



## **ESOA General Comments on the Implementation of the New Regulatory Framework for Electronic Communications Networks and Services**

December 2002

The European Satellite Operators Association (ESOA), a non-profit organisation based in Brussels, Belgium, represents the views of European satellite operators. ESOA has been established to ensure that communication satellite services remain a key component of European space policy; the organization reflects the views of satellite operators on critical political, regulatory and commercial matters both in Europe and on the international level.

ESOA is following the implementation of the new regulatory package for electronic communications very attentively, because the degree of harmonization amongst national rules will directly influence the ability of a pan-European, transnational business as satellite to contribute to the development of a widely available broadband infrastructure able to meet the political expectations enounced in the eEurope 2005 Action Plan.<sup>1</sup> More specifically, the new rules are due to steer both the putting in place and deployment of electronic communications networks and services.

With regard to the implementation of the new regulatory framework for Electronic Communications Networks and Services ("ECNS"), ESOA takes the general views outlined below in relation to the following particular issues:

- Interpretation of 'technology neutrality'
- Harmonisation of national rules
- Practical implementation of must-carry rules
- eEurope 2005 and new, innovative services

It is first important that the regulatory response in implementing the 'technology neutrality' principle enshrined into the new package is fully appropriate. National Regulatory Authorities (NRAs) should ensure that they treat all platforms in a fair and non discriminatory way, rather than attempting to impose uniform solutions and measures across the board, regardless of their appropriateness or proportionality. It is notably important to ensure that NRAs' consciousness and consideration of 'pan-European relevant markets' include a genuine assessment of the impact of the transnational nature of satellite service-delivery platforms: very different cost structures characterise satellite platform-based service supply and receipt, and the implications of such structures on economies of scale and scope are to be both acknowledged and taken into account in assessing the effective competitiveness (and resultant absence of need for regulation) of such particular markets.

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<sup>1</sup> eEurope 2005: An information society for all, Communication COM(2002) 263 of 28 May 2002

More particularly, ESOA submits that the principle of ‘technology neutrality’ implies that regulatory differentiation between satellite uplinks (earth-to-sky transmissions) and downlinks (sky-to-earth transmissions) are neither meaningful nor suitable; uplink and downlink should be seen as an integral part of a single transmission chain since both parts are necessary from a technical and economic perspective to establish a one-way satellite connection. It is notably important for NRAs to recall, and ensure consistency with, European regulatory measures (like the 1977 TSF Directive<sup>2</sup> and the 2001 ‘Right to Antenna’ Communication<sup>3</sup>) which require proportionate and justified approach towards the reception of signals, whether for receive-only systems or for two-way communications.

Despite the margin of manoeuvre left to national regulators, it is also crucial that the new package is implemented in a harmonised way across national borders, in order to reap the full benefits of the EU Internal Market and avoid distortions introducing delays in the take off of new technologies or leading to amplify market failures. ESOA commends NRAs, as well as the European Commission, to pay a lot of attention that the process in course until July 2003 is well coordinated. The new European bodies recently put in place, such as the European Regulatory Group or the Communications Committee, should already help for such coordination.

Therefore, another key regulatory principle flowing from the inherent pan-European nature of satellite-based services is the pivotal role of harmonisation. This has implications on the whole regulatory landscape – from operational networks and services licensing to access to spectrum rights and the need to adopt consistent rules on the putting into service of individual radio apparatus. A lack of harmonisation in these and related respects operates as a disincentive to the development of new and innovative satellite-based delivery services.

ESOA would then encourage NRAs to adopt an approach to harmonisation that reflects the “light touch” ethos underpinning the new ECNS regime. As a matter of principle, ESOA would like to see the harmonisation of currently diverging regimes at the least intrusive or onerous level necessary to allow NRAs to ensure compliance with obligations and consistency with policy goals.

The divergent approaches being taken across the Union to the licensing and regulation of radio spectrum fuels particular concern amongst all European market players. The satellite community, increasingly concerned with the ‘licensing by stealth’ practices regarding satellite downlink spectrum that has taken place until now, would urge all NRAs:

- To attach due weight to the internationally-agreed recommendations on spectrum exclusivity and share when considering the efficiency of its current spectrum management and assignment practices
- To recognise the inherent trans-national nature of some spectrum uses and to consider the jurisdictional limits that are, therefore, appropriate in relation to satellite delivery, whether for one-way or for two-way systems
- To resist any temptation to introduce licensing measures permitting entities to effectively deprive others of the possibility to rely on spectrum bands that are shared or unlicensed
- To adopt as much as possible a general approach in authorizing network operations for radiocommunications, undoubtedly when the risks of harmful interference do not exist– e.g. in exclusive frequency bands
- Where another National Regulatory Authority has site-related jurisdiction (e.g. site clearance), to resist calls to impose further layers of regulation on systems that are already complying with quite onerous obligations, since any such ‘double regime’ can only be detrimental for radiocommunications end-users and draw excessive and unjustified resources to regulators

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<sup>2</sup> Directive 97/36/EC of 19 June 1997

<sup>3</sup> Communication COM(2001)351 of 27 June 2001

It will also be important to ensure that, as content is increasingly reconfigured for provision over many alternative platforms, NRAs ensure that the regulatory regimes applicable to and developed for content do not encourage or facilitate delivery over one of more platforms at the expense of others. In this context, it would, of course, have been essential to reconsider the scope and nature 'must carry' rules in the period leading to the transition phase to digital broadcasting, regardless of the proposed changes to the regulatory framework. In any event, the inclusion of a relevant provision now merely ensures that the issues are put on the regulatory agenda for 2002-2003.

ESOA takes this opportunity to commend to NRAs that must-carry obligations shall only be imposed against appropriate remuneration. ESOA further commends the NRAs to go 'back to basics' – to consider what 'appropriate remuneration' means in the national context, to recall the underlying plurality, free speech and public service goals that underlie the very concept general interest objectives and to assess their respective clarity, proportionality and transparency characteristics that would justify obligations. ESOA would expect that due consideration be given to the greater public interest which can be achieved by striving to achieve a real balance between the cost of such obligations and the public benefit derived from access to protected content.

ESOA finally understands that the "Europe 2005" initiative is to encourage the development of enhanced broadband services across Europe. With this general goal in mind, ESOA submits that NRAs provides for trial authorisations which would enable operators to test the acceptance of enhanced services in niche markets. The emergence of innovative services is substantially delayed, if not prevented, with disproportionately burdensome licensing requirements applied at an early stage of the emergence of new services.

ESOA would be pleased to provide any further comments or details on these issues upon request.