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## COMMUNITY LEGAL FRAMEWORK FOR SATELLITE COMMUNICATIONS : CERTAIN ISSUES OF CONCERN TO THE INDUSTRY

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### I. OVERVIEW OF THE EUROPEAN LEGAL FRAMEWORK FOR SATELLITE COMMUNICATIONS: AN ATTEMPT TO LIBERALIZE AND HARMONIZE

The liberalization and harmonization of the telecommunications sector, including the terminal equipment market, services market and now infrastructure, have taken place in the wake of the Commission's 1987 Green Paper on Telecommunications<sup>1</sup>. However, satellite issues were until recently expressly excluded from this general movement.

The first communication on space issues which was released by the Commission in 1988<sup>2</sup> emphasized the need for a greater involvement in space issues, in a role complementary to that of the European Space Agency (ESA). However, it was not until 1990 that the Commission published the "Satellite Green Paper"<sup>3</sup> which listed certain fundamental objectives (endorsed by the Council)<sup>4</sup>:

- separation of regulatory and operational functions in the field of satellite communications in all Member States,
- full liberalization of the earth segment (i.e. abolition of all exclusive or special rights) including TV satellite reception terminals, receive-only satellite terminals, transmit/receive terminals and network control earth stations subject to type approval and licensing procedures (for transmit/receive terminals) and licensing procedures (for control earth stations);
- harmonization (i.e. mutual recognition of type approval and licensing procedures, coordination

of radio frequencies) of the earth and space segments to the extent necessary to facilitate the provision and use of Europe-wide satellite telecommunications services;

- free, unrestricted and direct access (i.e. access must be made on an equitable, non-discriminatory and cost-oriented basis) to the space segment capacity, including signal transmissions towards the satellite, subject to compliance with the appropriate licensing conditions aimed at safeguarding exclusive and special rights relating to access to the space segment;

- full commercial freedom for space segment capacity providers and in particular, the direct marketing of space capacity to services providers and users.

### ADOPTED MEASURES

To this date, the Commission and the Council have adopted two measures on the basis of the objectives mentioned above, the first relating to harmonization and the other relating to liberalization.

Firstly, regarding harmonization, the satellite earth station equipment Directive (the "SESE Directive"), adopted on October 29, 1993<sup>5</sup>, (i) establishes the single market for satellite earth-station equipment by relying, where appropriate, on the essential requirements already specified in Directive 91/263/EEC (providing for the full mutual recognition of terminal equipment), (ii) instigates harmonized procedures for certification, testing, marking, quality assurance and product surveillance for satellite earth station equipment, (iii) guarantees the right to use satellite earth station equipment which has been legally placed on the market (this right is subject to

licensing conditions where appropriate), and (iv) guarantees the right to connect satellite earth station equipment to public telecommunications networks without further procedures (this right is subject to licensing conditions where appropriate).

Secondly, regarding liberalization, on October 13, 1994, the Commission, acting on the basis of its powers under the competition rules, took Directive 94/46<sup>6</sup> implementing certain proposals of the 1990 Green Paper by extending the provisions of the 1988 Directive on competition in the telecommunications terminal equipment market and the 1990 Directive on competition in the market in telecommunications services, to satellite earth station equipment and to satellite communications services.

Commission Directive 94/46 thus constitutes an application of EC competition rules to the satellite sector, since it provides for the abolition of special and exclusive rights granted by Member States in relation to the importation, marketing, connection, bringing into service or maintenance of satellite earth station equipment, and the provision of satellite services.

### PROPOSED MEASURES

Several legislative measures or possible actions of the Community in the field of satellites are still under discussion.

Firstly, there is the proposal for a directive on the mutual recognition of licenses and other national authorizations for the provision of satellite network services or satellite communications services<sup>7</sup>. This proposal (hereafter the "Satellite Licensing Proposal") submitted in January 1994, aims at remedying the current situation whereby any satellite network operator or satellite services provider wishing to provide services in more than one Member State must apply for the necessary licenses in each of the Member States in which they wish to operate. The Satellite Licensing Proposal is in fact closely associated with a more general measure, the (amended) proposal for a directive on the mutual recognition of licenses and other national authorizations to operate

telecommunications services in general (the General Licensing Proposal)<sup>8</sup>.

The Satellite Licensing Proposal provides for (i) mutual recognition of licensing for certain categories of satellite services for which the EU will have determined the conditions of harmonization, and for (ii) mutual recognition of licensing for certain other categories of services for which the EU has decided that there is no need for prior harmonization of conditions for authorization.

Prior to the development of the system of full mutual recognition, the Satellite Licensing Proposal provides for a transitional "one-stop-shopping" regime (this system is already operating on an "ad hoc" basis in certain Member States with respect to access to the space segment)<sup>9</sup>.

Secondly, in June 1994, the Commission issued a communication on the subject of access to space segment capacity<sup>10</sup>. Indeed, there currently exists in Europe a bottleneck situation where national Telecommunications Organizations (TOs) continue to exercise control over most access to the space segment capacity in Europe, while at the same time acting as service providers themselves. In order to favor the expansion of the Community's satellite communications market, the Commission proposes that specific measures be adopted by Member States, in addition to those adopted following the Satellite Green Paper of 1990. The Commission suggests the following action:

- co-ordination at the international level in order to ensure the establishment and development of a unified European market; and
- adjustment of the constituent instruments of the international satellite organizations, in order to adapt these organizations (and in particular EUTELSAT) to a competitive environment.

The Council adopted a Resolution on December 22, 1994<sup>11</sup> lending political support to the Commission proposals concerning access to space segment capacity. The Council identified the basic goals of European satellite communications policy, which should be to ensure non-discriminatory access to space segment capacity

for all providers and users of satellite services, the urgent adjustment of the intergovernment satellite organizations, comparative and effective access to third country markets and the effective management of orbit and frequency resources within the framework of the ITU.

Thirdly, the Commission is preparing the emergence of a future regulatory framework for the so-called Satellite Personal Communication Systems (S-PCS) using satellites which are generally referred to as Low Earth Orbit satellites (LEOs). After carrying out hearings in 1992, the Commission in 1993 proposed a strategy<sup>12</sup> for S-PCS based on the following principles:

- convergence in regulatory policies in relation to the introduction of satellite personal communications and services, within the Member States, and between the EC and the US;
- broadening of the discussion beyond the EC and the US;
- introduction of these services in the EC, taking account of EC telecommunications, trade, space and regional development policies and in particular, the competition rules;
- developing an EC position on standardization, frequency spectrum sharing criteria, and licensing;
- creating a platform for discussions between industry, user and regulatory interests;
- encouraging the necessary additional R&D activities via EC mechanisms, the European Space Agency (ESA) and at the national level.

The Commission therefore emphasized, in relation to frequency sharing, the desirability of equitable access and the need for systems to share the spectrum. Furthermore, the Commission called for a convergence of national licensing regimes, and the development of worldwide standards. This policy was supported by the Council of Ministers<sup>13</sup>. Discussions to this effect are currently underway on a mandate to be given by the Commission to the European Committee for Telecommunications Regulatory Affairs of the CEPT (ECTRA) to draft a standard European satellite communications license within the context of the CEPT. The Commission has also received from the European Radiocommunications Office (ERO), a report on

S-PCS investigating the need for and the use of radio frequency spectrum for S-PCS. Finally, the Commission has obtained from ETSI various technical reports concerning standardization of certain aspects of S-PCS, in particular in relation with bi-modal handsets which could be used either for GSM or satellite networks.

In the meantime, heated debates have occurred between the US and the EU concerning the licensing of LEOs.

In June 1994, the Commission indicated to the US Department of State in relation to the FCC Notice on proposed rule making issued in January 1994, that uncoordinated licensing could lead to denial of access to world markets by virtue of, for instance, frequency scarcity. In a Report issued on October 1994<sup>14</sup>, the FCC noted the objections voiced by the European Commission concerning the licensing system proposed by the FCC, but considered that to delay the US licensing would be unacceptable, notably in view of the potential benefit to be derived from this new mobile satellite service, and the creation of an "instant" global and national telecommunications infrastructure.

## II. IMPLEMENTATION BY THE COMMISSION OF THE COMPETITION RULES IN THE SATELLITE SECTOR ON A CASE BY CASE BASIS

In the light of the proposed development in the satellite sector set out in the 1990 Green Paper, the Commission emphasized in its 1991 Guidelines on the application of the EEC competition rules in the telecommunications sector<sup>15</sup> the need to remedy the uncertainty surrounding the application of the competition rules in the field of satellites. To this end, the Commission devoted a specific section in its guidelines to the application of Articles 85 and 86 in the satellite sector.

The Commission foresaw that agreements between TOs for the operation of satellite systems and concerning space segment capacity may be caught by Article 85 insofar as the TOs are competitors amongst themselves. As such, agreements of this type may restrict competition between TOs and/or third parties, notably

through limiting the supply of space segment capacity or restricting business autonomy through imposing coordination between third parties and the parties to the agreement. Such agreements may also strengthen the parties' existing dominant positions, thus infringing Article 86 and precluding the award of an exemption under Article 85(3). Concerning agreements between TOs and private operators in relation to space segment capacity, the Commission considers that Article 85 may apply to cooperation and joint venture agreements, although such agreements may be exempted where specific benefits result. However, in the Astra decision adopted on the basis of Article 85, the Commission confirmed its position that an agreement imposing on customers the bundling of uplink and space segment capacity is contrary to the competition rules and would exclude the possibility of an exemption<sup>16</sup>.

In the Alcatel/ANT decision<sup>17</sup>, the Commission applied the competition rules to a joint venture and cooperation agreement in the satellite sector. It concluded that a restriction of competition within the meaning of Article 85 resulted from the provisions of the agreement between the manufacturers of space communication equipment for joint R&D, joint manufacturing and a degree of joint marketing. However, the Commission awarded the agreement an exemption under Article 85(3) on the grounds that it would result in the supply of higher quality equipment at lower costs and would contribute to promoting technical progress. The Commission recognized in its Decision that the agreement would help promote the competitiveness of European industry.

On the other hand, in the IPSP decision<sup>18</sup>, the Commission stated that a company created by a number of private companies and two TOs, for the purposes of providing international business telecommunications services using its own satellite system and offering bulk transmission capacities to third parties, would not be caught by Article 85 on the grounds that the partners of IPSP are not actual or potential competitors in the relevant markets to be addressed by the company.

Finally, it is worth mentioning that the Commission recently launched competition investigations into the Iridium and Globalstar mobile satellite systems. The Commission decided in June 1995<sup>19</sup> to request information from these two consortia since they have not, unlike INMARSAT and its partners with respect to the INMARSAT-P system, notified their agreement to the Commission under EC competition rules.

The Commission is particularly concerned about the nature, terms and conditions of the distribution policies, the nature of links with mobile (cellular) terrestrial networks and access by competing mobile satellite systems to the infrastructure owned by the partners in these consortia.

### III. IMPLEMENTATION OF THE EU SATELLITE LEGISLATION BY THE MEMBER STATES: THE DIFFICULTIES ENCOUNTERED BY THE MANUFACTURERS, THE NETWORK OPERATORS AND THE USERS

#### CONCERNING THE EARTH SEGMENT

- Harmonization of the liberalized equipment market
- Standardization

Directive 91/263/EEC<sup>20</sup> provides for the full mutual recognition of terminal equipment type approvals obtained in a Member State on the basis of harmonized mandatory standards (common technical regulations - CTRs) ensuring the conformity of the equipment with certain "essential requirements" laid down by the Directive<sup>21</sup>. For the purposes of the Directive, terminal equipment means equipment intended to be connected to the public telecommunications network.

The elaboration of these standards has been entrusted to the European Telecommunications Standards Institute (ETSI). At a second stage these standards, insofar as they implement the essential requirements provided for in the Directive, shall be transformed by Decision of the Commission into mandatory CTRs.

In 1993, Directive 93/97<sup>22</sup> extended Directive 91/263 to cover satellite earth station equipment (SESE), that is, ground equipment which is capable of being used either for transmission only, for transmission and reception, or for reception only of radiocommunication signals by means of satellites or other space-based systems, but excluding purpose-built satellite earth station equipment intended for use as part of the public telecommunications network. Work is currently underway within ETSI, on the elaboration of harmonized standards for SESE. ETSI has submitted two reports to the Commission examining the orientation of standardization. The ETSI Technical Report (ETR) n° 093 of September 1993 (phase 1 report) provides for a comprehensive review of the possible scope and level of standardization that might be applied to S-PCS in Europe (the phase 2 report is under preparation). In ETR n° 169 of July 1995, ETSI defines the Technical Bases for Regulations (TBRs) that are necessary for the adoption of CTRs for the application of the SESE Directive concerning SESE other than for S-PCS and Universal Mobile Telecommunications Services (UMTS). On the basis of these reports, the Commission has asked ETSI to establish a number of appropriate standards.

The implementation of Directive 91/263 itself is not complete, since a number of Member States (Belgium, Greece, Ireland and The Netherlands) have as yet not fulfilled their obligations under this Directive, while no Member State has yet implemented Directive 93/97 (concerning Satellite earth station equipment), even though the deadline for such implementation was set at May 1st, 1995.

With respect to the application of these directives, a number of problems can be identified:

(i) they institute a system of a priori control of the compatibility of products which is very "heavy", particularly in view of the speed at which technical developments take place in this sector, and which is costly for companies (the Commission appears however to be tending towards a system of presumption of conformity of equipment with essential requirements); ...

(ii) the slowness of the standardization and harmonization process, notably in the adoption of common technical regulations (CTRs) for the purposes of the Directive (so much so that the Commission is currently interpreting these directives as allowing the use of harmonized voluntary standards in the absence of CTRs);

(iii) complaints have been made to the Commission alleging that the mutual recognition of test certificates has on a number of occasions not been put into practice by Member States, which thus required that products be tested anew before being put onto the market;

(iv) certain Member States have apparently abusively required the obtention of authorizations for products which do not fall within the scope of the Directive;

(v) the use of intellectual property rights (IPR) in harmonized standards adopted by ETSI gave rise to a controversy which has been resolved with the agreement of the Commission, albeit with difficulty (ETSI interim IPR policy)<sup>23</sup>. It appears nonetheless that cases may have occurred of ETSI non-members being refused licenses on IPRs included in CTRs.

These factors, as well as the delays in the implementation of both Directives 91/263 and 93/97, have raised doubts as to their efficacy in facilitating the creation of a unified and competitive European market in telecommunications equipment, through the harmonization of technical specifications for such products. With respect to satellite earth station equipment, the existence in certain Member States of incidental legislation, for instance in the form of environmental regulations dealing with satellite dishes and parabola, has recently been brought to light. Such regulations may indeed serve to circumvent the free movement of equipment in Europe, by giving a competitive advantage to certain satellite systems over others.

- Interconnection

In the field of satellites, the interconnection problems concern mainly the link between the satellite network and the terrestrial network (fixed or mobile) and are constituted by the standardization issues which have just been described.

- **Harmonization of the liberalized services market: the licensing issue**

For the time being, the Satellite Licensing Proposal (as well as the above-mentioned General Licensing Proposal) is blocked for political reasons, such as the refusal of certain Member States to accept even the principle of the recognition of administrative acts (authorizations or licenses) adopted by other Member States in the field of telecommunications.

Telecommunications and satellite licensing is under discussion within ECTRA and more specifically, within the European Telecommunications Office (ETO, an ECTRA bureau established in October 1994 in Copenhagen, similar to ERO which deals with frequency bands issues). In 1994, an arrangement with ETO setting-up a one stop-shopping<sup>24</sup> came into force for the licensing of telecommunications services covered by Directive 90/338/EEC (Services Directive) with the exception of satellite services. This procedure will be in effect as of November 1995. A similar arrangement is under discussion within ETO concerning satellite services. A draft was submitted to the NRAs on September 12, 1995. It seems that the scope of such draft arrangement, which would in fact also cover services not yet liberalized under the Services Directive such as voice telephony, is likely to be criticized by some NRAs.

In reality, the licensing issue remains one of the major obstacles to the development of satellite services. The outright refusals to issue any license by certain NRAs (Italy, Portugal and Greece are often mentioned as the most notorious cases) or the often unacceptable delays in granting satellite users an operating license are based upon a host of arguments linked to procedure, or alleged frequency, right of way or numbering problems. The truth is that, although genuine problems do exist, most of the arguments advanced by certain NRAs conceal their general unwillingness to admit greater competition which they regard either as an encroachment on their sovereignty and/or a threat to their national (traditionally protected) industries. In

a world of global competition, one can reasonably assert that such attitude is detrimental to the interests of businesses and consumers in Western Europe. The limits on the powers of the Community institutions to amend the policies and practices of the Member States in this regard is striking.

Indeed, it is true that the scarcity of frequencies may create problems which even further technological developments will not be able to solve completely. For example a user wishing to go through INTELSAT satellites to correspond with its subsidiaries in Africa will use band C, the same band used by France Telecom for its terrestrial hertzian communications: therefore, some coordination may be necessary. Another source of difficulties linked to this question of scarcity is that quite a few countries refuse to "liberate" some parts of the spectrum which could facilitate the liaison with the satellites. Moreover, other countries actually liberate part of the spectrum in order to allocate it by way of auction. This may act as a deterrent for newly qualified potential entrants, who will not have the exorbitant resources required to meet the demands of cash-hungry governments.

Besides these causes linked to the limits of the spectrum, the license bottleneck can also be attributed to the following additional causes:

- the link between NRAs and the government in place, which precludes any independence with respect to (i) political issues (e.g. refusal of the French authority to grant a license to broadcast from Mururoa while France carries out its nuclear testing), (ii) labor or social issues (e.g. refusal to grant a license to an operator which employs its workforce more efficiently than the national competitor) or (iii) industrial policy issues (e.g. refusal to grant a license for a system likely to require foreign-made equipment rather than equipment manufactured locally);

- the link between NRAs and the former monopolist operator. Notwithstanding the fact that EU legislation has imposed a formal separation of the regulatory and operational functions, one cannot erase in one stroke, forty or fifty years of practices and habits; moreover, the staff of the NRAs as well as of the national laboratory used by the NRAs to test the equipment is frequently composed of former

employees of the former incumbent telecommunications operator. Thus, in practice, it is not infrequent for the NRAs staff to try to persuade the applicant to use the satellite owned in whole or in part by the former monopoly arguing notably that the procedural delays will be much shorter;

- the absence of any procedure, in the most egregious cases (e.g. to license V-Sat) or more often, the absence of a clearly defined, transparent procedure. Some procedures have proven to be so painstakingly complex that they could be characterized as Kafkaesque, (e.g. for the setting up of a teleport). In these cases, the application, even if finally obtained is likely to give rise to multiple expenses (including legal fees). Whether such procedural shortcomings are due to an insufficient political independence of the NRAs or to serious understaffing, they are totally incompatible with the requirements of modern business and competition;

- the frequent lack of an adequate regulatory response to the specific requirements of "satellite news gathering" services. This activity is indeed of a particular nature. When a reporter wishes to retransmit (live or by way of newstape) a sports event or a catastrophe such as an armed conflict or the results of an earthquake or a typhoon, he needs to be able to air his communication at a certain time. That means that such reporter must have beforehand (i) cleared the type approval of his antenna and earth station with the satellite operator and obtained from the latter the appropriate identification or registration number, and (ii) be granted the appropriate approval and license from the local NRA.

An attempt has been made by the so-called Inter-Union Satellite Operations Group (ISOG) (which includes the main worldwide associations of broadcasters) to devise together with satellite operators (in particular the signatories of the INTELSAT, EUTELSAT and INMARSAT organizations), a methodology for type approval of satellite equipment and for pricing of access charges to the satellites<sup>25</sup>.

However, the obtention of the license from the local NRA as well as the necessary coordination operations are often still a source of great difficulties, not to mention the consequences which the lack of harmonization may have for

such procedures in the various Member States of the EU.

### CONCERNING THE SPACE SEGMENT

The problems concerning the space segment are even more acute than those discussed above. Put in simplistic terms, they can be summarized as follows. The abuses of the former monopolists (particularly the mark-ups practised by the signatories of the various international satellite organizations) may result in the dismantlement of a system which combines the best guarantee for the public service as well as an invaluable experience in international relations. Therefore, although the new competitive context of satellite communications calls for a reform, the mere dismantlement of the various international satellite organizations does not appear to be the solution. Acceptable alternatives are presently being sought but the process will take several years.

In Recital 21 of the above-mentioned Directive 94/46/EC of 13 October 1994, the Commission acknowledges that "most of the available space segment capacity is offered by the international satellite organizations. The charges for using such capacity are still high in many Member States because the capacity can be acquired only from the signatory for the Member State in question".

In practice, any entity wishing to acquire space capacity will be guided by a set of three factors. First, geography: depending upon the place with which the entity wishes to communicate, it will have to select a given satellite based on its orbital position and the resulting coverage; second, availability of space; and third, the price consented by the satellite owner/operator.

In some cases, only one organization will possess a satellite with the appropriate orbital position sought by the applicant (e.g. the case of INTELSAT with respect to Africa) for the use of its satellite. Moreover, since the "Constitutions" of INTELSAT, INMARSAT and EUTELSAT do not, in principle, allow a private applicant to have direct access to the space segment, but require such applicant to pass by a member government or a so-called "signatory" (i.e. the former PTT monopolists), there is a danger that a

given NRA may direct a "client" towards one of said signatories. Finally, when solicited as an intermediary for one of these international organizations, the signatory tends to require a substantial mark-up on the price charged by such international organization, thus rendering the price of the space segment uneconomical.

It is precisely in order to put an end to such practices (deemed to constitute a violation of Article 86 of the Treaty of Rome) that a review of the provisions of the Constitutions of INTELSAT, INMARSAT and EUTELSAT is being carried out by the appropriate bodies of these organizations.

The reform movement has been led by INTELSAT which at the occasion of its 20th assembly of parties (Copenhagen, 29 August - 1 September 1995) decided (i) to allow the appointment of multiple signatories for a single member country, and (ii) to continue studies concerning the future of INTELSAT (including implementation of a commercial subsidiary option with a view to reaching a decision by April 1997, date of the next assembly of parties). Moreover, during the two preceding years, the Board of Governors had authorized both signatories and so-called "duly authorized telecommunications entities" to grant to private applicants various degrees of direct access level to the space segment of any of INTELSAT's 24 satellite network.

The reform has also touched INMARSAT in two ways: first, by the creation of a distinct subsidiary which will manage the future MEO network (called INMARSAT-P); second, by an envisaged reform of the structure established in 1979. However, it should be mentioned that the parties to INMARSAT are already allowed to license entities within their jurisdictions to use the INMARSAT space segment, although such entities must pay for such access through signatories which admittedly can take mark-ups<sup>26</sup>.

Finally, concerning EUTELSAT, a review of its constituting documents is also underway. Such review has already resulted in the admission of the possibility that there should be more than one signatory per country, as well as the abandonment of any provision which would

impede or discourage its members from using separate systems for the exploitation of the space segment. It should be added that five members of EUTELSAT (i.e. France, the UK, Germany, the Netherlands and Switzerland) have already concluded a one stop-shopping agreement whereby access to EUTELSAT can be obtained through any of the five signatories (i.e. the signatory granting the better conditions).

Within the scope of these general movements for reform, various solutions have been suggested, such as the creation of subsidiaries for specific commercial activities. However, this particular solution could threaten the stability of such organizations and amount to a privatization of their most lucrative parts, and leave to the governments the least lucrative. Alternatively, these public entities could be transformed into private structures which would be fully competitive with their private counterparts. However, this may also raise difficulties in terms of competition as these new entities could retain part of their privileges and immunities deriving from their international status.

Be that as it may, each of these organizations has a public service mission either vis-à-vis individuals (e.g. particularly evident in the case of INMARSAT) or countries (e.g. the role of INTELSAT vis-à-vis developing countries) which should be maintained and which each organization intends to maintain.

In such context, the path towards a balanced solution may take a few more years as already explained.

#### CONSEQUENCES OF SUCH DIFFICULTIES: A LOSS OF OPPORTUNITIES FOR WESTERN EUROPE

In its universally acclaimed forward-looking "White Paper" entitled Growth, Competitiveness, Employment/the challenges and ways forward into the 21st century<sup>27</sup>, the past president of the European Commission, Jacques Delors said that since information and communication technologies (ICTs) are transforming dramatically many aspects of economic and social life, "Europe should create the conditions that will allow it to maintain a



sufficient level of mastery over technology and benefit from an innovative and competitive ICT industry, within an open and competitive environment" (p. 104 of the above-mentioned White Paper).

Even though the situation of Western Europe is privileged, with a good coverage of fixed and mobile telecommunications networks, the use of satellite networks can nevertheless be quite useful for the public at large (e.g. satellite news gathering services) or businesses (e.g. V-Sat networks) either wishing to have access to urgent data (e.g. stock-exchange information) or simply willing to communicate rather cheaply and with a quasi-absolute guarantee of good performance with entities of their groups or clients located in various parts of the world outside the European Union where, for example, the terrestrial network is unreliable.

The difficulties met either by private network operators, service providers and/or users, the already-mentioned rarity of spectrum frequencies and orbital position, as well as the economic necessity to optimally sell as much as possible and at best 100% of the capacity available, may deter operators from investing in Western Europe and may induce them to re-orient/re-locate their activities towards less difficult and more promising markets. Indeed, other regions of the world such as Eastern Europe, Asia and Latin-America may appear much more attractive, notably for the two following reasons:

- the local political authorities, eager to catch up with progress and development, are generally much more flexible in granting satellite operators and users all the necessary permits;
- the satellite operators have determined that by placing new satellite capacity in such emerging markets, they enhance the possibilities of communication (the fixed infrastructure is generally not so developed in these countries) allowing new services to be rendered and therefore more customers for them; this is all the more so that these markets are generally highly competitive, forcing competitors to devise and offer more modern and inventive alternative services, which in turn give rise to more demand for capacity.

In such context, we believe that an urgent reform is needed in order to prevent the new communications highways from bypassing Western Europe, thereby depriving it of a vital influx of information.

#### IV. THE SPECIFIC CASE OF S-PCS

The question of the regulatory framework for the S-PCS (LEOs or MEOs) allowing worldwide mobile communications has been highly publicized. One reason is the substantial sums of money involved; another is the rivalry between the EU and the US on this specific aspect of telecommunications.

As it appears from Resolution 1065, adopted by the Council of the ITU, containing the agenda of the World Radiocommunication Conference (WRC-95) to be held in Geneva from 23 October 1995 through 17 November 1995, a large part of the discussions, besides the simplification of the Radio Regulations, will be devoted to the allocation of frequency bands for the mobile-satellite services and in particular with respect to the so-called "feeder links".

Three issues are particularly relevant:

- the use by the US LEO systems of the frequency band L of 1,6 GHz about which the European reservations may appear more a matter of principle than otherwise inasmuch as the European have yet no use for it;
- the intention of the signatories of INMARSAT to request an early allocation of the frequency band for 2 GHz, which would be an indication to these countries which are "occupying" such frequency band with their terrestrial services (i.e. microwave links), to abandon it;
- the resolution of the conflicts concerning the determination of the frequency band to be used for the feeder-link between the satellite gate-station and the terrestrial network since certain frequencies likely to be used for such links by systems such as Globalstar or Iridium may be presently used by fixed point to point system using INTELSAT satellites; regarding this subject, the above-mentioned report by ERO might give some cohesion to the position to be defended by Member States of the EU.

## V. POSSIBLE REMEDIES: MORE (ENFORCEMENT) POWERS FOR THE EU INSTITUTIONS; CREATION OF A EUROPEAN FCC; ATTEMPT TO NEGOTIATE RECIPROCAL REGIONAL AGREEMENTS

A remark frequently heard from operators is that the EU Commission is devising very neat and appropriate legislation (e.g. the SESE Directive of October 1993 or the October 1994 Directive foreseeing the liberalization of services in particular through easy licensing)... which however remains dead letter in practice for lack of enforcement by most Member States.

In the same vein, quicker specific procedures should be devised for cases where the urgent need for harmonizing measures cannot accommodate itself with the traditional EU legislative process (which has been rendered even more cumbersome since the entry into force of the Maastricht reform, which gives an increased role to the European Parliament). The technological train does not pass twice. Clearly, the EU authorities are aware of the dire consequences of the European Community lagging behind its main rivals (the US and Japan) with respect to technology, particularly in the crucial field of telecommunications.

It would thus be highly beneficial to the EU should the intergovernmental conference to be held in 1996 amend the EU treaties so as to provide for both (i) the definition of a new urgent procedure where the most important interests of the EU are at stake and where time is of the essence, and (ii) to give increased enforcement powers to the EU Commission.

Furthermore, the Commission has launched a study concerning the creation of a European regulatory authority (a kind of European FCC<sup>28</sup>, which should result in proposals to be published in January 1996. First, as stated by the so-called "Bangemann group" requested by the European Council to prepare a report for its meeting in June 1994<sup>29</sup>, it is clear that operations such as licensing or interconnection have a Community-wide nature, and thus require a single regulatory framework valid for all operators, which will be better conceived and implemented by an independent body operating at the EU level.

Second, all European operators agree that the fact that the CEPT is not a real partner for the ITU, due to its inter-governmental nature, renders it less effective than the FCC during discussions on the allocation of the spectrum to negotiate on a worldwide basis or to propose new standards.

Finally, it is a fact that telecommunications (including broadcasting activities, insofar as they use the same satellites) have become a global activity justifying a global treatment.

Today, the largest broadcasters such as BBC or CNN deliver information on a worldwide basis and for the good of the citizens of the world. Tomorrow, the LEOs or MEOs will enable any given person (whether an executive working in a Manhattan skyscraper or a beachcomber walking on a tiny island of Micronesia) to be reachable and to readily communicate. Therefore, the restrictions still imposed by both the US and the EU Member States vis-à-vis each others' operators appear totally anachronistic at a time when business interests are so inextricably linked. It is urgent that both the US and the EU authorities should abolish these barriers established against each others' nationals.

In conclusion, even if tremendous credit is due to those who have launched the liberalization of telecommunications in the EU and decided "to make a break from policies based on principles which belong to a time before the advent of the information revolution"<sup>30</sup>, much remains to be done, urgently.

1 COM (87) 290 final of June 30, 1987.

2 COM (88) 417 final of July 26, 1988.

3 COM (90) 490 final of November 20, 1990.

4 Council Resolution of December 19, 1991 on the development of the common market for satellite communication services and equipment, OJEC (1992) C 8/1.

5 Council Directive 93/97/EEC of October 29, 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment, OJEC (1993) L 290/1.

6 Commission Directive 94/46/EEC of October 13, 1994, amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard

- to satellite communications, OJEC (1994) L 268/15.
- 7 Proposal for a European Parliament and Council Directive on a policy for the mutual recognition of licenses and other national authorizations for the provisions of satellite network services and/or satellite communications services, OJEC (1994) C 36/2.
- 8 Amended proposal for a European Parliament and Council Directive on the mutual recognition of licenses and other national authorizations for telecommunication services, OJEC (1994) C 108/11.
- 9 MoU on satellite licensing among Germany, France, the UK and the Netherlands signed in March 1993. This MoU covers the VSAT and SNG using the 14 GHz to 14.25 GHz frequency bands.
- 10 COM (94) 210 final of June 10, 1994.
- 11 Council Resolution on further development of the Community's satellite communications policy, especially with regard to the provision of, and access to space segment capacity, OJEC (1994) C 379/5.
- 12 COM (93) 171 final of April 27, 1993.
- 13 OJEC (1993) C 339/1.
- 14 FCC 94-261.
- 15 OJEC (1991) C 233/2, points 122 and s.
- 16 Commission Decision of December 23, 1992, Astra, OJEC (1993) L 20/23.
- 17 Commission Decision of January 12, 1990, Alcatel Espace/ANT Nachrichtentechnik, OJEC (1990) L 32/19.
- 18 Commission Decision of December 15, 1994, International Private Satellite Partners (IPSP), OJEC (1994) L 354/75.
- 19 See Commission Press Release IP/95/549 of June 7, 1995.
- 20 Council Directive 91/263 of April 29, 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, OJEC (1991) L 128/1.
- 21 Article 4 of Directive 91/263, provides that the essential requirements are user safety, the safety of employees of public telecommunications networks operators, electromagnetic compatibility requirements, protection of the public telecommunications networks from harm, effective use of the radio frequency spectrum, and interworking of terminal equipment via the public telecommunications network where justified.
- 22 Council Directive 93/97 of October 29, 1993 cited above.
- 23 The ETSI interim IPR policy was the object of a Commission Notice pursuant to Article 19(3) of Council Regulation n° 17, OJEC (1995) C 76/5, stating that the Commission intended to take a favorable view of the agreement under Article 85 of the EC Treaty and Article 53 of the EEA Agreement. The ETSI interim IPR policy notably provides that with respect to essential IPRs relating to a particular standard, the IPR owner shall be requested to provide an undertaking to grant irrevocable licenses on fair, reasonable and non-discriminatory terms and conditions to both ETSI members and non-members to manufacture, sell, lease or otherwise dispose of equipment so manufactured.
- 24 The impact of such one-stop-shopping procedure must be put into perspective. Indeed, this procedure does not imply any mutual recognition of licenses but only aims to facilitate the access to information concerning the national legislation of CEPT members and to allow the filing of a single application for a license with respect to the countries designated in the application. The ETO plays a role in centralizing the applications and dispatching these to the appropriate NRAs, which still decide on the application independently. Their decision is transmitted to the ETO and then to the applicants.
- 25 See the report and recommendations included therein entitled "ISOG Broadcasters / Signatories Sub-Committee Report on SNG-Pricing Methodology and Operations / Administration" as originally signed in 1991 and subsequently updated in the Barbados in April 1995.
- 26 See on this point the very illuminating contribution of Mr. Alan Auckenthaler, General Counsel, International Mobile Satellite Organization to the 46th International Astronautical Congress, Oslo, 2-6 October 1995 entitled "Recent Developments at INMARSAT".
- 27 COM (93) 700 final of December 5, 1993.
- 28 A specific reference to the FCC has been made at paragraph 18 of a Resolution by the European Parliament entitled, Resolution on the recommendation to the European Council: "Europe and the global information society" and the Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of the Regions: "Europe's way to

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the information society: an action planned”,  
OJEC C 363/33 of December 19, 1994.

29 “Europe and the global information society”  
recommendations to the European Council,  
Brussels, May 26, 1994.

30 See footnote 27.