

EUROPEAN REGULATOR FOR TELECOMMUNICATIONS: THE NEED FOR A CHANGE

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I. Introduction

When the European Union announced its plan to establish a Satellite Center (EUSC) in Spain early this year, many people thought that this might be or become the nucleus of the first European Regulatory Authority at least for satellite communications. In reality, the European Union took over the already existing satellite center of the West European Union (WEU) including its installations and personnel, which is basically an intelligence institute for earth observations (see common action dated July 2001, O.J. 2001 L 200/5).

Today, after almost 50 years of a common European market, the satellite and telecommunications industry still fights its battle with 15 different legal frameworks in the 15 member states of the European Union. This paper will briefly describe the European liberalization of satellite communications in its section II, the still existing legal and administrative problems for the satellite industry in section III, and the potential solution in IV.

II. European Liberalization of Satellite Communications

1. European Directives and Decisions on Satellite Services

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By the end of 1994, the European Union adopted the Directive 94/46/EC (O.J. L 268/15 as of Oct. 19, 1994) which liberalized all satellite services in the European Union.

In 1997, the EU Council and Parliament enacted the so-called S-PCS-Decision (EU-Decision 710/97, O.J. L 105 as of April 23, 1997) regarding the coordinated licensing of satellite-based personal communication systems (S-PCS) in the European Union, which applies to IMT-2000 network operators as well.

Traditionally, different telecommunications licenses are required for satellite and mobile network operators, while S-PCS network operators offer converged mobile and satellite services, and receive one combined license.

An S-PCS license will be granted for the entire satellite network, including the earth segment, the satellites, and the up-and down link. The European Union member states will co-ordinate their licensing regimes according to the European Licensing Directive (97/13/EC, O.J. L 117/15) in order to facilitate the European-wide introduction of S-PCS network operators.

The idea behind this is that network operators need to receive one license

only, in a national licensing proceeding. From the beginning of this proceeding, the other national regulatory authorities will be notified about the status of the proceeding under the supervision of an EU-committee. The other regulatory authorities can comment on the license application and request certain license conditions.

The European Union adopted an extensive list of conditions for S-PCS network operators, including

- Universal service obligations,
- Interconnection duties,
- Data protection obligations,
- Publication of service charges, and
- Prior approval of subscriber agreements by regulatory authorities.

Once a first license has been granted by a regulatory authority, the other regulatory authorities will extend the license to their country.

2. Current Position of the European Commission

As part of the 1999 review of the telecommunications regime (see ONP Framework Amendment Directive 97/51/EC), the European Commission saw no need for a European Regulatory Authority on Telecommunications. An extensive survey had been conducted on behalf of the EU in the months before the 1999 review (Eurostrategies/Cullen International, Draft Final Report on the Possible Added Value of a European Regulatory Authority for Telecommunications, Brussels 1999).

Instead, the European Commission saw the need for a new Communication Committee (ComCom) which replaces the ONP Committee (Directive 97/51/EC)

and the Licensing Committee. Such ComCom shall distribute decisions of the EU and provide necessary interpretations (guidance notes). In addition, the EU installed a new High Level Communications Group with personnel of the national regulatory authorities (NRA) and the European Commission, which shall adopt common standpoints on regulatory issues.

Putting it in one phrase, the European Commission saw the need for coordination, co-operation and consent between the NRA under the direction of the European Commission.

On the legislative side, the European Union currently works on a decision regarding a common frequency policy for services such as GALILEO (satellite-based navigation system) air traffic control, digital TV and radio and will create two additional committees in this area.

III. Definition of the Problem

A common European market for telecommunications services requires a European-wide framework for technical standards, frequency allocation and service licenses and a limited number of agencies and bureaucracies involved.

1. European-Wide Technical Standards

In 1988 the European Union already established the European Telecommunications Standardization Institute (ETSI) in Sophia Antipolis, France. Together with the relevant industry partners, ETSI adopts more and more technical standards in the area of telecommunications as a sort of soft law,

which is only indirectly binding for market participants.

While the European industry and the European citizens are very satisfied with the growing number of European-wide standards, the United States in particular complains about potential trade barriers as a result of technical standards, despite the fact that many US companies play an active role in the various ETSI committees. As a result of the US complaints, the new European standard on universal mobile technical system (UMTS) does not favor any specific technology.

2. European-Wide Frequency Allocation

Since 1959, the European Conference of Postal and Telecommunications Administrations (CEPT) and its European Communications Committee (ERC) coordinate radio frequency allocation in Europe. CEPT has 43 member states in Europe including all member states of the European Union.

Similar to the International Telecommunication Union (ITU) and its World Radio Conference (WRC), which coordinates the radio frequency usage worldwide, CEPT has no legal power to adopt any binding decisions and cannot force its members to act in accordance with any prior and even unanimous decision.

In case of mobile communications, it was the European Union who allocated effectively the frequency bands for GSM-, ERMES- and DECT-services. In case of S-PCS and UMTS the European Union mandated CEPT to harmonize the relevant frequency bands.

Despite the lack of legal and administrative power, the sovereignty of the CEPT members is also paramount for CEPT itself: today, between 1/3 and 1/2 of the frequency band is still reserved for military and security reasons. As a result, no control of frequency usage, its reasonableness or relocation of any frequency usage exists on the European level.

Today, all frequency assignments still take place on a sovereign national level with no control by the European Union and a low-profile co-ordination by CEPT, which has no power or interest to interfere with the national domain.

3. European-Wide Licenses

Just as it was in those times when Iridium (Case IV/35.518, O.J. 1997 L 16/87) filed for 15 national licenses for its satellite service in the 15 EU-member states in 1997, an applicant must still file for service licenses and the relevant frequency assignments in each member state.

A committee of CEPT, the European Committee for Telecommunications Regulatory Affairs (ECTRA) has a mandate from the European Commission to work on harmonized licenses.

Due to the 1994 satellite service liberalization, it is clear that the applicant has a right to get the relevant licenses, but the conditions including the license fees or the type of administrative procedure under which the NRA will grant the licenses is still subject to harmonization due to the existing diversity.

Therefore, different license conditions hinder market access and result in a restraint of competition.

As a consequence, there is no license holder who has obtained licenses and the relevant frequencies in all EU-member states. Economies of scale are therefore limited and European operators have a significant disadvantage: Only the scale of the internal market is sufficient to justify and attracts the required financing of high performance trans-European information networks (see Bangemann report Chapter 3).

The UMTS debacle last year, when the various NRA in Europe granted UMTS-licenses, demonstrated the significant differences between the various EU-member states. In some countries an UMTS license was granted for an affordable amount of 50 million Euro, other applicants had to pay up to 8 billion Euro per license.

For the European Commission, the one-stop-license as described in the S-PCS-decision and in the so-called licensing directive (97/13/EC, O.J. 1997 L as of 117/1) is the next step in the future. An applicant would basically file for a cross-border license in his home country with the local NRA. The respective NRA would invite all or the relevant other NRA into the administrative procedure, which then could propose additional conditions. Finally, the first NRA will grant the requested license, which will be extended almost automatically by the other NRAs. This approach might make perfect sense in the area of telecommunications, where a service provider offers first service in his home country before he expands its service to other countries according to certain milestones. Amazingly enough, the one-

stop-license is the law since 1997 but was never accurately enacted.

We have to keep in mind that the satellite business is very different from other businesses. Initially it requires an enormous investment before a service provider receives a large service area where economies of scale is paramount.

As a result, the European satellite industry requested a European-wide license in analogy to the EU-broadcasting-directive: Under this directive, a broadcasting station, duly licensed in one country of the European Union, can transmit its program to any member state of the European Union without first obtaining additional licenses. (see Report of the Satellite Action Plan of the Regulatory Working Group on Market Access for Satellite Communications within the European Union as of October 22, 1999.)

4. Number of Agencies

It may be possible for companies like Alcatel, Marconi, Siemens, to actively work with a myriad of agencies and committees like ETSI, CEPT, ECTRA, ETNO, ERC, ETO, ERO, NRA, ComCom, ONP and Licensing committee. However, it is not possible for SMEs or innovative start-ups. The number of the various agencies, the bureaucracies involved and their overlapping responsibilities prevents easy market access of SMEs, and is a restraint of competition.

IV. Conclusion

The lack of an easy-to-get European service license, including the relevant frequencies, and a multitude of agencies involved, prevent innovation in the area of telecommunications Europe.

As a result, European consumers get innovative satellite services many years after the same service has been offered successfully in other areas of the world, if they get such service at all.

From the legal point of view, a consolidation of the myriad of committees in the area of telecommunication into one European Regulatory Authority makes perfect sense.

It is no wonder that the above-mentioned Cullen International survey identifies the development of pan-European telecommunications market, like satellite services and the Internet as areas, where management by NRA is seen as poor, and where market participants wish to see an involvement of an European Regulatory Authority.

While CEPT is not treaty-based, the EU has sufficient legal power to assume legislative, executive and judiciary authority over spectrum allocation, cross-border frequency assignment and the issuance of service licenses (see also Bangemann report 1994 on Europe and the global information society).