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The transformation of the International Satellite Organisations -

some aspects from a European perspective

Introduction[1]

From a European perspective, the current transformation of the International Satellite Organisations (ISOs) must be seen as the culmination of a process, which has started as early as 1990. In fact, as far back as in the Satellite Green Paper[2], the European Commission gave, in the general framework of the progressive liberalisation of telecommunications, clear indications on future regulatory reform for the satellite sector. While the Paper predicted that :

> "*the international satellite organisations will continue to provide a major part of the European space segment and INTELSAT and EUTELSAT account for a major percentage of satellite capacity currently accessible from Europe* (at the time)*, a large number of new actors are entering the field and a large number of new satellite systems are emerging which will substantially enlarge - and diversify - the European space segment over the coming years".*

It also stated that :

> "*Current regulation still does not integrate basic principles of modern telecommunications regulation in a multi-actor environment, such as the clear separation of regulatory and operational functions*".

At the same time, the Green Paper set out two requirements for change, which subsequently turned out to be detonators of fundamental reform for the International Satellite Organisations. It requested :

- ✓ Free unrestricted access to space segment capacity ;

and

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1 The statements put forward in this paper are the author's sole responsibility and do not represent positions by the European Commission.

2 "Towards Europe-wide systems and services - Green Paper on a common approach in the field of Satellite Communications in the European Community", Communication from the Commission, COM(90)490 *final*, 20/11/1990.

✓ Full commercial freedom for space segment providers.

The three-fold requirements of regulatory clarification, unrestricted access and the commercialisation of the sector, perceived world-wide, combined into the reforms which have culminated in the developments of the last two years, and which have fundamentally changed Inmarsat, more and more Intelsat, and now also Eutelsat.

A further point should be noted. The legal analysis developed in the Satellite Green Paper emphasised the lead role which European Competition Law would take in developing European positions on the on-going reforms. It recalled that :

> "*The Member States are obligated to exercise their influence in order either to achieve an application of international agreements in conformity with the Treaty or to bring about an amendment of these agreement. The potential for conflict which may result from the current situation with regard to Treaty rules may be demonstrated by quoting from the principles set out in the Commission guide-lines on the application of competition rules in the telecommunications sector, as regards application of articles 85 and 86 to satellites*[3].

The Paper resumed that

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[3] Commission Guidelines on the application of EEC competition rules in the telecommunications sector (91/C 233/02) OJ C233, 6/9/1991.

The Satellite Paper cited in particular :

"... agreements between TOs (Telecommunications Organisations) concerning the operation of satellite systems in the broadest sense are caught by Article 85. As to space segment capacity, the TOs are each other's competitors, whether actual or potential. In pooling together totally or partly their sales of space segment capacity, they may restrict competition between themselves.... Restrictions on third parties' ability to compete are likely to exclude the possibility of... an exemption. It should also be examined whether such agreements strengthen any individual or joint dominant position of the parties, which also would exclude the granting of an exemption. This could be the case in particular if the agreement provides that the parties are exclusive distributors of the space segment capacity provided by the agreement…".

"*An exemption is unlikely to be granted also when the agreement has the effect of reducing substantially the supply in an oligopolistic market, and even more clearly when an effect of the agreement is to prevent the only potential competitor of a dominant provider in a given market from offering its services independently. This could amount to a violation of article 86".*

> "*the best solution to avoid distortion of competition and to allow full use and best allocation of the existing international, national, and private space segment would be to ensure that users obtain direct access to space segment capacity, while providers of this space segment should obtain the right to market space segment capacity directly to users."*

It was clear at the time, and it became clearer so during the subsequent period that allowing International Satellite Organisations to act freely as commercial providers of space segment, and to enter into competition with a growing number of competitors in commercial fields, would require a fundamental transformation of the system of Conventions and Operating Agreements, the very framework of the operations of the international inter-governmental satellite organisations.

The Satellite Directive

The main principles of the Satellite Green Paper were enshrined in Directive 94/47/CE[4] of 13th October 1994, which has become the main legal base for the transformation of the satellite sector in Europe[5].

The Directive, issued under Article 90 EC Treaty[6], addressed the measures to liberalise satellite services in Europe, and explicitly requested that

> *"Member States shall ensure that any regulatory prohibition or restrictions on the offer of space segment capacity to any authorised satellite earth station network operators are abolished".*

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4 Commission Directive 94/46/EC of 13/10/1994 amending Directive 88/301/EEC and Directive 90/388/EEC, in particular with regard to satellite communications, OJL 268/15, 19/10/1994.

5 It should be noted that certain provisions of the Licensing Directive (Directive 97/13/EC), adopted in the context of the "1998 package" for the full liberalisation of the European telecommunications sector are also of major relevance for the licensing of satellite systems.

Regarding other Directives of major application to the satellite sector, see Directive 93/97/EEC (satellite earth station equipment) and Decision 710/97/EC (satellite personal communications services).

It noted that most of the available space segment capacity was offered by the International Satellite Organisations. "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". " Such exclusivity, permitted by some Member States, leads to a partitioning of the Common Market to the detriment of customers requiring capacity".

The Directive voiced a clear message to Member States"(Article 3, Directive 94/46) :

> *"Member States which are party to the international conventions setting up the international organisations Intelsat, Inmarsat, Eutelsat and Intersputnik for the purposes of satellite operations shall communicate to the Commission, at its request, the information they possess on any measures that could prejudice compliance with the competition rules of the EC Treaty or affect the aims of this Directive or of the Council Directives on telecommunications*.

There has been criticism that the Directive has been slow in being applied in a number of Member States. However, it has made its way since 1994. The Third Implementation Report[7] of February 1998 gave a summary view of implementation across the EU's fifteen Member States (table). By the time of the report, measures for enabling direct access had been taken in twelve out of the fifteen Member States.

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6 Numbering prior to the entering into force of the Amsterdam Treaty. With the entering into force of the Amsterdam Treaty on 1st May 1999, a renumbering of articles of the EC Treaty will apply.

7 Communication from the Commission, Third report on the implementation of the telecommunications regulatory package, COM(1998)80 *final*, 18/02/1998.

Since, pressure for implementation by the European Commission has further increased. Out of 7 infringement procedures concerning the implementation of Directive 94/46[8], 3 had been successfully closed by April 1999, while 4 were carried forward into formal legal proceedings[9].

Implementation of liberalisation and direct access has accelerated pressures in Europe to push further for the reform of the International Satellite Organisations, in order to avoid distortion of competition.

The new general environment.

1998 has meant a fundamental change for the environment of telecommunications :

- ✓ In the EU : full liberalisation of telecoms since 1st January 1998[10] ;
- ✓ WTO : global liberalisation of basic telecom services ;
- ✓ Major reform of the International Telecommunications Union (ITU).

The catchwords now are :

- ✓ Anti-trust / Competition Law action ;
- ✓ and International Trade Law.

The principles of competition and free trade must also govern the reform of the international satellite sector. As a consequence, the international satellite sector is exposed to fundamental restructuring.

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8 and Directive 97/13 concerning satellite licensing issues.

9 It is interesting to note that it is in the field of the implementation of the Satellite Directive that the Court of Justice has made its first formal ruling for non-compliance of a Member State with a Community Liberalisation Directive in the telecommunications field. (Art. 169) See Judgement of the Court of Justice of 25 February 1999 in Case C-59/98, not yet reported.

10 With transition periods for a limited number of Member States, the latest ending on 31st December 2000 (Greece).

- ✓ Restructuring and privatisation of the ISOs - Intelsat, Inmarsat, Eutelsat. This is the most direct indication of the seminal shift in the international structure of the satellite system which we are currently experiencing ;

- ✓ The market entry of the LEOs, the Low Earth Orbiting satellite systems, and similar systems such as Iridium and ICO ;

- ✓ A new role of satellites in the deployment of digital TV / multi-media which has made satellites central in the new markets which result out of convergence, but which has also placed them at the centre of some very complex competition cases in Europe ;

- ✓ Growing integration of satellites / terrestrial : between satellite mobile and terrestrial mobile ; between satellite and Internet ; between media and telephone networks ; and - quite soon - between global navigation systems and transport.

All of these trends are leading to a rising number of complex cases, which give further emphasis to the application of Competition Rules. A number of Decisions have set future directions for the principles to be applied :

- ✓ IPSP / Orion, International Private Satellite Partners Venture, the first major satellite case handled under EU Competition Rules, as far back as 1994[11] ;

- ✓ Inmarsat-P / ICO, the first case of the new generation satellite cases dealt with under EC Competition Rules[12] ;

- ✓ of course, the Iridium Decision[13] ,

- ✓ NSD, the Nordic Satellite Distribution case which involved major companies in television transmission and media in the European Nordic area as well as two major telcos - a representative case of the new satellite / cable / media cases[14].

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11 International Private Satellite Partners (IPSP), OJ L354/75, 1994.

12 Inmarsat-P, Case IV/35.296, Notice pursuant to Article 19(3) of Council Regulation N° 17 concerning a request for negative clearance or an exemption pursuant to article 85(3) of the EC Treaty, OJ C304/06, 15.11.1995.

13 Iridium, Case IV/35.518, OJ L16/87, 18.1.1997.

Some common lines resulting from these decisions and cases may be identified :

- ✓ Co-operations and joint ventures must have a clearly pro-competitive character and impact. This reasoning prevailed in both the positive Decision on IPSP and Inmarsat-P / ICO, both cleared under Article 85(1), EC Competition Rules ;

- ✓ No creation / extension of dominant positions. In the NSD Decision, under the EU's Merger Regulation, the Commission considered that this threshold was passed and therefore a prohibition was inevitable ;

- ✓ No market partitioning ;

- ✓ Market positions in satellites must not be used to leverage market power into new markets. This qualified the positive Decision on Iridium where the exclusive rights granted to gateway operator investors were considered ancillary to the project, which was found to be overall pro-competitive in its impact. However, the Decision also says that : "….. *the exclusive rights granted to gateway operator investors could be revisited should the particular circumstances of the case change in a substantial manner. Such would in particular be the case should Iridium acquire a dominant position in respect of the actual provision of SPCS* (Satellite Personal Communications Services) *services".*

The reform of the ISOs

The Decisions taken so far in the satellite sector show the basic principles applied under EU Competition Rules :

- ✓ Re-structuring and alliances must be pro-competitive in their overall impact,

And

- ✓ In many cases, pro-competitive safeguards will be required.

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14 Nordic Satellite Distribution, Case IV/M.490, Council Regulation N° 4064/89, 19.7.1995.

This applies particularly in the case of the strong market positions, which result from the previous regime in the sector, i.e. in the case of the International Satellite Organisations. Immunities acquired under different regimes cannot be brought forward to the new offsprings and privatised entities.

As set forth, the reform of the International Satellite Organisations is in the logic of the Commission's liberalisation and competition policy with regard to the satellite sector since the start of the decade.

With the clearing under EC Competition Rules of the Inmarsat reform (22nd October 1998), the Commission has further clarified its policy in that respect[15].

In the Satellite Green Paper, the Commission had set out basic guidelines for the reforms. With regard to a Review of the Eutelsat Convention and its Operating Agreement it requested, inter alia :

- ✓ Necessary modifications to ensure direct access for users to satellite capacity ;
- ✓ Necessary measures for implementing future independence ;
- ✓ Separation of regulatory and operational interests ;
- ✓ Opening of Membership of the consortia to new partners.

In the October 1998 clearing of the Inmarsat reform the Commission spelt out some clear further principles.

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15 See European Commission Press Release IP/98/923, Commission gives green light to Inmarsat restructuring.

The Press Release announced that "*the European Commission has given a green light to the restructuring proposals of Inmarsat. Inmarsat is the major international mobile satellite operator, which is currently an intergovernmental treaty organisation. The restructuring will transform the operating parts of Inmarsat into a public company. As part of its restructuring proposals, Inmarsat envisages a public offering of shares (IPO…."*.

*"The Commission has closed the file by means of a negative clearance administrative letter" (*issued subsequent to a formal Notification of the Inmarsat reform project under Regulation 17/62. The project was cleared under Article 85(1)).

While stating that it regarded this case as a model treatment for the reform of the other intergovernmental satellite organisations, it put forward two major guidelines :

- ✓ The new organisation "*should not have a privileged position on the market"* ;

- ✓ The easiest way of achieving this is to create a publicly quoted company "*which clearly has no immunities from competition law*".

The Commission made it clear that the public offering was very important and indicated that such a public offering should take place within three years. It added that "any delay could lead to the re-opening of the file".

Some conclusions

While the reform of Intelsat and Eutelsat are still on-going and final conclusions from a European perspective will have to wait until the review of these projects, some requirements for restructuring of the International Satellite Organisations seem to become clear. The guiding principle will be that the future commercial entities cannot be immune from competition law, nor enjoy undue or unjustified privileges for the provision of commercial services. There must be a clear separation of commercial activities and public service goals of a general nature, which were not clearly differentiated in the Conventions and Operating Agreements covering these organisations.

Based on the Inmarsat case, some extrapolations may be made concerning general positions for the transformation of the ISOs into commercial companies.

Based on the assessment made in the Inmarsat case, there seem to be three key requirements that any restructuring project should comply with :

(1) There should be a public offering for the new commercial entities, or, as a minimum, the shareholding in the commercial entity should be open for companies not participating in the (residual) international governmental organisation.

In order to avoid discrimination by the Signatories in favour of the commercial entity there should be a public offering of the shares in the new entity. As a minimum, the shareholding in the new company should not be limited to the Parties to the international organisation but should be open for third parties ;

(2) The scope of activities retained by an international governmental organisation should be as limited as possible.

From a competition policy point of view a solution may be preferable which would provide for a full privatisation. In any event, and in conformity with Community law the scope of activities retained by the international organisation that continues to enjoy special or exclusive rights must be kept as small as possible. The services provided by the international (governmental) organisation must be strictly limited to activities of public interest which can only be provided under such special or exclusive rights and this should be objectively justified ;

(3) There should be no undue advantages over competitors.

Neither the remaining international governmental organisation, nor the new commercial entities should enjoy any advantages over competitors, for example in respect of frequencies used for the provision of commercial services.

Consequently, the frequency rights used for the provision of such services should be held by the commercial entity. In addition the conditions governing the use of such frequencies by the commercial entity should be non-discriminatory with regard to those applying to private operators.

While cases will have to be looked at on their own merits, and the second stage of Intelsat's reform, and the reform of Eutelsat are still ahead, the general goal should be to adjust the situation in the sector to the general development of competition in telecommunications, while guaranteeing global satellite service, particularly also for developing countries. The ultimate objective must be to integrate the satellite sector fully into the new liberalised world telecommunications order, as it is being created by the new framework set by telecom reform, competition law, the WTO agreement, and a (reformed) International Telecommunications Union.

State of Implementation of Liberalisation Directive 94/46 (15.01.98)

	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK
	✔	✔	✔	●	✔	✔	●	✔	●	✔	✔	✔	✔	✔	✔
Measures to liberalise satellite services	✔	✔	✔	●	✔	✔	●	✔	●	✔	✔	✔	✔	✔	✔
Measures taken to allow bypassing national signatory Intelsat/Eutelsat	Y Y	N N	Y Y	N N	Y N	Y Y	Y N	Y N		Y Y	Y N	Y N	Y Y	Y Y	Y Y
Maximum legal duration of authorisation procedure : - VSAT - SNG - others.	 4w 4w 4w	n a	 6w 2w 6w	O	 4m 4m 4m	 6w 2w 4m	0	 3m 3m		 6w 2w 3m	 6m 6m 6m	 6w 6w 6w	n a		 6w 2w
Fees (excluding frequencies) : - published - an initial fee to be paid - an annual fee is to be paid	 Y Y Y	 n a N N	 Y N Y	 N Y Y	 N/Y Y Y	 Y Y Y	N	 Y Y Y	N	 Y Y N	 ⇨ Y N	 Y Y Y	 n a N N	 Y Y Y	 Y Y Y
Number of authorisations granted - VSAT - SNG - others.	335 177 158 0	 13 129 13	50 3	1	11	 41 40	 0 2 0	 46 77	 0 0 2	 30 40	 8	 7	n a		 17 74 90