

RECENT EUROPEAN REGULATORY ISSUES OF COMMUNICATION SATELLITE SYSTEMS

Marco Ferrazzani*
European Space Agency
Paris, France

It is a pleasure for me to intervene here today at this session, and I would like to thank the International Institute of Space Law and the moderator for having asked me to speak about a subject that is less usual than other fundamental topics of classical space law.

Indeed the projected activities by a large number of States and private concerns that plan to make use of the Low Earth Orbit (LEO) for purposes of telecommunication services are now stimulating the minds of lawyers for the different kind of issues already on the table or that soon will have to be considered. Such issues probably in time will need to be examined and analysed not only under the space law perspective, but more appropriately to cover the whole spectrum of various legal disciplines.

Nevertheless, speaking here as a European space lawyer and with the preoccupation of giving an up-to-date status of the developments in the are of today's programme, I have chosen to give a brief informative overview of most recent key legal issues emerged in Europe and concerning Low Earth Orbit communication satellites.

In this area the best suited examples are the upcoming regulatory measures envisaged for telecommunication services

that will inevitably have a bearing on the ways and modalities for the conception, management and related responsibilities of space operations and exploitations of LEO satellites systems including their earth terminals. Peculiar enough such regulatory measures are now discussed in Europe in the largest framework of a general deregulation of markets and services adopted at European Community level and intended to pave the way for a single market.

These political and economic requirements need not to be discussed here, but are without doubt the fundamental drive to a large effort of lawmaking in the present European scenario. It is also known that these European wide actions are taking place in the political context and within the competences of the Treaties establishing the European Economic Community, and that therefore they follow such practices and procedures as provided for in EEC law.

In this context the so-called liberalisation of telecommunication services also follows like other sectors the path of European Directives as pieces of legislation addressed to EEC Member States with the obligation for them to have the relevant provisions incorporated in each of the national legislations.

Copyright © 1993 by the European Space Agency.
Published by the American Institute of Aeronautics and
Astronautics, Inc. with permission. Released to AIAA to
publish in all forms.

*Attorney for the European Space Agency.

The Licensing Schemes

Several EEC Member States have already opened up certain satellite communication services to competition in the context of appropriate national licensing schemes. However, licenses are still granted in some European States on a discretionary basis or maintaining some exclusive rights granted to national public undertakings.

It has been recognized that the granting of advantages to certain satellite operators is hindering the establishment of a common market in which competition is not distorted that requires equality of opportunity between operators.

The long term objective of the present legislative trend is to harmonise the laws of the EEC Member States in a way that will avoid the existence of restrictions having the effect to prevent or make difficult the establishment of a European wide telecommunication market. In this strategy it is of crucial importance the appropriate arrangement of rights that telecommunication operators can enjoy through the national licensing systems. In addition the European legislation also tries to harmonise and liberalise such right at the highest possible level. Therefore, the licensing aspect has become one of the most important points at stake in the frame of telecommunication policies.

All this remains to be done, of course, with due respect of the necessary international requirements set forth at the level of the International

Telecommunication Union (ITU) in the interest of the efficient use of the frequencies and of the general use of the Outer space as provided for by space law.

The legal instruments which have been used so far and which are now considered to be used even more, are the EEC Directives. These instruments are based on the political positions already taken by the Commission of the European Communities when it issued in 1990 a Green Paper on the European telecommunication services, already well known today, where a few fundamental economic principles of liberalisation were stated as essential to the establishment of a unified market. Among such principles, one of the most evident and urgent to be implemented is the one of the so-called mutual recognition of licences. As indicated, in order to grant equal opportunity of access for an economic operator to the telecommunication services market, a single licensing framework should exist.

In Europe there is no telecommunication regulatory body (as the FCC in the USA) and for the time being, there are no conclusive plans to have one in the near future. Because of the quite elaborate mechanism of national authorisations within European States, the best approach today is to set up reciprocal procedures allowing a satellite operator to carry out its activity across the borders. Across the borders means that the service would be provided throughout the European Community territory without

having to obtain individual licenses or authorisations from each of the Member States as is the case today. This result would be achieved by the application filed by the satellite operator with one administration of one of the EEC Member States, and with one single authorisation having international validity within Europe.

Of course, this simplified procedure requires a lot more sophisticated coordination and harmonisation work between the administrations concerned, in advance both at technical and at regulatory level. But the objective of this action remain the simplification of procedures and the European coherence of approach and equal conditions of access to such economic services.

The Directive

In order to reach this objective, along with other liberalisations in progress today, as mentioned earlier, the instrument to be used is the EEC Directive. We are now at the initial stages of producing such a text. In fact a Draft Directive, which would come, as usual, as a proposal from the Commission of the European Communities is being actively considered. Already a Working Draft exists today for a "Proposal for a Council Directive on the mutual recognition of licenses and other national authorisations for the provision of satellite network services and/or satellite communication services, extending the scope of other Directives". This Working Draft is currently being examined by a Senior

Officer Group on Telecommunications (SOGT) which is a consultative body advising the European Commission on technical issues and regulatory policies of telecommunication in general. The text has already been discussed on several occasions by such Group in the last few months and as it proceeds some improvements and revisions are made.

We can only be able today to tell what the status is as we speak. Even more in the near future, the Draft Directive, once issued as a Commission proposal, will become subject to review by several instances, including the European Parliament, the Economic and Social Council, and ultimately approval by the European Council. There the path is long, but recent news are in the sense that already this spring, the Draft Directive could be submitted to the European Council which is now under the Danish Presidency.

The Provisions

It is interesting to note under the Draft which is available today, that basic concepts are mentioned with the aim to introduce new definitions in the national legislations. This is the base of the right to mutual recognition provided under Article 4 associated with the definition of "National authorisations".

Of course, the internal means and modalities of a State to grant its national authorisations are left free to be determined. These could be individual authorisations, class licenses or ad hoc legislation, however, in

conformity with Community law. Apart from this accomplishment of internal requirements, the States are obliged to allow the satellite service to be carried out, without imposing any additional national restriction or limitation that is not expressly provided for by the Directive itself, and therefore that it remains within its own scope.

A point that might be of importance for non-European operators is that under the Article 20 on Applicability it is provided that the mutual recognition of a national authorisation will be valid only for undertakings whose place of business and registered office are in the EEC territory, and the business is owned at least at 75% by nationals of EEC Member States.

This provision also allows the possibility for the Community to conclude agreements and conventions with other States on the basis of reciprocity, for extending or modifying such criteria. This is a classical formula often used in European directives that contain substantive harmonisation and approximation of European legislation and policies. Other provisions of the Draft are interesting and deserve to be analysed in greater depth such as the harmonisation of conditions for authorisation (Art. 6) and the procedural steps under Article 28 which will eventually form the heart of the licensing mechanism in the future.

Frequency and site coordination procedures are also taken into account in order to ensure that the existing frequency

regulations will be satisfied at all times. The international commitments already undertaken by EEC Member States in this area, are explicitly recognised by the Directive, and it is not the scope nor the possible effect of this instrument to modify them.

In conclusion, I believe this example of piece of European legislation to come, presents us with a typical legal situation to which any communication satellite system operator especially in LEO systems would have to face. Further analysis and practice will demonstrate how large such a legal instrument has had on low earth orbit systems.