Case C-100/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

8 February 2019

Referring court:

Cour d'appel de Bruxelles, section Cour des marchés (Belgium)

Date of the decision to refer:

23 January 2019

Applicants:

Viasat UK Ltd

Viasat Inc.

The other party to the proceedings:

Institut belge des services postaux et des télécommunications (the national regulatory authority for postal services and telecommunications in Belgium ('the IBPT'))

Interveners:

Inmarsat Ventures Ltd

Eutelsat S.A.

I. Subject matter and facts of the dispute

1 Inmarsat Ventures Ltd ('Inmarsat') is one of the two operators authorised to use in the European Union the 2 GHz frequency band to provide mobile satellite services ('MSS').

2 Inmarsat is developing on that band an 'EAN' (European Aviation Network) service, which it is actively preparing to launch and which consists in providing a high-speed internet connection on all flights within the European Union by means

of a system comprising both a satellite and a terrestrial-based 4G antenna network called ‘complementary ground components’ (‘CGCs’).

3 Inmarsat states that it has built a ground-based satellite station in Greece and that, on 28 June 2017, it launched its EAN satellite, which started to operate on 29 August 2017. For the rollout of its CGC network, it entered into partnership with Deutsche Telekom. It states that it applied for and obtained the authorisations necessary for placing CGCs in all the EU Member states (except Romania) and in Norway and Switzerland.

4 By decision of 7 August 2018, the IBPT granted Inmarsat user rights for six CGCs in Belgium.

5 Viasat markets satellite services of various kinds and provides, inter alia, in partnership with Eutelsat, in-flight connectivity (IFC) services to airlines operating in the European Union.

6 Viasat maintains that the EAN service does not correspond to the plan on the basis of which Inmarsat was selected by the European Commission and that it no longer complies with the European regulatory framework. Viasat criticises, in general terms, such use of the 2 GHz band, which consists mainly of air to ground services without the involvement of satellite, and not of mobile satellite services.

7 It also criticises the Commission for not preventing that different use and, in that respect, on 24 April 2017, brought an action before the General Court for failure to act (Case T-245/17, OJ 2017, C 213, p. 33).

8 Moreover, Viasat has brought proceedings before a number of courts of the Member States for annulment of the national authorisations issued to Inmarsat for CGCs which it has deployed for its EAN service in the EU Member States.

9 In the present case, Viasat takes issue with the authorisation granted by the IBPT for six CGCs installed in Belgium and seeks its annulment before the Market Court of the cour d’appel de Bruxelles, section Cour des marchés (Court of Appeal, Brussels, Market Division). Eutelsat has intervened in the proceedings in support of the form of order sought by Viasat.

II. Provisions at issue

EU law

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) (‘the MSS decision’)

10 Title I, headed ‘Objective, scope and definitions’, provides:

‘Article 1 — Objective and scope

1. …this decision …

creates a Community procedure for the common selection of operators of mobile satellite systems that use the 2 GHz frequency band in accordance with Decision 2007/98/EC, comprising radio spectrum from 1980 to 2010 MHz for earth to space communications, and from 2170 to 2200 MHz for space to earth communications. It also lays down provisions for the coordinated authorisation by Member States of the selected operators to use the assigned radio spectrum within this band for the operation of mobile satellite systems.

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.

…

Article 2 — Definitions

‘... The following definitions shall also apply:

(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.’

11 Title II, headed ‘Selection procedure’, provides:

‘Article 4 — Admissibility of applications

1. The following admissibility requirements shall apply:

…

(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 the provision of MSS commences;

(ii) 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 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 Articles 5(2) or 6(3).

…' [1]

12 Title III, headed 'Authorisation', provides:

'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 Articles 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 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.'

'Article 9 — Monitoring and enforcement

…

3. The measures defining any appropriate modalities for coordinated application of the rules on enforcement referred to in paragraph 2, including rules for the coordinated suspension or withdrawal of authorisations for breaches of the common conditions provided for in Article 7(2), designed to amend non-essential

[1] The 'Commission's decision adopted pursuant to Articles 5(2) or 6(3)', referred to in point (ii), is Commission Decision 2009/449/EC of 13 May 2009 on the selection of operators of pan-European systems providing mobile satellite systems (MSS), published in OJ L 149 of 12 June 2009. The provision may therefore be read as: ' by the time stipulated by the applicant but in any event no later than [13 June 2016]'

elements of this Decision by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 10(4).'

Commission 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

13 Article 1 — Subject matter, objective and scope

'1. This Decision lays down the modalities for the coordinated application of Member States' rules on enforcement applicable to an authorised operator of mobile satellite systems in the event of an alleged breach of the common conditions attached to its authorisation.

2. Taking into account the cross-border nature of MSS, coordination with the assistance of the Communications Committee shall aim in particular at facilitating a common understanding of the facts underlying any alleged breach and its gravity, leading to consistent application of national enforcement rules across the European Union, including coordinated timing of any measures taken, in particular where breaches are similar in nature.'

Belgian law

The Royal Decree of 11 February 2013 on systems providing mobile satellite services ('the MSS Royal Decree') implements that part of the MSS Decision which concerns the Member States. It authorises the two operators selected by the Commission to use the 2 GHz band.

Article 1 of that Royal Decree repeats the definitions of MSS and CGC given in the MSS Decision.

Article 3 provides:

'At least 50% of the population and 60% of the territory of Belgium shall be covered by 13 June 2016.'

Article 8 lays down the conditions under which operators may install CGCs, namely: notification, approval of the CGCs and communication to the IBPT of the characteristics and place of installation of the CGCs. Article 9 provides that no additional service may be offered exclusively via the CGCs. In the event of a failure of the satellite system, those CGCs cannot operate alone for more than 18 months,

III. Positions of the parties

A. Viasat

14 Viasat maintains, inter alia, that Inmarsat was under an obligation to cover by its services 'at least 50% of the population and 60% of the territory in Belgium… by 13 June 2016'. Since that condition was not fulfilled by that date, the IBPT was not entitled to authorise the CGCs.

15 It is established that the coverage obligation has not been fulfilled since Inmarsat states that, at that time, it had placed an order for the manufacture of a satellite and it is common ground that this had not yet been installed, let alone in service so as to cover 50% of the population and 60% of the territory in Belgium. Inmarsat did not launch its EAN satellite until 28 June 2017. However, that satellite is not yet active from a commercial point of view and, therefore, Inmarsat has not yet been able to deploy a mobile satellite system providing MSS on the 2 GHz band.

16 Viasat considers therefore that the IBPT adopted the contested decision in breach of the principle of legality in that the mobile satellite system of which every CGC must necessarily form an integral part did not exist even to the extent of fulfilling at least the obligation imposed by the MSS decision.

B. Eutelsat

17 Eutelsat adds that, in any event, even assuming that one day Inmarsat may launch the EAN commercially, it will never be able to provide a continuous commercial service covering at least 50% of the population and 60% of the territory of Belgium in the sense intended by the EU legislature. The EAN is a service intended exclusively for airlines worldwide and not only for those used by Belgian citizens. Business or relatively well-to-do customers who wish to be able to continue to consult their emails and watch in-flight films when flying over Europe do not necessarily represent more than 50% of the Belgian population, especially since that customer group does not consist primarily of Belgian or even European citizens. The public targeted by the EAN service is totally at odds with the objectives of the MSS decision and the MSS Royal Decree. Furthermore, Inmarsat modified its initial project and decided not to launch a satellite whose whole payload is intended for the MSS but to launch a reduced payload on a condosat generating a significantly lower capacity for MSS.

C. THE IBPT

18 The IBPT considers that the legislation authorises Inmarsat to operate a mobile satellite system in the frequency bands specified and establishes a genuine individual right for the selected operators to install CGCs if the three conditions laid down by Article 8 of the MSS Royal Decree are satisfied.

However, authorisation to install CGCs cannot be refused on grounds of non-compliance with the obligation to provide a certain coverage by 13 June 2016. The legislation does not make non-compliance with Article 3 of the MSS Royal Decree subject to penalties or forfeiture of the right to apply for authorisation for CGCs. The IBPT therefore remained competent to authorise CGCs after 13 June 2016

19 The IBPT also observes that:

– the date of 13 June 2016 and the coverage obligation are in Article 4(1)(c)(ii) of the MSS decision, which concerns a commitment to be given by the applicant operator before it is selected; if the selection of Inmarsat were to be called in question, that could only be done at Union level;

– Article 21 of the Law on the statute of the IBPT permits it to monitor the use of the rights granted and to penalise an operator who does not fulfil its obligations but does not give it the right to refuse to grant those rights if the conditions laid down by the Royal Decree are met; that is confirmed by Article 9(2) of the MSS Decision.

D. Inmarsat

20 Inmarsat also considers that the consequence of non-compliance with the time frame cannot be that the IBPT can no longer authorise its CGCs. The MSS Royal Decree gives Inmarsat the right to use the frequencies assigned to it on the 2 GHz band. No provision is made for any forfeiture of that right in the event of non-compliance with the deadline set in Article 3 of the MSS Royal Decree or for any revocation of the IBPT's powers. No provision of the MSS regulatory framework makes the grant of authorisations for CGCs subject to overall monitoring of whether the MSS system of which those CGCs are intended to form part complies with that regulatory framework.

21 The coverage requirement laid down in Article 3 of the MSS Royal Decree is not, however, rendered ineffective. That requirement forms part of the regulatory framework and the IBPT has competence to monitor compliance. If the IBPT were to find that Inmarsat had infringed the regulatory framework, it would be competent to take the measures it deems appropriate. A hypothetical infringement by Inmarsat of the coverage time frame cannot culminate in the loss of the IBPT's competence because it is precisely the IBPT which has competence to penalise such an infringement, were it to occur.

22 Since Inmarsat has been accorded a right to use frequencies in the 2 GHz band at Union level and the time frame for the launch of the EAN satellite has had the same effect throughout the Union, the consequences of that delay cannot be dealt with at national level. The European Commission is the only authority which can assess the alleged loss of competence of national regulators to grant national authorisations for the CGCs of the EAN. That is precisely why Viasat brought the

action for failure to act before the General Court of the European Union (Case T-245/17, pending).

23 Moreover, even though there was a delay, the satellite was eventually launched so that the EAN provides complete geographical coverage of the territory of the European Union and even beyond. It therefore covers the entire Belgian population, even though it must be acknowledged that the coverage rate in terms of population must be seen in the light of the fact that the EAN aims to offer services to passengers carried by airline companies. Any European citizen who travels by plane may therefore have access to the service. The condition laid down by the legislation is a condition of coverage and not a condition of actual use by 50% of the population.

The competent authorities of the other Member States share this view, since they support the CGC installations requested; none has said that it lacks competence in light of the fact jurisdiction in light of the fact that the time frame was not adhered to.

IV. Assessment of the Court of Appeal

24 The Court of Appeal notes that it is not disputed that Inmarsat, in its application, gave the commitment referred to in Article 4(1)(c) of the MSS Decision and that it has been established that Inmarsat did not comply with the requirement to cover 50% of the population and 60% of the territory in Belgium by 13 June 2016, at which date its EAN service was not yet operational.

25 From an examination of Viasat's submission that Inmarsat failed to comply with the coverage thresholds set, the Court of Appeal considers that it was not possible to determine at the outset, from the wording of Article 3 of the MSS Royal Decree, which includes those same thresholds, whether the Crown intended compliance with the coverage requirement laid down therein to be a necessary precondition for the exercise of the rights accorded to the operators selected, including the right to install CGCs in Belgium.

In order to give practical effect to that provision, it should however, a priori, be interpreted in that way.

Article 3 of the MSS Royal Decree reiterates the coverage conditions which operators must fulfil as laid down in the MSS Decision of the European Parliament and of the Council. However, the national provision differs from that in Article 4(1)(c) of the MSS Decision, in that the latter concerns a commitment which the operator must give in its application before it is selected. Article 7(2) of the MSS Decision provides, however, that the rights accorded to the candidates selected are subject to various conditions, including the condition that the candidates selected 'shall honour all commitments given in the applications or during the comparative selection procedure'.

26 In accordance with the principle of interpretation of national law in conformity with EU law, the Court of Appeal considers that the scope of Article 3 of the MSS Royal Decree should be determined in accordance with the MSS Decision which it is designed to implement, taking into account the wording, context and objectives of that decision.

27 Article 4(1)(c) of the MSS Decision provides that each applicant must, in its application, give a commitment to comply with the following coverage requirements:

– the mobile satellite system proposed must cover a service area of at least 60% of the aggregate land area of the Member States, from the time the provision of MSS commences;

– MSS must 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 is State by the time stipulated by the applicant but in any event no later than …' [13 June 2016].

28 Article 7(2) of the MSS Decision provides that the rights covered by paragraph 1 granted to the selected applicants are subject to various conditions, the 'common conditions'. These include the requirement to honour any commitments given in their applications, which encompasses the coverage obligations assumed in accordance with Article 4(1) c).

29 Decision 2011/667 establishes, furthermore, a coordinated procedure at EU level concerning the monitoring of compliance with those common conditions.

That coordinated procedure is considered expedient in the light of the cross-border nature of MSS, and it is aimed at 'facilitating a common understanding of the facts ... leading to consistent application of national enforcement rules across the European Union' (Article 1(2) of the decision). It may be inferred from the steps laid down for this procedure that it is directed a priori at cases in which, although the authorities of a Member State have authorised a selected operator, those authorities are aware of non-compliance with one or more of the common conditions which the operator may be able to rectify. The procedure allows for coordination and an exchange of information between the Member States and the Commission and for withdrawal of a national authorisation to be avoided until the operator concerned has had the opportunity to rectify the situation. The procedure established is silent as regards the role of the national authorities deciding on applications for CGC authorisations, a matter which is still governed by the MSS Decision.

30 In the present case, the Court of Appeal points out that the time frame imposed has not been adhered to and no longer can be. Therefore, the failure to fulfil the coverage requirement cannot be rectified. Since the failure to fulfil the requirement is definitive, it would a priori be preferable, in the interests of procedural economy, for the competent national authority concerned to have the

duty or the power not to authorise CGCs rather than to decide that it cannot take such non-compliance into account in connection with its decision to authorise CGCs, and is able to do so only subsequently, in connection with the procedure laid down by Decision 2011/667, which could lead, in the most serious cases, to withdrawal of the authorisation. The practical effect to be given to the provisions and the conclusions to be drawn from the established and definitive failure to comply with a common condition are the same.

The Court of Appeal considers that it could be maintained in that regard that a selected applicant which did not comply, by 13 June 2016, with the coverage requirement laid down in Article 4(1)(c)(ii) of the MSS Decision no longer has the right to use the radio frequencies on the 2 GHz band nor the right to operate a mobile satellite system.

Article 8 of the MSS Decision establishes the obligation of the Member States to 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 CGCs on their territories. It could be argued in that regard that a selected applicant that has not complied with the coverage requirement by the date laid down is therefore not covered by that provision.

It is in those circumstances that the Crown may have deemed it expedient to make fulfilment of the coverage requirement laid down in Article 3 of the MSS Royal Decree a necessary precondition for the exercise of the rights granted to the selected operators, in particular the right to install one or more CGCs in Belgium, thus avoiding, in such a case, the detour via the agreed procedure laid down by Decision 2011/660/EU, which may be seen as undermining the effectiveness of the right and of the penalty.

Not to penalise the failure of the selected operator to adhere to the time frame would deprive the coverage commitment given by the applicant operators at the stage of their selection of any effect, bearing in mind that the selection process in fact took into account the ability of operators to provide an MSS service within the time frame imposed (see, inter alia, the recitals of Decision 2009/449/EC, cited in footnote 1), and this is liable to distort the selection procedure and competition between operators.

31 In view of the above, the Court of Appeal considers it necessary to ask the Court of Justice about the interpretation to be given to Article 4(1)(c), Article 7(1) and Article 8(1) of the MSS Decision of the European Parliament and of the Council. It is a matter of interpretation which is of general interest for the uniform application of EU law, since the question whether or not the coverage requirement laid down in Article 4(1)(c) of the MSS Decision has been fulfilled is likely to arise in similar terms before other courts of the EU Member States, given the multiple ongoing proceedings concerning authorisations issued by the competent national authorities for Inmarsat CGCs in most EU countries.

V. The questions referred for a preliminary ruling

32 The Court of Appeal refers the following questions:

‘1. Are Article 4(1)(c)(ii), Article 7(1) and Article 8(1) of 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) to be interpreted as meaning that, where it is established that the operator selected in accordance with Title II of that decision has not provided mobile satellite services through a mobile satellite system by the deadline set in Article 4(1)(c)(ii) of the decision, the competent authorities of the Member States referred to in Article 8(1) of the decision must refuse to grant authorisations allowing that operator to deploy complementary ground components on the ground that that operator has failed to honour the commitment given in its application?

2. If the answer to the first question is in the negative, are those same provisions to be interpreted as meaning that, in the context given, the competent authorities of the Member States referred to in Article 8(1) of the decision may refuse to grant authorisations allowing that operator to deploy complementary ground components on the ground that it has not honoured the commitment to provide certain coverage by 13 June 2016?’