



Neutral Citation Number: [2020] EWCA Civ 624

Case No: C3/2019/0984

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
[2018] CAT 18

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2020

Before :

LORD JUSTICE LEWISON
LORD LEGGATT
and
LORD JUSTICE GREEN

Between :

Viasat UK Ltd	<u>Appellants</u>
Viasat Inc	
- and -	
The Office of Communications	<u>Respondent</u>
-and-	
Inmarsat Ventures Limited	<u>Intervener</u>

Mr Philip Moser QC, Ms Fiona Banks and Ms Khatija Hafesji (instructed by **Latham & Watkins**) for the **Appellants**
Mr Josh Holmes QC and Ms Julianne Kerr Morrison (instructed by **Ofcom Legal**) for the **Respondent**
Mr Tim Ward QC (instructed by **Jones Day**) for the **Intervener**

Hearing dates: 10th March 2020

Approved Judgment

Lord Justice Green:

A. Introduction / the issues

1. This is an appeal brought by Viasat UK Ltd and Viasat Inc (collectively “*Viasat*”) against the judgment (“*the Judgment*”) of the Competition Appeal Tribunal (“*the Tribunal*”) dated 7th December 2018 in which it rejected the appeal of Viasat against a decision of authorisation contained in two documents issued by the Office of Communication (“*Ofcom*”) dated 10th October 2017 and 22nd January 2018 (the “*Decision*”). In the Decision Ofcom granted authorisation to Inmarsat Ventures Limited (“*Inmarsat*”) for the use of 2GHz spectrum by ground stations in connection with the operation of an in-flight mobile communication service which used both ground stations and satellites. The authorisation was to “...*establish, install and use*” wireless telegraphy apparatus (i.e. the ground stations) in connection with the in-flight mobile service.
2. Viasat is a US company which provides a wide range of communication services in the US and internationally. It has headquarters in the US but also operates throughout the UK and the EU. It provides a variety of satellite services which include in-flight broadband services to commercial, private and governmental aircraft through satellite systems deploying various frequency bands. It is a competitor to Inmarsat. In unchallenged witness statement evidence before the Tribunal it explained that it was intending to market in Europe an enhanced version of the in-flight service that it provided in the US using a “*Viasat-3*” class satellite.
3. Ofcom is the regulator in the United Kingdom with responsibility for the communications market. It is the Respondent to the appeal.
4. Inmarsat, the Intervener in this appeal, supports the Respondent and seeks dismissal of the appeal. Inmarsat is a British satellite telecommunications company. It provides a range of mobile telecommunication services internationally.
5. The issue arises in the following way. On 13th May 2009 Inmarsat was selected by the European Commission to be the grantee of authorisations to use the 2GHz spectrum for pan-European mobile satellite services or “*MSS*”. The 2GHz spectrum is scarce bandwidth and the Commission initiated an allocation procedure whereby applicants for selection were required to submit applications which contained details of the MSS they were contemplating. In the event there were four applicants of which Inmarsat was one. After initial screening the number of eligible applicants reduced to two and this included Inmarsat. As it turned out the combined amount of spectrum the two remaining applicants sought did not exceed the total amount available and they were therefore both selected.
6. To be eligible for selection, applicants had to commit to meeting certain conditions and milestones. These included launch of a satellite within a prescribed timeframe which had an ability to meet a minimum (50%) geographical coverage with the MSS. The Tribunal found that Inmarsat satisfied the Commission at the time that it would meet the requisite conditions and milestones in relation to its proposed MSS. There was no charge payable for the authorisation which under the relevant legislation was to last for 18 years.

7. Following selection, the actual authorisation and licensing process was delegated, under the legislation, to the competent authorities in the Member States. This was because many conditions to be attached to authorisations derived from national law. The conditions to be imposed included those required under EU law and, for instance, incorporated the coverage and timeframe requirements referred to above. In accordance with the Commission selection process in August 2010, Ofcom granted to Inmarsat an authorisation and licence to use the 2GHz spectrum in connection with a satellite to provide the MSS.
8. Inmarsat did not however launch the MSS in question. The commercial and other reasons behind this are not germane to this appeal. Subsequently, in the Decision under challenge Ofcom granted an authorisation and licence to Inmarsat for the use of so-called “*Complementary Ground Components*” or “*CGCs*” (ie ground stations) in conjunction with a different MSS using the 2GHz spectrum. This new service concerned the use of mobile phones during flight on aircraft and would be provided over a “*European Aviation Network*” or “*EAN*”. Paragraph [57] of the Judgment described the proposed EAN:

“The object of the system ... is to provide Europe-wide internet services to passengers (and crew) on aircraft both in terms of emails and in terms of other internet access. The standard of service is intended to emulate the standard provided by home broadband. The satellite provided by Inmarsat would not have the capacity to do that by itself on any simultaneous and widespread scale, so the relevant signal is sent to and from aircraft by two routes – to and from the satellite, and to and from ground stations. So there are two principal elements to the EAN – the satellite and the ground station element. The signals are fed into a central server on the plane and distributed to passengers who communicate with the server via their mobile telephones or table (via wifi which is internal to the aircraft).”

9. The Tribunal explained how the CGC and satellite would work together. Satellites have substantially greater “*area coverage*” than an individual ground station but due to distance and power constraints the capacity of a satellite to transmit and receive data was significantly less than that of a ground station which could transmit a materially greater volume of data. Nonetheless, in relation to the EAN, there would be large areas of the English Channel, North Sea, Bay of Biscay, Mediterranean and Baltic which would not be covered by a terrestrial transmitter or receiver. The EAN thus provided full coverage for European passengers by a combination of the CGC and the satellite (Judgment paragraphs [60] and [61]).
10. There are three significant findings of fact made by the Tribunal of relevance to this appeal. First, that when the Decision was taken Inmarsat had not met the conditions and milestones contained in the initial authorisation. Second, that the new EAN service was materially different to that initially envisaged when Inmarsat was selected by the Commission. Third, that the CGC element of the EAN service was dominant relative to the satellite element. These findings form the underpinning of the legal arguments which Viasat advanced before the Tribunal and upon this appeal.

11. The commercial complaint of Viasat to these developments, as set out in its evidence to the Tribunal, was that the “... *repurposing of Inmarsat’s 2 GHz Band MSS licence to [EAN] purposes provides Inmarsat an unfair advantage in the emerging services for in-flight broadband connectivity in Europe*”. The riposte of Inmarsat is that Viasat had the chance to compete for selection in 2008 but it chose not to. It was now seeking to rewind time and undermine a key rival in the market. Its motives were purely commercial and its arguments technical and unmeritorious.
12. The Tribunal observed of Viasat’s position, as follows:
 - “3. Its underlying commercial complaint is that Inmarsat has gained an advantage by having the benefit of moved goalposts. It maintains that the intention of the scheme was for a satellite focused system which would provide useful benefits for people on the ground in the form of a signal which would not otherwise be available for them because commercial providers had not provided it. The spectrum which was the subject of the application was valuable, but the selection mechanism did not require any payment to be made for it, presumably on the basis that there was an element of public benefit in the use of the spectrum. Inmarsat have now departed from that scheme by providing a commercial service, using valuable but free (to Inmarsat) spectrum, to a limited number of paying airlines (or their customers), and it has done so by devising a service with heavy use of ground based components which was not originally anticipated. If that sort of use had been apparently on offer at the time then others, including Viasat, would have wished to be able to apply for the free use of the spectrum as well. What has happened is said by Viasat to be unfair and anti-competitive.”
13. It was confirmed during this appeal that the 2GHz spectrum is not the only route by which a satellite company can enter the relevant market. Viasat does not therefore argue that Inmarsat, by its conduct, has created significant barriers to entry to the market.
14. The dispute between Viasat and Inmarsat now ranges across Europe. In the appeal before the Tribunal Viasat raised a series of grounds objecting to the Decision of Ofcom to authorise Inmarsat to proceed with the EAN which the Tribunal rejected. Viasat is simultaneously challenging a decision of the European Commission for alleged unlawful failure to act upon a complaint it made to the effect that the Commission should take enforcement action against Ofcom for authorising Inmarsat under the Decision, and in the context of which there is also a dispute based upon (i) the refusal of the Commission to disclose to Viasat documents passing between Inmarsat and the Commission relating to an alleged agreement or deal between Inmarsat, and (ii) the Commission permitting Inmarsat to delay launch of the satellite that it had earlier committed to as a condition of being selected. That challenge is pending before the General Court. Viasat has also launched an administrative challenge to the authorisation decision made by the competent authority (BNetzA) in Germany. There is also litigation in the French Courts where by a judgment of 28th June 2019 the Conseil d’Etat referred three questions to the Court of Justice. As of the

date of this appeal the written procedure before the Court is closed but no date had been set for an oral hearing. The questions posed concern the meaning of the expression “*mobile earth station*” and the respective roles that satellites and ground components may play in a mobile satellite system.

15. Viasat has also lodged an appeal against the decision of BIPT, the competent authority in Belgium, in the Court of Appeal in Brussels which also authorised Inmarsat to use CGCs in conjunction with the spectrum allocated to it in 2008 for the EAN. In a judgment dated 23rd January 2019 the Court (Market Court Section, 19th chamber A, Market Chamber) made a reference to the Court of Justice on various questions. A stated reason for this was that a ruling of the Court of Justice would benefit all competent authorities and courts in the EU where similar issues arose. The gist of the questions referred queried whether non-compliance by Inmarsat with the initial conditions (in particular relating to coverage requirements) necessarily meant that national competent authorities were empowered to refuse to grant authorisations to Inmarsat to deploy CGCs (and should do so). On 5th March 2020, in Case C-100/19 *Viasat UK Ltd and Viasat Inc v Institut Belge des services Postaux et des Telecommunications (IBPT)* (“*Viasat v IBPT*”), the Court of Justice handed down a judgment which largely supports the analysis of the Tribunal and the position of Ofcom.

B. The Grounds of Appeal

16. The proceedings before the Tribunal amounted to a statutory appeal under section 192 of the Communications Act 2003 (“CA 2003”). Under 194A(2) CA 2003, the Tribunal was required to decide the appeal by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review, but taking account of the “merits”. The phrase “merits” has been considered by the domestic courts on previous occasions (see eg the analysis in *R (Hutchinson 3G UK Limited, and others v Office of Communications* [2017] EWHC 3376 (Admin) at paragraphs [35]–[45]). It is common ground however that both before the Tribunal and upon this appeal the issues arising are essentially points of law and jurisdiction. There is no material scope for any “merits” assessment to occur. The appeal to this Court is limited to points of law only under section 192(6) CA 2003.
17. The principal legislative measure in issue is Decision 626/2008/EC of 30th June 2008 of the European Parliament and of the Council on the selection and authorisation of systems providing MSS (the “*Selection Mechanism Decision*”). This laid down the rules and procedures governing the selection of Inmarsat to be authorised to use the 2 GHz radio spectrum in conjunction with a MSS. Details of this and other relevant legislative measures are described in Section C below. In the light of the judgment of the Court of Justice in *Viasat v BIPT*, Viasat has modified and narrowed its grounds of appeal. The issues now fall under two headings: (i) those which flow from the related facts that the EAN is materially different to the MSS contemplated in the initial authorisation and that Inmarsat has failed to comply with conditions attaching thereto; and (ii), those which relate to the definition of a “MSS” and a “CGC” under the Selection Mechanism Decision.

18. The grounds which flow from the departure by Inmarsat from the MSS initially contemplated and from its non-compliance with the original conditions can be summarised as follows:
- i) **Failure to observe the principles of equal treatment and transparency issue:** By granting Inmarsat authorisation in the Decision for the EAN Ofcom failed to observe the general principles of equal treatment and transparency which applied to the initial 2008/9 procurement (selection) process and subsequently and which prevents successful tenderers from departing materially from the initial grant.
 - ii) **Non-observance of conditions:** Ofcom wrongly failed to recognise that non-compliance with the initial conditions disqualified Inmarsat from authorisation relating to the EAN.
 - iii) **Failure to impose a condition requiring satellite use:** Ofcom erred in failing to impose upon Inmarsat a condition compelling it to install and actually use a satellite terminal capable of carrying a MSS.
19. The grounds which flow from the definition of a “MSS” and a “CGC” under the Selection Mechanism Decision are:
- i) **Non-observance of the complementarity requirement:** Ofcom erred in finding in the Decision that the use of CGCs as part of Inmarsat’s EAN was “*complementary*” to the satellite component of the EAN, when in fact it was dominant and primary (as the Tribunal found). In law Ofcom could only authorise a system in which the satellite was dominant and primary and the CGC subservient and secondary.
 - ii) **Non-observance of the radio path to satellite requirement:** The use of the CGC in the EAN did not meet the definition of a CGC under the Selection Mechanism Decision because it did not, as was required, form part of a radio-communication path to the satellite.
20. The Tribunal held for Ofcom (and Inmarsat) and against Viasat on all these issues. This appeal arises whilst the United Kingdom is in the transition period following exit day from the European Union. It suffices to record that (with limited exceptions which do not arise for consideration in this appeal) until the end of the “*Implementation Period*” or “*IP*”, which is presently set at 11pm on 31st December 2020, the same rules apply as they did prior to exit day: see *The Queen (Simonis) v Arts Council and others* [2020] EWCA Civ 374 at paragraphs [9] and [10].

C. The relevant legislation and its underlying purpose

21. The issues arising on the appeal involve a close analysis of the relevant statutory language, all of which is set out fully in the Judgment of the Tribunal. In the text below I summarise the principal measures in issue together with other instruments and documents relevant to the proper interpretation of the key terms in dispute. This appeal primarily concerns the Selection Mechanism Decision, but this instrument is but one part of a wider framework of connected EU measures, all of which serve the same objectives. All parties support their arguments on the meaning of specific terms

by reference to principles of purposive construction and draw inspiration from numerous legislative and policy sources. The Court of Justice in *Viasat v BPIT* indeed adopted a purposive approach to construction when it ruled upon the meaning of these same measures.

The Authorisation Directive

22. I start with Directive 2002/20/EC of the European Parliament and of the Council of 7th March 2002 on the authorisation of electronic communications networks and services (“*Directive 2002/20*”). This provides an important part of the overarching framework for all legislation in this field. It was amended by Directive 2009/140/EC of 25th November 2009 (the “*Authorisation Directive*”) which introduced changes to Articles 2(2), 3(2), 5, 6, 7, 10, and 14. Article 1 provides:

“1. The aim of this Directive is to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community.

2. This Directive shall apply to authorisations for the provision of electronic communications networks and services.”

23. The MSS in issue in this case (the EAN) falls within the description of “*electronic communications networks and services*”. The recitals identify the policy considerations which guide a purposive interpretation of the provisions in dispute in this appeal. It suffices to summarise these policy considerations as follows.

24. First, the regime seeks to facilitate a single European market in innovative and emerging communication services. The framework is technology neutral. It does not predetermine which technology should prevail. It recognises that over time the technology used to provide communications will evolve and change.

25. Second, for a policy of facilitating new and innovative and emerging services to succeed, operators need to take investment decisions over a lengthy time frame and need legal certainty in a changing technological environment.

26. Third, in the case of scarce spectrum needed for the provision of pan-European communication services the process of *selecting* operators to be given access to that spectrum should be conducted at the EU level: (a) to reflect the EU wide nature of the services to be provided; and (b), to enable EU wide conditions to be imposed upon selected operators. This ensures harmonisation of authorisation processes across the EU. It prevents the risk of inconsistent policy formulation and market fragmentation that uncoordinated national decisions would entail.

27. Fourth, whilst *selection* had to occur at the EU level the process of grant of authorisations should occur at the national level to reflect the fact that, in addition to conditions imposed by the EU, many conditions that operators would be made subject to were imposed under national law.

28. Fifth, it followed that in relation to authorisation to use the 2GHz spectrum national competent authorities were to abide strictly with the outcome of the EU selection process.
29. Sixth, in relation to conditions imposed at the EU level enforcement should occur upon a harmonised EU wide basis, again to prevent market fragmentation caused by conflicting decisions of different national competent authorities. This was so even if final implementation of such decision making was carried out by national authorities.
30. Seventh, in relation to EU imposed conditions “*save in exceptional circumstances*” it was disproportionate to suspend or withdraw the right to provide the service or the right to use spectrum “...where a undertaking did not comply with one or more of the conditions under the general authorisation”.
31. Eight, there had to be a power to amend “*rights, conditions, procedures, charges and fees*” relating to authorisations where objectively justified and proportionate.

The CEPT Report

32. Decision No 676/2002/EC of the European Parliament and of the Council of 7th March 2002 (“*the 2002 Radio Spectrum Decision*”) was an early measure establishing a legal framework to ensure the co-ordination of policy in relation to use of the radio spectrum. It was adopted on the same day as the Authorization Directive. Under Article 1(3) the EU was required, in its work in this area, to “*take due account*” of the work of international organisations related to radio spectrum management. The two most significant such organisations are the European Conference of Postal and Telecommunications Administrations (“*CEPT*”) and the International Telecommunications Union (“*the ITU*”).
33. Under Article 4(2) of the 2002 Radio Spectrum Decision, the Commission was empowered to issue specific mandates to CEPT. A mandate was in fact given to the CEPT to consider the harmonised technical conditions for the use of 2GHz bands for MSS in the EU. In July 2006 CEPT published a “*Report of the European Conference of Postal and Telecommunications Administrations*” (“*the CEPT Report*”). This was relied upon by the EU as guiding future legislative measures.
34. The CEPT Report informed much of the legislation that followed its publication. It has been referred to by all parties to this litigation. I would summarise the main points as follows: (i) radio spectrum can be allocated to providers of radio communication services; (ii) such capacity might be scarce; (iii) the 2GHz spectrum is an underutilised bandwidth which could be allocated to operators of satellites for use as part of systems providing radio communication services in the EU; (iv) there is a legitimate interest in the efficient use of that bandwidth; (v) satellite services can help in providing ubiquitous radio communication services; (vi) satellites are important to the future development of radio communication services; (vii) the technology needed to provide radio communication services is evolving and will change over time; (viii) satellites will increasingly be used in conjunction with terrestrial (ground) stations; (ix) such ground stations will be integrated with satellites systems and together they will improve geographical coverage and lead to ubiquitous systems and services; (x) this will improve communication services to the benefit of consumers.

35. In Section 2 CEPT explained the benefits of the future “... rollout and development” of mobile satellite “systems” as offering: “...instant and reliable global communication systems anywhere in the world together with social, economic, public safety and humanitarian relief benefits. MSS applications may include a large variety of services including road transport services, industry communications, video and radio services, services tailored to the needs of governments, national security requirements and emergency and disaster relief services”. CEPT recognised that MSS systems could provide “ubiquitous connectivity through widespread, international coverage”. The report identified a variety of services as candidates for MSS including: “... maritime, (which includes distress and safety communications); aeronautical (which includes the provision of communications to aircraft for the purposes of air traffic management, operational communications for airlines and communications for passengers); exploration (for example services to the mining, oil and gas industries); and public safety”.
36. CEPT highlighted the importance of hybrid ground station/satellite systems in which satellites could improve coverage in areas where terrestrial capacity alone was ineffective, for instance “rural areas where the economics or geography do not support terrestrial system build-out”. It continued: “... where sparse population does not provide the economies of scale to justify the roll-out of wireless networks or of land-based wireless network requiring a large number of transmitters, satellite networks have historically provided a swift and efficient deployment of services to communities which would otherwise not have access to such services.”
37. For these reasons, in designating the 2 GHz capacity to satellite, CEPT recognised that satellites would be used in tandem with “complementary ground components”. The concept of complementarity was functional, entailing CGCs working in conjunction with satellite to provide a better overall service. There is nothing in the CEPT Report which identifies any reason why CGCs should be subservient to satellites or (to put it another way) why satellites should be a dominant component of mobile satellite systems. The interest of CEPT was to see the combining of CGC and satellite technology to provide new services with improved coverage and, in consequence, better consumer services:

“The designation of the 2 GHz bands to MSS including the possibility to implement complementary ground components will allow for the development of a range of new markets and services. New satellite technologies (high-power platforms, large antennas) together with improved coverage in urban areas will attract larger consumer markets and initiate development of new services such as broadband services. Satellite systems are inherently capable of reaching a larger population of users and as such are very suited for multicasting operations, and the delivery of multimedia services to a large population of users. This type of applications [sic] is at the heart of the convergence of services enabled by electronic communications networks. The 2 GHz MSS band has been identified in the draft Radio Spectrum Policy Group Opinion on Multimedia Services is one possible non broadcast candidate band for the provision of such services.”

38. The combining of CGCs and satellites to produce “*integrated hybrid satellite/terrestrial systems*” was also important to the EU’s international competitiveness:

“Accordingly, endorsement of the CGC opportunity by the EU and national regulators will put Europe on a level playing field with the United States and Canada, in terms of MSS innovation and services to consumers.”

39. The conjoined use of CGCs would enhance the efficiency of the use of the 2 GHz spectrum:

“Apart from providing more efficient spectrum use, CGCs will benefit consumers by allowing MSS to provide improved quality of service. Improved coverage would result in continuous development of the ubiquitous connectivity which would be particularly beneficial to transport markets. According to the satellite industry, improved coverage would further attract large consumer markets resulting in improved economies of scale, which will partially off-set the development costs of new services such as ubiquitous mobile digital telecommunications, mobile broadband and mobile multicast services.”

(Emphasis added)

The public interest in the efficient use of the 2GHz spectrum is recognised also in recital [6] of Commission Decision 2007/98/EC of 14th February 2007 on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing MSS (“the 2007 Harmonisation Decision”).

40. “*Complementary Ground Components*” are described in section 4.2. The language used is reflected in the recitals to the Selection Mechanism Decision. The Report stated:

“4.2.1 Elements about CGC Complementary Ground Components (CGCs) i.e. ground based stations operating at the same frequencies as the associated satellites and used at fixed locations to improve the availability of MSS, for example in areas where the communication with space stations cannot be guaranteed. Typically CGC can improve the quality of service available to users by ensuring that MSS services can be extended into areas where traditionally service availability has been poor – for example, in buildings, in vehicles, in urban ‘canyons’, and in regions where the topography creates large satellite ‘shadows’ – for example mountainous regions, or regions at the very edge of the satellite footprint. Furthermore, they may play an important role in enhancing the efficiency of use of the radio spectrum. Some types of CGCs can transit traffic from one end user to another without passing through the satellite component of the system, reusing spectrum used by the

satellite in another geographical area. Such direct routing would temporarily bypass the satellite component to provide communications services which are identical to and fully integrated with the service offered by the whole MSS system footprint. Such bypass would allow increased spectrum efficiency for MSS, in line with EU spectrum policy.”

41. Consistent with the above, the position of CEPT was that CGCs should, technically and operationally, be an “*integral part*” of the “*satellite system*”. In the context of the CEPT Report the quality or characteristic feature of integrality is no more than that the CGC and satellite form part of a single overall system. This is relevant to the argument of Viasat that the CGC and satellite components of the Inmarsat EAN are to be legally unbundled and analysed separately as, in effect, quite different and unconnected communications systems (see paragraphs [104] – [117] below). The CEPT Report takes the opposite stance and treats CGCs and satellites as part of the same system, for instance:

“CGCs differ from independent ground components used by MS [mobile system] operators as they are technically and operationally an integral part of the satellite system and are controlled by the resource and network management mechanism of such system operating on the same frequencies as the associated satellite components and being delivered to an integrated user terminal.”

42. A proposed definition of a CGC (which was in pith and substance adopted into the Selection Mechanism Decision at Article 2(2)(b) (cf paragraph [49] below) was set out:

“The complementary ground component (CGC) is an integral part of a Mobile Satellite system and consists of ground based stations used at fixed locations to improve the availability of the mobile satellite service in zones where the communications with one or several space stations cannot be ensured with the required quality. CGC uses the same portions of the mobile satellite frequency bands ... as the associated space station(s).”

The 2007 Harmonisation Decision

43. Commission Decision 2007/98/EC of 14 February 2007 on the harmonised use of radio spectrum in the 2GHz frequency bands for the implementation of systems providing MSS (the “*2007 Harmonisation Decision*”) implemented the substance of the CEPT Report and provided for the harmonisation of the conditions for the availability and efficient use of the 2 GHz frequency band. The recitals set out summaries of parts of the CEPT report.
44. Recitals [2] and [3] highlight the importance of innovation in the use of satellites in the telecommunication and broadcasting environment. For instance:

“(3) ... The introduction of new systems providing MSS would potentially contribute to the development of the internal market

and enhance competition by increasing the offering and availability of pan-European services and end-to-end connectivity as well as encouraging efficient investments.”

45. Recital [4] highlights the conjoined (hybrid) nature of services combining satellite and CGC components: “...*systems capable of providing MSS should include at least one or more space stations and they could include complementary ground components (CGC), i.e. ground-based stations used at fixed locations in order to improve the availability of the mobile satellite service in zones where communications with one or several space stations cannot be ensured with the required quality.*”
46. Recital [8] provides that the 2GHz band, which were currently unused in most Member States, should “*in line with the CEPT technical conclusions*” be designated and made available without unnecessary delay in all Member States for systems providing MSS to ensure the development of such systems. Recital [9], dealing with the question of interference, endorsed the CEPT view of the complementarity of CGCs and satellite systems:

“(9) CEPT has concluded that the coexistence of systems capable of providing MSS and systems providing terrestrial-only mobile services in the same spectrum in the 2 GHz bands without harmful interference is not feasible in the same geographical area. Consequently, in order to avoid harmful interference to MSS and inefficient use of spectrum, it is necessary to designate and make available the 2 GHz bands to systems capable of providing MSS on a primary basis. This means that where the 2 GHz bands are used by other systems, which are not capable of providing MSS, these other systems should not cause harmful interference to nor claim protection from systems providing mobile satellite services. According to the CEPT, CGCs would not cause harmful interference, as long as they are an integral part of the system providing MSS, are controlled by the resource and network management mechanism of such system, and are operating on the same portions of frequency band as the satellite components of the system. Under these conditions, subject to an appropriate authorisation regime, CGCs could also be utilised even if signals are not transmitted through the satellite components.”

47. The Decision required Member States to designate and make available the relevant parts of the 2GHz band to satellite operators and ensure non-interference between such systems and other systems. Article 3(2) deals with CGCs:

“2. Any complementary ground based station shall constitute an integral part of the mobile satellite system and shall be controlled by the satellite resource and network management system. It shall use the same direction of transmission and the same portions of frequency bands as the associated satellite components and shall not increase the spectrum requirement of its associated mobile satellite system.”

The Selection Mechanism Decision

48. The Selection Mechanism Decision lies at the heart of this appeal. The central provisions in dispute are Articles 2, 7 and 8. I set out these and other relevant provisions below. Article 1(1) sets out the Objective and Scope:

“1. The purpose of this Decision is to facilitate the development of a competitive internal market for mobile satellite services (MSS) across the Community and to ensure gradual coverage in all Member States. This Decision creates a Community procedure for the common selection of operators of mobile satellite systems that use the 2 GHz frequency band... for space to Earth communications.”

2. Operators of mobile satellite systems shall be selected through a Community procedure, in accordance with Title II.

3. The selected operators of mobile satellite systems shall be authorised by Member States in accordance with Title III. 4. Operators of complementary ground components of mobile satellite systems shall be authorised by Member States in accordance with Title III.”

49. A good part of the argument in this appeal focuses upon the definitions in Article 2(a) and (b) which define “mobile satellite systems”¹ and “CGCs”:

“(a) ‘mobile satellite systems’ shall mean electronic communications networks and associated facilities capable of providing radio-communications services between a mobile earth station and one or more space stations, or between mobile earth stations by means of one or more space stations, or between a mobile earth station and one or more complementary ground components used at fixed locations. Such a system shall include at least one space station;

(b) ‘complementary ground components’ of mobile satellite systems shall mean ground-based stations used at fixed locations, in order to improve the availability of MSS in geographical areas within the footprint of the system’s satellite(s), where communications with one or more space stations cannot be ensured with the required quality.”

50. Article 4 contains conditions for the admissibility of applications for authorisation. In particular applications must contain commitments on the part of the applicant that: (i) the mobile satellite system proposed shall cover a surface area of at least 60% of the aggregate land area of the Member States, from the time the provision of MSS commences; (ii) the MSS shall be available in all Member States and to at least 50% of the population and over at least 60% of the aggregate land area of each Member

¹ To be distinguished from “MSS” which are “*mobile satellite services*”. See Article 1(1)

State by the time stipulated by the applicant but in any event no later than seven years from the date of publication of the Commission's selection decision.

51. Article 5 deals with the first selection phase and provided that the assessment of applications should rely on the satisfactory completion of milestones 1 to 5 as set out in the Annex. These stipulated as follows:

“1. Submission of International Telecommunications Union (ITU) request for coordination

The applicant shall provide clear evidence that the administration responsible for the ITU filing of a mobile satellite system to be used for the provision of commercial MSS within the territories of the Member States has submitted the relevant ITU Radio Regulations Appendix 4 information.

2. Satellite manufacturing

The applicant shall provide clear evidence of a binding agreement for the manufacture of the satellites required for the provision of commercial MSS within the territories of the Member States. The document shall identify the construction milestones leading to the completion of manufacture of satellites required for the provision of commercial MSS. The document shall be signed by the applicant and the satellite manufacturing company.

3. Satellite launch agreement

The applicant shall provide clear evidence of a binding agreement to launch the minimum number of satellites required for the continuous provision of commercial MSS within the territories of the Member States. The document shall identify the launch dates and launch services and the contractual terms and conditions concerning indemnity. The document shall be signed by the mobile satellite system operator and the satellite launching company.

4. Gateway Earth Stations

The applicant shall provide clear evidence of a binding agreement for the construction and installation of Gateway Earth Stations that would be used for the provision of commercial MSS within the territories of the Member States.

5. Completion of the Critical Design Review

The Critical Design Review is the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts. The applicant shall provide clear evidence of the completion, no later than 80 working days after the submission of the application, of the

Critical Design Review in accordance with the construction milestones indicated in the satellite manufacturing agreement. The relevant document shall be signed by the satellite manufacturing company and shall indicate the date of the completion of the Critical Design Review.”

Milestones 1-5 were not translated into licence conditions to be included by national authorities in authorisations (see in relation to Article 7 below).

52. Article 6 deals with the allocation of bandwidth where the combined demand for bandwidth of all eligible applicants exceeded that available. This did not arise on the fact of this case.
53. Article 7 deals with the conditions that can be imposed by national authorities in relation to the satellite element of the MSS:

“1. Member States shall ensure that the selected applicants, in accordance with the time frame and the service area to which the selected applicants have committed themselves, in accordance with Article 4(1)(c), and in accordance with national and Community law, have the right to use the specific radio frequency identified in the Commission decision adopted pursuant to Articles 5(2) or 6(3) and the right to operate a mobile satellite system. They shall inform selected applicants of those rights accordingly.

2. The rights covered by paragraph 1 shall be subject to the following common conditions: (a) selected applicants shall use the assigned radio spectrum for the provision of MSS; (b) selected applicants shall meet milestones six to nine set out in the Annex within 24 months of the selection decision adopted pursuant to Articles 5(2) or 6(3); (c) selected applicants shall honour any commitments they give in their applications or during the comparative selection procedure, irrespective of whether the combined demand for radio spectrum exceeds the amount available; (d) selected applicants shall provide to the competent authorities of all Member States an annual report detailing the status of development of their proposed mobile satellite system; (e) any necessary rights of use and authorisations shall be granted for a duration of eighteen years from the date of the selection decision adopted pursuant to Articles 5(2) or 6(3).”

54. Milestones 6-9, to be included as conditions inserted into national licences under Article 7(2)(b), were as follows:

“6. Satellite mating

The mating is the stage in the spacecraft implementation process at which the Communication Module (CM) is integrated with the Service Module (SM). The applicant shall

provide clear evidence that the Test Readiness Review for SM/CM mating has taken place in accordance with the construction milestones indicated in the satellite manufacturing agreement. The relevant document shall be 72 signed by the satellite manufacturing company and shall indicate the date of the completion of the satellite mating.

7. Launch of satellites

The applicant shall provide clear evidence of the successful launch and in-orbit deployment of the number of satellites required for the continuous provision of commercial MSS within the territories of the Member States.

8. Frequency coordination

The applicant shall provide clear evidence of the successful frequency coordination of the system in accordance with the relevant provisions of the ITU Radio Regulations. However, a system which demonstrates compliance with milestones one to seven inclusive is not obliged to demonstrate at this stage completion of successful frequency coordination with those mobile satellite systems which fail to comply adequately and reasonably with milestones one to seven inclusive.

9. Provision of MSS within the territories of Member States

The applicant shall provide clear evidence that it is effectively providing the continuous commercial MSS within the territories of the Member States using the number of satellites it has previously identified under milestone three to cover the geographical area the applicant has committed to in its application by the date of the commencement of the provision of MSS.”

55. Article 8 sets out the authorisation procedure for CGCs:

“1. Member States shall, in accordance with national and Community law, ensure that their competent authorities grant to the applicants selected in accordance with Title II and authorised to use the spectrum pursuant to Article 7 the authorisations necessary for the provision of complementary ground components of mobile satellite systems on their territories.

...

3. Any national authorisations issued for the operation of complementary ground components of mobile satellite systems in the 2 GHz frequency band shall be subject to the following common conditions:

(a) operators shall use the assigned radio spectrum for the provision of complementary ground components of mobile satellite systems;

(b) complementary ground components shall constitute an integral part of a mobile satellite system and shall be controlled by the satellite resource and network management mechanism; they shall use the same direction of transmission and the same portions of frequency bands as the associated satellite components and shall not increase the spectrum requirement of the associated mobile satellite system;

(c) independent operation of complementary ground components in case of failure of the satellite component of the associated mobile satellite system shall not exceed 18 months;

(d) rights of use and authorisations shall be granted for a period of time ending no later than the expiry of the authorisation of the associated mobile satellite system.”

Sub-paragraph (1) was the subject of the judgment of the Court in *Viasat v BIPT* which construed it as containing two separate conditions precedent to the grant of an authorisation by a national competent authority to use a CGC. These were (in summary) that the applicant had to be (i) selected by the Commission under the Selection Mechanism Decision and (ii) authorised to use the spectrum by the national competent authority. Sub-paragraph (3) set out the conditions to be imposed and these included, at (b), a requirement that the CGC constitute an “*integral part of a mobile satellite system*”.

56. Article 9 deals with monitoring and enforcement. It requires Member States to monitor compliance with the common conditions and take appropriate measures to address non-compliance. It was more fully implemented by the Commission Decision of 10th October 2011 on the co-ordination of the rules on enforcement in relation to mobile satellite services (the “*Enforcement Mechanism Decision*”). This compelled a co-ordinated approach to enforcement. If a Member State considers that an operator of a mobile satellite system is in breach of relevant common conditions, it must inform the Commission which must then refer the matter to a Communications Committee. This Committee comprises the EU and Member States. National authorities may not reach a final decision on sanctions pending its deliberations. Following such deliberation, a national authority can apply a sanction short of withdrawal or suspension of licence. If the breach persists or is repeated, the authority can withdraw or suspend a licence but the matter must first be re-referred to the Commission and to the Communications Committee. No decision can be taken pending that determination. Under the Authorisation Directive (see paragraph [31] above) the conditions may be varied by the national authorities. The Court of Justice in *Viasat v BIPT* has made clear that because of the overriding policy need to ensure consistency of administrative decisions and to avoid fragmentation, substantive decisions on breach are to be taken at the EU level even if then implemented at the national level.

57. The policy considerations underlying the Selection Mechanism Decision are the same as those which flow from the CEPT report and the Authorisation Directive (see paragraphs [23] - [31] and [34] above). Recital [1] refers to the need for coherent use of the radio spectrum to develop electronic communications services and thus contribute to stimulating growth, competitiveness and employment. Recital [2] endorses an earlier resolution of the European Parliament emphasising the importance of communications: “... *for rural and less-developed regions, for which the diffusion of broadband, lower frequency mobile communications and new wireless technologies could provide efficient solutions to achieving universal coverage in 27 Member States with a view to the sustainable development of all areas.*” Recital [3] refers to the Commission having established an objective of: “*facilitating the introduction of innovative satellite communications services, in particular by aggregating demand in remote and rural areas, while stressing the need for pan- European licensing of satellite services and spectrum.*” Recital [5] identifies MSS as contributing to the development of the internal market and as constituting:

“... an innovative alternative platform for various types of pan-European telecommunications and broadcasting/multicasting services, regardless of the location of end users... MSS could, in particular, improve coverage of rural areas in the Community, thus bridging the digital divide in terms of geography, strengthening cultural diversity and media pluralism and simultaneously contributing to the competitiveness of European information and communication technology industries...”

58. Recital [6] recognises the evolving nature of the technology: “*New applications of mobile satellite systems will emerge in the coming years.*” Recital [8] concerns CGCs. It attracted close scrutiny in argument:

“Complementary ground components are an integral part of a mobile satellite system and are used, typically, to enhance the services offered via the satellite in areas where it may not be possible to retain a continuous line of sight with the satellite due to obstructions in the skyline caused by buildings and terrain. In accordance with Decision 2007/98/EC, complementary ground components use the same frequency bands as MSS (1980 to 2010 MHz and 2170 to 2200 MHz). The authorisation of such complementary ground components will therefore mainly rely on conditions related to local circumstances. They should therefore be selected and authorised at national level, subject to conditions established by Community law. This should be without prejudice to specific requests made by competent national authorities to the selected applicants to provide technical information indicating how particular complementary ground components would improve the availability of the proposed MSS in geographical areas where communications with one or more space stations cannot be ensured with the required quality, provided that such

technical information has not already been provided in accordance with Title II.”²

59. Recitals [11] and [12] referred to the need for harmonisation of the award of spectrum to avoid fragmentation of the internal market. Recital [13] explains that the division of labour between the Commission and national authorities, with selection being at the EU level, was to avoid market fragmentation. The centralised process for selection was to “*ensure consistency*” and involved a “*synchronised assignment of spectrum and harmonised authorisation conditions*”. Recital [14] describes the benefits of a pan-European wide approach to selection and authorisation of MSS:

“MSS can generally reach geographic areas not well covered by other electronic communications services, in particular rural areas. The coordinated selection and authorisation of new systems providing MSS could therefore play an important role in bridging the digital divide by improving the accessibility, speed, and quality of electronic communications services in these areas, thus contributing to social cohesion. Therefore, the proposed coverage area of MSS (service area), as well as the timeframe for providing MSS within all Member States, are important characteristics which should be taken into account in an appropriate manner during the selection procedure.”

60. Recitals [21] to [24] concern enforcement and highlighted the importance of centralised, coordinated, decision making.

The Satellite Services Regulations

61. Brief mention should finally be made of the domestic implementing measures. The principal implementing measure is The Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010 (SI 2010/672) (“*the 2010 Regulations*”). Regulation 2 makes it a criminal offence to use the relevant part of the spectrum without a licence. Regulation 3 requires the granting of an authorisation to each applicant selected by the Commission procedure referred to above. There is no discretion:

“3 – Granting authorisations to the selected applicants

(1) Ofcom shall grant an authorisation under these regulations to each of the selected applicants for use in the United Kingdom of the frequency specified for that selected applicant in Article 3 of the Commission Decision subject to the conditions set out in these regulations.”

62. The conditions referred to are set out in Regulation 4 and follow the substance of Article 7 of the Selection Mechanism Decision:

“7 – Conditions of an authorisation

² Title II deals with the selection of providers.

(1) Ofcom shall ensure that the authorisations are subject to the common conditions, namely (a) the selected applicants shall use the frequencies which those applicants are authorised to use pursuant to regulation 3(1) for the provision of mobile satellite services; (b) each selected applicant shall meet milestones 6 to 9 set out in the Annex to the EU Decision by 14 May 2011; (c) each selected applicant shall honour all commitments given by that applicant in its application or during the comparative selection procedure referred to in Articles 4 and 6 of the EU Decision respectively; (d) each selected applicant shall provide Ofcom with an annual report detailing the status of development of their proposed mobile satellite system.”

63. Regulation 13 deals with CGCs:

“13 – Complementary ground components

(1) Ofcom shall carry out their functions under the Wireless Telegraphy Act 2006 so as to give effect to the obligations of the United Kingdom under the EU Decision and the Commission Decision insofar as those obligations have not been given effect by these Regulations. (2) Ofcom shall in particular pursuant to their powers under that Act grant a selected applicant, if requested, the authorisation necessary for the provision of complementary ground components of systems providing mobile satellite services subject to the common conditions specified in Article 8(3) of the EU Decision. (3) In this regulation ‘complementary ground components’ means ground based stations used at fixed locations in order to improve the availability of mobile satellite services in geographical area [sic] covered by those services.”

D. The Key Facts

64. I turn now to the relevant facts.

65. On 7th August 2008 the Commission issued a Call for Applications which invited applications for authorisation to use the 2GHz spectrum in connection with MSS. The process was under the Selection Mechanism Decision. A deadline was set for applications of 7th October 2008. Applications were received by ICO Satellites Limited, Inmarsat Ventures Limited, Solaris Mobile Limited (“*Solaris*”), and TerreStar Europe Limited. On 11th December 2008 the Commission issued a decision confirming that the four applicants met initial, threshold, admissibility requirements. Each applicant had to identify the MSS that it proposed for use in conjunction with the spectrum.

66. The Commission then evaluated the four applications against the required level of technical and commercial development of their proposed MSS. This was based upon satisfactory completion of milestones 1-5 as set out in the Annex to Decision 626/2008/EC (see paragraph [51] above).

67. In the light of this evaluation, the Commission concluded that only Inmarsat and Solaris met the test to become eligible applicants. Inmarsat requested 15MHz of spectrum for space to earth communications. Solaris sought 15 MHz for the earth to space communications and 15MHz for space to earth communications. Since the aggregate requirement for radio spectrum did not exceed that available, Inmarsat and Solaris were, without there being a need for the second evaluative stage, selected to provide mobile satellite systems in the relevant spectrum.
68. The details of the actual application made by Inmarsat were not disclosed to the Tribunal. We are told that there is a dispute about this before the General Court (see paragraph [14] above). However, the Judgment records (and this is not in dispute) that Inmarsat was proposing a 9-beam satellite in 2 polarisations using a 12m antenna and the Tribunal found that this was materially different to the EAN authorised by Ofcom under the Decision.
69. The formalities were completed through a Commission decision of 13th May 2009. Article 2 provided:
- “Inmarsat Ventures Limited and Solaris Mobile Limited are eligible applicants as a result of the first selection phase of the comparative selection procedure provided in Title II of [the Selection Mechanism Decision]. As the combined demand for radio spectrum requested by the eligible applicants retained as a result of the first selection phase of the comparative selection procedure does not exceed the amount of radio spectrum available ... Inmarsat Ventures Limited and Solaris Mobile Limited, are selected.”
70. An application was then made by Inmarsat in the United Kingdom under Regulation 3 of the 2010 Regulations for authorisation to use the relevant part of the spectrum for satellite use. This was granted on 31st August 2010 and was in broad terms. It conferred what the Tribunal described as a “... *a simple authorisation to use two frequency ranges of the spectrum for space-earth and earth-space respectively, within the UK*”. Inmarsat was required to meet milestones 6-9 of the Selection Mechanism (see paragraph [54] above) and all commitments given during the initial application to the Commission. At about the same time Inmarsat applied for equivalent authorisations in other Member States.
71. On 5th June 2014 Inmarsat announced an intention to use the 2GHz bandwidth for a newly planned pan-European service to aircraft over an air to ground network and to deploy a new satellite shared with a Greek broadcaster. The press release stated:
- “The aviation network deployment will be enabled by Inmarsat’s existing authorisation to operate integrated satellite/terrestrial communications services in 30MHz of S-band frequencies across the 28 Member States of the EU. Inmarsat has already commenced the licencing process with EU Member States in order to allow timely deployment of the new aviation services. Inmarsat has received strong support for its applications from many EU telecoms regulators and remains confident that, on the back of its substantial financial

commitment announced today, a consistent EU regulatory foundation can quickly be completed to support the deployment of these services for the benefit of EU businesses and consumers.”

72. On 22nd February 2006 Ofcom issued a consultation paper entitled “*Authorisation of terrestrial mobile networks complementary to 2GHz Mobile Satellite Service (MSS) A consultation on the licensing of 2GHz MSS Complementary Ground Component (CGC) for aeronautical use*”. The consultation was a response to the application by Inmarsat to use the 2GHz spectrum for which it had been authorised, for an EAN. The consultation paper stated:

“The purpose of the consultation. This document consults on proposals to authorise terrestrial base stations which allow ‘direct air-to-ground’ mobile satellite service (MSS) communications to aircraft. MSS are communications satellites, intended for use with mobile and portable wireless communications for terrestrial, maritime and aeronautical service. This consultation looks at the authorisation of these base stations, which form one end of the direct air-to-ground based links. This work follows plans from Inmarsat to use spectrum in the 2 GHz band to provide broadband services to passengers on aircraft. The company plans to do this through a combination of satellite and ground based communication links to aircraft. Inmarsat is one of two companies awarded MSS spectrum access rights in 2009, in the 2 GHz band, under an EU-led pan-European harmonised selection and award process.”

73. Viasat submitted a response in which it argued that the proposed use by Inmarsat was outside the scope of the European authorising legislation.
74. The Decision did not address Viasat’s complaint. It did though conclude that Inmarsat’s proposal was compliant with applicable EU legislation. It is implicit that Ofcom concluded that non-observance of the initial conditions was not an obstacle in law to authorisation. Ofcom concluded that, since Inmarsat had been selected by the Commission for use of the 2 GHz spectrum, it followed that it, Ofcom, was obliged to grant the authorisation.
75. The essential reasoning is in section 4 of the Decision:

“4. Conclusion: Ofcom’s decision and next steps

4.1 As explained above, Inmarsat is authorised to provide MSS in the UK using the Frequency Bands on which it was selected to operate by the European Commission. Under the Regulations which implement the EU Decision in the UK, Ofcom is obliged upon request to authorise Inmarsat to provide CGCs of a system providing MSS in the UK subject to the common conditions laid down in Article 8(3) of the EU Decision.

4.2 Ofcom is therefore obliged to authorise Inmarsat to use the Ground-based Stations as part of the EAN provided that they fall within the definition of CGCs laid down in the EU Decision and the Regulations and will conform with the common conditions.

4.3 The relevant provisions of the legislation are set out in section 2 above. The applicable definitions in the Regulations are as follows: ““mobile satellite services” means radio communication services provided by an electronic communications network and associated facilities capable of providing radio communication services between a mobile earth station in the United Kingdom and one or more space stations, or between mobile earth stations in the United Kingdom by means of one or more space stations”; and ““complementary ground components” means ground-based stations used at fixed locations in order to improve the availability of mobile satellite services in geographical area covered by those services.”

4.4 On the basis of the information provided by Inmarsat, Ofcom is satisfied that the Ground based Stations will constitute CGCs.

a) The Ground-based Stations will be used at fixed locations.

b) Inmarsat has confirmed to Ofcom that its EAN system will make use both of the Satellite Segment and the Terrestrial Segment to provide service to aircraft. The Ground-based Stations comprising the Terrestrial Segment will therefore be used as complements to the MSS Segment.

c) The Ground-based Stations will improve the availability of MSS because the Satellite Segment alone would have a lower performance, particularly in very dense areas, than an integrated service (see para 3.20). Inmarsat’s intention is therefore that the Terrestrial Segment will be used as complements to the MSS, improving the availability of the MSS within the EU.

4.5 Ofcom also considers, based on the information provided by Inmarsat, that the Ground based Stations will comply with the common conditions set out in Article 8(3). Those conditions are as follows:

(a) operators shall use the assigned radio spectrum for the provision of complementary ground components of mobile satellite systems;

(b) complementary ground components shall constitute an integral part of a mobile satellite system and shall be controlled by the satellite resource and network management mechanism; they shall use the same direction of transmission and the same portions of frequency bands as the associated satellite components and shall not increase the spectrum requirement of the associated mobile satellite system;

(c) independent operation of complementary ground components in case of failure of the satellite component of the associated mobile satellite system shall not exceed 18 months;

(d) rights of use and authorisations shall be granted for a period of time ending no later than the expiry of the authorisation of the associated mobile satellite system.”

4.6 Considering the common conditions in turn: a) Both the CGCs and the MSS Segment will make use of the Frequency Bands (see para 3.10); b) The CGCs are an integral part of Inmarsat’s EAN system; will be controlled by the satellite resource and network management mechanism (see para 3.8); and will use the same direction of transmission and the same portions of frequency bands as the MSS Segment of the EAN system (see para 3.10); c) Inmarsat’s satellite has been launched as is currently operational, and there is currently no reason to suppose that the satellite component of the EAN system will be unavailable for any period; d) Ofcom’s authorisation of Inmarsat to use the CGCs will be for the same period of time as its MSS Authorisation.

4.7 Accordingly, Ofcom has decided to authorise Inmarsat to use its Ground-based Stations to transmit in the Frequency Bands pursuant to section 8 of the Wireless Telegraphy Act 2006, subject to the common conditions set out in Article 8(3) of the EU Decision. This authorisation will be issued shortly.

4.8 Insofar as they are applicable, Ofcom is satisfied that its decision to authorise Inmarsat’s use of the Ground-based Stations is in accordance with its general duties under the Communications Act and the WTA. The authorisation will enable Inmarsat to use the Frequency Bands (which are currently lying fallow) to provide an innovative service to consumers in the UK and the EU. The system developed by Inmarsat incorporates the Ground-based Stations as an integral part. They are needed as part of the system in order to improve its availability and to ensure the required quality of aeronautical broadband services which the system will provide.

4.9 Ofcom notes that Inmarsat’s EAN service can technically be provided without the Satellite Terminal being installed; and

that there may be incentives for airlines not to install the Satellite Terminal, despite having purchased an integrated system from Inmarsat (these matters are set out in Section 3).

4.10 Ofcom therefore intends to monitor carefully the deployment of the EAN in order to ensure that the Ground-based Stations are indeed being used as complementary components of the EAN; and that use is also being made of the MSS, including the Satellite Terminal, by aircraft which utilise Inmarsat's service.

4.11 To that end, Ofcom will collect information from Inmarsat to verify that aircraft using the EAN are being fitted with the Satellite Terminal; and that services are being provided using the MSS as well as the Terrestrial Segments.

4.12 If it transpires that, after being authorised by Ofcom, Inmarsat is providing services to aircraft exclusively by means of the Terrestrial Segment, Ofcom will consider taking enforcement action on the basis that the Ground-based Stations are not in fact being used as CGCs (i.e. as complementary components of a system for providing MSS in order to improve the availability of the MSS) as is required under the terms of Inmarsat's authorisation."

76. The Tribunal (Judgment paragraph [54]) found the following in relation to the change of position by Inmarsat:

"It seems that Inmarsat did not consider that its then plans for the use of the spectrum were sufficiently commercially viable, and it did not seem to pursue the use of the spectrum at the time. It was suggested, without evidence, that that was because of the financial crisis, but we make no finding in that respect, and the reason does not really matter for present purposes. By 2014 Inmarsat had found what it considered to be a commercially exploitable manner of using its part of the spectrum, namely providing a pan-European service for airline passengers in aircraft, and this ultimately became the EAN for which its 2017 authorisation was obtained. It had changed its satellite plans in the course of this (and missed one of the milestones, because it did not launch on time); it decided to share a satellite with a Greek broadcaster and this satellite was launched in 2017. It had only 3 beams as opposed to the originally proposed 9. Inmarsat has been pitching its system to airlines."

77. Following publication of the Decision, Viasat commenced proceedings before the Tribunal.

E. Issue: The consequences of non-observance of conditions attaching to authorisations

78. I turn now to the first category of grounds of appeal which flow from the fact that Inmarsat did not observe the conditions in the initial authorisation and, instead, sought authorisation for an entirely new and different service to that envisaged when it applied for selection and authorisation. As set out in paragraph [18] above, Viasat identifies three different ways of expressing this overarching complaint.
79. The first two arguments ((i) and (ii) above at paragraph [18]) largely flow together. Viasat argues that Ofcom had no power to authorise Inmarsat to use the CGC in conjunction with the 2GHz spectrum for the EAN in circumstances where the service for which the CGC was authorised was significantly different to that initially authorised. The power to authorise is governed by the principles of transparency and equality and the Tribunal erred in finding that those principles had no application to the Decision. In written submissions Viasat argued that these principles served to prohibit Ofcom from authorising any material post-award variation. This stark point was expressed in the following way:

“In order to ensure transparency and equal treatment, **EU law forbids material (or substantial) post-award variations being made to the terms of an award.** A variation will be substantial, inter alia, when: (1) it extends the scope of the grant considerably; (2) it introduces conditions which, had they been part of the initial selection procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally selected or would have attracted additional participants in the selection procedure; (3) it changes the economic balance of the terms on which the grant was made in favour of the grantee in a manner which was not provided for in the initial grant. All of (1) to (3), which were engaged and had to be respected by Ofcom, were breached by Inmarsat’s and Ofcom’s subsequent conduct as found by the Tribunal. For the avoidance of doubt, there was also no express provision here to vary the terms of this grant after award, let alone one that was “clear, precise and unequivocal” which is the degree of specificity that EU law requires.”

(Emphasis added)

80. In support of the proposition that the principles of equality and transparency applied to procurement processes such as that in issue Viasat relied upon: Case C-91/08 *Wall AG v Stadt Frankfurt am Main* [2010] ECR I-2815 at paragraphs [68] and [69]; Case C-454/06 *Presstext v Austria* [2008] ECR I-4401 at paragraphs [35]-[37]; and Case C-496/99P *CAS Succhi di Frutta* at paragraph [111]. Viasat contends that: “*The application of general principles of EU law does not lead to a fragmentation of approach but, to the contrary, ensures that the terms of the initial selection and the integrity of the cross-border competition held by the Commission are not undermined.*” Viasat also says that had it been known that material changes were permissible then the original selection process would have attracted more participants and/or could have resulted in the selection of other candidates. It argues that it

submitted unchallenged evidence to the Tribunal (which was ignored) that it would have tendered. It is common ground that these principles do indeed apply to procurement processes and that they applied to the selection process adopted by the Commission in 2008. In fact they are explicitly identified as relevant in the recitals to the Selection Mechanism Decision. The issue therefore is not as to the existence of these principles, but as to their application.

81. In my judgment the Decision adopted by Ofcom did not violate these principles and the conclusion to that effect by the Tribunal was correct. Viasat's argument that the non-observance of conditions automatically disqualified Ofcom from taking the Decision is wrong in law. There is no inexorable connection between breach of conditions and authorisation. This is for a number of reasons.
82. First, the sole conditions precedent for the grant of the EAN authorisation by Ofcom were those set out in Article 8(1) of the Selection Mechanism Decision (see paragraph [55] above) and they were, on the facts, met. As of the date of the Decision Ofcom simply had to satisfy itself that Inmarsat was selected by the Commission to provide a MSS using the 2GHz spectrum and that it had, in implementation of that selection decision, been authorised to use the spectrum by the national authority (ie by itself). These were the only conditions precedent to the grant of the authorisation. As to this there was, and is, no doubt but that Inmarsat had been selected by the Commission (in 2008) and that it had been authorised (by Ofcom) to use the spectrum (in 2010). Accordingly, Ofcom had no right to refuse the authorisation sought. This was the logic set out in paragraph [4.1] of the Decision (see paragraph [75] above).
83. Second, this analysis was endorsed in the judgment of the Court of Justice in *Viasat v BIPT*. In Belgium, as in the UK, Inmarsat obtained an initial authorisation to use the spectrum having been selected by the Commission and this led BIPT to grant a later authorisation to use the spectrum in connection with CGCs. The Court held (judgment paragraph [47]) that Inmarsat met both conditions in Article 8(1). In relation to the first condition, this was satisfied in that "...*Inmarsat had the status of an "applicant selected" under Article 2 of the selection decision, a decision which had been neither amended nor repealed*" (judgment paragraph [47]). In relation to the second condition, the Court observed (judgment paragraph [48]) that Inmarsat had obtained from the Belgian authorities "... *the rights covered by Article 7(1) ...including the right to use the specific radio frequencies identified in the selection decision*". On this basis, applying a literal interpretation of Article 8(1): "... *such an authorisation cannot be refused on the ground that the operator concerned has failed to honour the coverage commitment given in its application by the deadline set in Article 4(1)(c)(ii) of that decision*".
84. Third, the Court held that in the light of the above analysis there was no automatic correlation between breach of a condition and the right to continued authorisation. The Court set out the consequences of breach:

"56. It follows that a failure by a selected operator to satisfy a common condition set out in Article 7(2) of the MSS decision, such as a failure to honour the coverage commitment referred to in Article 4(1)(c)(ii) of that decision, does not entail ipso facto the withdrawal of the authorisations referred to in Article 7(1) thereof, as such a withdrawal requires that the two-step

procedure set out in Article 3 of the enforcement decision be properly followed. The argument put forward by Viasat and Eutelsat, according to which a selected operator, such as Inmarsat, which has failed to honour such a coverage commitment, no longer has the right, as a result of that failure, to use the 2 GHz frequency band and, consequently, may no longer be regarded as being authorised, under Article 7(1) of the MSS decision, to deploy a mobile satellite system in that part of the radio spectrum, cannot therefore be accepted.

57. On the contrary, so long as that procedure has not resulted in a withdrawal decision, the selected operator continues to hold the authorisations referred to in Article 7(1) of the MSS decision, so that the second condition for the grant of the authorisation necessary for the provision of mobile satellite system CGCs, as set out in paragraph 46 above, continues to be satisfied.

58. Lastly, the objectives of establishing a common framework for the authorisation of mobile satellite system operators and of improving mobile satellite services by means of CGCs pursued by the MSS decision, as is apparent from, inter alia, recitals 18 and 25 thereof, support an interpretation according to which a Member State cannot refuse to grant an operator who satisfies the two conditions set out in Article 8(1) of that decision the authorisations necessary for the provision of mobile satellite system CGCs because of a failure, by that operator, to honour the coverage commitment given in its application, but may, where appropriate, initiate the procedure laid down in Article 3 of the enforcement decision.”

85. Fourth, the conclusion arrived at by the Court and derived from the strict language of Article 8 of the Selection Mechanism Decision was consistent with a purposive or contextual analysis of the provision. The court referred to the “*context*” or purpose of the regime. Reference was made to recitals [18] and [25] (in paragraph [58] – see above) and also to recital 8 of the Enforcement Decision which cites in imperative terms (cf “*requires*”) the need for coordinated action to avoid a “...*patchwork of enforcement decisions in contradiction of the pan-European nature of MSS*”. I would add that the policy considerations which permeate the legislation in this field strongly support this conclusion. An operator is authorised for 18 years, during which, inevitably, technology changes and evolves. What might be state of the art in year 1 may be redundant or uneconomic by year 7. It would make no sense to fix an operator with a permanent commitment to implement one MSS (that referenced in the initial application for selection) and not cater for and permit change and adaptation. This would undermine the principle of technological neutrality by preferring old technology over new technology. It would hinder investment – why would an operator invest if the rules precluded an ability to adapt to new circumstances? It would deny consumers the benefit of the most innovative services. A coordinated approach to enforcement enables the Commission and national authorities collectively to weigh up all such considerations and if needs be take steps to adapt the

authorisation in an objective and proportionate way. A coordinated approach enables a pan-European view to be taken to modification of conditions if, for example, it was concluded that operators needed to be released from old conditions in order to permit adaptation to evolving circumstances. All these factors reinforce the judgment of the Court of Justice.

86. Next, there is the argument under this general heading that had Viasat known that the system would permit an operator, such as Inmarsat, to acquire scarce spectrum and then avoid its commitments and conditions, it also would have participated in the selection process. In fact, the Tribunal made no finding that Viasat would have so acted. But in any event the premise that this is relevant and bespokes unfairness is not sustainable. At one level the answer is obvious. The Court of Justice has now clarified that the system does operate in the flexible manner complained of by Viasat. If Viasat decided not to participate in 2008 in the call and selection procedure, then this was a consequence of its own mistaken view of the law. That fault cannot be laid at the door of Inmarsat, the EU or Ofcom. If that therefore is the essence of the complaint it must fail. The law being what it was then Viasat was in the same position as Inmarsat in terms of equality of treatment and transparency. Moreover, were there any merit in the argument it would have prevailed before the Court of Justice in *Viasat v BIPT* where it would have led to the conclusion that national authorities were obliged to refrain from authorising CGCs to operators in breach of conditions attaching to earlier authorisations conferred following a selection or procurement procedure. Yet the Court concluded that national competent authorities were stripped of the power to refuse authorisations where the two conditions in Article 8(1) were met. I therefore reject the argument that there has been any breach of the principle of equality or transparency.
87. The final argument advanced by Mr Moser QC, on behalf of Viasat, under this heading is that Ofcom acted unlawfully in not imposing upon Inmarsat, as a condition of authorisation of the CGC, a condition that it install and operate the satellite (issue (iii) at paragraph [18] above). The sub-text to the argument was that Viasat did not trust Inmarsat to comply with the conditions attached to its CGC authorisation, given its history of recidivism. This is untenable. In the Decision (at paragraphs [4.4] – [4.6] - see above at paragraph [75]) Ofcom expressed itself satisfied, based upon information provided to it by Inmarsat, that the company would use the spectrum in connection with a satellite. Ofcom recognised (see paragraphs [4.9] – [4.12]) that the EAN service could technically be provided without the satellite terminal being installed and that there might be a commercial incentive for airlines not to install the satellite terminal, despite having purchased an integrated system from Inmarsat. Ofcom stated that it would collect information from Inmarsat to verify use of the satellite and if it found that Inmarsat was providing services to aircraft exclusively by means of the terrestrial segment, it would consider enforcement action. When the Decision is properly construed, Ofcom identified the risk in question and exercised its judgment in order to ensure that the risk was appropriately managed. Ofcom accepted that there was a proper public interest in the scarce 2GHz spectrum being efficiently used. It identified the risk of non-use of the satellite in conjunction with the spectrum. It addressed appropriate remedial action.
88. In ordinary administrative law terms, the reasoning set out in the Decision is logical and rational. Ofcom was justified in concluding that there was no need to impose an

extra condition upon Inmarsat. To have imposed such a condition would have been to impose a superfluous obligation. Inmarsat was obliged in any event to use the satellite and Ofcom was possessed of regulatory powers to address non-use. In these circumstances, the suggestion that Ofcom acted unlawfully in failing to impose an additional, express, condition and that the Tribunal erred in endorsing that failure cannot succeed.

89. Pulling these threads together, none of the objections raised by Viasat referred to above serve to cast any doubt upon the lawfulness of the Decision and the Tribunal was right to reject these arguments.

F. Issue: Complementarity

90. I turn now to the second group of issues which concern the definitions of mobile satellite system and CGC. The first concerns the issue of complementarity (see issue (i) at paragraph [19] above). Viasat argues that the CGC and the satellite are not “*complementary*” as required by the definition of an mobile satellite system and a CGC in the Selection Mechanism Decision. It contends that properly interpreted Articles 2 and 8 require that the CGC must be secondary and subservient to the satellite element of an MSS, which in the case of the Inmarsat EAN, it is not. This has two consequences in law. First, the CGC is not “*complementary*” to the satellite element as required by the definition in Article 2(2)(b). Second, the ground stations do not “*improve the availability of MSS*” in the relevant areas as also required by Article 2(2)(b) (see paragraph [49] above). Since these definitions are jurisdictional and because Ofcom erred in respect of them it had no lawful power to grant the authorisation under the Decision. In paragraph [80] of the Judgment the Tribunal articulated Viasat’s argument as follows: “... *the satellite did not make a particularly meaningful contribution to the system, and the system was not in reality a mobile satellite system with complementary ground systems merely supplementing the satellite signal, but was one which was more properly described as a ground system with a bit of satellite add-on.*”

91. I take the findings of fact of the Tribunal as the starting point. There are two overarching conclusions. First the Tribunal found that the CGC element of the authorised EAN was “*dominant*”:

“108. We will deal with the factual correctness of this analysis before turning to other points. On the facts as we have found them to be there is no doubt that the EAN is a system in which the CGC carries the bulk of the payload in terms of data transmitted and received. Those facts appear above. While over land (apart from Serbia) and while near the coast the ground components could and probably will provide the level and standard of service to the consumer which the marketing proposes without the satellite. The same is not true of the satellite over the sea (and Serbia). It could provide coverage over those areas but not to the same standard. To that extent the ground element can be said to be dominant.”

92. Second, as to the satellite element the Tribunal concluded as follows:

“108 ... On the other hand the satellite is an integrated part of the system, and is the only way of achieving coverage over the sea (and Serbia). That is a significant function both in terms of where coverage is provided, and also in terms of achieving a degree of continuity of coverage for aircraft flying over both sea and land. It is also capable of providing coverage over land where required in the event of ground transmitter outages or (not particularly likely) a ground signal being blocked by a physical feature.

109. Accordingly, the satellite cannot be dismissed as irrelevant. It has a relevance, though in coverage areas and data throughput terms it is not nearly as significant as the ground-based component.”

93. The nub of the point is therefore whether, in law, there is a requirement for the CGC component of an mobile satellite system always to be subservient or secondary to the satellite component. The core of Mr Moser QC’s argument can be summarised as follows. First, there is a strong EU policy in scarce radio spectrum (ie the 2GHz) being fully utilised and not left fallow; second, this was secured by ensuring that the CGC component was not dominant in a hybrid radio communication service which mixed terrestrial ground stations with satellite capacity; third, this meant that operators would concentrate their effort and investment on the satellite element ensuring that it was fully used; fourth, this analysis was borne out by the reference in the legislation to phrases such as “*complementary*” as a descriptor and qualifying characteristic of a ground station (i.e. the “C” in “CGC”), and in recitals which referred to the satellite as the “*primary*” component, and which referred to the CGC as “*improving*” or “*enhancing*” MSS. Mr Moser QC argued that all such terms reflected the important underlying assumption that satellites were dominant and CGCs were subservient.
94. Mr Moser QC supported his linguistic analysis by resort to the purpose of the Selection Mechanism Decision. He drew our attention to various recitals which he argued supported the notion of satellite priority. For example: (i) the promotion of the availability of pan-European services including rural areas (recitals [5] and [14]); (ii) the importance of harmonisation in view of the substantial up-front investment required for a satellite and the potential for interference (recitals [11] and [12]); and (iii) the need for long run-in periods prior to launch which involved the taking of complex technical steps required (recital [15]).
95. I do not accept these submissions. It is important to stand back. There is of course a legitimate policy interest in the limited 2GHz spectrum being efficiently used and not left “*fallow*”, as Mr Moser QC observed. But this has nothing to do with the number of CGCs used in an overall system or the relative balance of capacity or utility as between CGCs and satellites. This can easily be demonstrated. A satellite might be optimally (and therefore efficiently) used yet *still* account for considerably less than 50% of the data carrying capacity of a hybrid system. Efficiency of use of scarce bandwidth is not necessarily connected to the (relative) capacity of other apparatus (such as CGCs) used in conjunction with it. Indeed, as the Tribunal acknowledged CGCs are capable of carrying far more data than satellites. The argument can be turned around. What (rhetorically) would be the consequence for innovation,

investment and competitiveness if every mobile satellite system using the 2GHz spectrum could only deploy such CGC capacity as amounted to less than 50% of the satellite capacity? If that were the rule, which is what Viasat contends, this would risk deterring investment in the satellite in the first place because it would dramatically curtail the ability of an operator to use it in conjunction with the sort of overall service that would be most economically viable. The present facts can be said to reflect this reality.

96. Moreover, had Viasat's argument been valid there would surely have been in the CEPT Report and in subsequent implementing legislation detailed rules setting out how dominance and subservience were to be defined and measured. There would be thresholds such as 40/60 or 45/55 or 49/51. There would also be some metric of measurement, such as economic value or data carrying capacity, and there might have to be some system of weighted averaging to reflect the fact that the satellite and the CGC components might perform different (complementary) functions in an overall service so that (absent adjustment) they could not be compared like for like. There would be rules determining how relative importance was to be measured when the facts changed: does the analysis change if the flight using the EAN is largely over sea or mountains when the satellite is more important or is over land when the CGC might be most important? There are however no such rules anywhere to be found which, itself, is a fact militating against Viasat's argument.
97. Recourse to the CEPT Report offers no support to the Viasat argument. There is no discussion of CGC being technically or economically, or in any other way, subservient or secondary. The focus is upon the ability of CGCs to improve the functionality of MSS. A CGC is "*complementary*" and "*integral*" only in the sense that it is associated with a satellite in the same system or service:
- "The complementary ground component (CGC) is an integral part of a Mobile Satellite system and consists of ground based stations used at fixed locations to improve the availability of the mobile satellite service in zones where the communications with one or several space stations cannot be ensured with the required quality. CGC uses the same portions of the mobile satellite frequency bands ... as the associated space station(s)."
98. Paragraph 4.2 of the CEPT Report describes a situation whereby a mobile satellite system uses CGCs to avoid or minimise use of satellites. But this is seen as a positive benefit because it increases "...*spectrum efficiency, in line with EU spectrum policy*":
- "Some types of CGCs can transit traffic from one end user to another without passing through the satellite component of the system, reusing spectrum used by the satellite in another geographical area. Such direct routing would temporarily bypass the satellite component to provide communications services which are identical to and fully integrated with the service offered by the whole MSS system footprint. Such bypass would allow increased spectrum efficiency for MSS, in line with EU spectrum policy."
99. The specific terms referred to also do not assist Viasat's argument.

100. First, the expression in recital [9] of the Harmonization Directive (see paragraph [46] above) which refers to the “*primary basis*” concerns a quite different matter. It relates to the relationship between different bandwidths of spectrum. Recital 11 explains the linkage between MSS and the 2GHz bandwidth: “*It is appropriate to give priority to systems providing MSS in the 2 GHz bands because other frequency bands, for example those designated for GSM and UITS/IMT-2000, are available for systems providing terrestrial only mobile services.*” The phrase is not connected to the relative capacities or importance of satellites and CGCs.
101. Second, as to the expression “*complementary*”, it is clear from the CEPT Report that the phrase is used not to connote relative economic or technical importance but is used in the sense that the CGC works harmoniously with the satellite. The CEPT report recognises that CGCs tend to have materially greater data carrying capacity than do satellites, and that the main use of a satellite might to be improve coverage. Neither point logically leads to the conclusion that the satellite must always be dominant and the CGC subservient.
102. Third, the references to CGCs “*improving*” or “*enhancing*” the service must be seen in the broader context above. Because CGCs and satellites have different attributes, when they are combined the sum is greater than the individual parts: CGCs do improve or enhance MSS; but nothing suggests that CGCs should be subservient in the overall system or service.
103. For all these reasons I reject this argument.

G. Issue: The inability of CGCs to communicate with satellites.

104. The final issue raised by Viasat (issue (ii) at paragraph [19] above) concerns the interpretation of Article 2(a) of the Selection Mechanism Decision (paragraph [49] above) which defines “*mobile satellite systems*” as “*electronic communications networks and associated facilities*” which have the capability to provide radio communications services in three defined situations: (i) between a mobile earth station and one or more space stations; or (ii) between mobile earth stations by means of one or more space stations; or (iii), between a mobile earth station and one or more complementary ground components used at fixed locations. It is relevant that the three defined situations are drafted using the disjunctive “*or*”.
105. Viasat argues that the EAN system is not a “*mobile satellite system*” because there is no “*mobile earth station*”. Under Article 2(2)(a) of the Selection Mechanism Decision a mobile earth station must be present in each of the three paths and must connect to the satellite. But it is absent in the EAN because there is no mobile earth station where the CGC is involved. The signal passing between the aircraft and the CGC does not involve a radio communication service connected to the satellite. The aircraft has two spatially discrete communications modules: (i) a module which communicates with the satellite and (ii) a module which communicates with the CGC. Viasat adopts an unbundled view and contends that there are therefore two quite discrete entities or systems. At the functional level Viasat explains that the module communicating with the CGC has a different positioning, design, function and language to the module communicating with the satellite. Indeed, even if it were repositioned and pointed at the satellite since it speaks a different language from the satellite it could still not communicate with it.

106. If Viasat is correct, then in law the EAN is not a mobile satellite system and it cannot be authorised under Article 8 because it does not meet the conditions in sub-paragraph (3)(b). Ofcom erred in concluding that it did have jurisdiction.
107. The Tribunal did not accept this analysis. In the Tribunal's view, the optic through which Viasat analysed the issue was overly technical and myopic. It concentrated upon a technical unbundling of the overall system instead of standing back and examining the system as a whole. The Tribunal stated:

“97. ... We therefore have to decide, on the true construction of the Selection Mechanism Decision, whether the downward facing part of the system is a separate system from the satellite facing part, and cannot be a mobile earth station, or whether the equipment on the plane, of which the downward-facing equipment forms part, should be taken as a whole and properly viewed as a mobile earth station.

98. We have concluded that the latter is the proper view. The starting point in the logic is that, obviously, one single unit - say, a handset - which talked to both the satellite and the CGC would be a mobile earth station. There is no dispute about that. We do not think that that conclusion would be affected if the unit had two internal aerials, one of which addressed the satellite and one of which addressed the CGC. That would merely be a technical design choice which would not affect the overall description of the unit as a mobile earth station. Next imagine that the handset had separate circuitry as well for addressing the satellite and CGC respectively. Again, we do not think that that would affect the conclusion.

99. That is pretty close to what happens on an aircraft fitted with EAN. There are two separate aerials and separate circuitry (modems and other items supporting the aerials). The difference from the putative handset is that they are spatially separated. However, we do not think that that makes a difference. They both feed into the same central system in the aircraft including (we were told) a central controller which chooses from where to take and send a signal under control from the ground (via the satellite). The routed signal then feeds a central server, which accepts and distributes it to and from the passenger devices on the aircraft. The whole thing is, in our view, a mobile earth station as much as a single handset would be. There is therefore a mobile earth station in every path. The satellite-facing part of the system is undoubtedly capable, by itself, of constituting a mobile earth station, and we consider that the addition of a part which is designed just to address the ground, as part of the overall system on the plane, is an addition to a mobile earth station, bearing in mind that such things are entitled to address CGCs. Nor do we consider that it matters that the two parts speak different languages. That is a technical

choice, and does not affect the correct view of the overall gathering together of the equipment.”

108. Viasat criticises this conclusion:

“Adopting the Tribunal’s logic, all of the radio-communication equipment on the aircraft forms part of one mobile earth station without any limit by reference to the particular function being performed of any given piece of equipment, provided that it comprises equipment capable of communicating with the satellite. However, that would lead to the absurd result that all equipment connected to the server on board the aircraft, including mobile phones and laptops, would form part of one mobile earth station. That cannot have been the intention of the legislator.

Further, on the Tribunal’s analysis, it is the addition of the satellite-facing kit which makes the overall unit a mobile earth station: an aircraft with only a ground-facing module would not be, or would not be carrying, a mobile earth station.³ That leads to the absurd outcome that the very same equipment that is only ever used to communicate with a Ground-based station is a mobile earth station in some instances but not in others, depending on whether a physically and functionally separate set of equipment is added to the aircraft which has no impact on, and indeed cannot have an impact on, the carriage of any signal between the ground-facing module and the Ground-based stations. Again, that cannot have been the intention of the legislator.”

109. Before the Tribunal Viasat relied upon the definition of “*station*” and “*mobile station*” in Regulations promulgated by the ITU. This point was made only very lightly during the appeal. In the 2016 version of the ITU regulations “*Station*” is defined at Article 1 paragraph 1.61 as:

“One or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying on a radio communication service, or the radio astronomy service. Each station shall be classified by the service in which it operates permanently or temporarily.”

110. “*Earth station*” is defined as:

“1.63 A station located either on the Earth’s surface or within the major portion of the Earth’s atmosphere and intended for communication:

– with one or more space stations; or

³ See Judgment, para.104

with one or more stations of the same kind by means of one or more reflecting satellites or other objects in space.”

111. A “*mobile station*” is defined as:

“1.68 mobile earth station: An earth station in the mobile-satellite service intended to be used while in motion or during halts at unspecified points”.

112. “*Mobile satellite service*” is also defined:

“1.25 mobile-satellite service: a radio communication service: – between mobile earth stations and one or more space stations, or between space stations used by the service; or – between mobile earth stations by means of one or more space stations. This service may also include feeder links necessary for its operation”.

113. Viasat contends that under the Regulations the earth-pointing equipment is a “*station*” which is defined by reference to the service in which it operates. However, that service is not a mobile satellite service given that the ground-facing function does not fall within the definition of “*mobile satellite service*”.

114. I do not accept Viasat’s analysis.

115. First, the relevant optic through which the capability to communicate with the satellite must be measured is the system taken as a whole. The language used in Article 2(2)(a) reflects a systems-based analysis. It uses the phrases: “*mobile satellite systems*”, “*communications networks and associated facilities*”, “*a system*”, and a “*service*”. It is the overall system, service or network which must have the capability that is referred to in the definition. When the EAN is looked at through this end of the telescope it does have these capabilities, as the Tribunal correctly found. Whilst it is true that when viewed in a disaggregated way and in isolation the CGC does not permit radio communication with the satellite it is still capable of so doing when it is viewed as one integral component of a system which includes an module communicating with a satellite.

116. Second, there is no logical policy basis which could inform a purposive construction of the relevant terms supportive of Viasat’s argument. CGCs must be “*integral*” parts of the overall system. That is how CEPT contemplated their usage and that is consistent with the definitions under the EU regime: see Article 8(3)(b) of the Selection Mechanism Decision (paragraph [55] above). The characteristic of being “*integral*” indicates no more than that the CGC must play an important role complementary to that of the satellite – they work together to create a single overall service. There is no sensible basis upon which the rules drill down into the technical nuts and bolts of the overall system or service and then draw fundamental legal and jurisdictional distinctions based upon such differences as whether the two modules speak the same language. A rule which had that effect would distort technical neutrality, force operators to devise artificial engineering solutions to overcome problems created by legal definitions as opposed to being truly needed, and would curb the ability of competent authorities to authorise systems which matched

contemporaneous technology and economics and which maximised consumer choice. These are the purposes and objectives of the legislative regime and any construction of individual terms and phrases should be consistent with such purposes.

117. Third, in relation to the argument based upon reference to the ITU Regulations, the Tribunal was not convinced: See Judgment paragraphs [95] – [105]. I accept that in this regime the ITU regulations are at least relevant to the construction of the relevant EU measures, but they are not to be treated without more as dispositive. I agree with the Tribunal’s analysis on this. Article 1 paragraph 1.1 of the ITU Regulations provides: “*For the purposes of these Regulations, the following terms have the meanings defined below. These terms do not, however, necessarily apply for other purposes.*” The definition in the ITU Regulation is used as part of the definition of “*mobile satellite service*”, and “...*would indeed seem to point upwards (as it were) rather than downwards*” (Judgment paragraph [96]). But the definition of “*mobile satellite service*” excludes an equivalent of the CGC component provided for by the Selection Mechanism Decision and it is not therefore an accurate guide to the meaning of “*mobile earth station*” for the purpose of that Decision. Further, the relevant definition in the Selection Mechanism Decision (unlike that in the ITU Regulations) contemplates that a mobile earth station can point towards the earth as described in the third pathway in the definition of a “*mobile satellite system*” in Article 2(2)(a). These reasons are in my view compelling in distinguishing between the ITU Regulations and the definition in the Selection Mechanism Decision. Like the Tribunal I do not consider that the Regulations provide support for Viasat’s arguments. I reject this ground of appeal.

H. Conclusion

118. For all the above reasons I would dismiss the appeal.

Lord Leggatt:

119. I agree

Lord Justice Lewison:

120. I also agree.