

IISL-95-IISL3.05

## AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS

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### RECENT DEVELOPMENTS AT EUTELSAT

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#### Abstract

After some background information about the Organization: creation, legal form, working organs, purpose and activities, this paper examines the changes which have taken place since it was first established, the modifications which are currently under way and the longer-term prospects for the evolution of EUTELSAT.

#### Background information on creation, legal and institutional structure, purpose and activities

The European Telecommunications Satellite Organization (EUTELSAT)<sup>1</sup> was established by a Convention which opened for signature on 15 July 1982 and entered into force on 1 September 1985. Its Operating Agreement opened for signature and entered into force on these same dates.

EUTELSAT was established at the initiative of the European Conference of Postal and Telecommunications Administrations (CEPT) and under the auspices of the European Space Agency to establish a digital network in Europe for the provision of public telecommunications services and to contribute towards the development of European space industry.

EUTELSAT has the legal form of a European intergovernmental organization operating in the technical field, and thus has legal personality under international public law. The Organization is governed by an international treaty (the Convention) and also benefits from a Protocol on Privileges and Immunities<sup>2</sup> and a Headquarters Agreement.

The Organization is open to accession by European Member States of the International Telecommunication Union<sup>3</sup>. The Organization has 44 Members at present, with four other countries finalizing membership procedures.

Structurally, the Organization comprises three working organs:

- the Assembly of Parties, which is composed of representatives of Member States that are "Parties" to the Convention. The Assembly of Parties decides primarily on the general direction of the Organization and on its relations with other States and international organizations, and takes also decisions on matters affecting policy or the long-term future of the Organization. It also handles with applications for accession by new Members. Each State has one vote in the Assembly.

- The Board of Signatories, which is composed of telecommunications operators on the basis of one per country, each designated by the appropriate Party. These operators are the signatories of the Operating Agreement. The Signatories, who are the Organization's investors, take decisions within the Board on EUTELSAT's operation and development (decisions of an operational nature in the area of satellite procurement, decisions on fixing commercial conditions, EUTELSAT financing, etc.). Signatories' voting rights are linked to investment shares, calculated in accordance with their use of the EUTELSAT system.

- An executive organ headed by a Director General is the permanent working organ of the Organization. It implements the Board's decisions and submits proposals to it.

The EUTELSAT Convention specifies in Article III that the Organization shall have as its prime objective the provision of the space segment required for international and domestic public telecommunications services in Europe.

In practice, the Organization makes satellite capacity available for public telephony services, data transmission services, business services, and radio and television. It also provides the Euteltracs service for position-fixing and message exchange with mobiles.

In its activities, the Organization applies the principles of non-discrimination, neutrality, universality and continuity. Article III d) of the Convention states that "in the implementation of its activities, EUTELSAT shall apply the principle of

non-discrimination as between Signatories." This principle is seen in the fact that tariffs are identical for all Signatories, that all Signatories are entitled to their own respective territories in the coverage zone of the EUTELSAT satellites and that all EUTELSAT services are made available to Signatories irrespective of their geographical location or the level of their investment share in the Organization. EUTELSAT has to provide continuity for its services, and this requires careful planning of the back-up capacity in orbit for the satellites it operates and replacement of those satellites at the end of their operational life.

It should be added that under Article V b) of the Convention, "EUTELSAT shall operate on a sound economic and financial basis". The purpose of the Organization shall not be to make a profit.

### Changes which have taken place

Until recently, the European Commission paid no particular attention to the telecommunications sector. However, following moves towards deregulation on the other side of the Atlantic and then in the United Kingdom and the countries of northern Europe, the Commission began to reflect on the future of telecommunications in Europe. This resulted in the Green Paper on telecommunications in 1987<sup>4</sup>. This Green Paper was followed by an action plan<sup>5</sup>.

And yet, the Green Paper on telecommunications said that communications by satellite were to be set aside for later consideration and they were excluded from the directives published on

the basis thereof. In its Resolution of 30 June 1988<sup>6</sup> adopting the general principles of the Green Paper, the Council stated that one of the major goals of telecommunications policy was the working out of a common position on satellite communications so that this new information medium could develop in a favourable environment, taking account of the general rules of operation and exploitation of the network environment as well as the competition rules of the Treaty and existing international commitments of the Member States.

Thus it was that in its Green Paper on satellite telecommunications<sup>7</sup> of 20 November 1990, the Commission set out the principles of its policy on satellite telecommunications.

In its consideration of satellite communications in Europe, the Commission expressed the view that the principles underlying the constitutions of INTELSAT, Inmarsat and EUTELSAT, and of certain provisions enshrined in their statutes, were such as to run counter to the competition rules of the Community (in particular Articles 59 and following, 85,86 and 90 of the Treaty of Rome).

Guidelines<sup>8</sup> on the application of the Community's competition rules to the telecommunications sector as determined by the Commission (DGIV) to clarify the application of those rules to operators in the telecommunications sector also made reference thereto (points 126 to 128 and 144).

In its development of "lines of action for creating a favourable environment", the

Green Paper makes a distinction between the global organizations INTELSAT and Inmarsat, where the Member States of the Community are asked to define a common position in a number of areas, and EUTELSAT, for which the proposal is to "work towards a review of the EUTELSAT Convention and its Operating Agreement."

Major issues in this context are:

- necessary modifications to ensure direct access for users to EUTELSAT satellite capacity;
- future handling of the coordination procedure concerning the "economic harm" provision of the EUTELSAT Convention;
- necessary measures for implementing future commercial independence of EUTELSAT;
- mechanisms for ensuring cost-orientation of tariffs charged to users;
- implementation of the separation of regulatory and operational interests and opening of membership of the EUTELSAT consortium to new parties.

The Commission justifies this different treatment for the satellite organizations by the fact that the Signatories designated by the Member States of the European Union hold more than 80% of investment shares in EUTELSAT and of voting rights within the Board of Signatories. They are therefore seen as being in a position to influence EUTELSAT actions and the way in which the Organization functions, under the control of their Parties.

EUTELSAT has since endeavoured to ensure that the procedures of the

Organization - and the way in which it functions - evolve, particularly with respect to two points deemed fundamental for EUTELSAT in the Green Paper on satellite communications:

- relaxation of the consultation procedures relating to economic harm in the case of a space segment separate from that of EUTELSAT being established or used to provide international public telecommunications services in Europe.

The Board of Signatories and the Assembly of Parties have each taken a number of decisions in this respect, with the result that for some four years now, interpretation of the provisions of Article XVI a) of the Convention has been very flexible, a distinction being made between "reserved" services and "non-reserved" services.

As far as non-reserved services are concerned, i.e. services open to competition, a straightforward declaration procedure is applied. As soon as a summary of the characteristics of the planned utilization is received, the Signatory or Party intending to use a space segment separate from that of EUTELSAT can begin to do so. The information received is transmitted to the Assembly of Parties with a copy to the Board without any accompanying analysis. The Assembly merely notes the information received.

As for "reserved" services, the Assembly has preferred not to give a precise definition. The objective was to see the concept evolve alongside regulatory developments in Europe, and the normal procedure to determine economic harm continues to apply.

At the moment, it is only baseline telephony services that are included as "reserved" services.

- improved access to the space segment. A joint working group of Parties and Signatories (AP/SG) was set up to study improved access and the earth station approval procedure was subsequently alleviated, as to was responsibility for ensuring that stations comply with EUTELSAT documents on earth station approval<sup>10</sup>. Decisions were taken by the Board, and the Allottee of space segment capacity was made responsible both for proper use of the capacity leased to him (even if the end user of the capacity is in a territory other than that of the Allottee itself) and for verifying that the earth station complied with the EUTELSAT documents on earth station approval and the station's use (even if the station is operated in a territory other than that of the Allottee itself).

One Signatory, British Telecom, has set up a system whereby requests for space segment capacity submitted by licensed operators are passed through a separate body known as the Signatory Affairs Office.

In Hungary, the Signatory is represented by Hunsat, an association comprising the national broadcaster and the national telecommunications operator.

There is also an arrangement known as the "Multiple Access Arrangement". This was signed in September 1992 by the Parties and Signatories of Germany, France, the Netherlands, the United Kingdom and, more recently, Switzerland. Under this Arrangement an operator in one of the territories of the above-mentioned countries sends its application for capacity to any of

the five Signatories taking part in the Arrangement. The Multiple Access Arrangement gives concrete form to competition among Signatories by departmenting domestic markets.

### **Modifications under way**

The Assembly of Parties decided at its seventeenth meeting (13-14 December 1994) that the only practical alternative in the short and medium term was evolution within the context of an intergovernmental treaty framework starting first with changes introduced through a broader interpretation of the Agreements and then, as a second step, consideration of the appropriate amendments to the Convention and Operating Agreement.

As regards transitional measures within the context of the existing statutes, the admission of "Non-Signatory Entities" (NSEs) having direct access to EUTELSAT's space segment should be allowed, provided they accept investment shares corresponding to their utilization, subject to the notification to EUTELSAT of an arrangement at national level.

Procedures allowing the introduction of NSEs are expected to be finalized by the end of the year. A document is in the process of adoption and this will have to be signed between EUTELSAT and each NSE, specifying the rights and obligations of that NSE vis-à-vis the Organization.

A final point with respect to NSEs is that the Assembly of Parties took a decision at its eighteenth meeting (16-18 May 1995) stating that NSE arrangements are transitional measures in the evolution of the

Organization and are closely associated with the concept of more than one Signatory per country. Assuming, therefore, that the multiple Signatory concept is adopted by the Assembly and that it enters into force, NSEs would be asked to opt for Signatory status or to revert to pre-NSE status within a time limit to be defined.

A proposed amendment to the Convention mainly to allow more than one Signatory per country will be submitted for approval to the Assembly of Parties at its nineteenth (extraordinary) meeting on 13-14 December 1995. These "multiple" Signatories would be in place within two years, unless Parties and Signatories have the political will to implement such a change without delay.

The deletion of Article XVI in anticipation of full liberalization of the telecommunications infrastructure and services (this should occur within the European Union as from 1998) will also be submitted in the same proposal, together with a change in the composition of the Board of Signatories.

Currently, all EUTELSAT Signatories are entitled to participate in Board meetings as members. However, the proposal will be that only Signatories with an individual investment share of at least 0.1% of the total shares will be admitted as members of the Board of Signatories.

This proposal would not affect the voting power of each Signatory. Signatories that are not Board members would give instruction on how they themselves would wish to vote. A proposed amendment to Article 15 of the Operating

Agreement (earth station approval) will be submitted to the nineteenth meeting of the Assembly of Parties to seek the Assembly's views and recommendations to the Board on the decision to be taken. This decision is expected at the Board's first meeting in 1996.

The intention of the proposed amendment to Article 15 is that the Signatory of the territory in which an earth station is operated should be excluded from the application to have that station approved. This is in line with the obligations imposed upon the Member States of the European Union (and indirectly on the Member States of the European Economic Space and the states of Central and Eastern Europe and bilateral agreements with the European Union) as prescribed in Directive 94/46<sup>11</sup> of the Commission on the liberalization of equipment and services for satellite communications. Paragraph 20 of the Preamble of this Directive stipulates that Member States have to make sure that checks on the conformity of the earth stations to the technical and operational specifications governing access to space segment capacity of intergovernmental satellite organizations can be made directly between the operator of the station network concerned and the intergovernmental organization itself, under the exclusive control of the regulatory authority. Each Member State of the European Union was obliged to translate this Directive into its internal legislation by August of this year at the latest (apart from Portugal which was accorded a delay until January 1996).

In more general terms this Directive deregulates the sector vis-à-vis the provision

of satellite telecommunications services. However, voice telephony and public switched network traffic are excluded.

Reading together paragraphs 19 and 21 of the Preamble and Article 2 regarding modification of Directive 90/388/EEC as regards Article 6 b) implies general application of the Multiple Access Arrangement concept to all Signatories of the European Union countries.

Finally, at its eighteenth meeting, the Assembly decided to delete paragraph c) of Article XIX of the Convention, which states that an amendment which has not entered into force (entry into force requires ratification by two-thirds of the Parties whose Signatories hold two-thirds of the total investment shares) eighteen months after the date on which it was approved by the Assembly shall be deemed null and void.

In parallel, the Board of Signatories took a decision at its fifty-eighth meeting on 7 July 1995 to delete Article 22 e) of the Operating Agreement, which contained the same provision in the Operating Agreement<sup>12</sup>.

### **Long-term prospects for evolution**

Several scenarios are being prepared and examined before decisions are taken on the long-term evolution of the Organization.

After a first step towards change, which would involve direct access to the space segment, opening up the Organization to new actors and new investors as is the case with the NSEs, followed by the arrival of new Signatories once the Multiple Signatories per country approach is

adopted, the structure of EUTELSAT could be modified. A wide range of alternatives are being considered:

- A cooperative governed by an intergovernmental treaty.
- Substantial changes to the statutes within the existing governmental framework so as to set up structures similar to those of a limited-liability company; this would include the constitution of a Board of Directors and an Assembly of Shareholders. Two categories of shares would be established: shares reserved for Signatories and shares (without voting rights) which could be held by outside investors. This implies decoupling utilization and investment.
- An affiliate: an affiliate would be created as a limited-liability company subject to national law, and all or part of EUTELSAT's assets would be ceded or transferred to this new body. The relationship between EUTELSAT and this affiliate could be based on a management contract. The issues of financial relations and of decision-making and of the distribution of assets would in that case have to be addressed. In the case of a major entity active in many different areas, which is not EUTELSAT's present situation, or if the Organization were to become active in a new service requiring heavy investment, this option would probably be appropriate.
- "Umbrella", i.e. a company with a continued intergovernmental presence. A company would be set up under national law and all existing assets would be ceded or transferred to this company. However, the Parties would remain involved to continue to perform their regulatory role and take account of the political and general

economic interest dimension of the Organization in European terms.

Involvement of the Parties would require signature of a new Convention and perhaps also an agreement to grant certain privileges strictly proportionate to the public mission of the new entity. Such companies already exist or have existed in the past, e.g. Eurofima, Eurochemic and the Bank for International Settlements.

- A purely private company. The Organization would have to be dissolved and all its assets transferred to the new body.

Without prejudging the final decisions that will be taken on the long-term future of the Organization, the positions that have been adopted are still largely contradictory and not clearly defined.

Hitherto, the Parties have indicated their desire to retain government involvement so as to guarantee a continued public service mission for the Organization. Even though, in a considerable part of its activities EUTELSAT acts within a competitive environment - and has to "commercialize" itself - the political dimension of the Organization sees EUTELSAT today with 44 members (there were 26 in 1990 and all new accessions are from central or eastern Europe or from countries in the former USSR). This gives EUTELSAT a special role in tune with the "new" Europe and with the challenges that must now be faced.

#### End Notes

1. Before EUTELSAT was established on a permanent basis, the Organization

existed as Interim EUTELSAT under a provisional Agreement signed on 13 May 1977 between Administrations or Recognized Private Operating Entities. This was deposited with the French Administration, together with a Supplementary Agreement relating to the European Communications Satellite (ECS) system of 10 March 1978.

2. The Protocol on EUTELSAT Privileges and Immunities signed on 13 February 1987 entered into force on 17 August 1988. It is currently in force for more than 20 of the Organization's Member States.

3. See Article XXIII of the Convention.

4. Green Paper on the development of a common market for telecommunications services and equipment (ref: COM (87) 290) of 30 July 1987).

5. "Towards a competitive telecommunications market in the Community in 1992 - application of the Green Paper on the development of the common market for telecommunications services and equipment." (Ref: COM (88) 49) of 9 February 1988.

6. Council Resolution of 30 June 1988 concerning the development of the common market for telecommunications services and equipment by 1992, JOCE C. 257 of 4 October 1988 p.1.

7. Green Paper on a common approach in the field of satellite communications in the European Community, overtitled: "Towards Europe-wide systems and services." (Ref: COM 19) 490).

8. Document 91/C 233/02 JOCE of 6 September 1991.

9. The term "public telecommunications services" is defined in Article 1k (of the EUTELSAT Convention as meaning "fixed or mobile telecommunications services which can be provided by satellite and which are available to the public, such as telephony, telegraphy, telex, facsimile, data transmission, videotex, transmission of radio and television programmes between approved earth stations having access to the EUTELSAT Space Segment for further transmission for the public; multiservices transmissions, and leased circuits to be used in any of these services".

10. See Article 15 of the Operating Agreement.

11. Commission Directive 94/46 EC of 13 October 1994 modifying Directives 88/301 EEC (telecommunications terminals) and 90/388/EEC (telecommunications services), particularly as regards satellite communications.

12. Article 22 e): "an amendment which has not entered into force under paragraph d) of this Article eighteen months after the date on which it was approved by the Board of Signatories shall be deemed null and void."