European Satellite Operators Association

ESOA Comments on the Review of the European Union's Regulatory Framework for Electronic Communications

9 October 2006

1. 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 electronic communications and 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.

2. ESOA is pleased to contribute to the Commission's review of the regulatory framework for electronic communications, initiated by the Commission's Communication (2006)334 and accompanying documents. ESOA outlines its general views in the following discussion. Of course, ESOA will defer specific comment on many aspects of the review until after the Commission releases precise proposals for change. We hope that the following comments will assist the Commission in preparing those proposals.

OVERVIEW: Evolutionary rather than Revolutionary change in the Framework

3. ESOA perceives and accepts the general approach in the Communication of seeking evolutionary changes to the framework – we agree with the Commission's assessment that electronic communications continue to be a success story for the EU. Nevertheless, we would welcome even modest changes to the framework that can have a significantly beneficial impact on the ability of the communications satellite industry to do business and contribute to important Community goals. Further, as ESOA noted in its 6 February 2006 response to the Commission's earlier call for input on the review, there are some areas that could be significantly improved to foster the Internal Market for electronic communications using satellite networks.

4. Thus, we identify in these comments certain areas that in our view have the most impact on the satellite industry and where we believe that improvements to the framework should be considered. As a general matter, we divide these areas into the topics of authorisation structures (including terminal device regulation); access to spectrum; creation of pan-European markets; and consumer protection issues (including data security matters). As a final topic, we discuss institutional arrangements, relating largely to the committee structures proposed in the Communication.

5. Because these comments are submitted in response to general principles outlined in the Communication, ESOA thought it helpful to prepare the attached paper on satellite's role in the Internal Market. This attachment develops the broader theme of the contributions of the satellite communications industry to Community goals, which links to the comments we submit in this proceeding.

Authorisation Structures

6. An effective and harmonised regulatory structure for authorisations and rights of use is critical to the satellite industry, because satellite operators must deal with numerous countries within the footprint of their satellites. Unlike virtually any other electronic communications networks and services, the satellite sector depends on efficient and timely regulatory grants across the entire Community.

7. ESOA is concerned that the current regulatory structure permits excessive reliance on rights of use for satellite infrastructure. There should be no justification to maintain rights of use solely due to satellite networks' use of spectrum when there is no risk of harmful interference. Nevertheless, far too many Member States impose far too many licensing requirements on this sector. (This situation is noted in the Staff Working Paper at page 19.)

8. Thus, we strongly support the concept advanced in the Staff Working Paper (at page 12) to require that the grant of rights of use be subject to a "clear justification" that the risk of harmful interference cannot be managed in another way, and we agree with the Communication that only general authorisations should be used "whenever possible" (page 7).

9. Even where only general authorisations are required, there remains too much leeway for Member States to apply diverse requirements for those authorisations. This situation arises due to the possible combinations of notifications or registration and the divergent combinations and interpretations the Member States apply of the 18 condition permitted under the Authorisation Directive Annex. For that reason, we believe the concept of the general authorisation should be tightened.

10. An authorisation mechanism should mean only a registration, with limited or no conditions, little or no fee, and merely a simple notification. Experience in Nordic countries has shown that such a registration is sufficient for virtually all general authorisations. However, in many other Member States the general authorisation approach has almost systematically led to *ex ante* conditions for satellite networks and services, accompanied by administrative burdens and fees – thus leading to the notification essentially having an effect similar to individual licensing. In our view, Member States that currently impose any kind of individual authorisation scheme with associated fees should have the burden of justifying this approach.

11. There also is a need for stronger tools to harmonise the conditions that are applied to satellite rights of use. Current procedures for harmonising conditions, e.g., Framework Directive Article 19, are not sufficient and in any event can result only in non-binding recommendations. Thus, ESOA supports the concept in the Communication (at page 9, section 5.3.3) to adopt procedures for reaching EU-level agreement on common usage conditions and common approaches to authorisations – so long as these approaches result in minimal conditions and not the "highest common denominator." We note that satellite communications are explicitly given as an example where this approach could be used. Reliance on a committee approach for this harmonisation would maintain the ability of Member States to support important national goals while reaching for Community goals.

12. Finally, we support a coordinated review of the framework together with the R&TTE Directive. This directive harmonises rules on equipment (but not radio spectrum), which in turn can limit requirements for licensing terminal devices used in the satellite sector.

13. It is especially important to ensure consistency between the framework and the R&TTE Directive as the satellite industry moves towards providing new interactive services often to consumer terminals, e.g., to future mobile television terminals and any mobile satellite services.[1]

14. The R&TTE directive has improved the circulation and use of terminals, but has at times appeared to come into conflict with CEPT determinations on license exemption, which the satellite industry generally favours because these determinations give an additional level of regulatory certainty. We are encouraged that the Staff Working Paper discusses the need to ensure consistency between the framework and the R&TTE Directive (at page 24, and also the last proposal under point 3 at page 36), and we support the need to ensure this consistency.

15. The Staff Working Paper also refers to relaxing the obligation in the R&TTE Directive for public network operators to publish their network-terminal interface specifications (at page 24). We support this concept, which is not listed in the summary of proposals at the end of that document. ESOA member have observed that this requirement has worked to the disadvantage of some Mobile Satellite Service (MSS) operators who technically provide public networks but whose interface specifications were not the type of technical information that the original rule envisaged. As a consequence, there are instances where such publication rule should be more flexible, in particular for innovative services.

Access to Spectrum

16. More efficient spectrum management at the Community level is a major goal of the review. We support this goal and strongly favour improved coordination at the Community level, whether through the committee mechanisms or other approaches that help reach efficient and coordinated results. We caution, nevertheless, that optimising methods for allocating and assigning spectrum, just as making rules more flexible or neutral, are means to an end – they are not ends in themselves.

17. Thus, ESOA submits that these concepts always must be used with the aim of fostering the single market and of serving consumer and societal interests. At the same time that new spectrum management tools are introduced, there should be heightened attention to how these tools will foster pan-European services and eliminate market barriers. There is the risk, for example, that some methods – especially if adopted on a national level without sufficient attention to Community implications, as we have seen frequently with UK spectrum management – offer the significant risk fragmenting spectrum policy which in turn thwarts pan-European service.

[1] While the R&TTE Directive does not apply to receive-only broadcasting terminals, it would seem to apply to interactive consumer terminal devices used also to receive signals, which is a large market for satellite applications. This application exposes an inconsistency embedded in the framework. The framework applies data privacy and confidentiality rules to terminal equipment in e-Privacy Directives Articles 5(3) and 14, even though Framework Directive Recital 8 seems to say the framework does not apply to terminal equipment. These provisions are inconsistent and should be reconciled.

18. For this same reason, we cautiously support the concept of technological neutrality, subject to the Commission providing a commonly accepted definition. [2] It is recognised that limits to technology neutrality could be imposed on the grounds of ensuring proper sharing of generally authorised spectrum or avoiding harmful interference. This concept is critical, because in some cases an exclusive allocation of radio spectrum is necessary precisely due to the technology employed. Thus, at the international level exclusive satellite allocations have been agreed because there is no possibility of sharing with terrestrial services.

19. Consequently, it is necessary to preserve and acknowledge the role of the ITU Radio Regulations when considering technological neutrality, and ESOA would prefer to see reference to the international rules when defining the concept. Satellite platforms are normally coordinated at the international level, which means that total flexibility or technological neutrality is not always sustainable for international communications satellites.

20. A much discussed element of new approaches towards spectrum management is reliance on trading of rights of use. ESOA recognises the generic benefits of flexible spectrum management, including secondary trading, so long as conditions in the original licence and results of international coordination are maintained. Again, because satellite networks and most services are coordinated at the international level, in principle it is difficult if not impossible to create secondary markets for satellite spectrum. ESOA, as well as many individual companies within the satellite industry, have submitted extensive comments to the Commission on numerous occasions reflecting this concern. We do not see explicit recognition of this situation reflected in the Communication or accompanying papers, and look forward to fuller development of this concept.

21. ESOA tends to agree with the Impact Assessment (at pages 18-19) that the best method to ensure efficient spectrum management is wider application of existing committee mechanisms to ensure coordination at the EU level. This approach would require strengthened legal tools; for example, current Authorisation Directive Article 8 on harmonised assignment procedures is weak. The concept of relying on improved committee procedures is worthwhile, subject to comments we make below on institutional arrangements.

Creation of Pan-European Markets

22. ESOA is in complete agreement with the position expressed in the Communication (at page 3) that "creating a single European information space with an open and competitive internal market is one of the key challenges for Europe." We consider that the satellite industry is a critical element of creating that single information space. No other technology and no other network platform can provide pan-European services, regardless of distance, population density or other national factors, to the extent that satellite operators provide such services to European citizens.

23. There is no other theme more important to the satellite industry than consolidating the Internal Market and we could not agree more with the Communication (at page 8) that

[2] A first step towards introducing the concept must be to provide a commonly accepted definition. The Impact Assessment notes (at page 17) that the term "technology neutrality" is not clearly defined and under the current structure no coherent application can be ensured amongst the Member States. In our view, the concept does not mean that all technologies are interchangeable; some are better suited to specific requirements, such as satellite services for pan-European applications, widely-distributed networks (e.g., VSATs), broadcast distribution and emergency back-up in case of terrestrial failures.

"Europe must deliver a consistent regulatory approach in the 25 Member States." Only with this consistency can satellite platforms contribute to a pan-European market or single European information space. This theme supports our earlier comments in this submission on harmonising authorisation procedures and caution in applying certain spectrum tools to pan-European satellite networks.

24. Just as satellite is a critical component of pan-European service and serves the internal market goal, pan-European service is important to the economic development of satellite networks. Due to their wide footprint, satellite operators normally must have access to all Member State markets to justify the large investments required for communication satellite construction, launch and operation. Any policies that threaten this ability to provide service throughout Europe thus threatens the economic viability of satellite platforms. Fragmented spectrum trading or "flexibility" policies, adopted in some but not all Member States or on an uncoordinated basis, impede development of satellites.

25. For these reasons, ESOA expects that clarification will be forthcoming on the Commission's role and the means by which administrative burdens are minimised under any new effort to provide for pan-European services. ESOA urges against any approach that would merely add a layer of administrative control to existing regulation.

Consumer Protection Issues (including data security matters)

26. The Commission proposes a series of measures on improving security, including obligations for operators to notify breaches of security, requiring national regulators to impose specific security measures and in general future-proofing network integrity requirements. These proposals will likely have special impact on future interactive services provided by satellite platforms, so we will comment on specific measures once more details are available.

27. Satellite operators already are sensitive to the requirement in e-Privacy Directive Article 4 to ensure adequate technical and organisations measures to ensure security. We must caution nonetheless that the proposal to give NRAs additional powers to require information and apply binding instructions (Staff Working Paper at page 29) should be carefully delimited.

28. ESOA members have seen a trend towards requiring MSS operators to become established in Member States and obtain authorisations and even rights of use in order to be allowed to "export" data. This issue will arise in the future also with other interactive services. Nevertheless, such requirements runs contrary to the theory of the Internal Market and should not be permitted.

29. Thus, we urge that the framework explicitly recognise that some networks operate without necessarily installing network infrastructure in all countries where service is provided. The example is MSS, which in standard service patterns relies on a small number of hub stations across the globe. It should not be a requirement of any network security arrangements that the MSS provider must establish specific infrastructure in a Member State in order to comply with network security requirements, because such an approach is inefficient, disproportionate and inconsistent with single market principles.

Institutional Arrangements

30. The theory of the existing Regulatory Framework is that by limiting the need for rights of use and by harmonising conditions for both authorisations and rights of use, the need for mutual recognition of licenses or a single pan-European license is minimized. It is clear today, however, that rights of use have not been sufficiently limited in the satellite sector and conditions have not been adequately harmonised. Thus, we support institutional arrangements that can create this harmonised structure.

31. The Staff Working Paper and Impact Assessment stress reliance on current committee structures, e.g., expanded competency to the Radio Spectrum Committee (RSC) and Communications Committee (CoCom).[3] ESOA believe that committee experience today is relatively efficient with the current level of responsibility. Nevertheless, we add some caveats to the proposal.

32. Most important is that adequate transparency should be ensured. ESOA welcomes the regular briefings and relative (but not total) openness of documentation from these committees. But we note that greater reliance on these committees requires greater transparency and more opportunity to comment at an early stage on proposals before the committees.

33. These considerations apply with special force in the spectrum area. Again, the current structure by which the RSC issues mandates to the CEPT /ECC for technical input works reasonably well, but some issues are already bogged down and politicised at the CEPT level. Further, the CEPT and RSC process normally call for public input at or near the end of the process, once critical negotiations and debates are virtually finished. This approach is not sufficient – there must be opportunity for full and open discussion near the beginning of the process. Combining two institutions each only partially transparent will magnify problems industry faces in seeking to follow and inform regulatory debates.

34. Thus, ESOA welcomes the reference in the Staff Working Paper (at page 14) to introducing rules for appropriate public consultation. Although this reference applies in the paper only to allocations proceedings, we believe it should apply with equal force to decision mechanisms for coordinated spectrum management in general.[4] Including standards for this required transparency is necessary because the basic Community decision on committee procedures, Council Decision 1999/468/EC, does not itself contain such requirements.

SUMMARY

1. ESOA looks forward to contributing the views of the satellite industry when the Commission releases detailed proposals for change to the electronic communications regulatory framework. At this stage , we emphasise the following issues raised by the Commission's review:

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3 The Staff Working Paper suggests (at page 27) creation of a group to identify eAccessibility actions, which would then be adopted through committee procedures. ESOA would like to see more details on such a mechanism, with the aim of ensuring that the satellite industry would have adequate input to such proposals at an early stage. Any such group must ensure open and transparent public participation.

4 ESOA generally believes full transparency should be applied to all such important decisions undertaken through committee procedures. We urge in particular that the committee mechanism proposed to identify potentially tradable spectrum bands (Staff Working Paper at page 14) must ensure full public participation. The issue of spectrum trading is controversial and engendered substantial public input at all stages of discussion. The critical decisions to identify certain bands for spectrum trading thus must ensure transparency.

2. An effective and harmonised regulatory structure for authorisations and rights of use is critical to the satellite industry – the current structure should be tightened, with greater reliance on simple notifications.

3. We support efficient spectrum management. However, new tools should be adopted only so long as they foster the single market and better serve consumer and societal interests. Thus, we cautiously support the concept of technological neutrality but agree with the Commission that a commonly accepted and clear definition is needed.

4. The communications satellite sector already provides a single European information space and we support efforts to foster pan-European markets, so long as additional administrative burdens are not created.

5. Network security efforts should be carefully tailored to avoid duplicative requirements for infrastructure in all Member States.

6. We welcome institutional arrangements to harmonise regulatory conditions and access to spectrum, but caution that greater transparency will be required for committee procedures.