: It is a rational way of going about it.

4 MR. BOWSHER: -- it is a rational way of going about it,
5 and I think Dr Webb conceded that, relatively speaking,
6 there were orders of ranking, yes.

7 THE CHAIRMAN: Yes. Right. So if you are going to have one
8 of my imaginary handsets talking to those things, it has
9 got to have an LTE side and it has got to have a DBVS
10 side if you are going to use the same standards, so it
11 has to have built into it an LTE receiver and a DVBS
12 receiver chipset.

13 MR. BOWSHER: I believe that that is actually a question of
14 programming the modem. I'm not certain -- I will check
15 over the break -- that actually that can be done.

16 THE CHAIRMAN: I thought there was some evidence that you
17 needed separate bits, but the evidence was, for example,
18 if you have a phone, I think this was its evidence but
19 tell me if I'm wrong, if you have a phone which has a 3G
20 and a 4G thing, it has two different bits which are
21 capable of modulating and demodulating the signals and
22 they each feed into a central bit in the phone. That
23 was my understanding of the evidence.

24 MR. BOWSHER: Yes, and some of those pictures would support
25 that is that you could have one or more antennae with

1 the receiver transmitter which would all go to the same
2 modem, the modem would be programmed so as to receive
3 the different languages from the different receivers and
4 that would be, in Viasat's view of the world,
5 a terminal, because it is that modem that produces the
6 usable service.

7 THE CHAIRMAN: But you have still got two separate
8 receivers.

9 MR. BOWSHER: You have got two separate antennae and
10 receivers, yes. One modem.

11 THE CHAIRMAN: Well, you have still got two antennae and
12 receivers, and even if you had one modem in my satellite
13 world, you might have one antenna but you have got two
14 receivers, at any rate, in your handset and your phone.
15 They are linked, in this example, at the level of the
16 modem and the modem then feeds the output to the screen
17 or the loud speaker or whatever it is going to feed it
18 to, right, but you have got them in one box but you have
19 still got two receiving units in that one box that.

20 MR. BOWSHER: Yes.

21 THE CHAIRMAN: Now, what, in essence, is the difference,
22 then, between that and the aircraft where you have got
23 two receiving units on the aircraft, albeit you have
24 probably added two modems? You have got two inputs
25 feeding into a central -- let me be crude, I don't know

1 if our experts are here now so I will allow laymen's
2 language -- into a central dispensing unit. What is the
3 difference between my phone example and what is going on
4 in the aircraft?

5 MR. BOWSHER: Well --

6 THE CHAIRMAN: Why is -- because the handheld one you would
7 accept, I think, as being something which would be
8 allowed under the system, if they had set it up
9 correctly and didn't swap the satellite component. I'm
10 just looking at numbers of boxes and how many things you
11 have got here. What is the difference between this
12 handheld satellite phone and the aircraft?

13 MR. BOWSHER: One sticky says to me, "You may not need two
14 receivers", but let me just put that to one side. The
15 short point is in that example the contrast is between
16 what you then have, is a device which is intended to,
17 and capable of speaking in both directions, and so in
18 our regime world here, what the Legislator has tried to
19 do is say, well, you will be on the plane, you will be
20 wherever you are, you will be in the forest, wherever it
21 is, in this remote area, you will be able to use your
22 phone to the satellite and the social goal of extending
23 satellite use will be extended, and your phone can do
24 either. That is different from this situation where we
25 know that what is happening is that there is -- there

1 are two terminals being sold, yes, they may be being
2 sold in the same box, and maybe -- we will come on in
3 a moment after the break -- there are certain commercial
4 arrangements made to incentivise the two things both to
5 be installed, but they don't have to be installed
6 separately. On the contrary, they can be installed
7 separately, so they don't have to be installed together,
8 they can be installed separately, and we know that, in
9 fact, in operation the unit which is going to be doing
10 all the work in most cases to deliver the advertised
11 service, the bulk data, the watching Netflix, the
12 whatever it is, that is all coming through a unit which
13 cannot speak to the satellite.

14 THE CHAIRMAN: That is a slightly different point as to
15 whether it is one box or two. That is how the thing is
16 operated, what is the substance of the system.

17 MR. BOWSHER: We are talking about a characterisation
18 question.

19 THE CHAIRMAN: We are not talking about a characterisation
20 question at my level of debate. We are talking about
21 how many boxes are there question, which is -- I'm sorry
22 to describe your point so crudely, that is what we are
23 talking about. We have not yet got on to
24 characterisation of system, which is actually
25 a different question.

1 MR. BOWSHER: In terms of number of boxes you will have one
2 or two antennae, maybe one or two receivers, they will
3 go to a modem which will be programmed to accept more
4 than one language and it could be on a ship, on a plane,
5 on the back of a vehicle, whatever, and the difference
6 is that that is a unit which can speak to both, and if
7 it is your handheld set it can speak to both and it is
8 intended to speak to both, and by putting it in place,
9 by putting in place the commercial route for the
10 delivery of that unit you are serving the policy because
11 you are creating a service which will be primarily
12 satellite, so that the notion is that the satellite
13 service has been incentivised pursuant to the social and
14 industrial policy goals set out in the regime, whereas
15 if you put in place a system where most of the time the
16 satellite system is essentially redundant, and the real
17 service, the meat of the service is coming through the
18 terminal but cannot speak to the satellite, you are not
19 necessarily meeting that requirement, you are
20 encouraging people to build-up their capacity, their
21 investment and so forth in the ground communication, and
22 to take a further example, another reason why it matters
23 is when, in ten years' time, whatever the next thing is
24 when we are all having virtual reality on planes or
25 something, and whether or not there is compression or

1 MR. BOWSHER: Yes, but that is the File B which we will be
2 turning to.

3 THE CHAIRMAN: We will be.

4 MR. BOWSHER: We will be turning to the front of File B
5 because it is the authorisations at the front of File B.

6 THE CHAIRMAN: But we can shut the yellow pages?

7 MR. BOWSHER: We can shut the yellow pages.

8 The facts, as found in the authorisation, are not
9 under challenge. We, of course, challenge the
10 significance of the characterisation of the EAN as
11 a hybrid system. We say it is the not a term provided
12 for by the legislature. You have to decide whether this
13 is a Mobile Satellite System or not for there to be
14 a CGC to it, and to go a hybrid or otherwise is
15 effectively a fudge. If you have got both it is going
16 to be a hybrid. The question for this Tribunal, and
17 what should have been the question for Ofcom, is; is
18 this primarily a satellite system. That is the
19 primary -- its main purpose.

20 Now, there are many facts that we can go over
21 about -- which are relevant here, and I anticipate that
22 at some point Mr. Ward, not our Mr. Ward, Mr. Ward for
23 Inmarsat is going to say, "Ah, but Mr Pearce told us in
24 his witness statement at paragraph 57 that airlines will
25 ultimately" -- let me start again:

1 "As we have stated to Ofcom (paragraph 57 of
2 Mr Pearce, we don't need to get it out) as we have
3 stated to Ofcom, airlines will ultimately use the entire
4 integrated EAN so that CGC will not be used
5 independently from the satellite element".

6 Well, we have seen a little bit about what has been
7 said to Ofcom and it may very well be that that was said
8 but it seems that a lot of things seem to have been said
9 to Ofcom. What was said or not said by Mr Pearce is not
10 what is relevant here. What is relevant for this case
11 is what was found by Ofcom, and that is why we start as
12 to what was -- what, in fact, was found by Ofcom, and
13 even on its face the statement there is -- I'm not sure
14 what its value is. To say that it will ultimately be
15 installed, in our submission, doesn't really bite. If
16 anything, that is consistent with what I was saying
17 a few minutes ago, that they will be -- they can be
18 installed separately, not at the same time.

19 So the essential facts of the operation of the EAN,
20 the way it was being marketed, are found in the
21 authorisation. The functional operation of the EAN is
22 uncontroversial. It's in the authorisation, paragraphs
23 3.7 and 3.8, which is at B1, page 8. Again, I'm not
24 going to read all this out.

25 It is clear from that description in 3.7 and 3.8 of

1 the authorisation statement that there are two different
2 separate paths utilising two different standards or
3 languages, one between satellite and satellite terminal,
4 one between ground-facing terminal and ground-facing
5 station. As Ofcom was told by Inmarsat through the
6 marketing materials submitted, B8/15, which is the
7 reference on page 15 -- the satellite terminal includes
8 an -- sorry, we have just been to that. I don't need to
9 get into that again:

10 "The satellite terminal includes an antenna and
11 data unit", ie the modem, which we know from the
12 evidence of Dr Webb, paragraph 37, is the thing which
13 converts the base band electrical signal into a digital
14 data stream which can be use believe sent to an end
15 user, and that was a characterisation that Mr. Sharkey
16 agreed with.

17 We know from the marketing materials that the
18 compact satellite data unit acts as a modem and converts
19 the input signal into a usable capacity. I do not think
20 that's controversial.

21 We know that the ground-facing terminal consists of
22 two small antennas with a separate small modem unit,
23 specific to those antennae.

24 All of that -- there is a range of materials. When
25 one gets to the findings in the authorisation, what we

1 see at B1/8, paragraph 3.8(c), that the control of the
2 satellite segment and the terrestrial segment emanates
3 from the ground, and Mr. Sharkey confirmed that the
4 server on board is a dumb switch consistent with the
5 marketing materials. It's not itself carrying the radio
6 communication service. We know that each of the
7 satellite segment and the terrestrial segment can
8 operate independently. We knew that from Mr. Sharkey's
9 vivid evidence about the Inmarsat tests. We know it
10 from paragraph 3.19 of the authorisation. We also know
11 something about airlines' preferences which I will not
12 read out in paragraph 3.19 which may bear upon how
13 ultimately it will be before the satellite terminals are
14 installed.

15 As to airlines' incentives, as recorded in the
16 authorisation, Ofcom was specifically aware that there
17 was no obligation to install both the ground-facing
18 terminal and the satellite terminal. Ofcom recognised
19 that there may be incentives not to install the
20 satellite terminal even having purchased an integrated
21 system from Inmarsat. We know, if I can take you to one
22 other reference which I think is an open reference, we
23 know about what Inmarsat's expectation was, it is
24 consistent with the ultimate word from Mr Pearce, B,
25 tab 12, first page, under question 1:

1 "Does Inmarsat continue to expect that all airlines
2 will install all three components? Inmarsat's
3 expectation remains that over time all airlines will
4 install all EAN components on most aircraft".

5 Hardly a ringing endorsement. So that even
6 leaves -- that written assurance is not as unqualified,
7 as Mr Pearce would have it in his witness statement,
8 rather that -- I mean, that would seem to suggest that
9 even with their existing customers, that there will be
10 some aircraft that will not have it installed.

11 Ofcom was expressly told by Inmarsat that airline
12 needs and connectivity programme objectives will be one
13 of the drivers for airlines to adopt the two systems.
14 The drivers will include size, shape of airframes,
15 routes and so forth, that there will be a gradual
16 take-up and so on and so forth. None of this is very
17 surprising. They have said it would ultimately be for
18 each airline to decide on the balance of use between CGC
19 and MSS terminals. Inmarsat wasn't saying to Ofcom, and
20 there is nothing to suggest that they were saying that
21 there would be or needed to be universal deployment of
22 the satellite terminal from the go live date, and the
23 findings made -- there is nothing to re-open here on the
24 facts. This is unsurprising. We have unchallenged
25 evidence from Mr. Baldrige that there is an obvious

1 cost with installing kit, time that plane is grounded,
2 cost in terms of increased fuel consumption, that is in
3 Mr. Baldrige statement, paragraphs 58 and 61, it is
4 at tab -- it is file D, tab 1 -- aircraft are only
5 making money when they are carrying passengers, and
6 there are incentives, perhaps, to defer the longer
7 period of downtime that a satellite equipment
8 installation will require.

9 Indeed, Inmarsat is itself marketing the benefits of
10 only having to install the ground-facing terminal as we
11 see from B8/16. Sorry, I said we had closed it and we
12 are going it need to re-open it. My fault. The
13 document which I just told you to close, on the very
14 last page of that same document, under the heading,
15 "Installation", on page 16, I'm not going to read it
16 out, but what we know from the rest of the evidence
17 means that that must be a reference to, "Look what you
18 can do. You can get the ground-facing terminal
19 installed", because we know that that time period cannot
20 relate to the satellite period. That is afterwards.
21 That was picked up by Ofcom in a specific clarification,
22 I'm reminded, in the next tab, tab 9, page 2.

23 THE CHAIRMAN: Sorry, which bit of page 16 of tab 8 are you
24 inviting me it read?

25 MR. BOWSHER: Under, "Installation".

1 THE CHAIRMAN: All of it or just that paragraph?

2 MR. BOWSHER: Just that paragraph under, "Installation",
3 whereas -- what I'm saying is that they are promoting
4 the notion that that is an installation which can be
5 done, and that is a promotion to airlines, as you
6 rightly said, but we know from the timings, from the
7 evidence on timings from Inmarsat that that isn't the
8 installation of the satellite component. They are
9 promoting the notion that you can install the ground
10 terminal and get moving. We say it's -- sorry, I have
11 lost where I was. That prompted a further question.

12 Ofcom recognised in the authorisation the satellite
13 terminal will take longer to install. That's B1/12, and
14 this makes good the point I have just been making,
15 albeit too quickly, so that is File B, tab 1, page 12,
16 Ofcom were told, paragraph 3.22, that the satellite
17 terminal -- basically the ground-facing terminal is an
18 overnight job, whereas the satellite terminal requires
19 a longer stopover.

20 There is -- there are plain incentives for airlines
21 to at least defer the relevant installation.

22 I have covered, I think, in answer to earlier
23 questions, a number of these points. The ground network
24 provides the service. The ground network sets the level
25 of service. The system is designed to look to the

1 ground by default. That is the primary provider. The
2 contribution that is made by the satellite is very
3 specific. It is a contribution in the case of
4 malfunction, it is a contribution in a speculative
5 situation or blockage, a situation which, in
6 cross-examination, Mr. Sharkey could not identify any
7 actual problem, and if there were actual problems you
8 would have thought that would have had to have come out
9 in the CGC design process -- part of putting in place
10 CGC would have been to identify where those blockages
11 would be, so that is a wholly speculative issue is in
12 the area that is are geographically marginal. Literally
13 geographically marginal. This is a system in which the
14 satellite component is literally and geographically
15 marginal. It provides something to meet a coverage
16 requirement, even when it is -- but even when the
17 satellite itself is delivering service, it is not
18 delivering the same service that the ground network
19 provides. We know that there are constraints, we have
20 heard issues about coming to revert to cached content,
21 we know that even at the best low load scenario today
22 that is not going to be the service that is delivered.

23 Just very briefly ongoing forward, only Dr Webb's
24 evidence looks forward. He was much criticised for
25 trying to look forward as to what would happen, and --

1 but he was the only witness who really sought to get to
2 grips with the likely future demand for this service.
3 Whatever else is true, it is plain from the material
4 that there is going to be a substantial -- there must be
5 an expectation of substantial increase in this service,
6 perhaps tenfold. That is what is being sold. It is
7 being sold as a product which is scalable to meet a very
8 large increase in demand. We know from Mr. Sharkey's
9 evidence that the whole premise of EAN is that they will
10 be selling a product which represents an innovative sea
11 change which enables the service to be provided without
12 the limits that are imposed by, say, Emirates, to try
13 and dampen demand. We know from Mr. Sharkey that it is
14 expected that capacity will shape demand, and the
15 reality must be that going forward it will be that
16 scalable service, plainly scalable through the ground,
17 through enhancement of the ground network that is what
18 is being sold. There cannot be any real doubt in our
19 submission that what we are talking about is a ground
20 network providing the primary solution and that the
21 satellite component provides a marginal addition to meet
22 coverage requirements, but it doesn't even meet the
23 availability requirements.

24 I was going to turn, then, in the very few minutes
25 left in my timetable, I wanted to jump away to Ground 1B

1 and the law on -- the EU law issue that your Lordship
2 has already identified.

3 THE CHAIRMAN: Ground 1B being, in a nutshell? Remind me?

4 MR. BOWSHER: Change. General principles. Change to
5 solution is an infringement of EU general law
6 principles.

7 Let me just run into it briefly before I get into
8 opening the Authorities Bundle; Ofcom and Inmarsat
9 counted this claim with a number of observations. We
10 would simply say this it is quite normal in any tender
11 or auction scenario to ensure for any legal system to
12 ensure the integrity of that competitive tender process,
13 particularly one involving the disposal of public
14 resources, particularly where the risk is that the offer
15 on which a tender succeeded might subsequently be
16 changed. At a certain level this is just common sense.
17 Different legal systems have different mechanisms for
18 doing this. This is about establishing and maintaining
19 the integrity of the process put in place by the EU
20 commission. It is nothing to do with splintering the
21 harmonisation or whatever. If what the EAN -- if what
22 Inmarsat has put forward by virtue of the EAN is
23 a material change, then that undermines the integrity of
24 the entire process and that is something which should
25 not be permitted. Yes, it falls to this Tribunal to

1 deal with the matter as part of this -- these
2 proceedings. It arises here, just as it might arise
3 elsewhere.

4 I am not going to go through -- I have got a long
5 list of the various points that they make. I'm going to
6 try and deal with them in due course going through the
7 case law, but the short point is that we are dealing
8 with some substantial changes. We identify them in
9 paragraph 123 and following of our opening. We know
10 that what used to be a solution offering voice data,
11 multimedia, including aeronautical to web has changed to
12 a provision of web services to passengers only. Just
13 superficially, one can imagine how voice data,
14 multimedia, et cetera, might very easily have met the 50
15 per cent availability requirement in a way which this
16 service does not.

17 One can -- we know there is a substantial change in
18 the satellite which was put forward and must have been
19 evaluated. We know that it must have been evaluated, we
20 know, and it is recorded in the Selection Decision, it
21 has changed -- again, the 9-beam and the 3-beam I use as
22 a code for a change from a 9-beam satellite to a 3-beam
23 payload shared on another satellite. There has been
24 a change to the operator. This is no longer a form of
25 mobile satellite service, we say, and the substantial

1 delay involved is also relevant. The principles are
2 well-established principles of EU law. They are primary
3 law. They are not principles that need to be written
4 down in any legislation, they are supervening the
5 content of any of the legislation here because they flow
6 from the treaty. They are embedded in the treaty, even
7 if it is hard, sometimes, to find the words this
8 actually write them down.

9 I'm going to start backwards, if I may, by
10 addressing your Lordship's question about what they
11 might involve and how they have been applied in
12 practice, and then look at where they come from.
13 A short discussion as to what they involve arises --
14 appears in the *Firebuy* case, if one takes the
15 Authorities file, file GA, this was a procurement case,
16 this was a case about a competition for a national
17 contract for the delivery of firemen's uniforms.

18 THE CHAIRMAN: Which tab?

19 MR. BOWSER: 3A. Behind 3 there should be an A.

20 THE CHAIRMAN: 3A. Yes.

21 MR. BOWSER: I'm not going to get into the facts of this
22 case, but in short there were a number of points being
23 made. It's not a case specifically about change. This
24 judgment -- the reason for taking you to it is because
25 the passage I'm going to take you to by -- in this

1 judgment of Morgan, J's, has been adopted as sort of the
2 standard quick text by judges dealing with procurement
3 cases. I have given you, in the submissions, a couple
4 of references to very recent cases where it has been
5 referred to. This is treated as being the short text,
6 and it is from about paragraph 26 through to 39 that is
7 the relevant short text that is frequently repeated on
8 this point.

9 He summarises the nature of the -- the existence of
10 the obligations to treat B in an equally and
11 non-discriminatory way and in a transparent way at
12 paragraph 27. He describes what paragraph 30 means in
13 general terms in terms of transparency. In paragraph 31
14 he says:

15 "In relation to equality of treatment, speaking
16 generally this involves treating equal cases equally and
17 different cases differently".

18 Then skipping a couple on:

19 "When the court is asked to review a decision it
20 will apply the above principles".

21 Then jumping to 36:

22 "If the authority has not complied with its
23 obligations as to equality, transparency or objectivity,
24 then there is no scope for the authority to have
25 a margin of appreciation as to the extent to which it

1 will or will not comply with its obligations".

2 But in relation to the matters of judgment there is
3 a margin of appreciation, and then it talks about
4 manifest error, so that is the sort of very, very
5 elementary starting point. What I want to go to next is
6 one or two cases which apply those principles in the
7 context of changes, because that, I think, is the
8 clearest way of answering your Lordship's question of
9 how does equal treatment and transparency bite when you
10 talk about a change.

11 Again, I'm dealing here with a public procurement
12 case. I'm going to turn to tab 19. It is a fairly
13 recent case and it refers to some of the earlier case
14 law which we have already cited. The cases which are
15 most frequently cited with probably *Pressetext* which is
16 the starting point of this, and *Wall*, but the short
17 point is that the Court of Justice has consistently
18 treated these principles operating together as
19 preventing a -- two situations. 1) a tender from being
20 accepted on a basis which changes materially from that
21 which was originally submitted, so that you cannot have
22 change to the content of a tender during the tender
23 process, because that would be contrary to equal
24 treatment. You would be giving one tenderer an unequal
25 opportunity to change its bid. It would also be

1 non-transparency because it would almost certainly be
2 done in secret, but likewise, you cannot permit that the
3 same principles prevent a change being made to the
4 contract after it is entered into, because if you
5 permit -- if you have had a competitive tender the terms
6 of the contract and its performance are set, and then
7 you allow the contractor to say, well, actually, having
8 signed the contract I want to do something else.

9 Again, you have treated all the other prospective
10 competitors unequally because that contract has been
11 secured on the basis of a particular offer and what, in
12 fact, is going to be provided is something different,
13 and that is treated as a breach of equal treatment.
14 That is -- and I can make that good. The lengthy
15 passage I would take you to in this case at tab 19A --
16 no, 19 -- is, I'm told by Danes, it is called, "*Finn*
17 *Frogne*", but you have to swallow the "OGNE", I'm sure
18 I didn't get it right, this is a particular case
19 concerning the terms of a settlement of a dispute about
20 a public contract in which the scale of the contract was
21 reduced. Again, I'm not going to read it all out, but
22 can I take you to paragraphs 27-30 which are
23 particularly relevant. 28 and 29 I'm going to take you
24 to:

25 "It follows from the court's case law ..."

1 And that is the case law which we have already
2 cited --

3 THE CHAIRMAN: Paragraph 28?

4 MR. BOWSHER: Yes:

5 " That the court's case law that the principle of
6 equal treatment and the obligation of transparency
7 resulting therefrom preclude following the award of a
8 public contract the contracting authority and the
9 successful tenderer from amending the provisions of that
10 contract in such a way that those provisions differ
11 materially in character from those in the original
12 contract. Such will be the case that the proposed
13 amendments would either extend the scope of the contract
14 considerably to encompass elements not initially covered
15 or to change the economic balance of the contract in
16 favour of the successful tenderer, or if those changes
17 are liable to call into question the award of the
18 contract in the sense that had such amendments been
19 incorporated into the documents which had governed the
20 original contract procedure, either another tender would
21 have been accepted or other tenderers might have been
22 admitted to that procedure".

23 I will come back to that in a minute. Go to 29:

24 " As regards the latter case, it must be noted that
25 an amendment to the elements of the contract consistent

1 in it reduction in the scope of that contract's subject
2 matter may result in it being brought within reach of a
3 greater number of economic operators, provided that the
4 original scope of the contract meant that only certain
5 undertakings were capable of presenting an application
6 or submitting a tender any reduction (et cetera) may
7 result in that scope of contract being of interest also
8 to some operators".

9 Now 29 is just an example of 28, the general
10 principle is in 28. The consequence of all of this in
11 procurement law terms is set out in paragraph 30.
12 Perhaps we don't need to dwell on it but it refers to
13 the two cases which we referred to in our opening, and
14 again in the time I'm not going to take up time on that.

15 The answer to your Lordship's question in my
16 submission is paragraph 28. It would be a breach in
17 general terms to accept -- if amendments are made to the
18 scope of a contract which would change the economic
19 balance in favour of the successful tenderer, or which,
20 had they been incorporated in documents which governed
21 the award procedure, might have led to different
22 tenderers. You have evidence from Mr. Baldrige that if
23 he had known that, essentially, to put it very simply,
24 if he had known that what is now put forward as the EAN
25 was, in fact, a solution which was permitted by the

1 original legislative scheme, then Viasat would have
2 looked at the matter very differently, and would have
3 had to -- certainly would have considered making a bid.
4 There is no reason why Viasat would be the only one in
5 play. You have already heard today there are other
6 competitors interested, but it would also -- if what you
7 could do was put in place a ground-based network in
8 spectrum you were getting for free you wouldn't be
9 confined, obviously, to mobile satellite operators.
10 More likely you would be looking at ground based
11 operators who might try and get a satellite
12 subcontractor to enable them to secure that advantage.

13 THE CHAIRMAN: Can I just see where we are with this? This
14 assumes that what they have put in is a Mobile Satellite
15 System which complies, and they are putting in a CGC
16 which technically complies, does it?

17 MR. BOWSHER: It only adds to our case in that circumstance.
18 It encompasses and goes beyond the -- if it's not an MSS
19 and it is not a CGC then these principles still bite,
20 then Ground 1A is right but also Ground B because there
21 has been a material change because they have been
22 allowed to put in a non-MSS. It may be, also, that
23 there are circumstances in which there has been -- that
24 there -- that what is put in place is a Mobile Satellite
25 System, and that it is a legitimate CGC, but we would

1 say nonetheless, on top of that, the change is such,
2 even though the regulatory ticks can be put in place,
3 the change is such that these principles mean that the
4 CGC authorisation should not be granted.

5 THE CHAIRMAN: Well, how does that work? So on this
6 hypothesis they put in an original -- let's call it
7 a tender even though it is not, well, they put in an
8 offer, and that is all right and they win, they then
9 propose -- and on this footing it is general, it doesn't
10 actually specify what system they are going to put in,
11 they then propose something which is permitted by that
12 offer, on this hypothesis, it's not outside the scope of
13 what they were authorised to do, and certainly not
14 outside the scope of their offer, how, then, do these
15 principles come into play in those circumstances?
16 Viasat might say, well, I wish we had known, we would
17 have had a go, but then the answer is, well, you didn't.
18 You could have done exactly what we did, but you didn't.
19 I'm struggling to see how this principle applies, if
20 what they are doing is within the current definitions.

21 MR. BOWSHER: Well, my Lord, that, with respect, cannot be
22 right, because the starting point for --

23 THE CHAIRMAN: Well, it is right that I'm struggling, so I'm
24 just struggling to see how --

25 MR. BOWSHER: That was it. The starting point for this

1 analysis must be the Call for Applications rather than
2 anything else, because we are dealing here with
3 a competitive process in which what we are dealing with
4 is the operation of the process that was started by the
5 Call for Applications. That called for particular
6 proposals to meet certain criteria in order to, as it
7 were, to get the points that were going to enable you to
8 win, and bidders -- potential providers will have looked
9 at the Call for Applications and decided those are the
10 parameters that we have to meet, and --

11 THE CHAIRMAN: And on this hypothesis, if I can just
12 interrupt for the moment, on this hypothesis, what they
13 have done is within the Call for Applications, and what
14 distinguishes this case from any of the tender cases
15 that you referred to is that when you get to the
16 variation position after the contract is that the
17 contract is different from that which was tendered.

18 MR. BOWSHER: Can we go back to the Call for Applications
19 then? Because in order to have responded to the Call
20 for Applications, you will have had to have put in
21 a proposal which demonstrates compliance with each and
22 every one of the milestones, for example, and you will
23 have had to have shown how you are going to comply with
24 those milestones.

25 THE CHAIRMAN: Yes.

1 MR. BOWSHER: By reference to a particular proposal, it will
2 not be an abstract question, it will not just be an
3 assurance, yes, I will do it, it is evaluated, because
4 we know from the selection decision, because they go
5 through in some detail, and I pointed out to you --
6 well, I referred you to a reference where someone has
7 failed, this will not have been some abstract, "Please
8 tell us it is going to be all right", experts have gone
9 in and have analysed, on this system, is it or is it not
10 all right.

11 THE CHAIRMAN: Yes.

12 MR. BOWSHER: And so let's -- Viasat, let's take Viasat as
13 a real example, if Viasat are faced with the Call for
14 Applications and think, well, here is an opportunity for
15 some free spectrum, in order to do that I will have to
16 meet certain satellite-specific requirements, I will
17 also have to demonstrate that I can meet certain social
18 goals because that, again, is going to be scored in the
19 Call for Applications, there are large parts of it --
20 you will have to show that the service that you are
21 going to deliver pursuant to this system meet a series
22 of social goals, that's all in the -- particularly in
23 the second phase, but in -- because you will have to
24 show what services -- for example, in fact, even at this
25 stage you will have to show in Annex 3, part of the

1 scoring will deal with the extent to which the policy
2 objectives are met in accordance with the following
3 three equally weighted sub criteria, so you will have to
4 put through a fully-formed proposal which says, "This is
5 the satellite I'm going to use, it will meet this
6 schedule, it will do this, it will meet the technical
7 requirements of being a system in this way, it will meet
8 the public policy criteria because this population in
9 this remote part of the EU will be able to do something
10 they were not able previously to do, it will deliver
11 this particular service which meets the digital divide
12 concerns which were the concerns of the Legislator
13 underpinning this whole process". Just a reference,
14 F7/14, if you go through those selection criteria, and
15 you can then look at them being worked up in more detail
16 in those more detailed pages that follow, where there is
17 scores and allocations of scores.

18 MRS. WALKER: Mr. Bowsher, may I ask a question? My reading
19 of the 2008 decision was that those detailed selection
20 criteria only applied to the second phase which actually
21 was never reached in this particular process, so my
22 reading of the 2008 instrument, I was going to ask Ofcom
23 about this later, was that there is a lack of clarity
24 about whether what was being authorised was an operator
25 or a system providing Mobile Satellite Services, and I

1 wanted to explore that with Ofcom, but I had certainly
2 understood that only two applicants succeeded, and
3 therefore the second selection phase in Article 6,
4 setting out the detailed criteria, was never met. What,
5 as I understand it, would have had to have happened was
6 that any application under the first selection phase,
7 Article 5, would have had to set out, indeed it says
8 this:

9 "The credibility of themselves as applicants and
10 the viability of the proposed Mobile Satellite System".

11 But that was only setting out a Mobile Satellite
12 System and not the detailed criteria you are talking
13 about.

14 MR. BOWSHER: Yes. Can I take you through that? Can we go,
15 then, to File F, tab 6? Page 19. We start on Article 3
16 which tells you -- page 18 tells you that fair and
17 discriminatory opportunity to participate in the
18 comparative selection procedure, blah-blah, so these
19 principles are in there already. They are baked in, but
20 they prevail above.

21 Article 4, so the first stage is that applicants
22 have to meet certain admissibility requirements, and for
23 that they will provide a commitment as to availability,
24 and provide information largely about, if I can loosely
25 put it, themselves at that phase, and the Commission

1 will decide on the basis of those commitments and the
2 information about themselves at that stage, but if you
3 then go on to Article 5, once you have decided who is
4 admissible, you shall decide Article 5.1:

5 "The Commission shall assess whether applicants
6 have demonstrated the relevant level of technical and
7 commercial development of their respective Mobile
8 Satellite Systems. Such assessment shall rely on the
9 satisfactory completion of Milestones 1-5", then they
10 talk about the credibility of applicants also being
11 taken into account but what is plain is that the
12 assessment at the first stage, which did happen, is by
13 reference to satisfactory completion of the milestones.

14 Now those -- you can get a bit more from that if you
15 just keep your finger there, I'm sorry to ask you to use
16 fingers, but if you go to -- keep your finger there and
17 then go to the Call for Applications which is at tab 7,
18 page 9, you get more concrete -- this is the Call for
19 Applications which bidders will have read, and there is
20 a description here, again, you have got the same
21 material at the top, you are looking at the commercial
22 and -- technical and commercial development of the
23 mobile systems and then there is discussion below as to
24 how that analysis will take -- will go on.

25 Now, if you go to the milestones which are at page

1 13 of the document we are just in, you can see 1 is
2 perhaps -- it is just an application, but 2, 3, 4 and 5
3 are all system-specific, so for 2 you actually need to
4 have is a contract with someone to build a satellite.
5 That is not general. That is not, "We will build
6 a system which will -- we will build a system with
7 a satellite of this general performance". In order to
8 get through this first selection phase which Inmarsat
9 had to do, they presumably had to produce a binding
10 contract, presumably with Thales Elena(?), presumably
11 a binding contract for the Europasat 9-beam satellite,
12 and it is that that will have been evaluated by the
13 experts. Presumably they will have looked at the
14 technical annexes and said, "Yes, that is a satellite,
15 that is a real thing, it will do what it says it will
16 do", et cetera, et cetera.

17 Again, satellite launch agreement. They presumably
18 will have had an agreement with whoever -- Arriane(?),
19 the Russian launch -- whichever launch facility they
20 were going to use, and agreed for a launch on
21 such-and-such a date or a provision agreement or
22 whatever, but it will have been a real, binding
23 agreement for the construction -- binding agreement for
24 the construction of earth stations, and then perhaps
25 most importantly:

1 "Completion of the critical design review".

2 There will have to be, at this stage, at this first
3 selection stage they will have had to have shown, as it
4 says there, clear evidence, no later than 80 working
5 days after the submission of application of the critical
6 design review in accordance with the construction
7 milestones indicated in the satellite manufacturing
8 agreement. The relevant document shall be signed by the
9 satellite manufacturing company, and shall indicate the
10 date of the critical design review. This is not a sort
11 of general -- this is not some general notion of, "We
12 will provide a satellite". This is satellite-specific
13 material, presumably the satellite manufacturer is going
14 to come forward and say what he did or didn't do, and
15 that is where some people came unstuck. Paragraph,
16 recital 19 of the selection decision, perhaps we don't
17 need to turn it up, I can just read it to you. I took
18 you to it earlier.

19 The applications of ICO Satellite Limited, Inmarsat
20 and Solaris were supported by clear evidence in this
21 regard which led the Commission to consider that this
22 milestone had been satisfactorily completed.

23 As I say, the Terrastar reference which I gave
24 earlier and now can't see actually shows that this is
25 where they fell short.

1 MR. WARD: Just for convenience, 8 of those other two
2 applications is in recital 7. They missed deadlines for
3 submission.

4 MR. BOWSHER: Thank you. It is further developed in
5 paragraph 21 of -- in recital 21 of the selection
6 decision at tab 8:

7 "The inconsistent between the information provided
8 in the application and the information ..."

9 This is relating to the critical design review
10 provided subsequently:

11 " ... and the lack of clear evidence of the
12 completion of the critical design review are to the
13 satellite referred to in the satellite manufacturing
14 agreement is included in the application, led the
15 Commission to consider that Milestone 5 in conjunction
16 with Milestone 2 had not been satisfactorily completed
17 by Terrastar Europe".

18 That is not why they failed. They failed because
19 the technical offering for this satellite by Terrastar
20 wasn't up to snuff. So this is a technical evaluation
21 of the Terrastar offer. It fails. Technical evaluation
22 of the Inmarsat offer succeeds. We don't know anything
23 more about the detail.

24 We know, also, that -- this is a satellite-specific
25 analysis, or going back to -- I will use the word,

1 "Satellite", in priority once more.

2 MR. ELPHICK: Is the answer to Mrs. Walker's question that
3 Article 6 was never triggered?

4 MR. BOWSHER: Can I come on to that -- yes, it was never
5 triggered. My point is that's not relevant because
6 there is only one solution. You can't go to the second
7 phase with something different from what went through
8 the first phase. What you put forward in the first
9 phase is to be a fully worked-up satellite solution.
10 Now, it happens that there wasn't a competition at the
11 second phase, so the people who got the spectrum were,
12 as it were, the last people standing, but they must have
13 expected, when they put their application in, that they
14 would have to meet the scoring requirements all set out
15 in Annex 3. They wouldn't have -- they would have known
16 that they wouldn't have had the opportunity to change
17 their bid between the first and selection phase, and so
18 what they put forward for the first phase would have had
19 to make all the technical and social and other
20 compromises which they thought they needed to make in
21 order to get through the first phase and win the second
22 phase.

23 MRS. WALKER: I mean, I understand that. My reading is
24 slightly different. The 2009 commission decision talks
25 about whether applicants have demonstrated the required

1 level of technical and commercial development -- this is
2 Recital 8 -- of their respective mobile and satellite
3 systems, so my reading was that there didn't have to be
4 a firm contractual arrangement for a particular
5 satellite but that the technical and Commercial
6 Development was there. Actually, that point may not
7 matter hugely, because in putting that forward they
8 presumably would have had to have scoped something about
9 where their Mobile Satellite System was, so all I'm
10 trying to do is to drive a distinction between whether
11 there would have had to have been a contractually signed
12 agreement in detail. That's not my reading, but I can
13 take the point that there would have had to have been
14 sufficient understood about the Mobile Satellite System,
15 as this application was put forward, and then the
16 question that you are saying is that if Inmarsat relied
17 on a particular description of a Mobile Satellite System
18 you are then arguing that that could not be radically
19 changed without triggering the EU law provisions, and
20 that was actually the question I was going to ask Ofcom
21 to expand on this afternoon.

22 MR. BOWSHER: I may have missed out just one link in that,
23 then. The milestones I took you to in the Call for
24 Application are the same milestones in the 2009
25 decision.

1 MRS. WALKER: I understand that.

2 MR. BOWSHER: And they include the reference to binding
3 agreement, so yes, it may be true that, as you say, that
4 there will be some -- you will be looking at credibility
5 and so on and so forth, but you will not get through the
6 first -- the process -- the process which is provided
7 for in the operative legislation, Article 5, as opposed
8 to the recitals, explicitly refers to the requirement to
9 meet those milestone which explicitly refers to binding
10 agreements with regard to specific satellite and so on
11 and so forth, so that's tab 6, page 23, so you won't
12 have got -- there is no way that Inmarsat can have got
13 where they did without going through -- without
14 providing all of those binding agreements in respect to
15 a specific satellite. Not unless this process has been
16 waived.

17 Sorry, I'm sorry, I'm not sure I -- does that
18 eventually answer your question?

19 MRS. WALKER: That clears my point. Thank you very much
20 indeed.

21 MR. BOWSHER: And the second point is, and also, whatever
22 they did they will have known would have had to have
23 gone on to meet the second criteria, even though, as you
24 rightly say, they never had to meet that challenge
25 because there wasn't enough competition.

1 MRS. WALKER: Thanks.

2 MR. BOWSHER: The short point is, obviously, for Viasat or
3 any other operator, it is the balance there that makes
4 you -- that drives your decision whether to bid or not.
5 You look at all these things that are in the Call for
6 Applications, in order to get this contract I'm going to
7 have to promise this, this, this, this and this. Is
8 that something I want to do. It must be -- you have the
9 evidence of Mr. bald ridge from one competitor and it
10 really cannot be a surprise that if you had known that
11 this changed solution was something which you could do
12 under this regime then it was going to be rather good
13 business to get some free spectrum to do it.

14 THE CHAIRMAN: This submission of yours requires clear
15 evidence of what it was that Inmarsat said they were
16 going to do, so one can clearly measure their proposal
17 then against what they were proposing to do now, doesn't
18 it?

19 MR. BOWSHER: Well, it's in our submissions, I have given
20 you the clear --

21 THE CHAIRMAN: Can we deal with my question first of all?
22 It does?

23 MR. BOWSHER: It requires a basis for establishing that
24 there has been a material change. Yes. I would suggest
25 that there is such evidence. You have the -- all you

1 need -- you need to show that there has been a change in
2 the balance of the contract. What you can tell from the
3 evidence is that there has been -- I will go to the list
4 again -- we know that the solution offered now in the
5 EAN is not the solution which was subjected to the first
6 selection process. We have been told that the original
7 solution offered voice, data, multimedia, including
8 aeronautical to web services -- sorry -- including
9 aeronautical. We know that was -- we know that the
10 original offering was for that mix. That is a very
11 different mix from what is now being offered. That, in
12 itself, is a material change. The very fact that a mix
13 of voice, data, multimedia, I mean, I just use those --
14 they sound like glib words but one just has to think
15 about what that actually involves. If you are
16 delivering those services, presumably in a remote area,
17 you are going to have to put in place new delivery
18 systems. You are going to have to work out how you are
19 going to -- what is the user equipment, how are you
20 going to sell it, how are you going to sell the service.
21 This is a completely new commercial -- different
22 commercial offering. This isn't something you just bolt
23 on.

24 That is what they have -- it's all set out in
25 paragraph 92 of our closing submissions. They must have

1 met the various commitments and milestones in respect of
2 a specific satellite. The change to the satellite is in
3 itself material change. That is beginning and end of
4 it. That is all we need to make this case good. We
5 know that the choice and operation of the satellite was
6 essential to the operation of this -- to their getting
7 through to the second phase. We do not have to show
8 that this change definitely made a difference. The
9 nature of these principles of equal treatment and
10 transparency is to protect the integrity of the process
11 and they do not require certainty as to what would have
12 happened if. What they say is that the -- is the
13 risk -- it is the risk is sufficient that that is -- so
14 that if you can show that it would or would likely have
15 made a difference, that is sufficient. We can show
16 these substantial changes -- change in outcome, change
17 in satellite which must be significant, because it is
18 the very basis upon which the choice -- they won their
19 position, and the various other points, change to
20 operators, substantial -- it is all set out in detail in
21 paragraph 92 of our closing.

22 That, we say, is sample to make this point good. To
23 turn it on its head, if Inmarsat had wanted to -- given
24 the fact that we have created, we would say, at the very
25 least, a strongly rebuttable presumption that there has

1 been material change, it was always open to Inmarsat to
2 bring forward the evidence to show that, in fact, it is
3 more or less the same thing, because these principles
4 don't prevent all change, they permit change, they
5 permit change that is expected within the four corners
6 of the project or the contract, they don't freeze the
7 process, but they do not permit this sort of change.

8 The other case I needed to just remind you about is
9 the case is *Costa* and *Belgacom*. The evidence of bald
10 ridge on all this is unchallenged. Mr. Baldrige was
11 not cross-examined. He gives lengthy evidence. He
12 gives evidence on all of this about the market effects
13 of these changes. That has not been challenged. That,
14 in itself, was sufficient.

15 All I was going to say I'm not going to take you to
16 it again because *Costa and Belgacom* are referred to in
17 our submissions but they both make good the proposition
18 that these general principles of equal treatment and
19 transparency are principles from the treaty. They are
20 not confined to public procurement settings, they relate
21 to, in the *Costa* case, the grant of a license for
22 gambling operation. In *Belgacom* it is a license for
23 some telecoms -- particular telecoms license. There is
24 a more recent case, I can't remember whether we cited it
25 in the end, all to do with the grant of a license to

1 operate pleasure boats at the bottom of Lake Garda.
2 When you have a publicly operated competitive tender
3 those treaty obligations bite on the public body, either
4 running the process or whose activity can affect that
5 process.

6 I have gone on.

7 THE CHAIRMAN: Is there anything else that you want to say
8 if you have two minutes?

9 MR. BOWSHER: No.

10 THE CHAIRMAN: No. Thank you Mr. Bowsher.

11 Mr. Holmes, how long do you believe you will be,
12 assuming, unlikely though it seems, no questions -- in
13 fact it is improbable because I know we have got some
14 questions, but just left to your own devices how long do
15 you think you will be?

16 MR. HOLMES: An hour-and-a-half sir.

17 THE CHAIRMAN: An hour-and-a-half. Mr. Ward?

18 MR. WARD: Well, I will cut my cloth accordingly sir because
19 I know that it's important that we finish this case
20 today.

21 THE CHAIRMAN: Well, you must if you think that you will
22 need more time you just tell us how long you will need.
23 In fact, so much your case is in common with
24 Mr. Holmes --

25 MR. WARD: It is. I had in mind 45 minutes.

1 THE CHAIRMAN: So an hour-and-a-half, 45 minutes. That is
2 two and a quarter hours, that will take us to 4.15, if
3 you both adhere to that, and then we will have to have
4 our break. There will be some questions.

5 We will resume, to give ourselves time for breaks,
6 accidents and overruns, we will resume at quarter to
7 two.

8 (1.00 pm)

9 (Luncheon adjournment)

10 (1.48 pm)

11 SUBMISSIONS BY MR. HOLMES

12 THE CHAIRMAN: Mr. Holmes, before you start, first,
13 Dr Elphick has a request that he wishes to make, and
14 then I know that Mrs. Walker has a couple of questions.

15 MR. HOLMES: I'm grateful sir.

16 MR. ELPHICK: So just one question about enforcement. At
17 various times in the last few days we have heard about
18 the opportunities for enforcement action being taken
19 under Article 7.

20 MR. HOLMES: Yes.

21 MR. ELPHICK: You may not know this off the top of your
22 head, but we wonder if we could have some record of what
23 sorts of enforcement action have already been taken, or
24 are in the process of being taken, in different
25 jurisdictions.

1 MR. HOLMES: I'm grateful, sir. I may not be able to attend
2 to that fully on my feet.

3 THE CHAIRMAN: Well, Mr. Holmes, I think what we would
4 propose is that if someone can put down, preferably on
5 just one side of paper what enforcement steps are being
6 taken in various jurisdictions, I know that there are
7 references to enforcements scattered around the material
8 we have got and one of the reasons that we asked the
9 question is that no one of us can actually put his or
10 her hands on exactly where they all are, but we should
11 not have to do that. It is just a question of a few
12 lines, preferably on one side of paper, and agreed
13 between you if you would, please, and then it can be
14 transmitted to us.

15 MR. HOLMES: The task is clear. We will do that.

16 THE CHAIRMAN: It may be that most of it does appear in one
17 place but I for one couldn't tell you where this place
18 was, so that's the first thing. Thank you.

19 MR. HOLMES: Thank you.

20 MRS. WALKER: I had a couple of points which I would be
21 grateful if you could, either with your evidence, bring
22 out answers to. Some of them I referred to this
23 morning.

24 MR. HOLMES: Yes.

25 MRS. WALKER: My reading of the 2008 decision, it begins by

1 saying it was on selection and authorisation of systems
2 providing Mobile Satellite Services.

3 MR. HOLMES: Yes.

4 MRS. WALKER: And then when it gets to the Articles itself
5 it talks about the selection of operators of Mobile
6 Satellite Systems. Then when you get to Article 5 it
7 talks about the credibility of applicants and the
8 viability of the proposed Mobile Satellite Systems. So
9 it seemed to me it was a mixture of something about the
10 operator and something about the system that they were
11 proposing. So I actually have two questions arising
12 from that. We have not got complete information about
13 what it was that Inmarsat was offering in terms of a
14 proposed Mobile Satellite System, but if there was
15 a change in that, a significant change in that, my two
16 questions are; is that relevant, and, if not, why not,
17 and if it is relevant then how do the EU principles come
18 to be applied to that change, particularly against the
19 backdrop that both Article 7 and Article 8 say that the
20 Member States, when carrying out their role under
21 Article 7 and Article 8 need to do that in accordance
22 with national and community law. So that was, I'm
23 sorry, slightly complicated but I hope you can see what
24 I was meaning there.

25 MR. HOLMES: Crystal clear. Yes.

1 MRS. WALKER: Thank you, and then the second issue is; given
2 that the job is the authorisation of a Mobile Satellite
3 System, and we have had a lot of discussion about the
4 fact that some airlines may decide, or some aircraft may
5 decide not to have a satellite antenna, what does that
6 do to the definition of whether a Mobile Satellite
7 System exists if you have a plane which happens not to
8 have a satellite leg enabled on it?

9 MR. HOLMES: I'm grateful for those questions. Beginning
10 with the first, if we could take up the 2008 decision,
11 it is probably easiest to do it by reference to the
12 provisions there, it is at tab 6 of Bundle F, and in
13 summary, my submission will be that the selection was
14 indeed of operators, but as part of the process of
15 selection, it is clearly correct that their particular
16 plans for the spectrum were considered and were taken
17 into account. Those proposals contained commitments
18 which become binding by virtue of the common condition
19 under Article 7, and are enforceable as such.

20 MRS. WALKER: Right.

21 MR. HOLMES: That is the way in which the value contained in
22 their plans is crystallised, and they are held to that
23 value.

24 MRS. WALKER: So that is 7.2(c).

25 MR. HOLMES: Yes.

1 MRS. WALKER: "Selected applicants shall already honour
2 commitments given their applications".

3 MR. HOLMES: Yes.

4 MRS. WALKER: Yes.

5 MR. HOLMES: So the balance, the economic balance which is
6 at the core of Mr. Bowsher's Ground 1B is effectively
7 captured by two things. Firstly, and on the one hand
8 the commitments given, and, secondly, and on the other
9 hand, the requirement that what they actually provide is
10 indeed a Mobile Satellite System, and that if they opt
11 to use CGCs that their ground stations are, indeed,
12 CGCs, and, in fact, I don't understand that to be
13 contentious. If I could take you to a passage -- I will
14 come back to the legislation to make this good in more
15 detail, but I just want to show you where the submission
16 comes out in terms of the Ground 1B, the general
17 principles, if one turns within Viasat's closing
18 submissions to paragraph 131, and if you pick it up at B
19 on page 56 -- I'm so sorry, let me go back, there is
20 a prior reference that I need to pick up -- paragraph
21 125 on page 51. You see the first point is that the
22 Commission evaluated the specific mobile systems being
23 proposed. Well, we don't dissent that the Commission --
24 from the fact that the Commission did look at what was
25 being planned. This would be expected in any such

1 process, but particularly so whereas here operators were
2 being granted a highly valuable right without monetary
3 payment, and then they say this:

4 "The consideration in return for that right was the
5 obligation to use this spectrum for the specific
6 purposes set down in the EU decision and the delivery of
7 any commitments made".

8 So two things there, sir. The first of those two
9 things, the specific purposes set down in the EU
10 decision, can only, in our submission, be the
11 definitions of Mobile Satellite System and of CGCs, and,
12 of course, that aspect a full square before this
13 Tribunal and will be determined in these proceedings,
14 and if they are departing from those purposes, then
15 Ofcom's decision will need to be set aside. I made that
16 point in opening.

17 Looking at the second limb, delivery of any
18 commitments made, we agree that is how the value is
19 crystallised, and the commitments are enshrined in the
20 Article 7 common conditions, and again, there is
21 a process to ensure that that value isn't lost, that the
22 economic balance isn't shifted, by Inmarsat failing to
23 respect the undertakings it gave, the consideration or
24 value that it gave in exchange for the spectrum. That
25 process is precisely the enforcement process which we

1 have seen is harmonised and is subject to a particular
2 procedure, if Article 7 is breached then it is for the
3 national authorities to enforce that and because of the
4 harmonised nature of the scheme they now do that through
5 a process of dialogue with the other national regulators
6 and with the European Commission. That is the right way
7 in which that economic value is subject to control, so
8 standing back, we say, yes, the general principles, of
9 course they apply here as they do to all legislation,
10 but they are crystallised, they are achieved through
11 this legislative scheme in a way that does not leave any
12 room for an independent application of them in relation
13 to the separate authorisation of CGCs under Article 8
14 and the national legislation which implements it, so
15 that, in a nutshell, is our answer to the case on the
16 change of use, and just following up on the other
17 reference that I first took you to at Viasat's case, at
18 131, this is where Viasat sets out the various ways in
19 which it says the economic balance has shifted.

20 MRS. WALKER: This is 131 of fair evidence.

21 MR. HOLMES: Yes. You see at 131(a) the punchline is in the
22 final line:

23 "Ofcom has purported to authorise the EAN despite it
24 not amounting to a mobile satellite system".

25 So that is the first limb of the consideration, the

1 value that they have identified, and it is their ground
2 1A.

3 MRS. WALKER: Yes.

4 THE CHAIRMAN: But that is enforced by, or policed, or
5 whatever you like to say, by not having a CGC license.

6 MR. HOLMES: Yes.

7 THE CHAIRMAN: That is enforcement. You just simply cannot
8 grant a CGC for a non-MSS.

9 MR. HOLMES: Quite. You have teased this out a couple of
10 times, I think, with Mr. Bowsher, about how far this is
11 a fifth wheel to the coach, does this ground add
12 anything, and we agree with you, sir, with respect, that
13 the first of his reasons under this aspect of his case,
14 the general principles, collapses into Ground 1A.

15 THE CHAIRMAN: You can't be agreeing with me, Mr. Holmes,
16 because I have not actually formed a view.

17 MR. HOLMES: I'm grateful, sir. You raised a question with
18 Mr. Bowsher.

19 THE CHAIRMAN: I know what you mean.

20 MR. HOLMES: I am grateful.

21 The second point they make at B on page 56 is to say
22 that had it been clear in the original selection process
23 run by the Commission, that it would be possible to use
24 the 2 GHz Band for a terrestrial-based network and
25 without having to 1) meet the definitions of Article 2.2

1 or 2) meet the milestones and social policy commitments
2 as to service availability from a Mobile Satellite
3 System, the process would have attracted more
4 participants, so again, economic balance being disrupted
5 leading to unfairness. Others would have come forward
6 if they had known that they had the rights, the
7 entitlements, that are now being afforded to Inmarsat,
8 or which Inmarsat is claiming for itself, but again, you
9 look at the value and you see how it is protected under
10 the scheme.

11 The first limb, yes, sure, Article 2.2 definitions
12 apply, that is their Ground 1A and the Tribunal will
13 form a view about that. I will give you my submissions
14 shortly, and then the second limb:

15 "Meet the milestone and social policy commitments".

16 Well those are the commitments which are
17 crystallised, under Article 7, and which are subject to
18 enforcement under the Article 7 process. They do not
19 require, in this separate context under CGC
20 authorisations, for this Tribunal to step in and to
21 attempt a task which, as you observed, sir on the
22 evidence before you, is frankly impossible. You simply
23 do not have the material to undertake that assessment.

24 THE CHAIRMAN: So if we can illustrate this by sort of
25 things which are parallel to the issue which arise in

1 this case, let's assume -- well, we do not have to
2 assume, we know, that Inmarsat proposed a nine-beam,
3 whatever it was, satellite, and suppose that when they
4 get round it launching something they launch a hopeless,
5 one-beam satellite which is not really capable of I will
6 illuminating very many people's mobile telephones at
7 all, the goalposts have not been moved but the attempted
8 compliance -- assume that that an MSS for these
9 purposes.

10 MR. HOLMES: Yes.

11 THE CHAIRMAN: But it is not the sort of thing which was
12 envisaged because it plainly is not, then you say the
13 way that they are got is not to forbid them from having
14 a CGC, but to enforce, because, well, they may or may
15 not have complied with the promise to contract for
16 a satellite but also it may well not provide the
17 coverage, the 50 per cent coverage which has to be
18 provided under Article -- actually it is Article 4, is
19 it not.

20 MR. HOLMES: Yes.

21 THE CHAIRMAN: So you would enforce that obligation.

22 MR. HOLMES: Yes.

23 THE CHAIRMAN: The one thing that cannot be done is to
24 refuse them a CGC because they have not provided an MSS,
25 assuming that it is otherwise an MSS.

1 MR. HOLMES: You have hit the nail on the head, sir, but
2 just to make good the point about commitments, we know
3 that one of the commitments that emerges from this
4 process is the number of satellites. You see that from
5 Milestone 9 on the list, where there is a reference to
6 the number of satellites to which Applicants have
7 committed, but as the Tribunal teased out, I think, we
8 know that the same number of satellites has been
9 launched as was originally proposed. One satellite has
10 gone up. Now, the evidence suggests that the number of
11 beams of that satellite may differ from the original
12 proposal. That is the is the case that has been put to
13 you, sir, on the basis of the material before you.
14 Whether that constitutes a material change, whether it
15 altered the economic balance, really depends on other
16 commitments, whether it affects any of the other
17 commitments given. I doubt, sir, whether it would
18 affect coverage, because I think there is no dispute --

19 THE CHAIRMAN: No, it is availability.

20 MR. HOLMES: And also spectral throughput which is one of
21 the criteria against which assessment was performed.

22 THE CHAIRMAN: I have not looked at that at all. I do not
23 even know what it means.

24 MR. HOLMES: I do not think it matters. My submission is
25 simply that the commitments are what binds Inmarsat to

1 the mast, and ensures that there is no funny business
2 where the economic value shifts after the event. We say
3 that is very clear from the legislation, from the face
4 of the legislation, both EU and as interpreted and
5 implemented in national law. Just to make that good you
6 see that, I think, as you alluded to, Madam, Article 3,
7 paragraph 1, refers to the selection of operators, that
8 as you say, Article 5, paragraph 1 involves not only an
9 assessment of the credibility of the Applicants, but
10 also whether their plans -- their plans look viable,
11 whether there is something here that might get off the
12 ground and equally the milestones, as Mr. Bowsher
13 observed, are about launch of a particular satellite and
14 so clearly what is planned features as part of the
15 selection process.

16 One then turns to Article 7.1(c), and one sees that
17 the commitments that are given are binding, irrespective
18 of whether this is only a stage 1 process or a stage 1
19 and 2 process. In other words, whether there is enough
20 spectrum to meet all of the successful applicant's
21 needs, so that the process stops after the first phase
22 or whether it was necessary to go on to score the
23 applications according to the criteria set out in
24 Article 6. Either way, they cannot welch out of the
25 commitments they have given. Of course, those

1 commitments are then enforceable and you have seen the
2 monitoring and enforcement provisions.

3 Turning to the domestic implementation at tab 16,
4 the regulations --

5 MRS. WALKER: 16 of?

6 MR. HOLMES: The same bundle Madam, Bundle F. You see on
7 page 3 what Ofcom is required to do in Regulation 3:

8 "Ofcom shall grant an authorisation under these
9 regulations to each of the selected Applicants for use
10 in the United Kingdom of the frequency specified for
11 that selected Applicant in Article 3 of the Commission
12 decision, subject to the conditions set out in the
13 regulations".

14 Now, pausing there, the national Legislator rightly,
15 we say, did not require the authorisation of any
16 particular system, it required the authorisation of use
17 of the frequencies, the conditions referred to are then
18 set out in Regulation 4, and they are the common
19 conditions, and those common conditions are enforceable.

20 Now, sir, while we are in this document, you raised
21 a question about how a party that feels hard done by
22 might protect its rights if there were a substantial
23 change of use in the sense, in the narrow sense that we
24 have been discussing it, that is to say either
25 a departure from the definitions in Article 2.2, or

1 a failure to honour commitments. Well, sir, the first
2 of those, a failure to respect the definitions, would
3 allow a challenge to be brought either against
4 a decision to authorise -- to grant an authorisation
5 under Regulation 3, or a CGC authorisation.

6 As regards the latter, the common conditions, it is
7 worth noting that Regulation 10 provides for appeals
8 against decisions by Ofcom under the prior regulations
9 including the enforcement regulations which implement
10 the enforcement decision, and the Tribunal may well have
11 noted that Regulation 10, paragraph 6 makes clear that
12 references to a decision include, at point B, references
13 to a failure to make a decision, and to a failure to
14 exercise a power, or to perform a duty, but only where
15 the failure constitutes a failure to comply with any
16 form of request to make the decision, exercise the power
17 or perform the duty, so it is always open to someone who
18 feels to a commitment is being departed from, for
19 example, the minimum commitment in 4.1(c)(ii), to apply
20 to this Tribunal and to challenge Ofcom's failure to
21 take enforcement action. Now Viasat have not pursued
22 that route, presumably because they have taken exactly
23 the same course but at EU level. They have challenged
24 the Commission for failing to bring infraction
25 proceedings against Member States in relation to the way

1 in which these provisions are being implemented.

2 THE CHAIRMAN: Well, is the complaint that the Member States
3 are not enforcing obligations or is the complaint that
4 Member States are granting authorisations which they
5 ought not to? So I thought it was the latter.

6 MR. HOLMES: It may well be sir, in which case --

7 THE CHAIRMAN: That is a bit different.

8 MR. HOLMES: Yes. I agree with you. There may be a
9 difference there. I would need to look back at the
10 letter.

11 THE CHAIRMAN: In which case your point is not quite so
12 good.

13 MR. HOLMES: Well, the point is none the -- what definitely
14 does hold true, sir, is that they could bring
15 proceedings here in this Tribunal if they thought they
16 had a point, and we have seen that from the regulation
17 that I have just shown to you.

18 THE CHAIRMAN: Yes. It is not -- yes. It is not so
19 commercially attractive for a rival that thinks they
20 have been hard done by, because what would be achieved
21 if Mr. Bowsher were to win, and then they did not get an
22 authorisation, would be to knock a competitor out of the
23 market and leave the thing free for himself, and let's
24 face it, Viasat are not doing this out of some feeling
25 of public-spirited altruism, if they will forgive me for

1 saying so.

2 MR. HOLMES: That is a fair point, sir.

3 THE CHAIRMAN: But complaining about a failure to enforce
4 would not have the same -- if you are going to tell me
5 that they are, Mr. Bowsher, I want evidence.

6 MR. BOWSHER: I may be in fairness to point -- I think this
7 debate may be based on a misreading.

8 MR. HOLMES: Oh, forgive me. Tell me.

9 THE CHAIRMAN: Anyway, I will just finish what I was going
10 to say, which is no -- this really does not take the
11 debate anywhere, but I will say it -- a competitor that
12 manages to get some enforcement which might, eventually,
13 at the end of a very long road, produce a fine, unless
14 it actually does produce a revocation of the whole
15 thing, they are not going to do that, are they?

16 MR. HOLMES: Well, no, sir, but that just, in my submission,
17 illustrates that they are trying to shoehorn a different
18 question, a different track into these proceedings,
19 which are for the licensing of CGCs under a separate
20 authorisation.

21 THE CHAIRMAN: We need not pursue that. Mr. Bowsher, which
22 wrong tree are we barking up?

23 MR. HOLMES: I apologise if I have. I would be grateful
24 for ...

25 MR. BOWSHER: I simply may have misunderstood what is being

1 said here, but if Mr. Holmes is relying on 10.1 to
2 pursue a challenge to a decision only Inmarsat and
3 Solaris can do that because only a selected Applicant
4 can make that challenge after 10.1 and that is a defined
5 term in Regulation 1.

6 THE CHAIRMAN: So you are saying that nobody other than the
7 selected Applicant has locus --

8 MR. BOWSHER: Under that regulation. Again, I may be
9 misreading it but it seemed to me that -- that is why
10 I was saying I thought you were perhaps running up
11 a wrong tree.

12 MR. HOLMES: No, I'm grateful for that clarification.

13 THE CHAIRMAN: Well, I was driven up it by Mr. Holmes.

14 MR. HOLMES: I am the one, sir, who drove us up this tree.
15 I take full responsibility for that. I will need to
16 take instruction on that point, sir, because it is not
17 one that I can -- if that is the case then I apologise
18 for wasting the Tribunal's time.

19 MRS. WALKER: I have one follow-up question.

20 MR. HOLMES: Yes.

21 MRS. WALKER: One of the concerns, as I have understood it,
22 from Mr. Bowsher, is the fact that Viasat doesn't
23 actually know what the Commission really had from
24 Inmarsat, and looking for remedies in relation to that,
25 I would deduce from what you have said that if that

1 remains a concern for Viasat the route to remedy that,
2 I think you would argue from what you have said, would
3 be under Article 7, but then the question comes under
4 Article 7 to try and uncover that information, if it was
5 thought to be important, would it be the pursuit of the
6 national regulator authority or the EU machinery?

7 MR. HOLMES: Well, as I understand it, proceedings have been
8 brought on the basis that they want to obtain the
9 original application, and those are pending in
10 Luxembourg, but my client is not party to them, so --
11 there is a particular regime for obtaining disclosure of
12 documents.

13 MRS. WALKER: I see. Well, that is why what Mr. Elphick was
14 asking you for was important. Thank you.

15 MR. HOLMES: I'm grateful, Madam.

16 To take a step back, we do submit that the economic
17 value lies in the commitments and in observance of the
18 definitions. As Mr. Bowsher's closing submissions
19 appeared to accept, those pieces of economic value are
20 both enforceable by other means.

21 THE CHAIRMAN: I suppose if we come back to the wrong tree
22 up which we were barking, Regulation 10 does not apply,
23 that Viasat wanted to complain that Ofcom really is not
24 enforcing these things properly and therefore Inmarsat
25 are getting away with blue murder, then I suppose

1 ultimately JR would be available to them.

2 MR. HOLMES: JR is always available. I'm grateful for that
3 observation. Yes, there is always the inherent
4 jurisdiction, which we saw from the cases that I
5 canvassed in opening, that is always available as
6 a route for particular Applicants, and I apologise again
7 to the Tribunal for pursuing a line that may, in fact,
8 have been a dud, but there is judicial recourse, as
9 your Lordship observes, via the Judicial Review route.
10 I'm reminded by co-counsel that Judicial Review also
11 extends to a failure to act in appropriate --

12 THE CHAIRMAN: That is what I meant, actually.

13 MR. HOLMES: Yes. While we are on this particular topic,
14 sir, we do adhere to our submission in opening that the
15 milestone and criteria are generic to reflect the fact,
16 in my submission, that the legislation is
17 non-prescriptive as to what particular services are to
18 be offered, and the milestones are clearly just about
19 getting a satellite up in the air. They are not about
20 any particular type of service. I think it was
21 suggested by reference to the social policy criteria
22 that they showed a particular preference for rural
23 broadband.

24 Now, it is true that they do contain a mention of
25 serving consumers in remote and rural areas, but it is

1 worth seeing how that, in fact, would have operated, had
2 we reached Phase 2. If I could ask the Tribunal to
3 return to tab 6 and the EU decision, and turn to page
4 20, or picking it up at page 19 first of all, you see
5 that 20 per cent goes -- in Article 6, the various
6 criteria are specified together with their weighting.
7 Does the Tribunal have it?

8 THE CHAIRMAN: Just give us a moment.

9 MRS. WALKER: I'm there.

10 THE CHAIRMAN: Tab 6, page 19, Article 6.

11 MR. HOLMES: So the first criterion, consumer and
12 competitive benefits provided, 20 per cent, again, in
13 general terms, number of end users, range of MSS by
14 a particular date, and then the date of commencement of
15 the continuous provision of commercial MSS, these are,
16 of course, the extent to which an Applicant improves
17 upon the minimum commitments which apply by virtue of
18 4.1(c). There is then the reference to spectrum
19 efficiency which I made earlier, sir, in answer to your
20 question about bandwidth. Article 4.1(c) then is the
21 largest weighting at 40 per cent, pan-EU coverage, and
22 that is, as one would expect -- I am sorry -- this is,
23 in fact, the provision which offers them an opportunity
24 to improve on Article 4.1(c). I beg your pardon, and
25 this is about geographic coverage. It is a 40 per cent

1 weighting to reflect, of course, the fact that
2 satellites are all about pan-european coverage, then
3 4.1(d) one comes to the extent to which public policy
4 objectives are not dealt with by the preceding criteria
5 are achieved, 20 per cent weighting in accordance with
6 the following three equally-weight sub-criteria, so this
7 is a total of 20 per cent of the score, it is an
8 assessment of the extent to which particular objectives
9 are met, so in principle an application would not be
10 required to show compliance with any of them, it would
11 simply, then, lose the score assigned, and you see at
12 (i) a general reference to public interest services
13 contributing to the protection of health and safety and
14 security of citizens in general or specific groups, the
15 integrity and security of services, and then finally, at
16 Article 6.1(d) (iii):

17 "The range of services provided to consumers in
18 rural and remote areas".

19 So this, in our submission, shows that it was
20 a consideration, of course, we have seen that from the
21 recitals, but it was not front and centre stage of the
22 selection process, and it was not the only way in which
23 one could obtain authorisations, a selection, rather,
24 and the maximum weighting would be only a third of 20
25 per cent for (d) that could be achieved. For that

1 particular criterion, so around between 6 and 7 per
2 cent.

3 Now, we say that the fact in response to your
4 question, Madam, that this is about selecting operators,
5 albeit by reference to their plans leading to
6 commitments, is relevant to two aspects of the case that
7 Ofcom must meet. I have dealt, already, with the
8 general principles case, but there was also, today,
9 a new case advanced which I must admit may be my error,
10 but I had not detected it as a clear aspect of the
11 appeal, which is the complaint that Ofcom was required
12 to authority CGCs for the particular Mobile Satellite
13 System for which authorisation was originally given by
14 Ofcom in its 2009 decision pursuant to Article 7.

15 Now, in response to that, my submission is that
16 Ofcom was not required, under either Article 7 or under
17 the implementing legislation, Regulation 3, to authorise
18 a particular system. It was authorising an operator,
19 subject to the conditions. You saw that crystal clear
20 in the national legislation.

21 If you turn to Ofcom's authorisation decision we see
22 that it is -- we say that it is equally clear from that
23 decision. It is in Bundle E at tab 13.

24 THE CHAIRMAN: E1?

25 MR. HOLMES: E1, yes. Just to take a few points by

1 reference to it, paragraph 2 -- tab 13 -- authorisation
2 is given to Inmarsat to use the relevant bands, subject
3 to the terms below, and you see, "Use of spectrum", at
4 paragraph 2:

5 "The authorised operator must ensure that spectrum
6 bands are used by the space stations of the authorised
7 Mobile Satellite System, only in accordance with the
8 provision of this authorisation".

9 Now I think the submission was being made is that
10 the word, "Authorised", there, the, "Authorised Mobile
11 Satellite System", shows that one particular and
12 specific system was being authorised. I think that is
13 the submission. We say that that reads too much into
14 the word, "Authorised". It gives it a weight which it
15 cannot bear. All that is meant by that word is that the
16 authorised operator must ensure that the spectrum bands
17 are used by the space stations of whatever Mobile
18 Satellite System the authorised operator develops
19 pursuant to the authorisation. If it were otherwise,
20 one would expect to see on the face of the authorisation
21 some information about the particular system that was
22 being authorised, and we say that there is just nothing
23 to suggest that. It is a very generic authorisation in
24 accordance with the powers -- the powers and the duties
25 conferred by Regulation 3, and the Article 8 of the EU

1 decision, so we say there is really nothing to that
2 point. While we are in this document it is perhaps just
3 worth observing that paragraph 7 of the authorisation
4 specifically refers to the commitments which crystallise
5 the economic value of Inmarsat's -- sorry -- of
6 Inmarsat's application.

7 THE CHAIRMAN: How does authorisation, to use satellite
8 terms, work in a country where you actually do not have
9 your ground station? You are not doing anything, are
10 you. It says, "To receive". They are authorised to --

11 MR. HOLMES: So this is the authorisation to provide the
12 Mobile Satellite System as a whole.

13 THE CHAIRMAN: I know it is, and this is done on
14 a country-by-country basis.

15 MR. HOLMES: Indeed sir.

16 THE CHAIRMAN: What are they actually doing here which is
17 authorised?

18 MR. HOLMES: So they are allowing the spectrum to be used
19 with the satellite that they have launched.

20 THE CHAIRMAN: Who is, "They"?

21 MR. HOLMES: Sorry, the national regulator of a country
22 without CGCs.

23 THE CHAIRMAN: I know, but what is Inmarsat doing here which
24 needs authorisation?

25 MR. HOLMES: When the system is up and running it will be

1 using these slices of spectrum to transmit from the
2 satellite to the mobile earth stations which form part
3 of its system and that is outside the Wireless
4 Telegraphy Act, as I understand, which does not cover
5 space/earth communications.

6 THE CHAIRMAN: Supposing this authorisation is not given,
7 the ground stations, the authorisation were not given,
8 if for some reason the UK were holding out against the
9 rest of Europe, unlikely though that may seem, and this
10 authorisation was not given, what is it that Inmarsat
11 would be forbidden from doing? Because let's assume it
12 does not want to set up a ground station here, it does
13 not want to do any transmitting, what would it actually
14 be doing here?

15 MR. HOLMES: Well, the transmission would be to the mobile
16 earth station, sir, so if it did not want to offer
17 mobile earth stations in a given Member State then it
18 would not necessarily --

19 THE CHAIRMAN: Let's say it is a simple case with handsets.
20 Let's remove the complication of aircraft. So they
21 could not sell handsets here, basically.

22 MR. HOLMES: Yes, or allow the use of those handsets as part
23 of their -- using the spectrum as part of --

24 THE CHAIRMAN: So somebody brought their handset from France
25 where it would be authorised, Inmarsat would be breaking

1 the law, would they, in transmitting, even though
2 they -- I suppose they could beam their beam so it did
3 not hit England or hit the UK.

4 MR. HOLMES: Yes, sir. My attention is drawn to Regulation
5 2 of the regulations which provides that a person
6 commits an offence if the person uses the frequency
7 bands or any part of those bands for the provision of
8 Mobile Satellite Services except under and in accordance
9 with the authorisation granted.

10 THE CHAIRMAN: So the handset holder would be using them and
11 they would be in breach, so the authorisation exonerates
12 them as well?

13 MR. HOLMES: And equally, it would -- I believe that is
14 correct, sir, so if a handset were used in a Member
15 State which had not granted a national authorisation to
16 use a Mobile Satellite System on the frequency bands,
17 there would be a breach by the system operator insofar
18 as transmissions were made from a satellite to the
19 handset, and also it would appear from Regulation 2,
20 a breach by the handset user in using the frequency
21 bands, other than in accordance with the regulations.

22 THE CHAIRMAN: So if they did not have authorisation from
23 everybody, then they would have to adjust the beams on
24 the satellite so that they did not cover unauthorised
25 countries, in theory. I know that is why you need

1 harmonisation but that is how it works? Yes. I see.

2 Right.

3 MR. HOLMES: I think that's correct sir.

4 THE CHAIRMAN: I was puzzled as to what Inmarsat were doing
5 if they were not actually setting up a ground station to
6 using it, but you have answered my question. Thank you.

7 MR. HOLMES: I am grateful.

8 Sir, with those points out of the way, if I could
9 turn now, and just run through, rapidly, the individual
10 grounds? I will not repeat the points I have need
11 writing, instead I will pick up points from
12 Mr. Bowsher's written closings, or that he has made on
13 his feet today.

14 So beginning with Ground 1A, this obviously has
15 three limbs. The first is whether the EAN's ground
16 stations form part of a Mobile Satellite System as the
17 legislation requires, and in my submission they clearly
18 do. There are three elements to the definition. There
19 needs to be a satellite, well, there is one of those.
20 There may be ground stations, and both satellite and
21 ground stations must connect and provide service to end
22 users through the mobile earth station. That much is
23 common ground, so there has to be a mobile earth station
24 which connects and provides service to end users via
25 both the satellite path and the ground station path.

1 There is no dispute about that.

2 Now, in this case Ofcom found that the definition is
3 met, there is a satellite. Inmarsat opted to include
4 ground stations, and the satellite and ground stations
5 connect to the equipment on board the aircraft through
6 which Inmarsat provides a single and integrated service
7 to passengers using both connections, and Ofcom regarded
8 this equipment, taken together, as a mobile earth. Now
9 Viasat's case is that the on board equipment should not
10 be treated as a single mobile earth station. They say
11 that a mobile earth station must, by definition, be
12 confined to those particular components which are
13 necessary for connecting to the satellite, or I think
14 they run an alternative argument that at least the
15 components must be capable of connecting with the
16 satellite.

17 Now, on that basis they say that only certain
18 particular pieces of Inmarsat's onboard equipment
19 qualify as a mobile earth station while others do not
20 and specifically they exclude the downward facing
21 antenna which connects with the ground stations, and
22 which cannot connect with the satellite, given its
23 position and the language it uses. Now, we say that
24 Viasat's interpretation of, "Mobile earth station", is
25 too narrow. It is correct that the mobile earth station

1 must include equipment to connect with the satellite, we
2 don't dissent from that, but there is no need to exclude
3 the equipment connecting with the ground station. The
4 definition of a Mobile Satellite System expressly
5 provides that a mobile earth station can connect with
6 a ground station as well as with a satellite, and there
7 is nothing express in the legislation which requires
8 that the same antenna should be used for both
9 connections, nor is there any requirement that all
10 antennae used must be capable of connecting with the
11 satellite, even if they do not, and in our submission
12 there is no reason to read either such requirement into
13 the legislation. Neither requirement would serve any
14 useful purpose at all. Viasat says the same equipment
15 should be used to connect both satellite and earth
16 station in order to ensure a genuine and useful role for
17 the satellite. That is their submission in their
18 written closings at paragraph 69, and they say that
19 otherwise there would be nothing to prevent the use of a
20 token satellite which connects only with one mobile
21 earth station and millions of purely terrestrial
22 receivers, but that is incorrect. It is common ground
23 that the mobile equipment used must always amount to
24 a mobile earth station, and it must, therefore, in all
25 cases, include the equipment needed to be able to

1 connect with the satellite.

2 THE CHAIRMAN: So you must, in all installations, from the
3 outset, have a satellite terminal?

4 MR. HOLMES: They must -- to comply with the definition of a
5 CGC of a Mobile Satellite System there has to be, in
6 every radio communication path, a mobile earth station.

7 THE CHAIRMAN: Well, I am not sure whether you mean, "Path",
8 well, that depends, but that means that when you connect
9 an aircraft up, you must always, from the outset, have
10 a satellite terminal otherwise you do not comply.

11 MR. HOLMES: Yes, sir.

12 So the narrow issue, as we understand the case, is
13 whether there is any additional requirement that the
14 station must use the same antenna to connect with both
15 satellite and ground stations, or possibly, in the
16 alternative, a requirement that, if separate antennae
17 are used, they should both be capable of connecting with
18 the satellite, irrespective of whether they do, in fact,
19 connect to the satellite, and we say there is no
20 possible justification for either such requirement. The
21 only effect of such requirements would be to needlessly
22 degrade and obstruct the provision of a useful service
23 to end users. Requiring the use of a single
24 communication language, even where this is a suboptimal
25 from a technical perspective, and obstructing a system

1 such as the EAN which uses CGCs as well as the
2 satellite, given the need in such systems for antennae
3 to face in different directions on the undercarriage and
4 above the aircraft.

5 MR. ELPHICK: Are you saying, Mr. Holmes, that if an
6 aircraft has got its downward-facing satellite, but the
7 upward-facing antennae hasn't been fitted yet because it
8 is being done next year, that for that period, before it
9 has got the upward-facing one, it cannot be used --

10 MR. HOLMES: That would be non-compliant usage, yes, sir,
11 and that is what Ofcom -- may I take you to the decision
12 to see what Ofcom said in that? Just to take it out of
13 turn for a moment, it is in Bundle B and if you could
14 turn to page 17? We have seen it before you I think it
15 is just worth now seeing it again. Tab 1, page 17.
16 Ofcom observes the risk in 4.9. It notes that
17 Inmarsat's EAN can be technically provided without the
18 satellite terminal being installed, and there may be
19 incentives for airlines not to install the satellite
20 terminal despite having purchased an integrated system.
21 Ofcom therefore intends to monitor carefully the
22 deployment of the EAN in order to ensure that the
23 ground-based stations are indeed being used as
24 complimentary components of the EAN, and that the use is
25 being made of the MSS, including the satellite terminal,

1 by aircraft which utilised Inmarsat's service. To that
2 end, Ofcom would collect information from Inmarsat to
3 verify that aircraft using the EAN are being fitted are
4 the satellite terminal, and that the services are being
5 provided using the MSS as well as the terrestrial
6 segments. If it transpires after being authorised
7 Inmarsat is providing services to aircraft, individual
8 aircraft exclusively by means of the terrestrial
9 segment, Ofcom will consider taking enforcement action
10 on the basis that the ground-based stations are not, in
11 fact, being used as CGCs, ie as complimentary ground
12 components of a system for providing MSS in order to
13 improve the availability of the MSS as is required under
14 the terms of Inmarsat's authorisation.

15 So Ofcom, in my submission, is there making clear
16 that it would not comply if aircraft utilised Inmarsat's
17 service without the satellite terminal being installed,
18 and that it will consider enforcement action in that
19 case.

20 Now, whether enforcement action is appropriate
21 depends on an assessment of what is proportionate.
22 Ofcom may take the view that if it is a short period
23 between the stops -- scheduled repair stops for the
24 plane -- I forget exactly how they are described but I
25 know that it takes a little bit longer to install the

1 satellite terminal than it does to install the
2 ground-facing terminal, if we have got some aircraft, a
3 short period during which they are being used in a
4 non-compliant fashion, Ofcom would have to take a view
5 about whether to enforce, and what enforcement measures
6 to take in that situation, but it is made crystal clear
7 what it expects. It expects aircraft to be installed
8 with both the upward and the downward-facing terminals,
9 or antennae, and to make use of both.

10 THE CHAIRMAN: How does the concession you made this morning
11 fit into all this?

12 MR. HOLMES: It comes, sir, to the interpretation of Article
13 2.2(b), so I do not think it affects the point that we
14 are here discussing, because it is quite clear that you
15 can use a system, a Mobile Satellite System, with both
16 CGCs and a satellite. Now, the fact that Mobile
17 Satellite Services are to be understood in Article
18 2.2(b) as referring to the services connecting the
19 satellite and the mobile earth station doesn't, as we
20 understand matters, affect Ground 1A at all. I will
21 explain when we come to Ground 1B. We don't think it
22 affects -- or, sorry, the second limb of Ground 1A, the
23 point about whether the ground stations are CGC. We do
24 not think it has any effect there either but I will come
25 to that.

1 THE CHAIRMAN: What was your position before your concession
2 then?

3 MR. HOLMES: So in opening submissions, in relation to the
4 second limb of Ground 1A, I made the submission that
5 when considering what the services were -- the
6 availability -- when considering the services, the
7 availability of which was being improved by the CGCs, it
8 was appropriate to consider only the services from the
9 satellite, or a combination of the services provided
10 from the satellite and from the CGC, and I accept that
11 in Article 2.2(b) you -- when deciding whether the
12 requirement to improve the availability of Mobile
13 Satellite Services by the CGC, you look and you see what
14 the service would be if provided only by the satellite
15 and you then look to see what is add by virtue of the
16 CGCs in terms of availability of a service and the
17 availability of a service of the required quality.
18 It might become clearer when I come to the second limb
19 of Ground 1A.

20 THE CHAIRMAN: I do hope so.

21 MR. HOLMES: You hope so. Very good. I really do not -- my
22 submission will be that it makes absolutely no
23 difference.

24 THE CHAIRMAN: Right.

25 MR. HOLMES: It makes no difference. It was not part of the

1 decision. It was a small point that was advanced in
2 oral opening. That was not in the written openings, and
3 it does not affect the appropriateness of Ofcom's
4 assessment about the improvement of availability by the
5 CGCs.

6 To return to one of the opening questions, I was
7 asked about Viasat's alternative argument, I think it
8 was by you, Madam, that the EAN will not be a Mobile
9 Satellite System because some aircraft may, in practice,
10 try to use the system without an upward-facing antenna.
11 In our submission, Ofcom was licensing a future system
12 prior to its launch. It had to consider whether that
13 system, if properly and lawfully implemented, would fit
14 within the legislation. A possible risk of some
15 non-compliant usage would not justify refusing a license
16 altogether. The question is whether the integrated
17 system which Inmarsat is in fact selling would comply
18 and Ofcom found that it would., and the question of how
19 to treat individual aircraft, if there are any, which
20 try to use the system before their satellite terminal is
21 installed is a classic question for ex post enforcement.
22 It is not a question about whether to authorise the CGCs
23 in advance for the use that is proposed to be made of
24 them.

25 THE CHAIRMAN: It rings odd, does it not, because the

1 complaint in that particular case is not that the
2 satellite system is being used for a wrong purpose, it
3 is that it is not being used.

4 MR. HOLMES: Well, as I understand it, sir, the point is
5 that there might be some planes that do not use the
6 satellite even though there are others that do, and that
7 that usage takes the whole system outside the definition
8 of a Mobile Satellite System. We say that is not right,
9 as a matter of principle.

10 THE CHAIRMAN: Well, that may be right, but I confess I
11 still find it odd that you cure -- that the problem of
12 the non-using aircraft is one which is non-compliance
13 because it is not using the satellite, rather than it is
14 using it in -- someone is using it in the wrong way.

15 MR. HOLMES: Well, so what is happening --

16 THE CHAIRMAN: Basically you force compliance by forcing
17 them to use the satellite.

18 MR. HOLMES: Well, no, sir. Our job as Regulator is to
19 ensure that the CGCs, the ground stations, use this
20 spectrum, are CGCs of a Mobile Satellite System, and for
21 that we look at the use to which they are being put.

22 Now, we are not forcing anyone to install compliant
23 equipment. As we understand the position, Inmarsat is
24 marketing a compliant solution, and the fact that some
25 aircraft, airlines, in 2014 may not have wanted for all

1 of their aircraft to install a fully compliant system
2 does not show that the system, as proposed, does not
3 amount for Ofcom's licensing purposes to a Mobile
4 Satellite System. Cannot amount. We are in advance of
5 anything being implemented yet. No service yet offered.

6 Now, that brings me to the second limb of their
7 first ground, complimentary ground components.

8 The statutory test, and we should perhaps turn it up
9 so that we have it all at the forefront of our minds, is
10 in the Legislation Bundle at tab 6, and 2.2(b), and it
11 provides that:

12 "The ground stations should be used to improve the
13 availability of Mobile Satellite System in geographical
14 areas within the footprint of the system's satellites
15 where communications with one or more space stations
16 cannot be ensured with the required quality".

17 THE CHAIRMAN: Which is everywhere.

18 MR. HOLMES: There is nothing in that definition, sir, which
19 requires the improvement to be confined to particular
20 areas. You are right, sir, that the effect of the CGCs
21 within the EAN system is to effect a general improvement
22 within the footprint of the satellite of the quality --
23 the availability and quality of the service.

24 THE CHAIRMAN: Well, on the footing that nowhere can you get
25 the required quality without it.

1 MR. HOLMES: Well, on the footing that within the area of --
2 well, taking it in stages, the satellite provides
3 aircraft Internet services. The ground stations within
4 the area of their coverage, improve the availability of
5 those services by allowing more simultaneous end users,
6 and they also improve the availability of the services,
7 the services offered by the satellite, of the quality
8 required by end users, in that they allow end users to
9 access a wider range of applications that they may need
10 or want to use. We say that that is sufficient to
11 comply with the definition.

12 It is worth noting that the availability of the
13 satellite services is improved not only within the areas
14 of the CGC's operation, but also in the areas where the
15 satellite alone reaches, because the effect of the CGCs
16 is to allow the satellite to conserve the available
17 capacity for use in those areas, thereby increasing the
18 numbers that can be served and the range of services to
19 which they may be able to have access, and we say that
20 in legislation which is aimed at achieving consumer
21 benefits, that is precisely the type of improvement in
22 the availability of the service which CGCs are permitted
23 to effect.

24 If that is across the coverage of the satellite all
25 the better.

1 I come now, sir, to Viasat's arguments against that
2 conclusion.

3 Their first argument which featured prominently in
4 Mr. Bowsher's opening submissions is set out at
5 paragraph 80 of their written closings for your note.
6 The allegation is that Ofcom erred by failing to
7 consider whether the ground stations contributed to the
8 legislative imperative of prioritising communications
9 between earth and space via satellite. On that basis it
10 is said that Ofcom should have read into the statute
11 some limitation on the contribution that ground stations
12 can make to a Mobile Satellite System, and it should
13 have refused to license Inmarsat's ground stations
14 because they will deliver too much of an improvement to
15 the capacity of the EAN.

16 Now, in my submission, Viasat's argument rests on
17 a misunderstanding of the purpose behind the EU
18 harmonising regime. The legislation does not require
19 that priority be given to communications between earth
20 and space via a satellite. The legislation in fact
21 prioritises systems providing Mobile Satellite Services,
22 and therefore including at least one satellite over
23 separate terrestrial mobile systems, and we say that is
24 very clear from the Harmonisation Decision. If you
25 could turn to that please? It is in Bundle F at tab 5.

1 If we could begin with Recital 11, that really makes the
2 point very clear. It says there that:

3 "It is appropriate to give priority to systems
4 providing MSS in the 2 GHz Band because other frequency
5 bands, for example those designated for GSM and UMTS".

6 That is to say pure terrestrial mobile systems, the
7 bands for terrestrial mobile services, are available for
8 systems providing terrestrial only mobile services, so
9 in other words in this band you give priority to systems
10 with a satellite over purely terrestrial mobile systems.
11 Why do you do that? Well, on the one hand, it is
12 because of the coverage advantage that satellites offer
13 enabling the delivery of new, pan-european services, and
14 that is explained in Recital 3 of the Harmonisation
15 Decision and repeated in Recital 5 of the EU decision,
16 and on the other hand you do that because allowing other
17 purely mobile systems to share the spectrum could result
18 in harmful interference, and that is what Recital 9 of
19 the Harmonisation Decision explains, so you prioritise
20 systems that are capable of providing Mobile Satellite
21 Services because they incorporate a satellite. As
22 Recital 9 also makes clear, the problem of harmful
23 interference does not arise with hybrid satellite
24 systems incorporating GCGs, and so for that reason GCGs
25 are admissible and accepted for use in the band as part

1 of a system, and in Recital 9, to be clear, reliance was
2 placed on the words, "On a primary basis", that you so
3 he in the middle of Recital 9, but the recital is
4 actually very clear about what this means. It means
5 that mobile satellite systems should be given priority
6 over purely terrestrial systems to avoid interference.
7 It has nothing to do with affording priority to
8 earth/space communications within a particular Mobile
9 Satellite System.

10 You see that systems providing mobile satellite
11 services in Article 2, are specifically defined as
12 systems capable of providing radio communication
13 services between a mobile earth station and one or more
14 space stations, or between a mobile earth station and
15 one or more complimentary ground based stations used at
16 fixed locations, so it is clear that the systems that
17 are being prioritised can incorporate CGCs. This
18 legislation says nothing about the need to observe any
19 particular balance between the amount of the service
20 which is supplied via the satellite and the amount of
21 the service which is supplied by the ground stations.

22 Indeed, elsewhere in their closing submissions,
23 Viasat put the point correctly in our submission. If
24 you turn to paragraph 87 of their closing submissions on
25 page 38 you see that in responding to, arguments of

1 Inmarsat, an argument of Inmarsat, they say in the
2 penultimate sentence that its reliance on spectrum
3 efficiency and technology and neutrality principles is
4 misplaced, given that in the Harmonisation Decision the
5 Commission decided expressly to favour a particular type
6 of technology being systems capable of providing Mobile
7 Satellite Services. Well, we say, precisely. That is
8 what was being prioritised, not any particular service
9 within a system.

10 Viasat also relies on Article 1 of the EU decision
11 at the next tab which identifies as the purpose of the
12 decision to facilitate the development of a competitive
13 internal market in Mobile Satellite Services or, "MSS".

14 Now, it is quite correct that the EU regime seeks to
15 promote systems which are able to provide Mobile
16 Satellite Services, and that is to allow the wide area
17 coverage that one sees in Recital 3 of the Harmonisation
18 Decision, so there must, of course, be, at a minimum,
19 a satellite in the mix, but that does not require
20 satellite/earth communications to predominate in
21 quantitative terms over communications made by CGCs
22 within a given system.

23 The prioritisation for which Viasat contend would
24 serve no public policy purpose, and would have the
25 effect of needlessly limiting the quality of the service

1 that Inmarsat are permitted to provide to the detriment
2 of end users. The closest that Viasat get to
3 identifying any reasons for the alleged prioritisation
4 is the list at paragraph 18 of their closing
5 submissions, and I would like to address those points in
6 turn. It starts at page 7. You see at the top of the
7 paragraph, bottom of the page, they say:

8 "The very fact ..."

9 Do you have that:

10 " ... that satellite communications between earth
11 and space were being prioritised within the 2 GHz Band
12 is further evidenced by ..."

13 And then the first point:

14 "The unique characteristics of satellite
15 communications that the Legislator wished to promote to
16 increase the availability of pan-european services and
17 end to end connectivity, including in rural areas left
18 behind in the digital divide by other types of
19 communications".

20 Well, we agree that the Legislator wished to promote
21 the availability of pan-european services. This is the
22 coverage point that we have seen in Recital 3 and in
23 Recital 5, but we say that that is met by prioritising
24 the use of Mobile Satellite Systems, systems that
25 incorporate a satellite. Once the satellite is in the

1 system you have the coverage. It makes no odds. It
2 does not detract one jot from that policy objective if
3 you then allow CGCs to operate within the footprint of
4 the satellite to enhance spectrum efficiency, to create
5 more capacity, to allow more end users on to the system,
6 to allow a wider range of services to be used in the
7 air.

8 The second point in the list is the high upfront
9 investment costs involved in construction and launch of
10 a satellite, and the potential for interference which
11 could lead to the possibility that there otherwise would
12 not be a pan-european satellite service.

13 Now, you have my submission on the interference.
14 That is dealt with by reserving the band to a system
15 with a satellite in it. It does not say anything about
16 how the balance is to be struck between Mobile Satellite
17 Services and CGCs.

18 The second item -- sorry -- the other thing that
19 they mention here is the high upfront investment costs.
20 Well this explains why particular operators of satellite
21 systems need to be selected and authorised on
22 a pan-european basis as well as having -- as well as
23 reserving the spectrum for such systems. You need to
24 have a selection and authorisation process so that you
25 end up with the same crew of Mobile Satellite System

1 operators across Europe, so that they have the
2 opportunity to collect the economic advantages of a
3 service across Europe, but that, again, does not require
4 any particular prioritisation of air time within a given
5 at satellite system.

6 The third item identifies the time period and
7 technical complexity of launching a satellite. Well,
8 this requires the selection process to consider
9 carefully whether particular operators are credible, and
10 have viable plans for the satellite component of a
11 satellite system. Again, it does not support any
12 prioritisation of use between the satellite once
13 launched and ground stations forming part of the same
14 system.

15 The fourth item refers to the detailed annex in the
16 EU decision setting out milestones concerning how to get
17 a satellite into service, and this is because
18 a satellite system needs a satellite to achieve wide
19 area coverage. It does not justify a particular
20 prioritisation of use between the satellite and the
21 ground stations within a single system, so we say that
22 Viasat has not given any good reason for the alleged
23 prioritisation of earth/space communications within
24 a satellite system, and you have my point that the
25 effect of such a prioritisation would be to limit the

1 availability and quality of Inmarsat's service to the
2 detriment of end users, and yet the legislation was
3 centrally concerned with consumer benefit. The very
4 first recital of both the Harmonisation Decision and the
5 EU decision states that access to spectrum must be eased
6 to improve efficiency, promote innovation, as well as
7 greater flexibility for users and more choice for
8 consumers.

9 THE CHAIRMAN: It just depends which class of consumers you
10 are talking about. You would need to define the market,
11 would you not, really?

12 MR. HOLMES: You would, but in my submission it is quite
13 clear that the particular end users which Inmarsat is
14 now targeting its system will find considerable benefit
15 as a result -- to them -- as a result of these ground
16 components which will increase the numbers who can use
17 it, this is democratising of the use that can be made in
18 the air of Internet services, and also it will increase
19 the types of service that they can use while they are up
20 there.

21 THE CHAIRMAN: Well, it might, Mr. Holmes, but if the
22 comparison is, with, say, 50 per cent of the population
23 who are supposed to be caught by the beam one would have
24 thought you have chosen a particularly narrow, if not
25 rather privileged band of consumers.

1 MR. HOLMES: Well air travel, in my submission, sir, is not
2 confined -- it is certainly a mass activity by the
3 general public, and I will come to the point about what
4 Article 4.1(c)(ii) requires, if that is what you have in
5 mind, shortly, but in my submission if there had been
6 a requirement to use this only to bridge a digital
7 divide, or for millions upon millions of consumers that
8 would have been stated.

9 THE CHAIRMAN: I think I am bridling slightly at the heavy
10 reliance on great consumer benefits when one considers
11 that at any time the consumers who are capable of
12 benefitting, who would want to benefit from this, are
13 a pretty small proportion of consumers, but anyway,
14 Mr. Holmes, I don't think you need to --

15 MR. HOLMES: But the travelling public, sir.

16 THE CHAIRMAN: They are a small proportion of the travelling
17 public.

18 MR. HOLMES: So Viasat's second point is to allege that the
19 satellite plays only a marginal role in the satellite's
20 system, and the role is said to be so minor that there
21 is nothing useful for the CGCs to compliment, and one
22 sees that, for your note, at paragraphs 80-81 of their
23 closing submissions.

24 Now, as to this, Ofcom accepts that there must be
25 a genuine satellite in play. The evidence which the

1 Tribunal has heard shows that Inmarsat's satellite will
2 usefully contribute to its system. Its wide coverage
3 enables a pan-european service, and this will benefit
4 between 30 and 40 per cent of all European flights,
5 depending on whether the 150 kilometre buffer or the
6 100 kilometre buffer is adopted on Viasat's only
7 analysis, and for those flights the satellite will
8 provide coverage for around 20 per cent of the flight
9 over, on average, and the satellite can provide
10 a service to at least 20 planes at a level consistent
11 with the current usage of Viasat's own Mobile Satellite
12 Services.

13 Ofcom was therefore not required to conclude that
14 the satellite was nearly useless and to reject
15 Inmarsat's CGC application on that basis.

16 Now, there is one minor point of clarification that
17 is needed here in relation to a point that is made in
18 the written closings. Viasat refers, at paragraph
19 51(a)(iii) to a map, and just turning to 51(a)(iii), and
20 this cannot be confidential, sir, so I intend to read
21 it, the map shows the entire fleet -- is said to show
22 the entire fleet of two particular classes of
23 widely-used plane, Boeing 737 and 757, routes across
24 Europe, and that it is said to show what proportion of
25 flights remain within the coverage of the terrestrial

1 segment for the entirety of their journey.

2 Just turning to that map, sir, it is at Bundle B/23,
3 at page 15. You will see, sir, that the routes all come
4 from a single Member State, and the reason for that is
5 that this does not show the entire fleet of 737s and
6 757s used across Europe by all operators on all routes.
7 It simply shows one particular operator's routes at whom
8 this proposal was being pitched, so you cannot -- just
9 for the avoidance of doubt you cannot draw any
10 conclusions from this map at all. You see the name has
11 been blanked out:

12 "The following map shows the total coverage through
13 EAN 2 blank for the entire fleet".

14 So if it was intended to be suggested that this
15 shows for the EAN as a whole how much of the time on
16 particular routes will be outside the coverage of the
17 terrestrial terminals, the ground stations, it does no
18 such thing, and for that we have Viasat's own
19 quantitative analysis, and in my submission that shows
20 that there is a meaningful contribution being made to
21 coverage.

22 Mr. Bowsher referred this morning to a tenfold
23 increase in demand. It may be that he was intending to
24 refer to Dr Webb's -- you remember the graph in
25 Dr Webb's statement showing an increase in revenues for

1 aeronautical connectivity services in Europe and
2 European flights from around 100 million to a billion,
3 but that, of course, is the revenues achieved. It sheds
4 nothing upon the data usage requirement of individual
5 aircraft, and even assuming heroic growth of the
6 product, of this particular product, on a realistic
7 scenario, based on current levels of per passenger
8 usage, one sees that a meaningful number of planes can
9 be served.

10 Now, Viasat also says that Inmarsat could have
11 installed a bigger, or a better satellite which would
12 have played more of a role, and you see that, for
13 example, at paragraph 85 of Viasat's closing
14 submissions, but in my submission that would not justify
15 refusing the application. Ofcom had to assess whether
16 these were CGCs of a Mobile Satellite System. It was
17 not Ofcom's job to second-guess the technical and
18 commercial choices of Inmarsat in implementing its
19 network, so we say that point goes nowhere.

20 THE CHAIRMAN: Mr. Holmes, will you choose a convenient
21 moment for our break? I think our shorthandwriter,
22 after an hour-and-a-half, is entitled to her break.

23 MR. HOLMES: Now would be as good as any, sir.

24 THE CHAIRMAN: Right.

25 MR. HOLMES: Thank you.

1 THE CHAIRMAN: We will break until 3.20.

2 (3.13 pm)

3 (A short break)

4 (3.21 pm)

5 MR. HOLMES: Sir, just to pick up a very minor point which
6 aeries in the first tranche of my closing submissions,
7 we were discussing the route of recourse in the event
8 that -- in relation to enforcement measures and you,
9 sir, pointed out that, as always, there is Judicial
10 Review available. In this particular context we would
11 say, moreover, that the Article 4 right of appeal under
12 the framework decision directive applies so as to
13 require a compliant appeal. Just for your note, sir,
14 one sees that from Article 9, paragraph 2 of the EU
15 decision which makes reference to the rules on
16 enforcement being applied in accordance with Article 10
17 of the Authorisation Directive, and within the
18 Authorisation Directive at Article 10 there is
19 a requirement for undertakings to be able to bring
20 proceedings in relation to decisions made on
21 enforcement. So in our submission that simply goes to
22 confirm the point which is already clear as a matter of
23 domestic law, that Judicial Review is always available
24 as a route, and that that is required both domestically
25 and for the purposes of European law.

1 I have just a few more points to rattle through.
2 The only propose, unless I can assist the Tribunal, to
3 deal with the other points underground 1. Grounds 2 and
4 3 I hope you have my submissions on, and I am happy to
5 address questions.

6 THE CHAIRMAN: Yes. I think that, while I have not
7 personally sat down and matched your submissions --
8 although I have read your submissions I have not matched
9 them up with everything Mr. Bowsher has said, as far as
10 I can see you have basically met his submissions in your
11 submissions.

12 MR. HOLMES: Yes. I am grateful, sir.

13 THE CHAIRMAN: I am afraid we will only find out the holes
14 when it is too late and you have gone.

15 MR. HOLMES: Well, that is a risk I will have to take.

16 THE CHAIRMAN: That is the risk of litigation. Yes. Well,
17 I can say to you all that if, in fact, when we are
18 deliberating on our decision, some further thoughts
19 occur to us, particularly bearing in mind the rather
20 rushed nature of today, slightly rushed nature of today,
21 on which we want clarification then we will not hesitate
22 to ask you. It will be almost certainly in writing.

23 I don't mean you personally, I mean all of you.

24 MR. HOLMES: Yes. That is well understood.

25 So the third point taken in relation to the CGC limb

1 is to say that Inmarsat's satellite is used, or will be
2 used, when communications with the terrestrial segment
3 cannot be established, and they say that this is the
4 inverse of what was intended with the satellite playing
5 a secondary role in the system. Now, in my submission,
6 this is really just a variant on the argument that the
7 legislation prioritises some particular use of the
8 spectrum within a given system. Once it is accepted
9 that that is not the case, one sees that the test -- the
10 proposed use made of the ground stations is fully
11 compliant with the test and that it improves the
12 availability of the satellite service in areas where
13 communications with the satellite cannot be ensured with
14 the required quality, and you have my point that that is
15 both within and outside the area of the satellite's
16 coverage, the area of the ground station's coverage.

17 The fourth point is to object that Ofcom has
18 assessed the required quality of the service by
19 reference to a standard that only a terrestrial network
20 can deliver, but in my submission the required quality
21 is to be assessed by reference to the usage requirements
22 of the service's end users, and the CGCs increase the
23 availability of a service by boosting the capacity
24 available to end users, and this allows more to use it
25 and for a wider range of applications, and there is no

1 reason why quality should be capped by reference to what
2 the satellite itself is able to deliver, and nor should
3 quality be construed as meaning only signal strength as
4 Viasat suggests at paragraph 100 of its skeleton.

5 Of course, signal strength is one aspect of the
6 quality required of a service, but there is no
7 justification to confine quality of service to this
8 particular dimension, and the Tribunal will recall that
9 Dr Webb helpfully clarified his understanding of the
10 changing nature of quality with the advent of the
11 smartphone, and that now quality of service was to be
12 assessed by reference to capacity as well as to
13 coverage. In our submission that is a correct approach
14 towards how quality should be assessed, and we would,
15 just for your note, sir, Dr Webb canvases this at
16 paragraph 7 of his first report in Bundle D at tab 8.

17 Viasat's fifth point is to rely on Recital 18 of the
18 EU decision, and that is the one that says that CGCs are
19 typically used to enhance services in areas where it may
20 not be possible to retain a continuous line of sight
21 with the satellite, due to obstructions in the skyline.

22 We took it from paragraph 101 of Viasat's closings
23 that Viasat accepts that CGCs need not only be used to
24 solve coverage issues of this kind. We agree with that.
25 The CEPT report, for example, suggests wider use,

1 including spectrum efficiency use. Viasat's argument
2 seems to be confined to a narrower point now, which is
3 that CGCs must be used within a given system, more often
4 than not to deal with line of sight problems. So you
5 have to do some sort of quantitative assessment of what
6 CGCs are being used for, and the majority of them must
7 be used to address line of sight concerns, but then the
8 minority can then be used for some other unspecified
9 purposed, and we get that from Viasat's closings at
10 paragraph 91, but we say that there will be no rational
11 purpose served by requiring most CGCs on the system to
12 be used in one permissible way but not another, and that
13 this argument is simply untenable.

14 Viasat's sixth point at paragraphs 106 and 107 of
15 its closings alleges that Ofcom did not satisfactorily
16 address local conditions to see whether each individual
17 CGC was needed, but for the use in question, that is to
18 say to enhance capacity, there was no need for such
19 a localised assessment. The CGC's enhanced capacity --
20 they do not address line of sight issues, and that type
21 of use is not dependent on local conditions.

22 Viasat's seventh and final point is a retread of the
23 allegation that the EAN will be used when a satellite
24 antenna has not been fitted at all, and that there is no
25 mobile satellite service to improve, and one sees that

1 at paragraph 105 of Viasat's closing submissions.

2 Now, as I have already submitted, Ofcom had to
3 consider the system which Inmarsat said it intended to
4 provide. Ofcom tested whether it was genuinely intended
5 as a hybrid system, and any specific usage which is
6 outside the scope of the legislation can be dealt with
7 by way of enforcement.

8 The last point under Ground 1AA is whether the
9 Article 8 common conditions will be met. These are the
10 CGC authorisation conditions, and we accept that they
11 are relevant to the authorisation. The first is the
12 need for the stations to form an integral part of the
13 Mobile Satellite System. That is simply a repeat of the
14 argument about mobile earth stations which I have
15 addressed.

16 The second is the need for the ground stations to be
17 controlled by the satellite resource and the network
18 managements mechanism. We say that the evidence clearly
19 shows that they are. There is no requirement that the
20 system be controlled from the satellite. Such
21 a requirement would serve no useful purpose. Recital 9
22 of the Harmonisation Decision shows that the condition
23 in Article 8 is intended to avoid harmful interference
24 between CGCs and the satellite, and no one has suggested
25 that the ground control mechanism in Inmarsat's network

1 is not adequate to meet that objective. Indeed, Dr Webb
2 agreed that if one read conjunctive satellite resource
3 and network management mechanism, he conceded that the
4 network would have such a thing.

5 The third condition is that independent operation of
6 complimentary components, in case of failure of the
7 satellite components of the associated Mobile Satellite
8 System shall not exceed 18 months. Now, we say that
9 this is a red herring. The satellite has been launched,
10 and it has not failed. If it does fail, the independent
11 operation of the ground stations will need to be limited
12 to 18 months, but the condition provides no possible
13 reason for refusing to authorise the ground stations at
14 this point.

15 The issue which Viasat relies upon, the idea of some
16 aircraft using the system without satellite antennae, is
17 simply not the issue canvassed in Article 8.3(c), which
18 is about failure of the satellite completely. It is
19 rather than issue to be addressed by way of future
20 compliance.

21 Ground 1B is the substantial modification ground.
22 You have my point that any change of value is caught
23 either by the -- is guarded against either by the
24 definitions, or by the commitments given.

25 Now, Mr. Bowsher appeared to suggest, on his feet,

1 that there remained some independent role for Ground 1B,
2 even if -- even despite his Ground 1A, and even despite
3 the fact that he canvases the conditions separately in
4 his Ground 1C.

5 Now, the only way that this ground could add
6 anything to the other grounds, we say, is if operators
7 were not only required to meet their commitments and to
8 deliver a Mobile Satellite System as defined, but were,
9 in addition, rigidly required to stick to their original
10 plans, and you see some flavour of that, for example, in
11 paragraph 131(c) where there is a complaint about the
12 use of different and cheaper equipment, and a different
13 partner or subcontractor, but we say that there is no
14 such rigid requirement in the legislation, as Article 3
15 of the EU decision makes clear, the Commission's task
16 was to select particular operators, not particular
17 Mobile Satellite Systems, and Article 7 you have seen is
18 a requirement to authorise the operators selected to
19 operate a Mobile Satellite System and not the particular
20 system as proposed, and we say that such rigidity would
21 go beyond what is needed to ensure fairness. Operators
22 are held to their commitments and are also circumscribed
23 in the usage to which they may put the spectrum. It
24 would be needlessly prescriptive to go beyond that. You
25 have may point that Ofcom's authorisation decision was

1 not of a particular satellite system, but it authorised
2 the use of a satellite system.

3 Now that brings me to Ground 1C, which is the
4 allegation that Inmarsat cannot meet the minimum
5 coverage commitment under 4.2(c) -- 4.1(c)(ii) of the EU
6 decision.

7 Now, in Ofcom's submission, you have my point that
8 Article 7 conditions should be enforced under the
9 particular procedure laid down, and that should not be
10 carried over into the Article 8 authorisation process.
11 That process imposes a duty on-of come to authorise the
12 Mobile Satellite System operators to use CGCs on the
13 relevant frequency bands. The Legislator could have
14 inserted a condition under Article 8 requiring
15 compliance with the operator's commitments during the
16 selection process, but it did not do so, and instead
17 specified two separate authorisation processes.

18 Viasat objects that it would be absurd if Ofcom were
19 required to license a CGC under Article 8 in
20 circumstances where it was clear that the wider system
21 could never comply with a particular Article 7
22 condition, and I should address you on that.

23 Now, the first point is that regulators and the
24 Commission may very well take different views as to the
25 meaning of particular conditions or commitments, and

1 that is why the legislation requires a dialogue under
2 the enforcement process before enforcement action is
3 taken, and it would not be right for Ofcom to prejudge
4 the outcome of that dialogue in the context of a
5 separate CGC authorisation process.

6 The other point to observe here is the fact that
7 a system does not comply with a particular commitment
8 does not necessarily mean that it cannot continue
9 operating. Regulators need to consider what is
10 proportionate when deciding whether the appropriate
11 penalty is to withdraw the license, the authorisation
12 altogether, or to impose some other penalty, and, for
13 example, if a deployed satellite fails or falls short of
14 requirement, regulators will need to decide how to
15 proceed, and that may not -- it may not be appropriate
16 when hundreds of millions of pounds have been spent on
17 the launch of a satellite to remove the authorisation
18 altogether.

19 Similarly, if the commitments as to timing are not
20 met, as we know they were not, regulators will need to
21 take a view as to the consequences of the delay, so
22 this, again, explains why there is a process of dialogue
23 under the Article 7 process between national regulators
24 and the Commission, given the various competing
25 considerations which may need to be weighed, and that is

1 needed to ensure a harmonised approach.

2 So it would not be appropriate, in our submission,
3 to block CGC authorisations in circumstances where the
4 system may be permitted to continue in operation, even
5 where a particular commitment may not be met, and the
6 Article 8 CGC authorisation process has been kept
7 deliberately on a separate track.

8 Now, in the real world, of course, if Ofcom had
9 serious doubts --

10 THE CHAIRMAN: You are going to have to finish in five
11 minutes.

12 MR. HOLMES: I am grateful sir, I am very near the end. If
13 Ofcom had serious doubts as to whether a system was in
14 serious and irremediable breach of its Article 7
15 conditions, which is not the case here, the obvious
16 course would be for it to investigate that before
17 reaching a final conclusion on the CGC application, and
18 that is how it would prioritise its resources in
19 performing its licensing functions, but that, in my
20 submission, is very different from saying that the
21 Article 8 authorisation is subject to a legal
22 pre-condition that the system complies with Article 7
23 conditions. We say there is no such pre-condition.

24 In any event, sir, we do disagree that the
25 substantive commitment under 4.1(c)(ii) cannot be met by

1 Inmarsat's proposed EAN. The requirement is that the
2 MSS shall be available in all Member States to at least
3 50 per cent of the population and over at least 60 per
4 cent of the aggregate land area of each Member State.
5 It is accepted that the service must be commercially
6 available in an area covering at least 50 per cent of
7 the population, and we agree that commercial
8 availability involves a consideration of the factors
9 identified in the Call for Applications to which
10 Mr. Bowsler referred you. Just for your note, sir,
11 Bundle F, tab 7, page 21, where the distribution
12 channels exist and the service can be purchased by
13 customers, where the terminals supporting the specific
14 service are available for purchase in that country, the
15 required customer -- and whether the required Customer
16 Service infrastructure is in place.

17 Now, these conditions, we submit, can all be met by
18 a purely aeronautical service. The distribution
19 channels of the airlines, who are able to purchase the
20 service, as are their customers, terminals are available
21 for purchase by airlines. Inmarsat is actively
22 marketing its service, and we say that Article
23 4.1(c) (ii) does not require that a Mobile Satellite
24 System be used to provide at a minimum a particular type
25 of ground-based service allowing immediate accessibility

1 at any location within the coverage area. There is
2 nothing in the condition to support such a broad
3 interpretation which, in our submission, would run
4 counter to the recitals of both the Harmonisation
5 Decision and the EU decision which suggests a broad and
6 permissible approach as to the type of service being
7 offered.

8 One final point, sir, Viasat says that it would not
9 comply with the commercial availability requirement to
10 put a single handset in each Member State. That is at
11 paragraph 143 of its closings. We agree. The service
12 must be actively marketed. Airlines are being actively
13 solicited by Inmarsat to take its service. Unless there
14 are further questions, sir, those are my closing
15 submissions.

16 SUBMISSIONS BY MR. WARD

17 THE CHAIRMAN: Thank you Mr. Holmes.

18 Mr. Ward, I doubt you will need three-quarters of an
19 hour, will you?

20 MR. WARD: I am going to confine myself to 30 minutes if
21 that would be acceptable.

22 THE CHAIRMAN: Yes.

23 MR. WARD: What I would like to do is address some of the
24 core points raised by Viasat in respect of ground 1,
25 from Inmarsat's perspective our overarching submission

1 is that Viasat's of the legislative regime and it is
2 lacking any form of underlying rationale.

3 When he opened this morning Mr. Bowsher said it is
4 necessary to look at what the goals of thus regime are,
5 and we would respectfully agree with that, but then he
6 sought to answer that question and said, well, why is it
7 that one would prioritise the satellite component, and
8 he said that because at the heart of the framework is a
9 prioritisation of earth and space communication, so in
10 my respectful submission that does not take us much
11 further, but for the reasons Mr. Holmes has already
12 explained at length, the submission is based on
13 a misreading of the legislation. It prioritises systems
14 providing MSS which, by definition, include
15 complimentary ground components, but the implications of
16 that error are very far-reaching indeed, because this
17 argument based on prioritisation is the driver of most
18 of Viasat's case, because what that case amounts to is
19 that the EAN is impermissible because there is too much
20 capacity provided by the ground networks.

21 Now, looking at it from a policy point of view, it
22 is impossible to detect any rationale at all for that
23 limitation, because what it amounts to is a service
24 which is beneficially enhanced in the way the EAN is,
25 must be forbidden. Now that is obviously good for

1 Viasat's commercial interest, it has a competing
2 product, but it does not serve any public interest
3 objective for the EU or seeking to serve, and those
4 objectives, in short, were efficiency, competitiveness
5 and innovation. Just for the Tribunal's note, we see
6 those objectives in the first three recitals of the
7 Harmonisation Decision, and the first five recital as of
8 the EU decision. I will not take your time with going
9 back to them but they speak for themselves.

10 Now, we do not dispute, of course, that the
11 satellite is an essential element in an MSS, and the
12 reason is, again, explained in the recitals. Satellites
13 have obvious advantages in terms of coverage in
14 particular. One satellite can cover the whole EU, and
15 we can see, again, just for your note, in Recitals 5 and
16 14 of the EU decision, the driver for this is the idea
17 of this enhanced satellite coverage, enhanced coverage
18 a satellite can provide, and there were times when
19 Viasat's submissions sounded as if there was no
20 satellite in the EAN, but of course that is not right,
21 and what is fatal to their appeal is the legislation
22 establishes no permissible maximum to the benefits which
23 the ground stations can achieve.

24 Just to show you an illustration of where this error
25 manifests itself, may I ask you to turn up Viasat's

1 closing submissions on page 8? This is a paragraph
2 I don't think Mr. Holmes took you to unless I have
3 momentarily distracted myself. He took you through
4 paragraph 18 but I don't think he went through paragraph
5 19.

6 What it says is had there not been any intention to
7 prioritise within the 2 GHz Band communications between
8 earth and space, there simply would have been no need
9 for the Legislator to go to the extensive lengths it
10 went to in order to create a harmonised process. Well,
11 with respect, that is obviously wrong. You still need
12 to harmonise the use of the frequencies, no matter what
13 the respective rules are of the two elements. Otherwise
14 what one ends up with is the patchwork of regulation
15 across the Member States that the community was so keen
16 to avoid.

17 Whilst we have that open, could we please now turn
18 to page 64 which really jumps to the end in a sense that
19 this is a point about Article 4.1(c), and Mr. Holmes has
20 just addressed you on that, what do the coverage
21 requirements mean in Article 4.1(c), and you might
22 recall that a point we made in our skeleton argument was
23 that if Viasat is right about the coverage requirements,
24 Aero services would not be compliant at all within this
25 regime because one could not serve, through an area

1 service, everybody on the ground, and we pointed to the
2 fact that Aero services were obviously envisaged in the
3 preparatory documents for this regime, and Viasat now
4 has an answer to that, and the answer is at the bottom
5 of page 64 in the last line:

6 "An aeronautical service could be provided in
7 addition to any kind of service that satisfies the
8 Article 4.1(c) requirements".

9 So in other words, provided you have a service that
10 is, say, a ground broadband covering half the
11 population, you can also add on an Aero service but,
12 according to Viasat, you cannot do it in its own right,
13 and in our respectful submission, that simply makes
14 a nonsense of the policy that is behind this
15 legislation.

16 Moving on very rapidly just to touch on the
17 individual grounds, Ground 1A is a good example of this
18 excessively technical approach devoid of any policy
19 rationale. This is the definition of mobile satellite
20 systems. Essentially, after a lot of argument, it
21 boiled down to the question of whether you could have
22 two different antenna, and that has been much debated
23 this morning. At one point it started to sound as
24 though the critical issue was actually whether there was
25 one or two modems, but -- and then there was --

1 THE CHAIRMAN: That is the same point, because when people
2 are talking about antennae, they are talking about the
3 boxes, are they not?

4 MR. WARD: Maybe it is.

5 THE CHAIRMAN: That is what I have assumed. It is not just
6 the antennae just as an aerial, it is antennae plus
7 whatever is in the receiver, plus a modem. That is what
8 makes up the receiver.

9 MR. WARD: Sir, that may be right, and in our respectful
10 submission it simply does not matter at all, any more
11 than the debate that was had about whether one is
12 talking about one terminal or two terminals. Terminals
13 are not a term of art for the purpose of this regime.
14 Just for your note, to save time, you will remember you
15 were taken to a yellow document which was a proposal to
16 a particular airline, and the point was made about
17 whether it described more than one terminal. If you
18 ever get back there, it is at Bundle B, tab 8, page 15,
19 you will see at the bottom of the page it talks about,
20 "Terminal", in the singular, two lines from the bottom.
21 I can show you, but really nothing rides on any of this.

22 What was also said in Mr. Bowsher's submissions is
23 what I wrote down was, "Sold in one box is all it
24 amounts to", and that is plainly not right for the
25 reasons that you have heard at great length, but really,

1 stepping back from this, what possible public interest
2 would be served by insisting that there should be only
3 one antenna? It is, in my respectful submission, an
4 argument that borders on the frivolous, to think that
5 the ability to use this spectrum band would depend upon
6 that, particularly so, as has been ventilated today,
7 such an approach would be suboptimal in terms of the
8 different languages that the systems would use.

9 Now, Viasat have attempted to answer that question
10 in their closing submissions, so I would like to show
11 you that answer, and it is on page 27 of their written
12 document, paragraph 69. It is in the last three lines.

13 THE CHAIRMAN: Paragraph 69?

14 MR. WARD: Paragraph 69, last three lines, where it says:

15 "The purpose of that requirement is clear, namely to ensure
16 it is indeed earth-to-space satellite

17 communications which are prioritised from the 2 GHz Band
18 by, for example, preventing separate and distinctive" --

19 THE CHAIRMAN: I must be in the wrong paragraph.

20 MR. WARD: I am in the Viasat written closing, I am on page
21 27, looking at paragraph 69.

22 THE CHAIRMAN: Oh, in the middle of the paragraph. I had
23 the end. Sorry.

24 MR. WARD: Well, maybe your print-out is different from
25 mine.

1 THE CHAIRMAN: No, it is not. You meant the last three
2 lines on the page. I thought you meant the last three
3 lines of the paragraph. Carry on.

4 MR. WARD: I am sorry sir, I was not clear. I hope you are
5 with me, the purpose of that requirement is clear, is
6 where I intended to pick up.

7 THE CHAIRMAN: Yes.

8 MR. WARD: So what is the purpose? They say it is to ensure
9 that indeed earth-to-space satellite communications
10 which are prioritised, for example, preventing separate
11 and distinct equipment from being used for communicating
12 with the ground-based stations, versus what is used to
13 communicate with the satellite.

14 So it is obviously parasitical on this false
15 conception that earth-to-space transmissions must be
16 prioritised, but what is being posited there is a very
17 long way indeed from what is going on in this case.
18 What we have is a single integrated system where the two
19 different antennae are connected in the ways the
20 Tribunal has heard. This objection reads as if what
21 Inmarsat is doing is providing a kind of separate mobile
22 phone service or something of that kind with the ground
23 stations.

24 Again, whilst we have that document open, I want to
25 turn to the second part of the first ground, which is

1 the slightly more substantive question of whether the
2 ground stations are complimentary, and we will see this
3 also collapses down to the same point, and we can see
4 that in paragraph 80 on page 34. What is said is that
5 it explains the nature of Ofcom's supposed error:

6 "Ofcom therefore erred by failing to consider
7 whether the terrestrial segment contributed to the
8 legislative imperative of prioritising communications
9 between earth and space via satellite".

10 If you accept the submission made by Mr. Holmes and
11 strongly endorsed by me, the answer is they didn't err
12 because that was not a requirement, and we see exactly
13 the same dialogue going on in paragraph 83 where, again,
14 they recite our strongly-asserted objection:

15 "Both Ofcom and Inmarsat complain there is no
16 minimum capacity threshold the satellite component of
17 the system must provide".

18 Correct. We do indeed:

19 "Whilst there is no express numerical threshold,
20 plainly, in order to be consistent with the purpose and
21 scheme of the legislation, it is necessary to consider
22 whether any ground component is being deployed in a way
23 that is consistent with, and enhances, the
24 prioritisation".

25 So that falls away for precisely the same reason.

1 Finally in this section and whilst we are here, we
2 have the point in paragraph 89 which Mr. Holmes has
3 already referred to so I will be brief, which is
4 complaining, if we look at the bottom of page 38, to the
5 last sentence of paragraph 89, that what is going on
6 here is the very inverse of the legislative intent, but
7 stepping back, again, we know that this particular piece
8 of spectrum has significant limitations. Inmarsat has
9 taken it, and using the complimentary ground stations,
10 has much a much better and more useful product. That is
11 not in any conceivable way contrary to any legislative
12 intent.

13 Now, the final limb of this first ground is improve
14 the availability, and here Mr. Holmes has dealt with
15 this so I just want to go quickly to one point which is
16 on page 41 of Viasat's written closing, and this time it
17 is paragraph 97 where it says:

18 "There can be no question on the basis of the
19 information that was before Ofcom and now reinforced by
20 the evidence before the Tribunal that the terrestrial
21 segment of the EAN is in fact setting the performance
22 baseline for the system rather than enhancing what the
23 satellite itself provides".

24 Mr. Holmes has made submissions which we associate
25 ourselves with, that there is no legal requirement in

1 that way, but it is a highly semantic argument, which of
2 the two is setting the baseline. You could just as well
3 say the satellite was providing a performance baseline,
4 and the ground stations enhance it to ensure it can
5 reach the required quality, but what possible policy
6 reason would there be to prevent the use of ground
7 stations to reach a higher quality standard? That
8 cannot benefit competition, innovation or consumers.

9 Moving on with apologies for rather rattling
10 through, the next limb of the argument is about whether
11 the CGCs are at least capable of meeting the common
12 conditions in Article 8, and Mr. Holmes went through the
13 three of them, but the one that has attracted the most
14 argument is whether the satellite is controlled by, "The
15 satellite resource and network management mechanism",
16 and we know that Dr Webb under questioning from
17 Dr Elphick accepted that if one read the whole
18 definition it was satisfied, and what Viasat says, can
19 I show you page 113 of the closing on that, it says that
20 was a straightforward error of law, because there was no
21 finding that the satellite had any role in controlling
22 the complimentary ground component, but there is no
23 conceivable or identified policy justification for this
24 interpretation of the words. Why would the Legislator
25 have insisted that the control mechanism should be

1 located in space? That is what this amounts to. It is
2 risky, it is expensive to put things in space, and when
3 they go wrong, they are difficult to fix. What policy
4 object would it serve to require it to be controlled in
5 that way? What matters, as Mr. Holmes has said, is that
6 the CGC and satellite elements work together in an
7 integrated way, subject to common control, although it
8 is also worth recalling that the Tribunal heard evidence
9 from Mr. Sharkey that in practice the satellite does
10 play a role here, communicating with the, "Meet me",
11 point, and just for your note, that is Day 3, page 177.

12 In the few minutes left to me I want to say
13 something about Ground 1B, the general principles, and
14 again, let's start, if we may, by looking at how the
15 case is put in Viasat's closing. For this, we go to
16 paragraph 122 on page 51 where it is said:

17 "It is not part of Viasat's case that general
18 principles of EU law prevent any modification being made
19 to the Mobile Satellite System that was proposed and
20 selected, but these principles do prevent any
21 substantial modification from being made without
22 requiring a rerun of the competition".

23 So that is the ultimate target of this argument.
24 That is where it is supposed to be going, but before we
25 get to the detail of that, the argument fails at the

1 very first hurdle, because even if all of that was
2 right, which, in our submission, it is not, it had
3 nothing at all to do with the process Ofcom was engaged
4 in. It did not carry out the selection procedure, nor
5 is it in any position to rerun it. Those are all
6 matters for the Commission.

7 Now, we do accept that the general principles do
8 have a role in Ofcom's decision, so just to take
9 a blindingly obvious example of transparency, supposing
10 Ofcom reached a decision and chose not to publish it.
11 That one might sigh administrator see Viasat might come
12 along and say, well, hang on a minute, the general
13 principle of transparency has been infringed there.
14 Anyway, I do not want it start making a hypothetical
15 example, nobody doubts that but that principle must
16 govern Ofcom's own activities, and indeed the EU could
17 have chosen to link the authorisation of CGCs to the
18 selection process, but it did not, and the reason why is
19 obvious. Again, looking at the policy of this regime,
20 once again, the policy object is to promote innovative,
21 pan-european services. What we have seen, before the
22 Tribunal, is that launching satellite services is
23 anything but straightforward. Just to remind you of the
24 trouble that Solaris had, they had a faulty satellite
25 Echostar bought them out, Echostar bought a secondhand

1 180-beam satellite and indeed they still have not
2 launched any services. Just to remind you, that was
3 a Space News article we saw at Bundle E1 tab 19, but on
4 Viasat's case, if these problems arise, then the
5 successful selected party has to face another tender
6 exercise. Now, it has taken ten years to get even this
7 far, but suppose that the successful party, like
8 Echostar, launches a service using its satellite, but it
9 is a commercial failure, so it wants to market
10 a different service for which there might be a market.
11 Well, suppose, as was actually the case for Solaris, the
12 satellite is defective, so it wants to put up
13 a different satellite maybe a simpler satellite with
14 less beams. Mr. Bowsher said change to the satellite is
15 itself a material change, so on Viasat's case, all of
16 the sunk costs, the time and the energy and all of this
17 must be set aside, we must go back ten years, the
18 selection process must start again, and you might think
19 that such an approach would be seriously offputting to
20 investors, because if you were being asked to put money
21 into an S Band project, the legal advice from
22 Mr. Bowsher -- on Mr. Bowsher's case would be, "Well, be
23 warned, because if you have a glitch or a change of use
24 or a change of technology you want to resort to Plan B,
25 you are out. It is back to the beginning. You have

1 gone down the snake, you are back it to the first square
2 of the board".

3 THE CHAIRMAN: You are not allowed a Plan B.

4 MR. WARD: You are not allowed a Plan B. Exactly so. So
5 that is not the approach of the community Legislator.
6 What it did instead, as Mr. Holmes has explained, is
7 adopted is a graduated enforcement mechanism for the
8 Article 7 commitments that can deal with any relevant
9 change of circumstances, so if Solaris went to the
10 Commission and said, as one imagines it did, "Our
11 satellite is duff, we need another one", the Commission
12 did not say, "Tough, you are out", but obviously we can
13 infer, and I emphasise I know no more about this than
14 the Tribunal does, that as Echostar is still sitting on
15 this S Band authorisation, the Commission clearly has
16 not withdrawn it.

17 Then finally, under this head, and I think finally
18 finally, I want to talk about the two authorities
19 Mr. Bowsher actually showed the Tribunal this morning to
20 show why they are of no assistance whatsoever to his
21 case, and they are in Bundle G, and they really, if
22 anything, just serve to underline the flaw in that case,
23 and the first one is at 3A, and this is the case called
24 *Firebuy*, about buying equipment for firemen.
25 Mr. Bowsher cited this --

1 THE CHAIRMAN: Sorry, tab which?

2 MR. WARD: I am so sorry, it is 3A in Bundle G, inserted
3 this morning. The part that he relied upon from Morgan,
4 J's judgment is about four pages in, paragraph 26 and
5 following headed, "The relevant legal principles".

6 THE CHAIRMAN: Yes.

7 MR. WARD: Now, as he explained this was a procurement case
8 about a tender to supply firemen's uniforms, but the
9 point I am going to make, and then try not to labour too
10 far, is this is about obligations upon the authority
11 that lets the tender. It is not about the obligations
12 on someone doing something else in a regulatory regime.

13 THE CHAIRMAN: Well, to be fair to Mr. Bowsher, he was not
14 citing this case because it was a parallel case
15 operating in a similar field, he was doing it to satisfy
16 my questions of what actually the principles of
17 transparency and all these odd words which never mean
18 quite what you think they are going to mean meant in
19 this context. That is the purpose of it.

20 MR. WARD: Sir, I entirely accept that, entirely, but it is
21 still an important point that all of these cases turn up
22 in the context of contracts being let by authorities and
23 obligations on those authorities.

24 We can just see that very, very easily from just
25 paragraph 27:

1 "The principle relevant enforcement community
2 obligations are obligations on the part of the authority
3 to treat bidders equally".

4 Then if I just invite you to skim read, 28, 29 and
5 30 are about obligations on the authority, and 36 is
6 about an obligation on the authority.

7 I am going to very briefly make the same point about
8 the other case he opened, which is under tab 19, which
9 is the Finn *Frogne* case, and he took you to paragraph
10 28-30, and what we see here, again, are obligations on
11 the contracting authority, so paragraph 28:

12 "It follows from the court's case law the principle
13 of equal treatment and the obligation of transparency,
14 following the award of a public contract, the
15 contracting authority and the successful tenderer ..."

16 I am sorry, I have read that badly, but:

17 " ... may not amend the provisions".

18 Then again at 30:

19 "A substantial amendment of a contract after it has
20 been awarded cannot be effected by a direct agreement
21 between the contracting authority and the successful
22 tenderer".

23 This matters because what we have here is
24 a harmonised framework under which the person who is
25 playing the role as close as possible to this

1 contracting authority is the Commission. It is not
2 Ofcom at all. It is not Ofcom's job to enforce this.
3 These generalised principles do not assist here because
4 all that Ofcom is doing is playing a limited and narrow
5 role within this harmonised framework. It is not the
6 role of an authority letting a contract.

7 I am three minutes ahead of time. Unless I can
8 assist further, those are the submissions for our side.

9 THE CHAIRMAN: Thank you Mr. Ward.

10 REPLY BY MR. BOWSHER

11 MR. BOWSHER: The aim was, I think, that I would be half an
12 hour so I will try and aim for 4.30 and see how we go.

13 Sir, can we just start with where we just finished,
14 so before you put *Finn Frogne* away, we may as well pick
15 up that point, the two points made, I didn't take you to
16 the whole judgment, it is not true that these principles
17 necessarily prevent the ability of -- prevent the
18 possibility of change. Indeed, *Finn Frogne*, the case
19 which is at tab 19 in the Authorities Bundle is itself
20 a case about a contract which went wrong, and the
21 settlement of the litigation that arose out of it, and
22 it is all to do with whether or not the agreed changes
23 to address -- the agreed changes that were being agreed
24 in the settlement were such as to be impermissible, and
25 the point of principle is set out on the following page

1 to the page I took you to before, paragraph 36. So it
2 is tab 19, paragraph 36:

3 "The very fact that because of their subject matter
4 certain public contracts may immediately be" --

5 THE CHAIRMAN: Just a moment. Yes?

6 MR. BOWSHER: "The very fact that because of their subject
7 matter certain public contracts may immediately be
8 categorised as being unpredictable in nature means that
9 there is a foreseeable risk that difficulties may occur
10 at the implementation stage. According in respect of
11 such a contract it is for the contracting authority not
12 only to use the most appropriate procurement procedures
13 but also to take care when defining the subject matter
14 of that contract. Further, as is clear from above, the
15 contracting authority may retain the possibility of
16 making amendments, even material ones to the contract
17 after it has been awarded on condition that this is
18 provided for in the documents which governed the award
19 procedure".

20 So you have variation procedures worked into the
21 draft contract which you attach to the bid document, so
22 everyone knows how you are going to regulate change, so
23 if you know that there is likely to be changes you
24 provide for those changes and the way in which they will
25 be implemented in the documents which are made

1 available, and advertised to all bidders.

2 So it is not true to say that this prevents all
3 change. In our submission it is also wrong to say that
4 Ofcom can avoid their obligations under these general
5 treaty principles which sit above the rest of EU law,
6 simply by saying, well, it is the Commission's process.
7 Mr. Holmes accepts, as I understand it, that Ofcom acts
8 under the subject of these principles. If, and insofar
9 as it grants a CGC authorisation which effectively
10 crystallises the ability of an operator to start putting
11 in play an unlawful service, that is -- by reason of
12 change -- then it that is acting in breach of those
13 principles, and it cannot avoid the fact by saying,
14 well, we have looked at this, the change has happened,
15 but someone else could look at this as well. Now, it
16 might be that there are other ways in which they can
17 deal with this in interaction with the Commission, but
18 from the point of view of the legal obligation it falls
19 to them to deal with it.

20 Can I go back to the beginning, and I am not sure
21 I have got the concessions right in my head, because
22 I think sort of the changes to the concession may have
23 changed, but at the very least, as I understand it,
24 Mr. Holmes is now saying that for the purposes of the EU
25 decision -- for the purposes of 2.2(b) of the EU

1 decision -- that the third path is not for the provision
2 of a mobile satellite service. It is only the first two
3 as a mobile satellite service. In 2.2(b) of the EU
4 decision --

5 THE CHAIRMAN: Just a minute. Let me get that. It is
6 easier to see in 2.2(a). Yes.

7 MR. BOWSHER: In 2.2(a) there are the three paths we have
8 seen many times. What I understand Mr. Holmes to be
9 saying now is that the first two paths constitute MSS,
10 Mobile Satellite Services, but that he accepts that
11 services between a mobile earth station and one or more
12 complimentary ground components used at fixed locations,
13 but that is not a mobile satellite service, that is
14 a terrestrial service. I am not sure I have quite
15 worked through all the consequences that --

16 MR. HOLMES: It is not that it is terrestrial, it is just
17 not a mobile satellite service.

18 MR. BOWSHER: Thank you.

19 THE CHAIRMAN: Sorry, I was puzzled at the time and I remain
20 puzzled. The third one --

21 MR. BOWSHER: The third one --

22 THE CHAIRMAN: The mobile earth station and one or more
23 complimentary ground components used at fixed locations.
24 That is not a mobile satellite service.

25 MR. BOWSHER: That is what he says.

1 THE CHAIRMAN: I am getting more and more puzzled as to what
2 that actually means, but carry on, Mr. Bowsher. It is
3 not your concession.

4 MR. BOWSHER: I think that has a number of -- I was a little
5 bit taken aback at the time as you may have gathered
6 because I was trying to understand where that goes. At
7 least three consequences seem to flow from that.
8 Firstly, if that is the case there, then it seems to me
9 one has to read Article 1.1 as emphasising that the
10 purpose of this decision is to facilitate the
11 development of a competitive internal market for the
12 delivery of the services in the first two paths and not
13 the third. Not ruling out the third, but that the
14 purpose of the decision is to give priority to the first
15 two paths and the not third, because otherwise you would
16 be reading Mobile Satellite Services in a different way
17 in adjacent articles of the decision which would be
18 absurd. That is the first point.

19 Secondly, if that is -- again, if one is going to
20 read this in the same way that path is not a mobile
21 satellite service, then surely one has to read the
22 available requirement in Article 4.1(c)(ii) in that
23 light in which case the availability requirement can
24 only be measured, the 50 per cent availability
25 requirement, can only be measured by reference to

1 availability of the first two paths. This has been our
2 case all along, but it seems to me that by reason of
3 this concession, Ofcom is agreeing with us.

4 The third consequence is in 2.2(b).

5 THE CHAIRMAN: Just a minute.

6 MR. BOWSHER: Sorry.

7 THE CHAIRMAN: Yes.

8 MR. BOWSHER: And the third consequence, I think, is 2.2(b).

9 If you read it the way we have been reading it and now,
10 as I understand it must be the consequence of
11 Mr. Holmes's concession, if the definition of
12 complimentary ground components means systems, cutting
13 a few bits, used at fixed locations in order to improve
14 the availability of MSS services, where communications
15 cannot be ensured with the required quality, well, that
16 only makes sense if it is the availability of the
17 services as you defined them in the previous
18 subparagraph, so it is only where the availability of
19 communications in the first two routes are not of the
20 required quality, that you can use a CGC. All of this
21 makes perfectly technical sense, in our reading, that
22 this is a satellite-driven solution. You only use the
23 third route because the satellite is not able to do its
24 job for whatever reason. It is not able to meet the --
25 to provide the level of service with the required

1 quality. The required quality, and obviously the
2 requirement will then have to be defined by reference to
3 what you expect of the MSS, which will be the MSS as
4 defined -- it has got to be the same thing in the two
5 parts of the -- of Article 2.2.

6 Now if I am right on that it seems to us that
7 Ofcom's position has more or less collapsed into ours.
8 If I have misunderstood and I grant that I may have
9 done, I am concerned that the only way to deal with this
10 is that maybe we need a short time to put a towel on our
11 head and each of us to set out precisely what we mean by
12 this concession, and in two pages each just make an
13 exchange but can I park that point and come back to it,
14 but it seems to us, at first blush, that it means that
15 these parts of the case are really very simply in our
16 favour.

17 Can I deal, then, with enforcement issues very
18 briefly? I do not want to spend too long on this.
19 There is a lengthy passage in Mr. Baldrige's statement
20 from paragraph 70-80 where he deals with the
21 interactions between Viasat and Ofcom and what we did or
22 didn't know. The short answer to how it is that these
23 proceedings are the right proceedings for us to be
24 bringing, and this discussion about JR and so on that is
25 really by-the-by, we knew, as one gets from the

1 evidence, and there is a little bit in the bundles, we
2 knew that there were compliance actions going on. We
3 did not know what their substance was, but we knew that
4 there were compliance proceedings going on.

5 THE CHAIRMAN: Do you mean enforcement proceedings?

6 MR. BOWSHER: Sorry, you are quite right, we were continuing
7 to interact, and it was not until this CGC
8 authorisation, effectively it was the statement rather
9 than the decision itself as Mr. Holmes rightly said at
10 the beginning, that we knew that the original error had,
11 as it were, crystallised into something that was going
12 to be delivered, so it is the statement that we
13 challenge rather than anything else. Until then, we do
14 not know what is going to come out of this.

15 We were a little bit surprised by some of the points
16 being made about what is or is not lawful. In paragraph
17 108 of our closing we record what we had understood to
18 be Ofcom's concessions twice to the effect that the
19 regulator must ensure that the definition of CGCs is
20 met, and must then consider whether the CGCs would be
21 capable of meeting the Article 8 common conditions
22 before authorising particular CGCs, and there is two
23 references there. I would invite you to look at those
24 references carefully, perhaps not now, not least because
25 this is my opportunity to point out that I had forgotten

1 to tell you earlier, those references are a little
2 confusing, the D1 references are to Day 1, and in fact
3 Day 1 is H4 and --

4 THE CHAIRMAN: I didn't find those confusing as I found H4
5 and so on, so I prefer, "D1". If that means, "Day 1"?

6 MR. BOWSHER: D1 surprisingly meant Day 1. Is.

7 THE CHAIRMAN: Yes.

8 MR. BOWSHER: It is at H4. I am not going to waste time on
9 it. Your Lordship knows where we are. We share the
10 confusion and I am sorry about that.

11 That leads, of course, if that is the concession, it
12 seems to us very difficult for Ofcom to effectively
13 postpone their consideration of matters such as the
14 coverage -- the availability requirement that is being
15 raised with you, because if they know that this service
16 is not going to be able to meet that requirement, and
17 they know that that was a commitment that had to be
18 honoured, it does reach the level of absurdity if, in
19 fact, they issue a CGC knowing that the moment that that
20 CGC is implemented -- if the moment that the service is
21 implemented by reason of the CGC's authorisation having
22 been put in place, that service will be an unlawful
23 service. You went through the issues about who would be
24 committing a criminal offence, it presumably is not
25 going to be until the full network is in place that that

1 service is provided, so unless they are actually going
2 to either apply conditions as to the delivery of the
3 service which they have not done, or actually prevent
4 the service coming to effect altogether, it seems rather
5 odd to adopt this course. In any event, if, as it now
6 seems to be conceded, that it is effectively ultra vires
7 to go ahead and allow an unlawful service to proceed,
8 and if it is right that Ofcom understood that they had
9 to look into that, then it seems to us that effectively
10 we have won on Ground 2. We have not given a great deal
11 of weight on Ground 2 because our Ground 2 is to say
12 that you should have applied proportionate and necessary
13 conditions to whatever you had to do. It is somewhat --
14 it is the next stage, but if, taking that availability
15 situation on its face, if they are saying, well, we
16 think we might have to apply a CGC authorisation but we
17 think that the moment that we do you will be applying
18 a service which cannot possibly meet the availability
19 requirement, at the very least there has got to be an
20 analysis as to what that actually involves, and must,
21 presumably, involve a series of conditions. It is not,
22 in our submission, good enough to say, "Well, we will be
23 keeping our beady eye on them and using enforcement".
24 At that point it is a genuine dereliction of
25 responsibility to simply say, well, we know this is not

1 going to be right but we are going to wait and see how
2 it turns out, and then we will apply our enforcement
3 procedures.

4 There are a number of points where it has been said,
5 ah, well, it has how been suggested that we are reading
6 things in from these prelegislative documents. That is
7 wholly wrong. We are applying natural readings of words
8 such as, "Mobile", "Earth", and, "Station", and trying
9 to give natural use to those words. We refer to the
10 other previous documents, in answer to repeated
11 questions, what could possibly be the policy reason for
12 that, what could possibly be the reason for that, well,
13 you have to go back and you read this material and we
14 have heard this question again, what could possibly be
15 the policy reason for not allowing Inmarsat to go ahead
16 with its broadband into air passengers service when
17 I think it was going to be competitive, innovative and
18 good for consumers.

19 Well, with respect it is blindingly obvious when you
20 read the previous documents. The people who will be
21 disappointed will be all those, for example, who would
22 have been benefitting from the voice, multimedia and
23 data services that Inmarsat were going to benefit from
24 on the proposal which they originally made in order to
25 meet the social policy criteria. This is not the best

1 possible, most economically -- this is not the
2 production of the most efficient economic outcome. This
3 is a process applicable to this spectrum which produces
4 a particular policy driven outcome and it is a policy,
5 first around satellites and second around social grounds
6 which will necessarily raise perhaps rather unusual
7 outcomes. That is the intention and it is noticeable
8 that whenever Mr. Ward, today, has been referring to
9 what is the policy, he does not refer to the social
10 policy issues, which do seem to have been right at the
11 heart of what the community Legislator originally looked
12 for.

13 I have a couple more points but can I just check
14 before I go on to them ... can I just check one thing?

15 (Pause)

16 THE CHAIRMAN: Yes, Mr. Bowsher?

17 MR. BOWSHER: I am not going to go back, because I have
18 already touched on the case law on change, on Ground 1B
19 and I should have dealt with the point then, but when
20 Mr. Holmes was looking at the case law there he
21 presented that very much as if the only test for
22 material change in economic balance, that is not
23 correct. If you go back and look at our skeleton on the
24 point, well, it is set out in paragraph 90(g) of our
25 opening, lest I direct you back to that --

1 THE CHAIRMAN: You are allowed to do that, but anyway.

2 MR. BOWSHER: Not for now.

3 THE CHAIRMAN: Not even for later. We are not going to go
4 back and start reviewing your opening, so if you have
5 got a point you want to make you should make it now so
6 that we can write it down on our documents, not having
7 to find your opening again.

8 MR. BOWSHER: This comes from *Presstext* which is, as it
9 were, the starting point for this area of law.

10 THE CHAIRMAN: Can you spell *Presstext* for us?

11 MR. BOWSHER: P-R-E-S-S-E-E-T-E-X-T. One word. It is
12 Authorities Bundle, tab 13. And the relevant passages
13 are 31-38.

14 THE CHAIRMAN: What do they say?

15 MR. BOWSHER: The point you get from 34-38 is that there are
16 a number of different criteria which you -- and they are
17 alternative criteria -- which you apply in deciding
18 whether or not a change is material. One of them is the
19 economic balance point which is paragraph 37 of
20 *Presstext*, but you also look, going further up, to 34,
21 you start at 34:

22 "The first question is, is the question of is it
23 materially different in character from the original
24 contract, such as to demonstrate intention of the
25 parties to renegotiate the essential terms".

1 Well, we would say the change in service delivery
2 here, it does mean that it is materially different in
3 character. This is no longer mobile data, et cetera, et
4 cetera:

5 "An amendment to the public contract during its
6 currency may be regarded as being material".

7 This is 35:

8 " ... when it introduces conditions which, had they
9 been part of the initial award procedure, would have
10 allowed for the admission of tenders other than those
11 initially admitted or would have allowed for the
12 acceptance of a tender other than the one initially
13 accepted".

14 Well, the change in satellite must be relevant
15 there. We have got the unchallenged evidence of
16 Mr. Baldrige that Viasat would have bid in changed
17 circumstances, and then there is the expansion of scope,
18 if the contract expands in scope, then that may also be
19 regarded as material. What you get from *Finn Frogne*,
20 it is not just an expansion in scope but also
21 a reduction in scope. These are not hard-edged things
22 but they are more -- but that is the statement, so it is
23 not just economic balance, although economic balance is
24 important.

25 Can I just finish with two final points? Again, in

1 the area of the torturing of language, it is not us that
2 is torturing language. I will take just the one
3 example, I am not going to go to the text, but what you
4 have heard about the word, "Typically", would fill
5 a small book. In our submission, when you read the
6 passage, the relevant passage, it is fairly clear what
7 it means. There is an obvious use for CGCs which comes
8 after the word, "Typically", but what the Legislator is
9 saying is, well, this is the typical use, and presumably
10 the Legislator thinks there might be another use but he
11 or she does not know what it is. That is all it means.
12 This is the usual use, there may be another one. No one
13 has come up with any instance of what this other one
14 would be, but that is the typical use.

15 Then finally, I would highlight the fact that if, as
16 I understand it, the concession is that aircraft without
17 the satellite terminal are not travelling with a mobile
18 earth station, then it seems that you cannot lawfully
19 authorise any service until -- give effect to the
20 CGCs -- until you are sure that the satellite terminals
21 are installed and working. Again, this goes back to our
22 point on enforcement. If, in fact, you are -- if Ofcom
23 is authorising the installation and operation of CGCs on
24 the basis that it goes that there is no -- for
25 a significant number of aircraft and from the decision

1 we get that there is quite a number of aircraft that
2 might be involved, that it knows that these will, in
3 fact, be committed -- or the operators will be
4 committing criminal offences by doing so, it seems
5 a most extraordinary approach to enforcement to say
6 well, let them go on and commit the offence and the
7 passengers, and then we will see what happens
8 thereafter. Again, this is exactly the burden of our
9 Ground 2, and we say that once one is in this situation
10 it must be wrong simply to leave this to future
11 enforcement. It must be appropriate at that point to
12 put in place necessary and proportionate controls to
13 ensure that the service that is delivered is a lawful
14 service. We say it is not. It is just a question of
15 lawfulness. Is it lawful or not. It is a question of
16 the vires of --

17 THE CHAIRMAN: Just test this. Assuming that is your only
18 point, and suppose we were with you on that point, I
19 want to see where does it go. What does it lead to?
20 This authorisation should be set aside in its entirety
21 and it should go back again?

22 MR. BOWSHER: If that were the only point it would have to
23 be remitted to consider what were the appropriate
24 conditions to ensure lawful operation of the --

25 THE CHAIRMAN: Right, and supposing that we did that and the

1 appropriate condition were, it would be obvious if we
2 did that, would be to impose a condition that all
3 aircraft must have both terminals. That is a complete
4 Pyrrhic victory for, you did not?

5 MR. BOWSHER: Well, both installed and operating.

6 THE CHAIRMAN: Supposing that had to be done and there would
7 be a lot of eye rolling and -- well, nevertheless we
8 will have to do it, that would mean that there would be
9 a delay, that would be a Pyrrhic victory, would it not?
10 The system would still, inevitably, be rolled. Inmarsat
11 are not going to roll over and say, "Oh well, we have
12 got to do that, we are not going to do it at all". It
13 would be a Pyrrhic victory, wouldn't it?

14 MR. BOWSHER: I am not sure it is a Pyrrhic victory, its
15 a victory. We will have established that there were
16 proper controls put in place. It is not what we are
17 aiming for in this case, but it is what we say should
18 happen on that limited point. It is not the -- that is
19 why I haven't said a great deal about Ground 2
20 throughout. We have seen, we have touched on it today,
21 they are marketing a competitive advantage about getting
22 those ground-facing terminals in, in 24 hours,
23 immediately, and then you can be up and running, running
24 the service, well, what was market in that document we
25 look at, I am afraid I can't remember the reference is

1 by definition, unlawful, in the light of what I think
2 Mr. Holmes was saying today. That is something that
3 should not happen. That competitive advantage should be
4 stopped. That is not a Pyrrhic victory from us. It may
5 not be all that we are seeking in this case but it is
6 far from a Pyrrhic victory. It would go far beyond, for
7 example, what Ofcom currently say they are going to do
8 in paragraph 4.10 of the authorisation statement, which
9 is just, well, we will monitor and see what happens.

10 I am still a little unclear whether I have got this
11 concession from Mr. Holmes --

12 THE CHAIRMAN: I am going to deal with that.

13 Mr. Holmes, the only -- one of the few things about
14 which of us are unanimous is that we, none of us,
15 understand where this concession point (a) came from and
16 (b) is going.

17 MR. HOLMES: I understand, sir.

18 THE CHAIRMAN: The only way I think we can resolve that
19 is -- and then understand what difference it makes to
20 Mr. Bowsher's case, because he is entitled to understand
21 it as well, is for you to stick on a piece of paper,
22 preferably no more than one side, I think the starting
23 point for what you are conceding and what, if anything,
24 you say the effect of the concession is.

25 MR. HOLMES: Very good sir.

1 THE CHAIRMAN: It may be one of those concessions you may
2 regret having made, but anyway, you have made it, and so
3 we would like to know what it is, the starting point,
4 what it is, and its direction, and then Mr. Bowsher can
5 have permission to indicate what difference that makes,
6 if any, to his case, and then I hope, at that point, we
7 will understand it. If we do not we will ask you some
8 more questions or ignore it, depending on what we think
9 the position is.

10 MR. HOLMES: That is understood, sir. We will prepare
11 a short document. It certainly will not be more than
12 two sides at most.

13 THE CHAIRMAN: We would like that to be done by close of
14 business on Thursday please.

15 MR. HOLMES: That is understood, sir.

16 THE CHAIRMAN: Mr. Bowsher, your response, please, close of
17 business on Friday may be a bit tight, but close of
18 business on Monday. Yes. Close of business on Monday
19 please.

20 MR. WARD: Sir, might we have the opportunity, if so --

21 THE CHAIRMAN: Yes of course. You may, at the same time as
22 Mr. Bowsher, put in your response.

23 MR. WARD: Thank you.

24 MR. HOLMES: Thank you sir.

25 THE CHAIRMAN: Thank you all for your submissions.

1 Mr. Holmes, are you going to deal with the case to
2 which I referred, the case which you were in but forgot
3 you were in?

4 MR. HOLMES: Yes, sir. I am very happy to deal with that.

5 THE CHAIRMAN: Well, if you want to, put it in the same
6 document otherwise it is going to do the rounds about
7 the concession.

8 MR. HOLMES: I shall do so.

9 THE CHAIRMAN: And I think we have already asked for the --
10 and the document outlining the enforcement proceedings
11 can accompany the same documents.

12 MR. WARD: Sir, if I may just mention one last thing, on our
13 side we are well aware of the pressures on the Tribunal
14 but as the Tribunal will have also observed, delay in
15 itself is highly detrimental to my client's interest and
16 we just respectfully ask that the judgment be made
17 available as early as, of course, the Tribunal is able
18 to.

19 THE CHAIRMAN: Well, it would never be made available
20 earlier or later than that date in any event. If you
21 press me, Mr. Ward, I shall start asking to be reminded
22 about when it was you asked for authorisation, when you
23 got it, when you started to implement it, and that is
24 something like ten years ago so there is ten years'
25 delay built into this which is not down to the Tribunal.

1 MR. WARD: Sir, I would not dream of seeking to press the
2 Tribunal.

3 THE CHAIRMAN: Good. Thank you. Well, you can assume that
4 all decisions that come from this Tribunal are given at
5 and not before and not after the earliest possible
6 moment. I would hope that you will get it before the
7 long vacation, but I am not promising. I am certainly
8 not warranting either. Is there anything else? Thank
9 you all for your submissions. The decision will emerge
10 in draft for your typographical and other comments in
11 the usual way. Thank you all.

12 (4.38 pm)

13 (Hearing concluded)

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