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Special Issue

Liberalisation of Telecommunications in Europe

The European Union Satellite Telecommunications Policy

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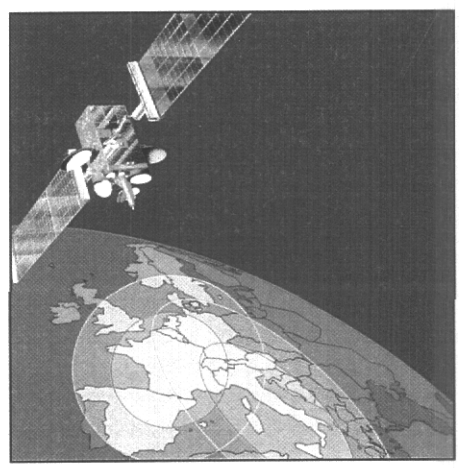
The general definition of the European Union Policy for satellite telecommunications has originally been expressed in the Green Paper of the Commission of 20 November 1990 on a common approach in the field of satellite communications in the European Community and then translated into several resolutions, directives and other Community instruments.
The European Union Policy regarding satellite communication has three main objectives: the liberalisation of the earth segment, the liberalisation of access to the space segment and the commercial freedom of space segment providers.

The word of the Chairman

As was announced in the previous ECSL News, *this special issue is devoted to Liberalisation of Telecommunications in Europe. This issue is coming a little later than expected but our choice was to provide you with the widest spectrum of views possible on the subject and some time had therefore to be spent in collecting the contributions. Beside the events presented in the second part of this issue, many others took place recently, in particular the Granada Summer Course, which was a resounding success. In order to keep up with the accelerating developments in Europe and in the world, we will publish our next Newsletter in January. May I once again stress that* ECSL News *is your magazine and that it is the place where our Members may share their views with others, and enlarge our circle of communication and cooperation.*

G. Lafferranderie



1. The general options and objectives defined in the **Green Paper** were confirmed by the Council Resolution of 19 December 1991 and have been implemented in a series of instruments.

• *Council Directive of 29 October 1993* supplementing Directive 91/263/EEC in respect of satellite earth station equipment. This directive aims at creating an advanced, open Community-wide market for earth station equipment through efficient harmonised procedures of certification, testing, marking, quality assurance and product surveillance. Some national disparities may however be acceptable since harmonisation of national laws is limited to those requirements necessary to satisfy the essential requirements relating to satellite earth station equipment. These essential requirements include user safety, electromagnetic compatibility, protection of the public telecommunications network from harm, effective use of the radio frequency spectrum, *interworking of terminal equipment* with public telecommunications network equipment and interworking of terminal equiment via the public telecommunications network.

• *Council Resolution of 7 December 1993* on the introduction of satellite personal communication services (S-PCS) in the Community considers the coming developments in this field, in particular via systems using low Earth orbiting satellites (LEOs). The Council invited Member States to develop a Community Policy on S-PCS and a coordinated position at international level such as within the International Telecommunications Union and vis-à-vis non-Member States. The importance of mobile communications including satellite telecommunications and their evolution towards personal communications was also recognised in the Commission Green Paper on mobile communications adopted on 27 April

1994. In particular the Commission was invited to closely monitor international developments and regulatory proceedings outside the Community and to consult with non-Community countries on the co-ordinated introduction of S-PCS systems at a global level. In this context, the Commission presented a demarche to the US Federal Communications Commission regarding the latter's current plans to allocate frequencies and grant licences on a unilateral basis to several US applicants for the installation and operation of S-PCS systems which would provide for a global coverage. The Commission is therefore asking for a global reflection on this matter in order to achieve co-ordination at an international level.

• *Communication of 10 June 1994* from the Commission to the Council and the European Parliament on the provision of and access to space segment capacity and to related frequency resources. The idea is that measures at European level should accompany market pressure and favour investments and development of the market in order to provide the European industry with a viable base for world-wide competition. Policy lines aim at ensuring throughout the European Union direct access to the space segment, in particular to space segment provided by International Satellite Organisations (ISOs) such as Intelsat, Eutelsat, Inmarsat; at ensuring a joint action by the Member States in the reform of the ISOs and in particular Eutelsat, joint management in the future of the space segment as a common resource of the Union, in particular as to orbital positions allocation and radio-frequencies; and at ensuring comparable and effective access to third countries, in parallel to the Community's market liberalisation and finally at including satellite-based services in programmes for Trans-European Networks as a major priority such as promoted by the Maastricht Treaty and recognised by the Bangemann Report on the Information Society.

2. Two further pieces of legislation are also under way:
• *A draft Commission Directive* introducing competition in the markets in satellite terminal equipment and in the markets for satellite communications services and therefore amending directives 88/301/EEC and 90/388/EEC should be adopted in the coming months. This directive aims at removing all exclusive and special rights remaining in the satellite terminal equipment and services markets except for public voice telephony. Existing exclusive rights have generally been granted to organisations which already enjoyed a dominant position on the terrestrial network or to one of their subsidiaries, thereby extending the latters' dominant position. Special rights include rights granted to a limited number of undertakings which limit the number of these undertakings other than according to objective, proportional and non-discriminatory criteria.
• *Proposal for a European Parliament* and Council Directive for the mutual recognition of national licenses for the provision of satellite services: a common position on this proposal should be adopted by the Council before the end of 1994. The purpose is to facilitate the provision and use of Europe-wide satellite telecommunications services subject to compliance with essential requirements. This will suppress the need for satellite communications service providers and earth station operators who want to provide their services in more than one Member State to apply for a licence in each Member State in which they wish to operate, for each earth station concerned. Two mechanisms are provided: either through licensing under harmonised conditions which are recognised throughout the European Union or through a transitional one-stop shopping regime for those satellite services for which mutual recognition has not been achieved. The Commission would be assisted by the Community Telecommunications Committee in the recognition procedure.

3. In addition to these legislative measures, action is also being carried out through *competition law principles.* The Commission has published on 6 September 1991 guidelines on the application of European Union competition rules in the telecommunications sector and in particular in relation to satellite communications. The guidelines provide examples of anticompetitive agreements which could not be granted exemptions from EU competition rules and address specific issues such as distributorship agreements for satellite services, uplink services, and joint venture agreements between telecommunications operators and private parties.

4. Finally, the so-called *Bangemann Report* presented to the European Council on 24-25 June 1994 in Corfu on the specific measures to be taken into consideration for the infrastructures in view of the global information society, insisted on giving the priority to networks extension. In particular the European Satellite industry will be urged to develop common priority projects to widen the scope of communications so as to develop trans-European networks and to participate actively in the development of worldwide systems.

Reference documents relevant to Satellite Communications

1. *Green Paper on a common approach in the field of satellite communications in the European Community.* COM (90) 490 final, 20.11.90

2. *Council Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment.*
OJ N° C8, p.2, 14.01.92.

3. *Proposal for a Council Directive on the approximation of the laws of the Member States concerning satellite earth station equipment, extending the scope of Council Directive 91/263/EEC.*
COM (92) 451 final, 10.12.92.

4. *Communication from the Commission on Satellite Personal Communications.*
COM (93) 171 final, 27.04.93

5. *Directive 93/97/EEC of 29 Oct. 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment.*
OJ N° L290, p.1, 24.11.93.

6. *Draft Commission Directive amending Directive 88/301/EEC and 90/388/ EEC in particular with regard to satellite communications.*
SEC (93) 1891 final, 01.12.93.

8. *Proposal for a European Parliament and Council Directive on a policy for the mutual recognition of licences and other national authorisation s for the provision of satellite network services and/or satellite communications services.* COM (93) 652 final, 04.01.94.

9. *Communication from the Commission to the Council and the European Parliament on satellite communications: the provision of, and access to, space segment capacity.*
COM (94) 210 final, 10.06.94.

10. *Demarche of the US Department of State on Satellite Personal Communications Services, 01.06.94.*

Les conséquences de la libéralisation des télécommunications en Europe sur les activités et la structure d'Eutelsat

M. Roisse

L'Organisation européenne de Télécommunications par satellite (Eutelsat) a été créée sur une base permanente en 1985 à l'initiative notamment de l'Agence spatiale européenne qui voulait encourager le développement d'une industrie spatiale européenne; c'est une organisation intergouvernementale européenne qui a pour mission principale la fourniture du secteur spatial nécessaire à des services publics de télécommunications (y compris de télévision) internationales et nationales en Europe. Les Etats, Parties à la Convention d'Eutelsat, sont représentés à l'Assemblée des Parties qui est l'organe politique de l'organisation. Les Signataires qui sont les opérateurs de télécommunications désignés (à raison d'un Signataire par Etat membre) participent au Conseil des Signataires où il prennent les décisions propres à assurer le fonctionnement de l'organisation.

1. La Commission européenne a joué un rôle décisif dans la réflexion sur l'évolution du secteur des télécommunications en Europe qu'elle considère désormais comme essentielle au développement économique en faisant paraître le *Livre Vert sur les télécommunications* (COM (87)90, 30.7.1987) puis un *Livre Vert satellite* (COM(90) 490, 20.11.1990) où la Commission a posé les principes de sa doctrine dans ce domaine. Ce Livre Vert consacre des développements particuliers aux organisations internationales de télécommunications-par satellite.

S'agissant d'Eutelsat, la Commission proposait un réexamen des textes de l'organisation axé essentiellement sur l'accès à la capacité satellitaire, la procédure de coordination relative au préjudice économique (Article XVI de la Convention Eutelsat), les mesures pour assurer l'indépendance commerciale future d'Eutelsat, une fixation des tarifs en fonction des coûts, la séparation des fonctions de réglementation et l'exploitation et l'ouverture d'Eutelsat à de nouveaux partenaires.

2. Depuis l'envoi de ses commentaires au Livre Vert, Eutelsat s'est notamment attachée à faire évoluer les procédures et le fonctionnement de l'organisation sur deux points considérés comme fondamentaux dans le Livre Vert satellites: l'assouplissement de la procédure de coordination relative au préjudice économique et l'amélioration de l'accès au secteur spatial. Sur le premier point, s'agissant des services ouverts à la concurrence, la procédure se limite à une simple information; pour l'accès à la capacité de secteur spatial, un arrangement 'd'accès multiple' signé entre les Parties et Signataires allemands, britanniques, français, hollandais et

suisses permet à un opérateur de faire son choix entre les capacités offertes par les participants à cet accord. On s'attend à une généralisation de cet arrangement.

3. Une communication de la Commission sur l'accès et la capacité de secteur spatial est parue le 10 juin 1994 (COM(94)210). Elle comporte des parties consacrées à Eutelsat (évolution de l'organisation, rôle de service public etc..). D'autre part, des directives satellites sont en cours de rédaction ou de mise en place, à la suite du Livre Vert de 1990:

– Une directive 93/97/ du Conseil du 29 octobre 1993 complétant la directive 91/263 en ce qui concerne les équipements terrestres de communications par satellite;

– Une directive sur l'extension au secteur des satellites des directives 88/301/ (terminaux de télécommunications) et 90/388 (services de télécommunications) qui a pour objet de libéraliser les équipements et services (sauf la téléphonie de base) a été adoptée le 13 octobre 1994;

– Un projet de directive sur la reconnaissance mutuelle des licences est en train d'être remodelé; l'adoption du texte final devrait intervenir en 1995.

4. Comme Intelsat et Inmarsat, Eutelsat est confrontée à la nécessité d'évoluer compte tenu du processus de libéralisation des télécommunications déjà réalisé ou en projet (en Europe, le principe d'une libéralisation des services de téléphonie de base en 1998 a déjà été approuvé auquel pourrait s'ajouter par la suite une certaine libéralisation des infrastructures) .

Des réflexions sont en cours au sein d'Eutelsat pour étudier les perspectives d'évolution de l'organisation; aujourd'hui, grâce à son infrastructure satellitaire, elle contribue à la mise en place d'un réseau trans-européen de télécommunications, fournit ses prestations selon des principes de neutralité et d'égalité mais tire la majorité de ses revenus de la télévision où l'environnement est très concurrentiel. Les trois scénarios principaux qui sont à l'étude sont le statu quo, une modification substantielle des Accords existants sur la direction des affaires, la commercialisation et la structure de financement, et la création d'une société privée avec ou sans implication des Etats. Ces réflexions devraient déboucher sur des propositions qui seront présentées au Conseil des Signataires puis à l'Assemblée des Parties d'Eutelsat qui doit se réunir à la mi-décembre 1994.

Le rôle futur de l'organisation comme instrument de coopération au bénéfice de l'Europe doit être analysé non seulement avec l'optique des opérateurs de télécommunications et des autorités de réglementation mais aussi du point de vue des Etats. Au moment du choix qui décidera de l'évolution d'Eutelsat, il faudra s'être aussi assuré que la solution retenue pourra être mise en oeuvre dans un délai raisonnable sans déstabiliser Eutelsat ni porter atteinte à l'acquis existant d'une organisation qui compte aujourd'hui dans ses rangs les représentants de 42 Etats européens.

The EC Directive on Copyright, Satellite Broadcasting and Cable Retransmission

Marie-Helen Pichler

The EC Directive on copyright, satellite broadcasting and cable retransmission was adopted unanimously by the EC Council of Ministers on 27 September 1993. Member States are bound to bring into force national provisions implementing the Directive by 1st January 1995. The Directive confirms and ensures that only one law, that of the originating country as defined, is applied to the act of satellite broadcasting. The definition of communication to the public by satellite clarifies what actually constitutes the act of broadcasting by satellite and where it takes place. The Directive thus has achieved its main aim of ensuring a secure legal framework for cross-frontier satellite broadcasting. At the same time, it guarantees a certain level of protection for all rights owners in all Community countries. Additionally, it aims to facilitate simultaneous and unchanged cable distribution of foreign (terrestrial or satellite) broadcast programmes by its provision that all rights should be exercised compulsorily through collecting societies, except the rights exercised by a broadcaster in respect of its own transmissions.

1. Assimilation of DBS satellite transmission to FSS transmissions

Article 1(1) resolves the copyright implications of the use of FSS satellites (such as Astra or Eutelsat) for broadcasting purposes and confirms the de facto general recognition that transmission of programmes by communications satellites should be treated as broadcasting where individual reception of the signals takes place in circumstances comparable to those applying in the case of broadcasting satellites. The satellite transmission of encrypted programmes is also considered as a communication to the public if the broadcaster makes the decoders available to the public.

2. Clarification of the applicable law

Concerning the question of the applicable law, the directive brings an important clarification in providing that only one law, ie the law of the country of origin, is applicable to the act of satellite broadcasting. It is the legislation of the country "where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth", that is the country where the 'régie finale' takes place.

The definition in Article 1(2) of communication to the public by satellite is thus the key definition in the directive, clarifying what actuallly constitutes the act of broadcasting and where it takes place. When the 'régie finale' takes place in a non-Community country, the criteria of the place of the up-link or the principal establishment of the broadcaster may be taken into account. The Directive thus avoids the cumulative application of

different legislations and in eliminating all criteria linked to the countries where the programmes are receivable.

The definition of the sole applicable legislation does however not mean that the broadcaster needs to pay only a remuneration limited to the audience of the country of origin. The Directive does not define the conditions of the remuneration but provides that the necessary authorisations for the satellite broadcasts must be acquired by contract and leaves the details to the negotiation by the parties.

3. Harmonisation of the level of protection of right holders

Chapter II of the Directive guarantees a certain level of protection in respect of satellite broadcasting for all rightowners in all EC countries. It ensures (Article 3(1)) that the exclusive right of the author to authorize satellite broadcasting must not be limited by non-voluntary licensing (that would oblige the right owners to tolerate the communication to the public of their works against equitable remuneration, without however having the right to oppose such communication). The directive grants this protection to authors in the strict sense, ie to the creators of a work such as authors, composers, directors, dialogue writers, etc. as well as to the holders of neighbouring rights, ie performing artists and phonogram producers.

4. Transitional provisions

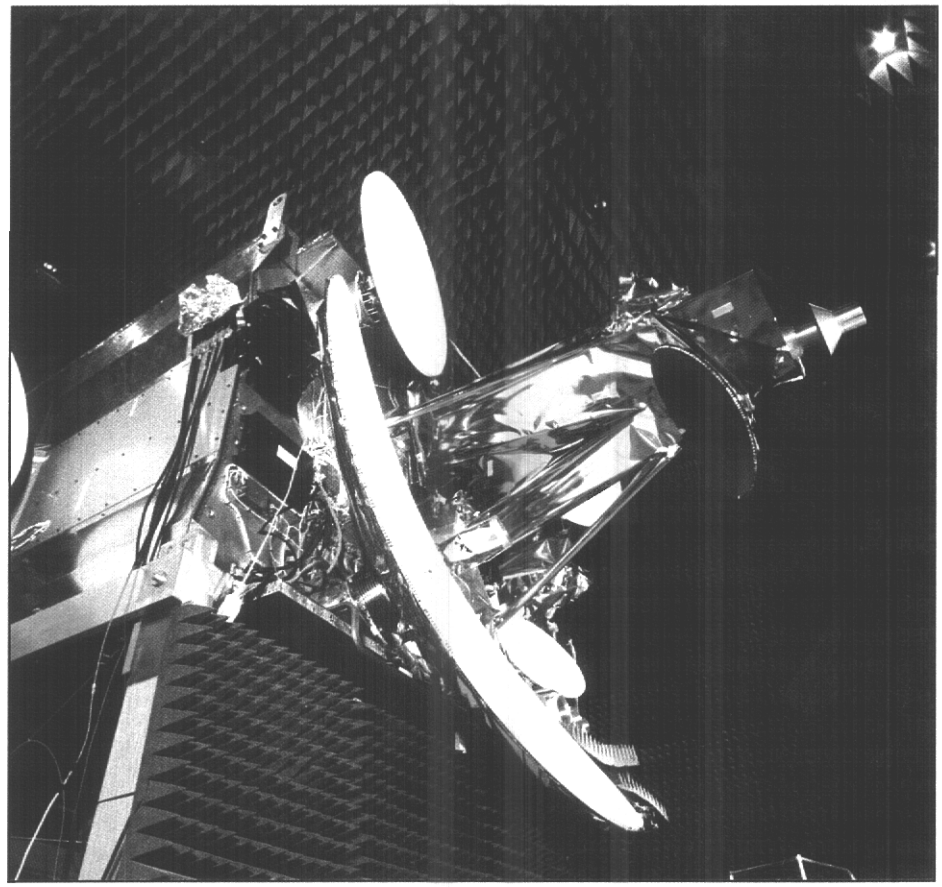
Article 7 provides for transitional provisions on satellite broadcasting, which refer to the substantive rights guaranteed under the Directive and, in particular, to a contractual interpretation rule for existing co-production agreements. In practice, it has the effect of inciting the parties, where necessary, to adapt existing contracts in the light of the directive. For the future, it is very important that all contracts relating to satellite broadcasting are formulated clearly to avoid ambiguities or incompatibilities leading to possible economic conflict. In particular, the expression 'granting rights for' a certain country should be avoided, which is likely to be misleading in this context. The acquisition of satellite broadcasting rights is the right to carry out a concrete act of broadcasting in a certain country, under whatever conditions may be laid out in the contract, including exclusivity, priority, etc.

5. Retransmission by cable

In order to promote trans-frontier re-transmission of programmes broadcast via Hertzian waves (whether terrestrial or satellite) and to assure cable distributors a minimum of legal security, the directive provides for the compulsory exercise of rights through collecting societies. The compulsory exercise of rights through collecting societies does not apply to broadcasters in respect of their own

transmissions (whether the rights concerned are his own or have been transferred to him by other copyrights owners and/or holder of related rights). Here the broadcaster is a right holder for his own transmissions over which he *holds identical rights* as for example a producer over his film. Thus the broadcaster is in a position to authorise or to prohibit the cable distribution of his broadcast and to demand a corresponding remuneration.

An important innovation of the Directive concerns the cable distribution of television programmes broadcast originally by satellite. In fact, the collecting society AGICOA that represents the producers of audiovisual works, is presently only competent to authorise the cable distribution of programmes broadcast originally via terrestrial waves and receivable in the countries where the cable distribution takes place. The Directive thus implicitely obliges AGICOA (or a similar body) to extend its competence to the distribution of programmes broadcast originally via satellite.



Liberalisation of Space Communications
Effects on the private users

Sa'id Mosteshar

In recent years, and in particular since 1992, a number of measures and proposals by the Commission have signalled and spurred increasing liberalisation of space communications within the European Union. Recognising the significance of the cross-border nature of space communications, the Commission has included appropriate measures to extend the ambit of its liberalisation to include communications between Member States and other European countries.

Central to the Commission's policy have been steps to encourage and implement to varying degrees the following measures:

1. The availability of direct access to the space segments of International Satellite Organisations;

2. Simplification and Union-wide recognition of terminal equipment approvals;

3. Mutual recognition of licences and authorisations granted to space communications services by a Member State in all other Member States; and

4. Interconnection between space communications systems and the terrestrial public telecommunications network.

Clearly, such fundamental liberalisation measures have an impact on the market in space telecommunications, both by attracting new operators of systems and providers of services, and in offering users new choices in fulfilling their communications needs.

Direct access to space segment

The lack of direct access to major providers of space segment has adverse effects on competition. The necessity to obtain the space segment from the ISOs, through the ISO signatories, by private operators wishing to bring new services to market, adds costs to the space segment. All signatories make a charge for coordinating and obtaining space segment of the ISOs for private operators. This charge is not always directly related to the costs of the signatory and is often a percentage of the space segment charges.

In addition, the information which the private operators have to give in order to secure space segment, particularly projected future traffic, is sensitive commercial information. Understandably, private operators have been unhappy to provide such information to

the signatories, which in most cases are direct competitors of the private operator.

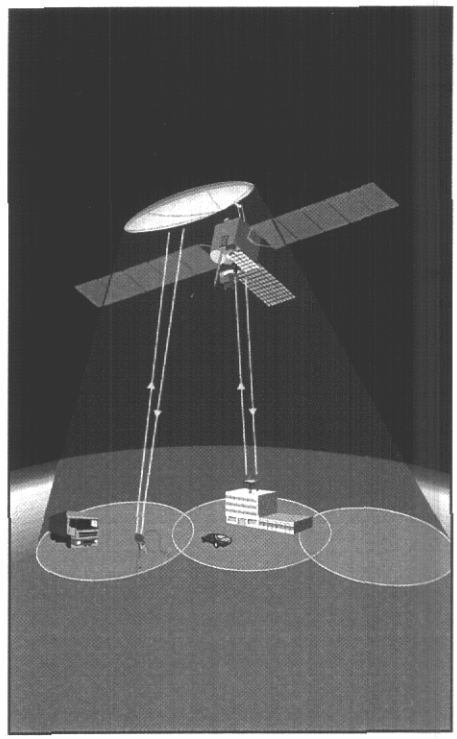
Direct access to the space segment of the ISOs means that private operators are more likely to enter the market and to compete effectively with the incumbent signatory, in most cases the public telecommunication operator in the relevant Member State. To the end user, it represents savings in costs, both directly, through elimination of some of the costs of obtaining the space segment, and indirectly, through the price impact of added competition.

Mutual recognition of terminal equipment approval
The elimination of the need for type approval in each Member State also reduces costs and eases the flow of terminal equipment throughout the Union. By thus creating a single market in terminal equipment, the cost associated with space communications services is reduced and the choices for private users are increased, be they end users or private operators.

This measure not only makes space communications services more attractive and affordable, but has an impact on the number of services because of an increased market size.

Mutual recognition of licences
In its proposed Directive of 4 January 1994 [COM (93)652 final – COD 482, OJ 94/C 36/02, 4 February 1994], the Commission envisaged two approaches to mutual recognition of satellite services licences. First, general categories of satellite communications services which would have defined and harmonised licensing conditions to which national licences would conform, leading to recognition throughout the Union. Secondly, where no harmonised licensing conditions have not yet been defined, a transitional one-stop shopping regime would apply to enable provision of services throughout the Union.
In the case of the transitional provisions, the grant of any licence or of an authorisation is not mandatory, and Member States will continue to apply different criteria for the recognition of other licences. The conciliation procedure envisaged by the Commission may not lead to any agreement and in such a case no further remedy is available to the applicant.

Once harmonisation has taken place, there will be certain procedures for



securing recognition of a licence or an authorisation in all other Member States. However, the extent of the liberalisation achieved by this policy of mutual recognition will depend largely on the harmonised conditions established. If some of the elements of the Proposed Mutual Recognition of Licences of 1992, applicable to all but satellite services and a few others, is adopted in relation to space communications, the scope of the space communications services that may be provided under the proposed regime will be confined to those permitted in the least liberal Member State.

Nevertheless, any easing of licensing procedures will assist in the creation of a larger market in space communications services. Assuming that the harmonised conditions are liberal, they will help to ensure a wide range of services, with multiple providers and users.

Frequency and site coordination
A further aspect of space communications is that of obtaining spectrum allocations and site clearances in each Member State. Certain services, such as satellite news gathering, have presented problems for providers and users in a number of Member States. It is often a time-consuming process, may be used to prevent or delay a service.

There are proposals for this problem also to be addressed and resolved through the establishment of a time-table for assignments and clearances, backed by an appeal process. However, until a central European system of spectrum management is established, this aspect of space communications will continue to be a source of difficulty and possible discrimination for space communications services.

Interconnection with public networks
In some Member States, space communications systems are subject to licence conditions which prohibit their interconnection with the public communications network. In the converging environment for all communications services, such prohibition poses a serious limitation on the attraction and usefulness of space communications systems and services. Even where no prohibition exists, the public network operators can limit competition from other space communications networks by protracting negociations for interconnection.

In its proposed directive [COM(93) 652 final – COD 482], the Commission includes a provision requiring Member States to ensure that interconnection agreements are entered into and implemented in a timely and efficient manner.

This measure alone will have a dramatic effect on the availability of space communications services. It will provide users with the ability to have a fully flexible communications service with the ability to reach a large number of services by a mixture of networks.

Conclusion
Undoubtedly, the liberalisation of space communications will enlarge the market in the networks and services available to users. Some will use the growing number of providers to access such facilities and others will find easier and more cost effective to establish their own facilities.

But liberalisation at the European Union level is not sufficient to ensure the benefits of liberalisation accrues to users and new system operators and service providers. Many existing practices, procedures and regulations at the Member State level can frustrate and inhibit users and new operators alike. To have a truly single market in space communications, the Commission will have to progress toward a central and unified regulatory framework, with a single licensing and terminal equipment approval body, as well as a spectrum management authority for the whole of the Union.

Un projet à suivre: la création d'une Cour internationale d'Arbitrage aéronautique et spatial

Michel Bourély

La Société française de Droit aérien et spatial (SFDAS), soucieuse d'apporter sa contribution à la difficile question du règlement des différends en matière aérienne et spatiale, vient de servir de cadre à l'étude d'un projet de création d'une Cour internationale d'Arbitrage aéronautique et spatial.

La principale des raisons de cette initiative est la constatation qu'il est très difficile pour les juridictions nationales étatiques, ou pour les tribunaux arbitraux existants, de prendre en compte les caractères propres aux litiges internationaux survenant dans le domaine aérospatial.

C'est pourquoi la Cour d'arbitrage qui vient d'être créée à l'issue de cette étude (et qui est totalement indépendante par rapport à la SFDAS) a exclusivement pour vocation de régler par voie d'arbitrage les litiges liés directement ou indirectement aux activités tant aéronautiques que spatiales. Cette double compétence étant évidemment justifiée par les caractères communs à ces deux catégories d'activités.

Il faut souligner toutefois que la compétence de la Cour est limitée aux litiges autres que ceux pouvant survenir entre Etats. Elle ne prétend donc aucunement se substituer aux instances internationales existantes ou à créer, qui sont chargées de régler les différends entre Etats.

L'objectif poursuivi par les créateurs de la Cour d'arbitrage est donc avant tout de permettre à tous ceux – personnes physiques ou morales, entreprises publiques ou privées – qui sont impliqués dans des litiges nés à l'occasion de l'exercice d'activités aéronautiques ou spatiales de disposer d'un organe spécialisé dans le règlement de tels différends.

C'est cette spécisalisation qui est la première raison d'être de la nouvelle Cour et qui est développée dans le Règlement d'Arbitrage, c'est à dire le texte qui définit l'organisation de la Cour, son fonctionnement et la procédure à suivre devant elle.

L'originalité de la Cour internationale d'Arbitrage aérien et spatial résulte aussi de plusieurs autres facteurs:
– son caractère international, bien qu'elle s'appuie sur une structure juridique de droit français et qu'elle ait son siège en France;
– la sélection, sur la base de leur spécialisation dans le domaine aérospatial, des arbitres et des experts;
– l'adoption de règles de procédure adaptées à la nature particulière des litiges, notamment:
1) l'institution du référé arbitral,
2) la possibilité de choisir les experts en fonction de leurs spécialités,
3) le souci de rapidité dans l'instruction et le jugement des litiges, et
4) la volonté de limiter les frais supportés par les Parties.

La Société française de Droit aérien et spatial espère que son initiative sera bien acceptée par tous ceux auxquels elle s'adresse et qu'elle contribuera utilement à la sécurité des relations juridiques entre les personnes physiques et morales qui exercent leur activité dans le domaine aéronautique ou spatial.

A proposal for a more equitable use of the frequencies spectrum

Silvia Ospina

Recent events in the satellite world should be of concern to space policy makers. Principal among them is the national (unilateral) licensing of global low earth orbiting satellites (LEO) systems and the view that only that is is required, whether for earth observation or communications satellites. This issue has been raised in several fora, ranging from the ITU, the FCC, to less institutional settings, such as conferences in both Europe and the USA. The Europeans are not alone in their distress over what seems to be the USA's Federal Communications Commission's disregard for other countries' policies, and disregard of the fact that the 'bargaining' partners are not of the same sort.

On the one hand, it must be perplexing to government officials in other countries to have representatives of private consortia (rather than their official counterparts) seeking licenses to operate their LEO systems. In most countries, it is still the government or official sector that authorises the use of the radio frequency spectrum.

On the other hand, it may be puzzling to private negociators to discover that their ability to secure the right frequencies for their services, may be influenced and limited by national policies and economic priorities.

Many countries share a similar concern: the frequencies allocated to mobile telecommunications are already used for security services, and changing then over to other services is beyond their budgets. Further, as mobile communications systems may have negative effects on the local public switched telephone network (PSTN, which is usually regulated by official entities) there may be reluctance to grant operating licences to foreign private corporations which may not leave behind many financial benefits.

Hence, negociations between countries and private parties may produce more problems and stalemates than if the parties were on a more equal footing, or if they took their case to a neutral venue. The contentious aspects of negociations for orbital slots or frequencies could be minimised if an 'international technical arbitration forum' were established, either under the aegis of, or independent from the ITU.

A relatively impartial international body could devise 'equitable methods' for using the spectrum, to ensure that the concerns of the small countries and not only the interests of the space powers or their corporations are borne in mind. The European Community is debating the creation of a Pan-European regulatory body, while other countries have suggested that the ITU create one, to reach viable global solutions to the present regulatory impasse. An alternative is proposed here, the establishement of an 'international technical arbitration forum', which would focus on the technical merits of the proposed systems and base its decisions or recommendations on these.

Ideally, it would be comprised of a small group of persons (a mix of engineers and of lawyers) whose determinations or decisions would be binding. Further, to avoid frivolous proceedings, arbitration fees would be charged, based on the frequencies and/or the number of satellites at issue.

Under this proposal, no global system would be licensed to commence operations, unless and until it has received the authorisations of the 'International Technical Arbitration Forum' to do so. That authorisation would be granted (or withheld) after hearings on the technical issues, and not only on the corporate, economic or political aspects of the systems.

A neutral forum of this type could obviate the need for the creation of a Pan-European regulatory body, as well as of a large regulatory entity within the ITU, since the Arbitration Forum's decisions would be binding both on private corporations and on governments.

In the zeal and haste to deregulate and to privatise satellite communications and other space activities, we seem to be losing sight of governments' role in formulating policies adequate or appropriate to their countries. The long-term effects of their inter/national policies and not merely short-term business interests, should be considered. A neutral arbitration forum may begin to serve the purpose of long-term policy-making.

National Points of Contact

The Netherlands – *Workshop on recent developments in the field of protection and distribution of remote sensing data*

On 5 April 1994, a Workshop on the subject was organised at ESTEC, Noordwijk, by the Dutch NPOC with the support of ECSL. Considering the special interest of Dutch members in having more information on remote sensing issues, this workshop was intended to provide an update on new developments in this field. After a technical presentation by Mr. Stefano Bruzzi (ESA Earth Observation Directorate) who underlined the main concepts which lawyers need to understand in order to grasp the actual legal issues, Mr. Marco Ferrazzani (ESA Legal Affairs Department) presented the legal principles applicable to remote sensing and the ESA policy on the matter. Mr. Harry Tuinder (Consultant) presented the developments in the European Communities relating to legal protection of remote sensing data. Mr. Baede (Chairman of the Earth Observation Working Group at Royal Dutch Meteorological Institute) analysed more closely the Dutch policy and interests in remote sensing, and Mr. J. L. van Genderen (International Institute for Aerospace Survey and Earth Science ITC) presented the implications of remote sensing for developing countries. The Workshop was animated by Professor Peter Malanczuk (University of Amsterdam). The proceedings of the Workshop are available from the Dutch NPOC or the ECSL Secretariat.
Dutch NPOC:

Frans von der Dunk,
Leiden University,
PO Box 9520
2300 RA Leiden,
Netherlands.
Tel: (+31-71) 27 77 25.
Fax: 27 76 00.

Spain – *Seminar on the Liberalisation of Telecommunications*

On 29 June 1994, a full-day seminar was organised by the Centro Espanol de Derecho Espacial (CEDE) in Madrid at the Escuela Diplomatica. The Seminar was opened by Mr. M. Albiana Serain, Deputy Director of the Diplomatic School and Prof. J. A. Pastor Ridruejo, President of the CEDE, gave the introductory speech. The formal lectures were given by: Mr. W. Thiebaut (Legal Affairs Department, ESA) on the industrial policy of ESA and the Stette report; Mr. J.-M. Casas Cortezon (responsible for promotional services at Hispasat) on the services and the commercialisation framework of Hispasat; H. E. P. de Torres Simo (member of the Spanish Court for the Defense of Competition) on the liberalisation of telecommunications; Mr. G. Muros (Telefonica Sistemas de Satelites, S. A.) on the news realities: the current spectrum of the communications via satellite; Prof. J. Cremades (a practising lawyer) on the satellite in the general framework of the liberalisation of telecommunications in Spain; H. E. A. J. Navarro Gonzalez (Director General of Legal and Institutional Community Coordination, Ministry of Foreign Affairs) on the current status of the adaptation of Spain to the new trends of the EEC.

The round table, in which Mr. A.Fournier, responsible for engineering at Antena 3 de Television, participated, was animated by Mr. J. L. de San Pio, Secretary General of the CEDE and practising lawyer at Garrigues Abogados. Most Spanish companies in the aerospace sector were represented at this meeting. Based on their comments, the Seminar was a success not just as far as the main lectures were concerned, but also for the open discussion on the liberalisation of telecommunications which is currently the object of an extraordinary interest in Spain and elsewhere. For more information on the Seminar, contact
J. L. de San Pio,
CEDE, Escuela Diplomatica,
Paseo de Juan XXIII, 5,
28040 Madrid, Spain.
Phone: (34-1) 521 2151.
Fax: (34-1) 521 8497.

France – *Naissance d'une nouvelle structure*

Nous avons annoncé, dans le n° 13 d'*ECSL News*, la création d'une Association pour le Développement du Droit de l'Espace en France (ADDEF).

La première Assemblée Générale de cette association s'est tenue à Paris, le 12 mars 1994, et a commencé par une Table Ronde présidée par Mme Simone Courteix qui a brossé un tableau de l'état actuel du droit de l'espace. MM. M. Dahbi (Faugère et Jutheau), C. Roisse (Eutelsat) et L. Dufresne (Spot Images) ont ensuite exposé les problèmes de responsabilité qui découlent actuellement des activités spatiales concernant respectivement les lanceurs spatiaux, les télécommunications par satellites en Europe et la diffusion des données des satellites de télédétection. Les trois intervenants ont souligné les difficultés résultant, dans de nombreux pays, dont la France, de l'absence de législation nationale dans ces domaines. La séance s'est poursuivie par l'Assemblée générale proprement dite qui, après avoir entendu un rapport de M. M.Bourély sur les objectifs de l'ADDEF, a étudié un certain nombre de questions concernant le fonctionnement interne de l'association et esquissé le programme de ses activités futures. Il a été notamment décidé que l'ADDEF assurera désormais le rôle de 'Point de Contact' de l'ECSL pour la France. Le Bureau de l'ADDEF qui est maintenant constitué de façon définitive, est ainsi composé: Présidente, Mme S. Courteix; Vice-Présidents, M. Bourély et P. Kahn; Secrétaire général, P. Clerc; Secrétaire général adjoint, L. Rapp; Trésorier, D. Ruzié. Les membres français de l'ECSL qui ne l'ont pas encore fait sont invités à faire parvenir leur adhésion à l'ADDEF en écrivant à ADDEF:
28 rue Saint-Guillaume,
75007 Paris.
Tel: (33-1) 44 39 86 06;
Fax: (33-1) 44 39 86 42.

Finland – *Creation of an National Point of Contact*

The interest of Finnish lawyers for ECSL activities has been demonstrated by the creation of a National Point of Contact in Finland. The Finnish NPOC is
:
Professor Maurice Andem,
University of Lapland, Faculty of Law,
PL 122,
SF 96101 Rovaniemi,
Finland
Tel: 35 860324527.
Fax: 860324205.

Conference

ESA Paris, 5-6 December 1994

Workshop on Intellectual Property Rights and Activities in Outer Space in a Worldwide Perspective.

'Intellectual Property Rights' (IPRs) raises a number of important legal questions related to space activities. These questions concern for example the ownership of intellectual property, infringement of IPRs, sharing of IPRs, protection of data, transfer of IPRs. They have to be treated in the context of increasing cooperative efforts. In particular IPRs and activities in outer space raise a number of specific problems related to jurisdiction and control and the application of national intellectual property laws in outer space, outside the States' sovereignty.

ECSL has been very active in the study of these problems. Two research studies have been carried out on legal protection of remote-sensing data, and IPRs and activities in outer space. A number of workshops have been organised on these issued, the last one was held on 5 and 6 December 1994, to which all ECSL members were invited.

The next issue of *ECSL News* will be devoted specifically to IPRs and activities in outer space. Readers interested in contributing to this subject are invited to inform the *ECSL News* Coordinator before **15 January 1995.** The deadline for submission of papers is **31 January 1995.**

Recent Publications

• Marietta Benkö, Willem de Graaf & Kai-Uwe Schrogl: *International Space Law in the Making,* Current Issues in the UN Committee on the Peaceful Uses of Outer Space, Editions Frontières, 1994.

• S. Courteix: Droit, Télédétection et Environnement, *Actes du Colloque de Strasbourg, Juin 1993. Sides 1994.*

• Sa'id Mosteshar: *European Community Telecommunications Regulation,* Graham & Trotman, 1994.

• ECSL: *ECSL Summer Course on Space Law and Policy Basic Materials,* Volume 2, 1994.

• ECSL: *Proceedings of the Third ECSL/Dutch NPOC Workshop on Recent Developments in the Field of Protection and Distribution of Remote Sensing Data,* ESTEC, April 1994 (published in September 1994).

• E. M. Soop: *Handbook of Geostationary Orbits,* Space Technology Library Series, Kluwer Academic Publishers, 1994.

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The 1994 Manfred Lachs Space Law Moot Court Competition: *European Preliminaries*

The European Preliminaries of the 1994 Manfred Lachs Space Law Moot Court Competition, organised by the European Centre for Space Law and the International Institute of Space Law took place on 8 April at ESA Headquarters in Paris. Four teams presented the arguments of States Alpha and Gamma on the use of the Galactica space station with issues of intellectual property rights, commander's authority and liability for damage. The four teams were:

University of Amsterdam (A) composed of B P E Horbach, B Kalthoff & C Voogd;
University of Helsinki (D) composed of P Iiskola, C Thompson & K Valonen;
University of Leiden (B) composed of J Molina Martinez-Lozano & M Sheng-ti Gau;
University of Paris (C) composed of H Stein & A Baillif.

The briefs of the participating teams were evaluated by a jury composed of M. André Farand (ESA), M. Knut Focke (Institute of Air and Space Law, Cologne University), Mrs. Lina Panella (University of Messina). In the morning session the court presided by Professor Wassenbergh, and composed of Mrs. Monique Nion (Baker & McKenzie Paris) and Professor Sybesma Knol (University of Brussels) heard the pleadings of Amsterdam representing Alpha v. Leiden representing Gamma and Paris representing Alpha v. Helsinki representing Gamma. In the afternoon session, the court presided by Professor Kopal, and composed of Professor de Faraminan (University of Jaen) and Dr Kröner (Trenite van Doorne Rotterdam) heard the pleadings of Leiden representing Alpha v. Paris representing Gamma and Helsinki representing Alpha v. Leiden representing Gamma. The overall level of the competition was very good and the courts were very active in asking questions to the teams. The team of the University of Helsinki won the competition and was sponsored by ECSL to go to the finals on the occasion of the IAF Symposium held in October in Jerusalem.

The results of the final competition will be reported in the next *ECSL News*