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 not to be submitted to the inspector

Brussels Court of Appeal

Judgement

Market Court Section

19th Chamber A

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1.

VIASAT UK Ltd, the registered office of which is located at Sanford Lane, Wareham, BH20 4DY DORSET (United Kingdom),

2.

VIASAT INC, the registered office of which is located at 6155 El Camino Real, Carlsbad CA 92009-1699 (United States),

applicants,

represented by Pierre DE BANDT, lawyer, whose offices are located at 1040 BRUSSELS, avenue de l’Yser 19

versus

1.

The Belgian Institute for Postal services and Telecommunications (“B.I.P.T.”). the registered office of which is located at 1030 BRUSSELS, boulevard du Roi Albert II 35 Ellipse Building, - Building C,

opposing party,

represented by lawyers Sebastien DEPRE and Evrard DE LOPHEM and Philippe VERNET, whose offices are located at 1050 BRUSSELS, Place Eugène Flagey 7,

In the presence of:

1.

IMMARSAT VENTURES LTD, voluntarily intervening party, which gives as its address for service the offices of its counsel Alexandre VERHEYDEN, lawyer, located at 1000 BRUSSELS, rue de la Régence 4,

represented by lawyers Alexandre VERHEYDEN, Karl STAS and Cristiana SPONTONI, whose offices are located at 1000 BRUSSELS, rue de la Régence 4;

Having regard to the documents relating to the proceedings, and in particular:

- the application instituting proceedings filed by the company incorporated under English law Viasat UK Itd and the company incorporated under Delaware (U.S.A.) law Viasat Inc (hereinafter jointly referred to as “Viasat” or “the applicants”), on 27 July 2017, for annulment of the decision of the BIPT Council of 29 June 2016 “concerning the rights of use by Inmarsat Ventures Ltd in regard of complementary ground components”;

- the voluntary petition to intervene filed on 5 September 2017 for Inmarsat Ventures Ltd (hereinafter referred to as “Inmarsat”)

- the pleadings submitted on 15 December 2017 on behalf of Viasat;

- the summary pleadings submitted on 23 January 2018 on behalf of the BIPT and Inmarsat;

- the administrative file submitted by the BIPT[[1]](#footnote-1) and the files submitted by the parties.

Having heard the counsel for the parties at the public hearing of 7 February 2018.

I. **THE FACTUAL AND LEGAL CONTEXT OF THE CONTESTED DECISION**

1.

Inmarsat presents itself as a leading European provider of mobile satellite communication services worldwide; among these services, it cites “high-speed data transmission, the provision of secure communications for vessels of all sizes, land-based users, for commercial aviation, for government, military and civilian applications as well as the management of satellites and essential basic infrastructure” (conclusions, p. 4).

Viasat presents itself as a multinational company that develops and produces effective systems providing rapid, secure and high-quality communications to any location and that provides telecommunications services for end users; it states that it markets different types of satellite services and provides in-flight connectivity services to hundreds of aircraft belonging to several airlines operating flights to the United States (conclusions, p. 3).

2.

The decision of the BIPT Council of 29 June 2016 “concerning the rights of use of Inmarsat Ventures Ltd in regard of complementary ground components” (hereinafter referred to as the “Decision”; “complementary ground components”, hereinafter also referred to as CGCs) grants to Inmarsat rights of use for six complementary ground components, subject to the following conditions:

2.1. The rights of use are valid from 1 July 2017 to 14 May 2027;

2.2. The flight terminals may not produce, in the 1920-1980 MHz band, at ground level, a power flux density higher than:

- PFD(δ)= 2\*δ-125.5 dB(Wm2/5 *MHz/)* for 0°≤δ≤5°

- *PFD(*δ*)=* 1385\*δ-116.3 *dB(Wm2/5 MHz/)* for 5°<δ≤90°

with δ representing the angle of arrival at the Earth’s surface with respect to the horizontal plain;

2.3. Inmarsat Ventures Limited exercises the rights of use in accordance with the obligations resulting from the Law of 13 June 2005 on electronic communications, the Royal Decree of 11 February 2013 on systems providing mobile satellite services and from any other legislation, regulations or individual implementing decisions applicable in this area.

3.

This decision falls within the scope of the designation of Inmarsat, along with another operator, as an “S-band” operator (cf. below) in the European Union (cf. below).

-The applicable European legal framework

4.

By Decision 2007/98/EC of 14 February 2007 “on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services”[[2]](#footnote-2) (hereinafter referred to as the “Harmonisation Decision”), the European Commission decided to harmonise the conditions ensuring “*the availability* and efficient use of the frequency bands 1 980 to 2 010 MHz (earth-to-space) and 2 170 to 2 200 MHz (space-to-earth) for systems providing mobile satellite services in the Community” (Article 1 of the Decision).

The Decision provides that Member States will designate and make available as from 1 July 2007 the frequency bands 1 980 to 2 010 MHz and 2 170 to 2 200 MHz (also referred to as the “S-band”, or “2 GHz” band) for systems providing mobile satellite services.

5.

By Decision 626/2008/EC of the Parliament and of the Council of 30 June 2008 “on the selection and authorisation of systems providing mobile satellite services (MSS)”[[3]](#footnote-3) (hereinafter referred to as the “MSS Decision”), a Community procedure for the joint selection of operators of mobile satellite systems that use radio frequencies was created.

The Decision provides for the following definitions in its Article 2.2:

“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.”

The Decision provides for the selection procedure and establishes the selection criteria. Among these it is provided, in particular, that the admissibility of the application requires that:

Article 4.1. c:

“applications shall include a commitment on the part of the applicant that:

i) the mobile satellite system proposed shall cover a service area of at least 60% of the aggregate land area of the Member States, from the time at which provision of MSS commences,

ii) MSS shall be available in all Member States and to at least 50% of the population and covering at least 60% of the aggregate land area of each Member 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 decision adopted pursuant to Article 5(2) or 6(3)”.

The Decision provides, once the applicants have been selected, the following provisions concerning Member States:

Article 7 - Authorisation of the selected applicants

“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 Article 5(2) or 6(3) and the right to operate a mobile satellite system. They shall inform selected applicants of those rights accordingly.

(...)”.

Article 8 - Complementary ground components

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

2. Member States shall not select or authorise operators of complementary ground components of mobile satellite systems before the selection procedure provided for in Title II is completed by a Commission decision adopted pursuant to Article 5(2) or 6(3). This is without prejudice to the use of the 2 GHz frequency band by systems other than those providing MSS in accordance with Decision 2007/98/EC.

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.”

6.

By its Decision 2009/449/EC of 13 May 2009 “on the selection of operators of pan-European systems providing mobile satellite services (MSS)”[[4]](#footnote-4) (hereinafter referred to as the “Selection Decision”), the Commission ruled that Solaris Mobile Limited (which was subsequently renamed Echo Star) and Inmarsat were eligible applicants at the end of the first selection phase.

Article 3 of the decision provides that:

“The frequencies which each selected candidate shall be authorised to use in each Member State in accordance with Title III of Decision No 626/2008/EC shall be the following:

a) Inmarsat Ventures Limited: from 1 980 MHz to 1 995 MHz for earth to space communications and from 2 170 MHz to 2 185 MHz for space to earth communications;

*b)*Solaris Mobile Limited: from 1 995 MHz to 2 010 MHz for earth to space communications and from 2 185 MHz to 2 200 MHz for space to earth communications”.

7.

By Decision 2011/667/EU of 10 October 2011, “on modalities for coordinated application of the rules on enforcement with regard to mobile satellite services (MSS) pursuant to Article 9(3) of Decision no. 626/2008/EC of the European Parliament and of the Council[[5]](#footnote-5)“ (hereinafter referred to as the “Enforcement Decision”), the Commission defines the modalities for coordinated application of Member States’ enforcement rules concerning an authorised operator of mobile satellite systems in the event of an alleged infringement of the common conditions attached to its authorisation.

- The applicable Belgian legal framework

8**.**

The Belgian framework is established by the Law of 13 June 2005 on electronic communications (the “LCE”), which transposes the European regulatory framework on electronic communications; in particular, the LCE was amended by the Law of 18 May 2009 pertaining to various provisions regarding electronic communications.

The LCE is supplemented by two laws of 17 January 2003, one concerning the Belgian regulatory authority, the BIPT[[6]](#footnote-6), and the other the BIPT appeals and disputes resolution law (defined above).

Given the distribution of competence between the Belgian State and the [European] Communities concerning audio-visual media content and technologies, the European rules have also been transposed in three regional decrees[[7]](#footnote-7).

9.

Article 18 § 1 of the LCE provides that:

“The conditions for obtaining and exercising the rights of use of radio frequencies entirely or partially for electronic communications services offered to the public shall be established by the King by a decree issued after obtaining the opinion of the Institute and following deliberation in the Council of Ministers, and may only concern:

1°

the service or the technology concerned, for which the rights of use of the radio frequency are granted, including, where appropriate, the coverage and quality requirements;

2°

the effective and efficient use of radio frequencies in accordance with the applicable legal and regulatory provisions;

(...)”.

10.

To take account of the European framework and of the rights granted to Solaris and Inmarsat, the government issued the Royal Decree of 11 February 2013 “on systems providing mobile satellite services” (hereinafter referred to as the “MSS Royal Decree”).

It contains the following provisions:

“Article 1. For the purpose of the implementation of this decree:

1° “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;

2° “Complementary ground components (or CGCs) 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;

3° “Selected operator” shall mean an operator selected pursuant to Commission Decision 2009/449/EC on the selection of operators of pan-European systems providing mobile satellite services (MSS), namely Solaris Mobile Limited and Inmarsat Ventures Limited;

(...).

CHAPTER 2. - Authorisation of the selected applicants

Section 1. - Assignment of frequencies

Art. 2. Selected operators that have given notification for the provision of electronic communications services pursuant to Article 9 of the Law, shall be authorised to operate a mobile satellite system in the following frequency bands:

1° Inmarsat Ventures Limited: up to 15 MHz in the 1980 - 1995 MHz band for Earth-to-space communication (uplink) and up to 15 MHz in the 2170 - 2185 MHz band for space-to-Earth communication (downlink);

2° Solaris Mobile Limited: up to 15 MHz in the 1995 - 2010 MHz band for Earth-to-space communication and up to 15 MHz in the 2185 - 2200 MHz band for space-to-Earth communication.

This assignment of frequencies shall be valid until 14 May 2027.

Section 2. - Coverage obligation

Art. 3. At least 50% of the population and 60% of the Belgian territory shall be covered by 13 June 2016.

Art. 4. Mobile satellite systems cannot cause interference to other radio communications services.

Section 3. - Service provision

Art. 5. The services offered shall be established by the Institute on the basis of the dossier submitted by the selected operator for the purpose of its selection pursuant to Decision no 626/2008/EC of the European Parliament and of the Council of 30 June 2008 on the selection and authorisation of systems providing mobile satellite services (MSS).

Selected operators shall provide to the Institute a list of the companies for the marketing of services with which they have concluded contracts. The contracts shall be provided at the request of the Institute.

Art. 6. Selected operators shall provide, at the request of the Institute, any information concerning the status of the establishment of their network, the marketing of services and their financial situation.

Section 4. - Exemption from licensing

Art. 7. The terminals of selected operators are exempt from the authorisations provided for in Article 39 of the Law.

CHAPTER 3. - Complementary ground components

Art. 8. The selected operators are authorised to install one or more complementary ground components in Belgium subject to the following conditions:

1° they have made a notification for the provision of electronic communications networks pursuant to Article 9 of the Law;

2° each complementary ground component is approved by the Institute prior to its commissioning;

3° the technical characteristics and the place of installation of each complementary ground component are sent to the Institute at least one month prior to the desired commissioning date.

Art. 9. § 1. Selected operators shall use the assigned radio spectrum for the provision of complementary ground components of mobile satellite systems.

§ 2. Any complementary ground component shall constitute an integral part of a mobile satellite system and shall be controlled by the satellite resource and network management mechanism.

Selected operators shall not offer, via the complementary ground components, services other than those offered via the satellite component.

Any complementary ground component 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.

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

§ 4. The authorisations granted by the Institute for any complementary ground component shall be valid until 14 May 2027”.

-Inmarsat’s notifications and authorisations in Belgium

11.

On 17 June 2014, Inmarsat gave notification to the BIPT[[8]](#footnote-8) for the provision of electronic communications services, namely a mobile satellite service (MSS) in accordance with Article 9 of the LCE.

On 13 April 2016, Inmarsat sent the BIPT[[9]](#footnote-9) the technical characteristics of six complementary ground components, with a view to their approval.

A public consultation took place between 8 and 22 June 2016[[10]](#footnote-10). The BIPT states that it did not receive any contribution[[11]](#footnote-11).

12.

By its decision of 29 June 2016 concerning Inmarsat’s rights of use for the CGCs, the BIPT approved the CGCs sent by Inmarsat and granted rights of use, according to the technical conditions specified. This is the Decision.

-The services developed by Inmarsat in the S-band

13.

The service developed by Inmarsat concerns the provision of in-flight connection services to the aircraft overflying the European Union by means of a system comprising a satellite and a complementary ground component network, called the “European Aviation Network” (“EAN”). The service was launched with a first customer, the IAG group, comprised of various airlines (British Airways, Iberia, Aer Lingus and Vueling).

Inmarsat states that it built a satellite ground station in Greece and launched its EAN satellite on 28 June 2017, which has been in service since 29 August 2017. For the deployment of its complementary ground component network, it has entered into a partnership with Deutsche Telekom.

Inmarsat argues that its service constitutes an MSS within the meaning of the European and Belgium regulatory framework, and produces an expert opinion in support of this position (its item 1).

14.

Viasat asserts that the EAN service does not correspond to the plan on the basis of which Inmarsat submitted its application and for which it was selected by the European Commission, and that it is no longer a service that fully corresponds to the definition provided for in the European regulatory framework. It is a hybrid service, with a ground-to-air component for ground-to-aircraft communications, with the involvement of the satellite, which does not constitute an MSS, which is the reason why Viasat considers that Inmarsat’s ground components authorised by the Decision do not meet the definition of complementary ground components provided for in the European and Belgian regulations, because they are not intended to be used in a complementary manner “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”.

Viasat bases its position in particular on a technical analysis of Inmarsat’s service carried out by its engineers (its item 3).

-Proceedings before the General Court of the European Union (Case T-245/17)

15.

On 24 April 2017, Viasat brought an action for failure to act against the Commission before the General Court of the European Union, based on Article 265(3) TFEU (Case T- 245/17)[[12]](#footnote-12).

In this action, according to the summary published in the O.J., it bases a first argument on the Commission failing to adopt a decision to prevent an alternative use of the 2 GHz frequency band. It considers that the Commission unlawfully failed to decide that the use of the 2 GHz frequency band for mobile satellite services (“MSS”) on a primarily terrestrial network constituted a fundamental change in the use of the 2 GHz frequency band, which is harmonised and for which allocations are granted in the Union by a Union selection procedure. The Commission should have assumed its responsibilities and taken action to adopt a decision prohibiting national regulatory authorities from authorising Inmarsat to use the 2 GHz frequency band primarily for air-to-ground services instead of MSS, in accordance with the Union’s MSS decisions.

The second argument, raised in support of the claim of failure to act, [is] based on the Commission failure to take action to prevent fragmentation of the internal market. The Commission has an obligation to exercise its powers in order to prevent the risk of fragmentation of the internal market for pan-European MSS providing universal connectivity, which could occur if national regulatory authorities (“NRAs”) were to decide - on their own initiative - to authorise a specific company to use the 2 GHz frequency band for a new purpose. In fact, the failure to fulfil this obligation, in response to the letter from the applicant and to the requests for guidelines from the NRAs, increases the risk of certain Member States authorising the use of the 2 GHz frequency band for other purposes.

The third argument, raised in the alternative in support of the claim of failure to act, is based on interpretation errors. The Commission’s decision, in the above-mentioned letters of 14 and 21 February 2017, must be annulled because the Commission erred in its interpretation: 1o) of the provisions granting it competence in the area of MSS spectrum harmonisation; 2o) of the extent of its obligations to ensure full compliance with the general principles of Union law on procurement contracts that are applicable in this case; 3o)of its obligations to prevent any discrepancies between the decisions adopted by Member States and to ensure that the internal market for pan-European MSS providing universal connectivity is not fragmented; and 4o) of the extent of its obligation of fair cooperation to assist Member States in the exercise of the duties arising from the treaties.

This action is pending, according to the explanations provided by the counsel for the parties at the hearing.

16.

At the hearing, Inmarsat’s counsel stated that his client was withdrawing its request, formulated in conclusions (p. 17, § 57), for the dismissal of Viasat’s item consisting of extracts from the Commission’s statement of defence in this case.

II. **THE OBJECT OF VIASAT’S PETITION**

17.

The BIPT requests that the Court:

• “Mainly: declare the petition admissible and well founded on the basis of its four arguments and, therefore, annul the Decision of the BIPT Council of 29 June 2016 concerning the rights of use of Inmarsat Ventures Ltd regarding complementary ground components and which was published on the BIPT’s site on 29 May 2017, and

• In the alternative and in the case of doubt regarding the interpretation of the European regulatory framework (quod non): declare the petition admissible and refer to the CJEU the questions for preliminary rulings included in points 115 and 189 of these summary conclusions;

• Order the BIPT to pay the costs, including legal costs, (estimated at 1440 euros), and the intervening party to pay its own costs”.

It asserts that its action is admissible, notwithstanding the criticisms formulated by the BIPT and Inmarsat (cf. below) and invokes and elaborates the following arguments for annulment:

- First argument: the BIPT erred in its interpretation and application of its powers by adopting the Decision;

o First part: by considering that, when it authorises (so-called) complementary ground components, it only has a restricted and limited power, the BIPT breached Articles 3, 8 and 9 of the Royal Decree on systems providing mobile satellite services and Article 8 of the “MSS” Decision;

o Second part: the BIPT had no competence to adopt the contested decision after 13 June 2016 and thus acted in breach of the principle of legality;

- Second argument: the contested decision is inconsistent with the European and regulatory framework relating to the use of the 2 GHz band;

o First part: “by authorising air-to-ground base stations that are not part of a mobile satellite system, the contested decision is inconsistent with the European and Belgian regulatory framework relating to the use of the 2 GHz band”

o Second part: the contested decision breaches the European and Belgian regulatory framework relating to the use of the 2 GHz band by authorising air-to-ground base stations that do not fulfil the conditions for being defined as “complementary ground components”;

o Third part: the contested decision breaches the European and Belgian regulatory framework using the 2 GHz band because it authorises the base stations proposed by Inmarsat even though the latter has not fulfilled and still does not fulfil the conditions and commitments provided for in those regulations

- Third argument: the contested decision breaches the fundamental principles of equality, non-discrimination and transparency enshrined in European law and Belgian law;

o First part: the contested decision is manifestly unlawful because the authorisation of air-to-ground base stations proposed by Inmarsat results in a substantial change to the conditions underpinning the pan-European selection procedure and the “MSS” Decision;

o Second part: the contested decision is manifestly unlawful because the authorisation of the air-to-ground base stations proposed by Inmarsat results in/approves a change in the operator selected by the European Commission in the context of the pan-European selection procedure;

- Fourth argument: the contested decision breaches the obligation to state reasons;

o First part: failure to provide substantive reasons;

o Second part: failure to state formal reasons;

18.

Viasat requests that the Court:

Declare the application for annulment inadmissible, or at the very least unfounded;

Order the applicant to pay costs, including legal costs of EUR 1,440.”

It has developed eight arguments in defence of its position, which are listed as follows:

- Argument 1: the appeal is inadmissible due to lack of legal interest.

- Argument 2: The complementary ground components sent by Inmarsat are compliant with the installation conditions laid down by Article 8 of the Royal Decree of 11 February 2013, meaning that the Contested Decision was not taken in violation of this regulation (the 1st part of ViaSat’s first argument is unfounded).

- Argument 3: The BIPT could not refuse to approve the complementary ground components communicated by Inmarsat on the grounds that the latter was not compliant with its coverage obligations on 13 June 2016 (the second part of ViaSat’s first argument is unfounded).

- Argument 4: ViaSat’s position is contrary to the principle of technology neutrality (the first two parts of ViaSat’s second argument are unfounded);

- Argument 5: The BIPT could not refuse to approve the complementary ground components communicated by Inmarsat on the grounds that the latter was not compliant with the conditions for its selection by the European Commission (the third part of ViaSat’s second argument is unfounded);

- Argument 6: The purpose of the Decision is not to implicitly approve a modification of Inmarsat’s selection conditions (the first part of ViaSat’s third argument is unfounded);

- Argument 7: The Decision does not lead to a change of selected operator (the second part of ViaSat’s third argument is unfounded);

- Argument 8: Adequate reasons have been given for the Decision (ViaSat’s fourth argument is unfounded).

19.

Inmarsat makes a preventive intervention to support the BIPT’s position and the Decision.

It requests that the Court:

- “Declare its intervention admissible and well-founded;

- On a principal level, to declare Viasat’s petition inadmissible and, moreover, unfounded;

- Order Viasat to pay all costs, including legal costs estimated at €1440”.

III. **ADMISSIBILITY**

lll.1.- Admissibility of Viasat’s appeal

- Time limit

20.

Viasat’s appeal against the Decision of the BIPT Council of 29 June 2016 is based on Article 2 of the Law of 17 January 2003 “on the appeals and the settlement of disputes arising from the Law of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors” (hereinafter referred to as the “BIPT appeals and disputes resolution law”);

The appeal was brought in a petition filed with the registry on 27 July 2017, within the legal time limit of 60 days from the publication of the Decision. As the parties are agreed in their submissions, the Decision was in fact only published by the BIPT on its website on 29 May 2017.

- Legality of the document instituting proceedings

21**.**

Inmarsat invokes the inadmissibility of the appeal and the invalidity of the petition, on the grounds that the latter states an incorrect address for Viasat UK’s registered office, and does not state the business number for Viasat Inc. The facts are not disputed by Viasat but it does dispute the legal consequences that Inmarsat draws from them.

22.

Pursuant to Article 2 § 2 of the BIPT appeals and disputes resolution law, an appeal filed against a decision of the BIPT must be filed in a petition that contains, under penalty of invalidity:

“(...)

2° if the applicant is a natural person, his or her first name, surname, profession and place of residence, as well as, where appropriate, his or her business number; if the applicant is a legal person, its name, its legal form, its registered office and the status of the person or body that represents it, as well as, where appropriate, its business number; [...].”

Pursuant to Article 3 of the same law: “The provisions of the Judicial Code relating to appeals shall apply for all aspects relating to the proceedings before the Market Court that are not addressed by this Chapter”.

22bis.

Neither the material error in Viasat UK’s address or the lack of indication of the Viasat Inc’s US business number result in the invalidity of the appeal. This invalidity is not governed by Article 2, § 2 of the BIPT appeals and disputes resolution law and, in any case, the error committed and the omission of Viasat Inc’s business number have not prejudiced any party (Article 861 of the Judicial Code, applicable pursuant to Article 2 of the BIPT appeals and disputes resolution law).

- Locus standi

23.

The BIPT and Inmarsat also invoke that the petition would not be admissible because Viasat would not prove an interest in the action. Since this action falls within the context of proceedings for the enforcement of legal rights, the interest is to be assessed in accordance with the jurisprudence of the Council of State: it is necessary for the contested act to cause the applicant a personal, direct, certain current and legitimate disadvantage and, on the other hand, for the annulment to give them a personal and direct advantage, even minimal. In this case, these conditions are not met by Viasat. The interest asserted by Viasat is merely an interest in the commercial failure of Inmarsat, of which it considers itself a competitor; this does not constitute a sufficient interest within the procedural meaning of the term. Viasat does not have the necessary technical capacity to use the S-band and furthermore did not participate at the time in the European Commission’s call for applications; the annulment of the Decision would not enable it to obtain a right of use of S-band frequencies.

Viasat disputes this. It asserts that it is a competitor of Inmarsat for the provision of in-flight connectivity services on board aircraft overflying the European continent and that, as such, it has the required interest to request the annulment of the Decision, due to the latter unlawfully permitting Inmarsat to use the S-band for a use highly divergent from that of which the ban was intended, which creates a distortion of competition to the detriment of the other operators active in the emerging in-flight connectivity market in Europe.

24.

Pursuant to Article 2 § 1(2) of the BIPT appeals and disputes resolution law: “Any person with an interest in bringing proceedings may bring the appeal referred to in paragraph 1”.

This provision is to be interpreted in light of Article 4.1 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework” Directive), which provides that:

“Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who or which is affected by a decision of a national regulatory authority has the right of appeal against the decision to a body that is independent of the parties involved. (...)”

Article 8 of the “Framework” Directive titled “Policy objectives and regulatory principles”, moreover states in its paragraph 2:

“The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(...)

b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(...)”.

25.

The European Court of Justice ruled as follows in relation to the terms referred to in Article 4.1 of the “framework” Directive for “companies which provide electronic communications networks and/or services, and which is affected by “ the Decision”(cfr its decision of 21 February 2008, in case C-426/05, *Tele2 Télécommunication GmbH c. Telekom-Control-Kommission)*):

“26. It is (...) established case-law that the need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (...).

27. Accordingly, the scope which the Community legislature intended to confer on the terms user ‘affected’ or undertaking ‘affected’ by a decision of a national regulatory authority for the purposes of Article 4(1) of the Framework Directive must be assessed in light of the purpose of that article within the context of that directive.

(...)

30. (...) Article 4 of the Framework Directive follows from the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (Case C-432/05 Unibet [2007] ECR I-2271, paragraph 37 and the case-law cited), pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual’s rights under Community law (Unibet, paragraph 38 and the case-law cited).

31. In the case covered by Article 4 of the Framework Directive, the Member States are required to provide for a right of appeal before an appellate body in order to protect the rights which users and undertakings derive from the Community legal order.

32. It follows that the requirement to provide effective judicial protection, which is at the the origin of Article 4 of the Framework Directive, must apply to both users and undertakings which may derive rights from the Community legal order, in particular from telecommunications directives, and whose rights are affected by a decision taken by a national regulatory authority.

(...)

37. Next, it should be pointed out that, under Article 8(2) of the Framework Directive, the national regulatory authorities must promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by, inter alia, ensuring that there is no distortion or restriction of competition in the electronic communications sector.

38. As noted by the Advocate General in point 24 of his Opinion, and as submitted by the Danish Government, a strict interpretation of Article 4(1) of the Framework Directive to the effect that that provision confers a right of appeal only on persons to whom the decisions of the national regulatory authorities are addressed would be difficult to reconcile with the general objectives and regulatory principles arising, for those authorities, from Article 8 of that directive, particularly with the objective of promoting competition.

39. It follows that Article 4(1) of the Framework Directive must be interpreted as granting a right of appeal also to persons other than the addressees of a decision taken by a national regulatory authority in the context of a market analysis. Thus, users and undertakings competing with an undertaking (formerly) having significant power in the market concerned must be regarded as being ‘affected’ for the purposes of that provision when their rights are potentially affected by such a decision.”

26.

In its above-mentioned judgement (case C-426/05), the Court of Justice, applying these principles, concluded that a competing undertaking was “affected” within the meaning of Article 4.1. of the “Framework” Directive by a decision taken by a national regulatory authority in the context of a market analysis.

In its judgement of 23 April 2009[[13]](#footnote-13), the Court of Cassation applies the case-law of the judgement of 21 February 2008 of the Court of Justice in case C-426/05 and quashes the judgement of the Brussels Court of Appeal, which was referred to it, which had refused Mobistar the right to intervene in proceedings relating to the appeal brought by Belgacom against a decision of the BIPT, on the following grounds:

“the appeal provided for by Article 4.1. of the “Framework” Directive is open not only to the dominant operator but also to the alternative operator and (...) it is for the national court to verify that internal procedural law ensures the safeguarding of the rights that this competing undertaking obtains from the first one, in the Community legal order.

The alternative operator may therefore intervene before the Court of Appeal to which the appeal brought by the dominant operator is referred. Contrary to what the contested judgement decides, the demonstration, by the applicant, that it is directly and individually concerned by the decision is not a prerequisite for the admissibility of that intervention (...)”

27.

More recently, in a judgement of 22 January 2015 (case C-282/13, T-Mobile Austria GmbH vs. Telekom-Control-Kommission), the Court of Justice ruled, by applying the same principles, that a competing undertaking was “affected” within the meaning of Article 4.1. of the “Framework” Directive by the decision taken by the national authority in the context of a procedure for the transfer of rights of use of radio frequencies provided for in Article 5, § 6 of the “Authorisation” Directive, and that this decision may have an impact on that undertaking’s position in the market.

In recital 39 of that judgement, the Court provides the three-step test that it applies to determine whether an undertaking is “affected” within the meaning of Article 4.1. of the “Framework” Directive by a decision of an NRA. The conditions are that: (i) the undertaking providing electronic communications networks and/or services is a competitor of the undertaking or undertakings to which the decision of the NRA is addressed, (ii) the NRA makes a decision in the context of a procedure intended to safeguard competition and (iii) the decision in question may have an impact on that first undertaking’s position in the market.

28.

In this case, Viasat maintains that it provides electronic communications services, namely electronic communications services for airlines, for in-flight communications, and is therefore a competitor of Inmarsat, since the latter is entering the in-flight communications sector, via its EAN services. This competitor status is not seriously contested, by the BIPT or by Inmarsat.

The fact that Viasat did not apply for S-band allocation does not allow it to be denied competitor status, no more than the fact that it did not participate in the consultation procedure organised by the BIPT in June 2016. Moreover, Viasat participated in the public consultation procedures organised by other NRAs, such as BNetzA (Austria) and ComReg (Ireland).

The disputed Decision on the other hand was taken in the context of the MSS Royal Decree of 11 February 2013, which is part of the European MSS regulatory framework and the general regulatory framework relating to electronic communications. As stated in Article 8 of the “Framework” Directive, it follows from the general duty of NRAs to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by, inter alia, ensuring that there is no distortion or restriction of competition in that sector. The MSS regulatory framework also includes references to this general objective, in particular in that it aims to safeguard and even to enhance competition “by increasing the offering and availability of pan-European services” (recital (3), in fine, of the Harmonisation Decision; cf. also recital (5) of the MSS Decision).

Since, according to Viasat’s argument, the Decision is unlawful and, therefore, offers Inmarsat an unlawful competitive advantage in the global aeronautical communications market, it must be concluded that the condition that the Decision may have an impact on Visat’s position has also been met. Indeed, according to Viasat’s argument, any CGC architecture of the EAN system is unlawful and therefore that system could not be developed as Inmarsat intends.

29.

As previously also ruled by the Court of Justice, Article 4.1. of the “Framework” Directive - and consequently in Belgian law Article 2. § 1(2) of the BIPT appeals and disputes resolution law - must not be restrictively interpreted, given the regulatory framework’s general objective of the promotion of competition.

Thus, in this case, restricting the right of action to an undertaking with rights in the S-band would make no sense because that would, in practice, amount to preventing potential illegalities of the Decision from being contested, because only two undertakings have been granted such rights, and neither they nor the BIPT have an interest in bringing an appeal against a decision of the BIPT that authorises CGCs to use that frequency band.

It is therefore not required that Viasat be able to invoke rights in the S-band, or that the Decision result in a direct disadvantage and its annulment in a personal and direct benefit for Viasat. Its competitor status in relation to the services offered by Inmarsat and its claim that the Decision is unlawful and results in the distortion of competition to its detriment, are sufficient to give it the required interest.

30.

It follows from the above that Viasat has the required interest in bringing an action within the meaning of Article 2§ 1(2) of the BIPT appeals and disputes resolution law.

III.2.- Admissibility of Inmarsat’s voluntary intervention

31.

The admissibility of Inmarsat’s voluntary preventive intervention is not contested. Inmarsat is the direct beneficiary of the Decision and it states that in the event of the annulment of the Decision, it would risk losing the right to install and operate complementary ground facilities on Belgian territory for its mobile satellites services system, “which would render worthless major investments already made and would seriously harm its ability to offer services and therefore to continue its commercial activities” (p. 7 of its conclusions).

IV. **DISCUSSION**

IV. 1. **Joint examination of the first part of the first argument for annulment - the BIPT has misinterpreted and wrongly applied its powers in adopting the Decision - and the fourth argument for annulment - failure to state formal reasons**

IV.1.1. **Position of the parties**

A. Viasat’s position

32.

In the first part of its first argument, Viasat maintains that in consideration of it only being in possession of restricted and limited powers when authorising (alleged) complementary ground components, the BIPT was in breach of Articles 3, 8 and 9 of the MSS Royal Decree and Article 8 of the MSS Decision.

This first part of the argument was developed in light of the position made clear by the BIPT in this dispute, which consists of maintaining that its powers relating to authorisation of the CGCs proposed by Inmarsat was very limited and, in particular, that it could not verify whether or not these CGCs complied with the European and Belgian regulatory framework.

33.

It is evident from the European regulatory framework that the powers of the national regulatory authorities, when called upon to authorise or refuse the ground components proposed by a selected operator, are much more extensive than what the BIPT claims.

Pursuant to Article 8 of the MSS Decision, the national regulatory authorities may only authorise ground components (i) where they are “complementary ground components” within the meaning of the MSS Decision, (ii) where they are an integral part of a “mobile satellite system” within the meaning of the MSS Decision and (iii) where the European and national regulatory framework in the area of mobile satellite services, in its broadest sense, is complied with.

When they authorise the ground components proposed by a selected operator, the national regulatory authorities (including the BIPT) must, at the very least, verify that:

- The proposed ground components satisfy the definition of complementary ground components and are an integral part of a mobile satellite system within the meaning of European law (i.e. the MSS Decision);

- The common conditions listed in Article 8(3) of the MSS Decision are satisfied;

- It is necessary/proper to install the proposed ground components to improve the availability of the mobile satellite service in light of (mainly) local circumstances;

- The authorisations are granted in compliance with the European regulatory framework relating to mobile satellite systems (e.g. the minimum service availability obligation as well as the steps described in the annex to the MSS Decision - see infra).

The power of the BIPT, with regard to authorisation of complementary ground components, is not therefore “limited”, “purely technical” or “formal”, as BIPT and Inmarsat mistakenly claim.

The European Commission came to the same conclusion in case T- 245/17. Indeed, in response to Viasat’s argument that the European Commission unlawfully failed to decide that the use of the 2 GHz band on a primarily ground-based network constitutes a fundamental change in the use of the 2 GHz band, the European Commission stated *“[...] the task of ensuring compliance* with the common conditions pursuant to the [“MSS”] decision is entrusted to the legislators of the Member states and not to the Commission” (item 11 from Viasat, § 85).

Furthermore, in several Member States where Inmarsat has requested authorisation for air-to-ground base stations as complementary ground components, most of the national regulatory authorities have exercised the aforementioned powers (even though in most of these cases they came to an incorrect decision). None of these national regulatory authorities regarded their powers as being “limited” and/or “purely technical”: quite the opposite in fact. Each of them, when adopting a formal decision, assessed whether the air-to-ground base stations proposed by Inmarsat could be described as complementary ground components and formed part of a mobile satellite system and satisfied the common conditions listed in Article 8(3) of the MSS Decision.

34.

The BIPT failed to take account of the Belgian and European regulatory framework mentioned above in adopting the Contested Decision, which it expressly confirms, moreover, in its initial pleadings[[14]](#footnote-14). The only elements verified by the BIPT are the following:

- The formal obligations listed in Article 8 of the MSS Royal Decree; and

- The existence of any interference with systems using adjacent frequency bands (particularly with 3G networks using adjacent frequency bands).

However, it is evident from the European and Belgian framework that it was incumbent upon the BIPT, within the context of authorisation of the air-to-ground base stations proposed by Inmarsat, to, at the very least, verify the following elements: whether such stations could be described as complementary ground components, whether they constitute an integral part of a mobile satellite system, whether they are required to improve the availability of mobile satellite services in light of local circumstances and whether the other conditions provided for in the regulatory framework are satisfied.

The BIPT could not simply authorise the air-to-ground base stations proposed by Inmarsat without any verification of these elements. Otherwise, this would transform every authorisation for complementary ground components by the national regulatory authority, within the context of a mobile satellite system, into a mere formality without any impact on achieving the objectives set by the European and Belgian legislators. This would therefore permit the selected operator to install ground-based infrastructure unrelated to these objectives. The fact that the national regulatory authorities have extensive powers to ensure retrospective enforcement of the regulatory framework relating to mobile satellite systems does not justify the conclusion that their power to authorise complementary ground components is reduced to endorsing, without any verification, the proposals submitted by the selected operators.

35.

Additionally, if the court had any doubt regarding the interpretation of the European regulatory framework, Viasat requests that the court submit the following queries to the Court of Justice of the European Union for a preliminary ruling:

**1)** “Should Article 8 of the MSS Decision be interpreted thusly that when they grant the authorisation required for the provision of complementary ground components on their territory, the national regulatory authorities must also verify that:

(i) The proposed ground stations are indeed an integral part of a mobile satellite system within the meaning of Article 2(2)(a) of the MSS Decision;

(ii) The proposed ground components are indeed “complementary ground components” within the meaning of Article 2(2)(c) and Article 8(3)(b) of the MSS Decision;

(iii) The common conditions referred to in Article 8(3) of the MSS Decision are satisfied;

(iv) It is necessary to install the proposed complementary ground components for the purpose of improving the availability of satellite services using the 2 GHz band; and

(v) The authorisations are granted in compliance with the European regulatory framework relating to mobile satellite services and, in particular, the minimum service availability obligation as well as the steps described in the annex to the MSS Decision?

**2)** Should Article 4(1)(c)(ii) of the MSS Decision be interpreted thusly that the national regulatory authorities are no longer competent to grant the authorisations required for the provision of complementary ground components on their territory where, at the time of their decision, the service availability obligation provided for in this article has not been fulfilled by the selected operator and/or where the 7 year timeframe referred to in this provision has expired?””

36.

In the first part of its fourth argument, Viasat cites a substantive failure to state reasons in that the Decision was based on the mistaken assumption that the disputed ground components proposed by Inmarsat:

- Are an integral part of a mobile satellite system within the meaning of the applicable legal framework;

- Constitute CGCs within the meaning of that same framework;

- Improve the availability of the proposed mobile satellite services;

- Are installed, operated and managed by Inmarsat.

Since it was based on erroneous grounds, the Decision is in breach of the obligation to state the substantive reasons for the decision.

37.

In the second part of its fourth argument, Viasat cites a failure to state formal reasons, in that the BIPT should have indicated in the Decision (or, at the very least, in the administrative file) the grounds supporting the elements stated above, as well as:

- The fact that steps 6 to 9 were indeed complied with by Inmarsat and, in particular, that the satellite had been launched into space and Inmarsat was providing commercial mobile satellite services on a continuous basis on Belgian territory at the time of the adoption of the Contested Decision;

- In accordance with Article 3 of the MSS Royal Decree, the mobile satellite services were indeed being provided to 50% of the Belgian population and over 60% of Belgian territory as of 13 June 2016, due, mainly, to the availability of appropriate mobile ground stations required to effectively provide such services;

- The “common conditions” provided for in Article 8(3) of the MSS Decision and Article 9 of the MSS Royal Decree were satisfied at the time at which the Contested Decision was adopted.

**B.** Position of the BIPT and Inmarsat

38.

The BIPT is of the opinion that Article 2 of the MSS Royal Decree authorises Inmarsat to operate a mobile satellite system in the specified frequency bands, and that Article 8 creates a genuine subjective right, on the part of selected operators, to install CGCs where the three conditions referred to are satisfied, namely: a notification, approval of the CGCs and a communication to the BIPT of the properties and place of installation of the CGCs.

The BIPT could only carry out technical monitoring, pursuant to Article 4 of the Royal Decree, to verify that there was no harmful interference with 3G networks using adjacent frequency bands.

When the request for authorisation was submitted to it, the power of the BIPT only consisted of being able to verify the three conditions referred to above (which were satisfied; something that is not disputed) and its technical monitoring.

39.

If it should emerge that Inmarsat is not compliant with the regulatory framework, the BIPT could sanction it, however this time within the framework of Article 21 of the BIPT Status Law, which provides for infringement proceedings.

Only actual use of the CGCs permits such monitoring. Before they are actually commissioned, the regulator does not have the possibility of monitoring whether the operator is going to comply with the CGC conditions of use.

The British regulator (Ofcom) followed the same reasoning in its decision of 10 October 2017.

40.

Additionally, the BIPT is not opposed to the questions suggested by Viasat being submitted to the Court of Justice of the European Union for a preliminary ruling.

41.

According to Inmarsat, no provisions in the regulatory framework for MSS make an overall review of compliance with this regulatory framework for the MSS system, of which CGCs are intended to be part, a prerequisite for the granting of authorisations for those CGCs.

It is of the understanding that it would be illogical to refuse the authorisation of CGCs on the basis of an assumption that they would not be used in compliance with the applicable regulatory requirements, and this even prior to their commissioning. The only sensible approach, which was the one taken by Ofcom, the British regulator, is to first authorise the CGCs and then monitor whether they are being used in compliance with regulatory requirements.

42.

Furthermore, Inmarsat generally considers that Viasat’s arguments for annulment are not actually aimed at the Decision but constitute proceedings for failure to act against the BIPT, who Viasat criticises for having failed to monitor compliance by Inmarsat using the applicable regulatory framework. For this reason, all of the arguments are inadmissible.

43.

If they are admissible, the arguments are unfounded.

44.

When it authorises CGCs pursuant to Article 8 of the MSS Royal Decree, it is not the responsibility of the BIPT to monitor compliance with the coverage parameters set out in Article 3 of the decree. The BIPT does not have any discretionary power in the granting of CGC authorisations and may not refuse them where the operator is already authorised based on Article 7 of the MSS Decision.

45.

In any case, Inmarsat fully satisfies the coverage parameters provided for in Article 3 of the MSS Royal Decree.

Inmarsat’s EAN satellite covers virtually the territory of the Member States of the European Union in its entirety (see Figure 1 in Inmarsat’s pleadings). Once almost 100% of the territory is covered, this also corresponds to almost 100% population coverage.

The coverage obligation (ability of a satellite to service a particular area) must not be confused with satellite capacity (volume of traffic capable of being conveyed to the area), which is, by necessity, limited.

The coverage obligation does not imply commercial commissioning either. It would be contradictory to make the commercial availability of the service a precondition for the authorisation of CGCs since the CGCs are part of the MSS system.

It is also ironic that Viasat criticises the delays in commercial operation of the EAN given that it is Viasat, through its multiple legal actions in different European countries, that has caused the delay.

46.

Finally, Inmarsat is of the opinion that there is neither a need nor a benefit in submitting the questions requested by Viasat to the Court of Justice of the European Union for a preliminary ruling: it would only delay resolution of the dispute unnecessarily.

47.

The BIPT and Inmarsat also contest the fourth argument for annulment. They are of the opinion that it simply repeats the arguments developed by Viasat in support of its previous arguments and that there has not actually been any breach of the obligation to state reasons. They therefore largely refer the court to their defence concerning the previous arguments.

**IV.1.2. Decision of the Court**



“Complementary ground components of a mobile satellite system” are defined in Article 1, 2° of the MSS Royal Decree as : “*ground-based stations used at fixed locations in order to improve the availability of the mobile satellite service 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”.* This definition transposes the definition provided in Article 2.2. (b) of the MSS Decision.

Article 8 of the MSS Decision provides the following with regard to the role of the Member States concerning CGCs on their territory :

*“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.*

*2. Member States shall not select or authorise operators of complementary ground components of mobile satellite systems before the selection procedure provided for in Title II is completed by a Commission decision adopted pursuant to Articles 5(2) or 6(3). This is without prejudice to the use of the 2 GHz frequency band by systems other than those providing MSS in accordance with Decision 2007/98/EC.*

*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.”* (emphasis added).

Article 8 of the MSS Royal Decree provides that :

“*The selected operators are authorized to install one or more complementary ground components in Belgium under the following conditions :*

*1° they have made a notification for the provision of electronic communications networks pursuant to Article 9 of the Law [of 13 June 2005 concerning electronic communications];*

*2° any complementary ground component is approved by the Institute before its putting into service;*

*3° the technical characteristics and the place of installation of each complementary ground component are transmitted to the Institute at least one month before the desired date of putting into service.*”



It results from Article 8 of the MSS Royal Decree that the Institute must approve each CGC before it is put into service.

In view of Article 8 of the MSS Decision and in order to give sense to the condition laid out in Article 8, 2° of the MSS Royal Decree, this necessarily means that the Institute verifies whether the CGCs which are submitted for approval fall under the definition of CGC laid out in Article 1, 2° of the MSS Royal Decree and are an integral part of the mobile satellite system developed by the operator selected by the Commission and, more in general, that the CGCs satisfy the common conditions listed in Article 8.3. of the MSS Decision and are used in the context of a network that complies with the European legal framework.

Such verification has, for that matter, already been carried out by the regulator of the United Kingdom, OFCOM, in its decision published in October 2017 authorising Inmarsat’s ground stations (Annex 9 to Viasat’s file). On the basis of the information provided by Inmarsat and as a result of its assessment of the issue, OFCOM has come to the conclusion that Inmarsat’s ground stations could be authorized but that, given the importance of the terrestrial component of the system and the fact that the EAN service can technically be provided without the satellite terminal being installed by the airlines, OFCOM would carefully monitor the deployment of the EAN in order to ensure that the ground-based stations are indeed being used as complementary ground components of the EAN (abovementioned decision, § 4.9 and 4.10).

Likewise, in its draft authorisation decision subject to public consultation, Arcep, the French regulator, conditions the authorisation that it would grant to Inmarsat upon respect by Inmarsat of the common conditions listed in Article 8.3 of the MSS Decision.

The Irish regulator, ComReg, also considers that, in the context of its competence to authorise CGCs, it is under the obligation to verify whether the operator complies with the European regulatory framework (see Annex 7 to Viasat’s file, Excerpt from Decision 17/97 of ComReg, published on 27 November 2017).

The BIPT admits that, in its short decision, it has not verified whether the ground components which were submitted for approval fell under the definition of CGC laid out in Article 1, 2° of the MSS Royal Decree and were an integral part of the mobile satellite system developed by the operator selected by the Commission, and more in general whether the submitted CGCs satisfied the common conditions listed in Article 8.3.

of the MSS Decision and were used in the context of a network compliant with the European legal framework.

Having failed to carry out that assessment, the BIPT’s Decision is not legally motivated.

In its response to the plea, the BIPT does not propose to complement its motivation on that issue. None of the parties asks the Court to make use of its power of full review. The Court may not use its power of full review on its own motion in order to complement the motivation of the Decision.

The fourth plea is therefore well-founded, and justifies the annulment of the Decision.

There is no need to proceed to the assessment of the other pleas for annulment.

**V. THE COSTS**

In accordance with Article 1017, 1st indent of the Code of Judicial Procedure, the BIPT, which is unsuccessful, is condemned to bear the costs, fixed by Viasat at 1.440 € (procedural indemnity), as well as 420 € (case registering indemnity) and 40 € (contribution to the second line budgetary fund), *i.e.* 1.900 €.

Inmarsat, in its quality of voluntary Intervener, may not pretend to a procedural indemnity (Supreme Court, 25 January 2013, Pas. 2013, Book 1, p. 23), besides the fact that its voluntary intervention is without merit anyways.

**FOR THESE REASONS,**

**Section Market Court**

In view of the provisions of the Law of 15 June 1935 on the use of languages in judicial matters,

Ruling on a contradictory basis,

Receives the appeal and declares it well-founded,

Annuls the decision of the Council of BIPT of 29 June 2016 “concerning Inmarsat Ventures Ltd’s rights to use complementary ground components”,

Condemns the BIPT to bear the costs, fixed at 1.900 €, to Viasat UK Ltd. And Viasat Inc.

Declares Inmarsat Venture Ltd.’s voluntary intervention admissible but not founded.

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This judgment was delivered at the hearing of 14 March 2018 by

M. BOSMANS Judge serving as president

K. PITEUS Judge

C. VERBRUGGEN Judge

B. HEYMANS Court clerk

B. HEYMANS C. VERBRUGGEN

K. PITEUS M. BOSMANS

1. Submitted in electronic form using USB sticks submitted to the hearing. [↑](#footnote-ref-1)
2. O.J., 15 February 2007, L 43/32. [↑](#footnote-ref-2)
3. O.J., 2 July 2008, L172/15. [↑](#footnote-ref-3)
4. O.J. 12 June 2009, L 149/65. [↑](#footnote-ref-4)
5. O.J., 11 October 2011, L 265/25. [↑](#footnote-ref-5)
6. Law of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors, Belgian Official Gazette, 24 January 2003 (“BIPT status law”). [↑](#footnote-ref-6)
7. Namely the Decree of the Flemish Community of 27 March 2009 on radio and television broadcasting (Belgian Official Gazette,16 September 2009), the Decree of the French Community on audio-visual media services consolidated on 26 March 2009 (Belgian Official Gazette, 24 July 2009) and the Decree of the German-Speaking Community of 27 June 2005 on audio-visual media services and cinematographic representations (Belgian Official Gazette, 6 September 2005). [↑](#footnote-ref-7)
8. Item 1 of the administrative file. [↑](#footnote-ref-8)
9. Item 5 of the administrative file. [↑](#footnote-ref-9)
10. Item 12 of the administrative file. [↑](#footnote-ref-10)
11. Item 14 of the administrative file. [↑](#footnote-ref-11)
12. O.J., 3 July 2017, C. 213/33. [↑](#footnote-ref-12)
13. No C.06.0296.F, unpublished, item 13 of Inmarsat's legislation and jurisprudence file. [↑](#footnote-ref-13)
14. Point 16 of the BIPT's initial pleadings. [↑](#footnote-ref-14)