

Case C-515/19

Request for a preliminary ruling

Date lodged:

8 July 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

28 June 2019

Applicant:

Eutelsat SA

Defendants:

Autorité de régulation des communications électroniques et des postes

Inmarsat Ventures Ltd

...

...Eutelsat SA asks the Conseil d'État (Council of State, France)...:

1. To annul, as ultra vires, Decision No 2018-0001 of 22 February 2018 of the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of Electronic Communications and Postal Services, France), granting Inmarsat Ventures Limited authorisation to operate complementary ground components of a mobile satellite system;

...

Eutelsat SA submits that:

-... [Or. 2]...

- the authority committed an error of law and a manifest error of assessment in authorising Inmarsat Ventures Limited to operate complementary ground components, which infringed the applicable European legislation in that the

network envisaged by Inmarsat Ventures Limited did not constitute a mobile satellite system, the ground stations of that network were not designed as ‘complementary’ to the satellite component of the system, and the network did not pursue the objectives assigned by the legislature to systems providing mobile satellite services, and also in that Inmarsat had not provided mobile satellite services prior to the date stipulated in Article 4(1)(c)(ii) of Decision No 626/2008/EC, namely 1 December 2016, which ought to have prevented the grant of such authorisation;

-...

...the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of Electronic Communications and Postal Services) contends that the application should be dismissed. [...]

...Inmarsat Ventures Limited contends that the application should be dismissed [...].

By intervention registered on 5 June 2019, Viasat Inc. and Viasat UK Ltd ask the Conseil d’État (Council of State) to grant Eutelsat’s application.... They support the applicant’s pleas and submit, in addition, that the insufficient reasons are stated for the contested authorisation in that the authority did not make a finding for or against the applicant on the issue of whether the ground stations of the planned network would communicate with a mobile earth station within the meaning of Decision No 626/2008/EC of 30 June 2008, and would accordingly constitute complementary ground components, and that that authorisation is vitiated by an error of law in that it authorised the holder to operate complementary ground components in breach of Article 8(c) of Decision No 626/2008/EC.

...;

Having regard to:

- the Treaty on the Functioning of the European Union;
- Commission Decision No 2007/98/EC of 14 February 2007;
- Decision No 626/2008/EC of the European Parliament and of the Council of 30 June 2008;
- Commission Decision No 2009/449/EC of 13 May 2009; **[Or. 3]**
- the request for a preliminary ruling presented to the Court of Justice of the European Union in Case C-100/19, by the cour d’appel de Bruxelles (Court of Appeal, Brussels), on 8 February 2019;

-...;

The dispute

1. Commission 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 provided that Member States were to make those frequency bands (referred to as the MSS bands, from ‘mobile satellite services’) available for systems providing such services within the European Union with effect from 1 July 2007. Decision 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 created an EU procedure for selecting among mobile satellite system operators seeking authorisation, pursuant to Decision 2007/98/EC of 14 February 2007, to use that frequency band, and made provision for coordinated authorisation, by the Member States, of the operators thus selected. Under that decision, it was open to Member States, in certain circumstances, to authorise the selected operators to use the MSS bands for the operation of ‘complementary ground components’ of mobile satellite systems, in order to improve the availability of MSS in geographical areas where communications with one or more space stations cannot be ensured with the required quality. By Decision No 2009/449/EC of 13 May 2009, the European Commission selected Inmarsat Ventures Limited and Solaris Mobile Limited as authorised operators of pan-European systems providing mobile satellite services.
2. By decision No 2014-1257 of 21 October 2014, the Autorité de régulation des postes et des communications électroniques (Authority for the Regulation of Postal Services and Electronic Communications) authorised Inmarsat Ventures Limited to use certain MSS band frequencies in metropolitan France. By decision No 2018-0001 of 22 February 2018, the authority authorised Inmarsat Ventures Limited to operate complementary ground components of a mobile satellite system. Eutelsat seeks the annulment of that decision on the basis that it is ultra vires. **[Or. 4]**

The intervention

3. Viasat Inc. and Viasat UK Ltd have established a sufficient interest in the annulment of the decision of the Autorité de régulation des postes et des communications électroniques (Authority for the Regulation of Postal Services and Electronic Communications) of 22 February 2018. Their intervention is accordingly admissible.

Inmarsat’s objection of inadmissibility

4. It is apparent from the documents in the file that Eutelsat is a company providing, amongst other things, in-flight connectivity services similar to those which Inmarsat Ventures Limited intends to provide under the authorisations granted to it, and in particular the authorisation which is at issue in these proceedings. Eutelsat therefore has such an interest as to have standing to contest the decision it challenges.

The plea alleging failure to comply with the time-limit in Article D. 406-14 of the code des postes et des communications électroniques (Postal and Electronic Communications Code, France)

5. ...

6. ...[plea rejected]

The plea alleging failure by the regulatory authority to examine whether the conditions laid down in Article 8 of Decision No 626/2008/EC of 30 June 2008 were met

7. ...[Or. 5]

8. ...[plea rejected]

The plea alleging breach of Article L. 32-1 of the code des postes et des communications électroniques (Postal and Electronic Communications Code, France)

9. ...

10. ...[plea rejected]

The pleas alleging infringement of European Union law

11. Article 2(2) of Decision No 626/2008/EC of 30 June 2008 defines mobile satellite systems as: ‘(a) ... *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*’. It defines complementary ground components as: ‘(b) ... *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*’. Furthermore, Article 8(3)(b) of that decision provides that: ‘*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 [Or. 6] bands as the associated satellite components and shall not increase the spectrum requirement of the associated mobile satellite system*’.

12. Article 4 provides: ‘1. *The following admissibility requirements shall apply: ... (c) applications shall include a commitment on the part of the applicant that: ... (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).' Article 7 provides that: *'1. Member States shall ensure that the selected applicants, in accordance with the time frame and the service area to which the selected applicants have committed themselves, in accordance with Article 4(1)(c), and in accordance with national and Community law, have the right to use the specific radio frequency identified in the Commission decision adopted pursuant to Articles 5(2) or 6(3) and the right to operate a mobile satellite system. They shall inform selected applicants of those rights accordingly. ... 2. The rights covered by paragraph 1 shall be subject to the following common conditions: ... (b) selected applicants shall meet milestones six to nine set out in the Annex within 24 months of the selection decision adopted pursuant to Articles 5(2) or 6(3); (c) selected applicants shall honour any commitments they give in their applications or during the comparative selection procedure, irrespective of whether the combined demand for radio spectrum exceeds the amount available'*. Finally, Article 8 provides: *'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'*. The Commission decision on the selection of operators of pan-European systems providing mobile satellite services (MSS) was published on 12 June 2009 in the Official Journal of the European Union, and the date referred to in Article 4(1)(c)(ii) was therefore 13 June 2016. However, this date was postponed to 1 December 2016.

13. It is apparent from the documents in the file that Inmarsat Ventures Limited intends to use the MSS band frequencies to develop a system, known as the European Aviation Network (EAN), for the provision of aviation connectivity services. This system provides a mobile service to aircraft using satellite transmissions, which are received by a terminal located above the aircraft fuselage, and transmissions from complementary ground stations across the European Union, which are received by a terminal located below the aircraft fuselage. All of those transmissions use the MSS frequency band. The satellite element of the system was put into service on 29 August 2017.
14. ...[Or. 7]...[the plea based on the objective of reducing geographical disparities in digital access through the use of satellites is rejected]
15. Secondly, the applicant submits that the authorisation to operate complementary ground components granted to Inmarsat Ventures Limited by the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of Electronic Communications and Postal Services) is contrary to the provisions of Decision No 626/2008/EC of 30 June 2008 in that the network envisaged by Inmarsat Ventures Limited does not constitute a mobile satellite system, because its complementary ground components do not constitute an integral part of it. The outcome of this plea will depend, first, on the legal criteria

to be used in recognising a mobile earth station within the meaning of Decision No 626/2008/EC of 30 June 2008, and secondly, on whether the applicant is right in contending that that decision requires a mobile earth station which communicates with a complementary ground component also to be capable, without the use of separate equipment, of communicating with a satellite, and if so, how it is to be determined whether the equipment is one and the same.

16. Thirdly, the applicant submits that the contested authorisation is contrary to the provisions of Decision No 626/2008/EC of 30 June 2008 in that the complementary ground components which are authorised by the contested decision are not complementary with respect to the satellite component of the network. In order to deal with that plea it is necessary to determine, first, whether Article 2(2) of the decision is to be interpreted as meaning that a mobile satellite system must be principally based on a satellite element, or whether, on a correct interpretation of that provision, the view can be taken that it is immaterial what the respective roles of the satellite and ground elements may be, even where the satellite element serves no purpose unless communication with the ground element is impossible, and secondly, whether complementary ground components covering the entire territory of the European Union can be installed on the basis that communications with the space stations cannot be ensured with the required quality, within the meaning of Article 2(2)(b), at any point.
17. Fourthly, the applicant submits that the authorisation to operate complementary ground components granted to Inmarsat Ventures Limited by the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of Electronic Communications and Postal Services) is contrary to the provisions of Decision No 626/2008/EC of 30 June 2008 in that, as of the date referred to in Article 4(1)(c)(ii) of that decision, namely 1 December 2016, Inmarsat Ventures Limited had not provided mobile satellite services, and this fact ought to have prevented the grant of that authorisation. In order to deal with that plea, it is necessary to determine whether, in a case where it is shown that an operator selected in accordance with Title II of that decision has not, by the deadline laid down in Article 4(1)(c)(ii), complied with the commitments as to geographical coverage of mobile satellite systems set out in Article 7(2), the competent authorities of the Member States are required to refuse authorisation to operate complementary ground components, or whether, failing that, they are entitled to refuse such authorisation.
18. ...[Or. 8]...[dismissal of a plea advanced by the intervening companies]
19. It is necessary to answer the questions set out in paragraphs 15, 16 and 17 above in order for the Conseil d'État (Council of State) to resolve the dispute before it ...[referral to the Court of Justice pursuant to Article 267 TFEU]

DECIDES:

... To stay Eutelsat's application pending a ruling from the Court of Justice of the European Union on the following questions:

1. What legal criteria are to be used in identifying a mobile earth station within the meaning of Decision No 626/2008/EC of the European Parliament and of the Council of 30 June? Is that decision to be read as requiring that a mobile earth station which communicates with a complementary ground component must also be capable, without the use of separate equipment, of communicating with a satellite? If so, how is it to be determined whether the equipment is one and the same?

2. Is Article 2(2) of that decision to be interpreted as meaning that a mobile satellite system must be principally based on a satellite element, or can the view be taken, on a correct interpretation of that provision, that it is immaterial what the respective roles of the satellite and ground elements may be, even where the satellite element serves a purpose only where communication with the ground element is impossible? Can complementary ground components covering the entire territory of the European Union be installed on the basis that communications with the space stations cannot be ensured with the required quality in any respect, within the meaning of Article 2(2)(b) of the same decision?

3. In a case where it is shown that an operator selected in accordance with Title II of that decision has not, by the deadline laid down in Article 4(1)(c)(ii), complied with the commitments as to geographical coverage of mobile satellite systems set out in Article 7(2), are the competent authorities of the Member State required to refuse authorisation to operate complementary ground components? If not, are they entitled to refuse such authorisation?

...[Or. 9]...[signatures]