COMMISSION DECISION

of 23 December 1992

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32.745 — Astra)

(Only the English and French texts are authentic)

(93/50/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 2 thereof,

Having regard to the notification for exemption submitted pursuant to Article 4 of Regulation No 17 on 3 June 1988 by British Telecommunications plc (hereinafter 'BT'), Société européenne des satellites SA (hereinafter 'SES') and BT Astra SA, of a series of agreements and related documents regarding the marketing and provision of television broadcasting services by satellite, which notification was subsequently amended by BT to include also an application for negative clearance,

Having decided on 3 April 1990 to open proceedings in the case,

Having given the undertakings concerned the opportunity to reply to the objections raised by the Commission pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

(1) On 3 June 1988, BT, SES and BT Astra SA notified to the Commission of the European Communities for exemption only a series of agreements and related documents regarding the marketing and provision of television broadcasting services by satellite; subsequently, in its reply to the Commission's statement of objections, BT argued that Article 85 (1) did not apply to the arrangements and by letter of 5 December 1990 formally requested the notification to be considered as amended in that respect.

A. The parties

(2) SES is a Luxembourg corporation established in 1985 for the purpose of operating satellites. Its first satellite, Astra I A, launched in December 1988, was the first medium-powered satellite not owned by telecommunications organizations ('TOs') offering international television services in Europe. At the time of notification, SES did not yet have a turnover. Capital to cover the costs of purchasing the satellite, having it launched and other expenses such as marketing and insurance, were covered by the input of approximately twenty shareholders from various Member States and others, and State-guaranteed bank loans.

In 1991, SES's turnover rose to Lfrs 3 471 954 747. A second medium-powered SES satellite, Astra I B, was launched in February of 1991.

(3) BT has a number of subsidiaries, none of which is involved in the satellite sector. BT's total turnover for the year ended March 1992 was ± £ 13 337 000 000.

BT is a licensed operator, entitled to carry out telecommunications activities in the United Kingdom, which includes uplinking signals to satellites.

According to Condition 1.1 of BT's licence granted under Section 7 of the Telecommunications Act 1984, the 'Universal provision of telecommunications services' is imposed on BT *vis-à-vis* every person who requests such services; Condition 5 further requires BT to take all steps to provide international connection services to its customers to the extent necessary to meet all reasonable demands for such services. Condition 53-5-b provides for exceptions and limitations to

(1) OJ No 13, 21. 2. 1962, p. 204/92.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

these obligations in certain cases, i.e. if the demand for such services in a given area is, or seems likely to be, insufficient to cover the costs of setting up that service there.

Television distribution by satellite

(4) TV channels are transmitted by various means, such as terrestrial broadcasting, cable and satellite. A combination is also possible, for example via a satellite to a cable operator who transmits it to the end-viewers. Transmission by satellite involves the following steps:

1. television channels are prepared by a 'programme provider';

2. the signals are transmitted from the television studio to an earth station from where the 'uplink' to the satellite takes place; programme providers must contract for such uplink services with a licensed operator, which in most EC countries is exclusively the TO;

3. on the satellite, the signals are received and amplified by a 'transponder', and then beamed back to earth. Satellites are covered by several such transponders, 16 in the case of the Astra I A satellite;

4. when the signals are 'downlinked' to the earth, they are caught by a satellite receive dish; the receiver can be:

   (a) a cable operator who then transmits the signal by cable to the TV viewers;

   (b) SMATV (satellite master antenna TV) systems which distribute to residents of a hotel or apartment building; or

   (c) TV viewers who receive the signals directly by placing satellite dishes on their rooftop; the latter is referred to as direct-to-home (DTH) reception.

   The size of the receive dish depends on the strength of the satellite being used. Low-powered satellites require very large receiving dishes, more than 1,5 metres in diameter, while the signals from medium- and high-powered satellites can be caught by much smaller dishes, suitable for individual rooftops.

   As to geographical coverage, or the satellite 'footprint', low- and medium-powered satellites can cover all of Europe, whereas high-powered satellites are generally limited to reception in individual countries.

(5) Until the launch of Astra I Á all satellites in Europe were operated by TOs, individually or collectively. The various steps in the transmission of TV channels are covered by exclusive rights bestowed on TOs by international treaties and domestic laws:

1. The uplink

According to the Radio Regulations of the International Telecommunications Union and domestic telecommunication laws in the Member States, only 'licensed operators' are allowed to uplink signals to satellites. In most countries in Europe, at the time of the notification there was only one licensed operator: the TO. In the UK, the duopoly created by the 1984 Telecommunications Act resulted in two licensed uplink providers, BT and Mercury Communications Ltd; seven other licences to provide uplink services were granted in 1988 to 1989 and a class licence was introduced subsequently. At the time the joint venture agreement was concluded, however, BT was the only licensed operator in the UK actually providing uplink services for international television distribution. SES is likewise a licensed uplink provider in Luxembourg.

2. The space segment (satellites)

The geostationary satellites in orbit for telecommunication purposes are for the most part owned and operated by international organizations, such as Intelsat (International Telecommunications Satellite Organization), Eutelsat (European Telecommunications Satellite Organization), Inmarsat (International Marine Satellite Organization) or by domestic TOs.

The Intelsat and Eutelsat treaties, which have been signed by *inter alia* all Member States, restrict other persons from operating satellites alongside Intelsat and Eutelsat satellites without having gone through an approval or 'coordination' procedure. In the notification and subsequent proceedings, the parties referred primarily to the Eutelsat procedure.

Eutelsat was established in 1982 by an intergovernmental Convention, at present signed by 32 European Governments (called the 'parties').

Next to the convention there is an 'Operating Agreement' signed by the TOs (called the 'signatories') from the States who are parties to the convention. Each member country designates one 'signatory'; in the UK, BT is the Eutelsat signatory.

TO signatories finance the Eutelsat satellites in proportion to their utilisation thereof, in other words the more a TO uses transponder capacity on a Eutelsat satellite, the more its contribution will be; signatory TOs also share in the revenue in the same proportion. At the time the joint venture was established, BT had the largest investment share.

At the outset Eutelsat operated four low-powered telecommunications satellites. The first of the Eutelsat II series of medium-powered satellites of the same kind as Astra (i.e. enabling reception by a 60 to 90 cm dish) was launched in August 1990.

Pursuant to the Eutelsat Convention, when a Party or TO becomes aware that an entity wishes to operate satellites and/or satellite uplinking and downlinking equipment independently from Eutelsat within the Party's jurisdiction, that Party or TO is obliged to furnish all relevant information to Eutelsat. The Eutelsat authorities must then determine whether the operation of that non-Eutelsat satellite:

— will be technically compatible with the Eutelsat satellites,

— will not cause the Eutelsat system significant economic harm (1).

With respect to the Astra satellite, the Eutelsat Assembly concluded that no significant harm would be caused to the Eutelsat system provided that, *inter alia*

— Astra would be used for one-way television transmission only,

— no more than four Eutelsat channels switched from Eutelsat's satellites to Astra.

(1) Article XVI (a) of the Eutelsat Convention.
In 1992, Eutelsat's Assembly of Parties adopted a Resolution according to which only those non-Eutelsat satellite systems providing 'reserved services' will be subject to the full Article XVI (a) consultation procedure.

The SAO

Following scrutiny of BT's role as Eutelsat signatory, the Office of Telecommunications, Oftel, announced in November of 1989 that a Signatory Affairs Office (SAO) would carry out BT's functions as signatory independently from BT's commercial arm; this means that UK licensed operators now have access to Eutelsat (and Intelsat) space segment capacity on the same footing as BT.

3. The downlink

The laws of most Community countries require a satellite operator to obtain the consent of the local TO for the reception in that TO's territory of downlink signals from satellites. Furthermore, in the case of Astra, Eutelsat required coordination not only in respect of the uplink to and operation of the satellite, but also with regard to the downlink into any countries party to Eutelsat.

The joint venture

(6) SES's Astra 1A satellite has a total number of 16 transponders for which customers had to be found. As the satellite television market was characterized by a predominance of English-language channels, SES concluded that a majority of the channel providers (potentially) interested in broadcasting via Astra would be located in the UK. Consequently, before the satellite was launched, the decision was taken to allocate a minimum of nine and a maximum of 11 of the 16 transponders to a joint-venture established by BT and SES, whose stated aim would be to:

— offer operators of UK-originated TV programmes a packaged service consisting of a BT uplink in the UK and transponder space on SES's satellite,

— stimulate the development of the satellite market by:

(a) encouraging manufacturers of satellite dishes suitable for so-called 'direct-to-home' (DTH) reception to increase production;

(b) encouraging retailers to promote and sell this equipment; and

(c) encouraging home-viewers to buy such dishes so that they can receive Astra's signals directly on their roof-tops.

(7) The following agreements and other documents were examined during the notification procedure:

— the main or joint-ventures agreement of 17 December 1987 between SES and BT, in which they agreed to set up the 50/50 joint-venture company BT Astra SA, and whereby SES undertook to lease transponders to the joint venture company for further disposal via a UK licensed operator (thus not necessarily BT) to final customers as a packaged contract including the uplink,

— four side-letters dated 17 December 1987 relating to:

— the allocation of options to BT of transponders on the Astra satellite,

— SES's undertaking in relation to Clause 6 (4) of the agreement concerning its obligation not to divert satellite business from the UK,

— the formation of a joint marketing company (Satellite Promotions SA),

— SES's franchise from the Luxembourg Government as to the use of the Astra satellite,

— the BT/SES joint-venture marketing plan, which detailed the marketing activities to be undertaken by the parties: BT would concentrate on facilities marketing, i.e. finding customers for the service, and SES would concentrate on retail marketing, i.e. the receiver equipment industry and end-users,

— the main services and separate services agreements, likewise relating to the marketing activities,

— the agreements between BT and television programme providers. These agreements are not uniform. Most are for a period of 10 years, with a lump sum being paid in advance by the customer for the full period covering both uplink and transponder lease; the price paid decreases in proportion to the number of transponders leased. One agreement is for three years, with the possibility of extending to 10 years; in the first three year period, the customer is charged monthly, thereafter a lump sum is paid. Only in one agreement is a distinction made in the amounts being paid for the uplink and the transponder lease.

The joint venture arrangements were to continue for as long as the Astra satellite would remain technically 'alive', i.e. normally 10 years.

(8) Individual provisions which were of relevance in the Commission's examination were:

1. Clause 3. The transponders covered by the joint-venture agreement between SES and BT were leased to BT Astra SA, which in turn would lease them to a 'licensed UK operator'. Pursuant to a side-letter of 17 December 1987 between the parties, SES agreed that the Joint Venture would grant BT options over 9 transponders, to be disposed of within a stated period. BT in its turn would offer a single contract to programme providers comprising both the uplink by BT and a space on the Astra satellite.

2. Clause 5 covered BT's rights and obligations 'where it is the licensed UK operator'. Sub (1) provided that although BT had the right to determine the component for the uplink service to be included in the total price to the customer, it would consult with SES in setting this price.

3. Clause 6 covered SES's rights and obligations. Clause 6 (1) provided that although SES had the right to determine the price which was charged to UK customers for the use of transponder space on the Astra satellite, it would consult with BT in setting that price even where BT was not the 'licensed operator'.

4. Clause 5 (2) obliged BT to make the Astra satellite the satellite of first choice in marketing TV services, and not to discourage use of Astra in its pricing and marketing, for

example by charging customers using the new medium-powered Eutelsat II series of satellites (at the time of the joint venture not yet launched) lower margins or uplink fees than those using Astra.

5. Similarly, Clause 6 (5) obliged SES to use its best efforts to ensure the use of BT's uplink services to the transponders, which was consistent with the 17 December 1987 side-letter whereby SES granted options with respect to nine transponders to BT.

6. Clause 6 (4) obliged SES not to seek to divert UK-originated programmes, i.e. programmes physically prepared primarily in a UK studio, to uplink outside the UK. According to the side-letter of 17 December 1987 with regard to Clause 6 (4), SES also had to refrain from encouraging programme providers to prepare their English-language programmes in studios outside the UK. Specifically, SES was obliged not to induce programme providers to use studios in and uplink from Luxembourg by providing commercially preferential terms 'either for the satellite capacity or for the uplink services' (SES being licensed to provide uplink services in Luxembourg).

7. Clauses 5 (3), 6 (2) and 7 contained provisions aimed at facilitating transfer to the Astra satellite of customers hitherto using satellite services on other satellites. In this context, BT could provide its existing customers (transmitting via the Intelsat I or Eutelsat I satellites) the facility of 'double-illumination', i.e. simultaneous transmission to both satellites. As customers would be hesitant to 'double-illuminate' if that meant paying for two full leases, these arrangements provided for BT and SES to bear part of the costs. Furthermore, BT undertook under certain conditions to facilitate early termination by customers of existing contracts.

8. Although SES was contractually free to market the transponders not covered by the joint venture arrangements as it saw fit, its freedom was limited by Clause 6 (4) which provided that all UK originated programmes (i.e. prepared in studios in the UK) uplinked to the Astra satellite had to be marketed through the joint-venture and by Clause 6 (5) which determined that where a customer planned to uplink from the UK, the terms offered to that third party could not be more favourable than those offered to the JV. Furthermore, SES would endeavour to ensure that the service offered by BT Astra in the UK was not 'mutually inconsistent' with the service offered by SES in other countries.

9. Clause 6 (6) provided that unless otherwise agreed between BT and SES, SES would not utilize transponders on satellites other than Astra 1A for programmes prepared in or uplinked from the UK while any of the transponders covered by this Agreement remained available for use.

10. Pursuant to Clause 9 of the joint-venture agreement and the terms of the customer contracts, the channel provider paid BT a lump sum covering the uplink service and the transponder lease. The latter amount was passed on in its entirety by BT to BT Astra SA, which in the turn passed on 90 % to SES; 10 % went back to BT as the 'BT Service Charge'. In other words, for its involvement in the joint venture BT received;

— the uplink fee,

— the 10 % BT service charge on the transponder lease.

Clause 9 also referred to a 'Eutelsat payment' to be made per transponder by SES to Eutelsat; in reply to a request for information from the Commission, the Director-General

of Eutelsat stated that 'there are no payments to Eutelsat whatsoever, nor indeed any other arrangement of payment in kind rather than cash, nor any exchange or transaction of any kind possessing any value, as between Eutelsat and SES or any other party which could be deemed as related to utilization of the GDL (Astra) satellite. We have not seen and are not aware of the contents of the joint-venture agreement of 17 December 1987 referred to in your letter'.

As the joint-venture agreement did not bestow any absolute exclusivity on BT, in theory any other 'licensed UK operator' could have leased the transponder capacity from BT Astra and conclude the customer contracts comprising uplink and transponder space with the programme providers. However, in that event the 10 % 'BT service charge' would continue to be paid by BT Astra to BT; the 'licensed operator' in fact carrying out the coordinating function would only receive the fees for its uplinking activities, while BT would still receive 10 % for an operation in which it played no apparent role, except that of being part owner of the joint-venture company.

Termination of the joint-venture

(9) On 3 April 1990, the Commission initiated proceedings under Regulation No 17, having come to the preliminary conclusion that the notified arrangements fell under Article 85 (1) of the EEC Treaty and could not benefit from an exemption under Article 85 (3). Subsequently, the parties presented a proposal whereby the joint-venture agreement and related side letters and service agreements would be terminated, but the customer agreements concluded under the joint-venture arrangements would remain in place pursuant to a novation resulting in direct transponder leases from SES to BT instead of via the joint-venture company. As the removal of the joint-venture company from the chain of transponder leases from SES to, ultimately, the programme providers, did not in reality change the *status quo*, the Commission, on 26 July 1990, sent a statement of objections to the parties, who presented their views in writing and orally at a hearing held for that purpose on 13 and 14 November 1990.

(10) On 30 January 1991, the parties signed an agreement terminating their joint-venture arrangements, subject to the same conditions as contained in the proposal referred to above in recital 9.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(11) The arrangements between the parties restricted competition in the markets both for the provision of satellite transponder capacity for the distribution of television channels and for uplink services. The effects of the cooperation between the parties were felt both in the United Kingdom and elsewhere in the Community.

1. *Restriction in the market for space segment capacity*

(12) SES and BET are direct competitors in the European market for the provision of space segment capacity for the transmission of television channels.

(13) As the owner of the Astra I A satellite, SES could offer 16 transponders to programme providers seeking satellite transmission.

(14) BT has since 1983 been offering space segment capacity on Eutelsat (and Intelsat) satellites to programme providers. Pursuant to Article 16 of the Eutelsat operating agreement, all applications for the allotment of Eutelsat space segment capacity to programme providers passes through the signatories, in the UK BT. BT arranged for the ultimate disposal of the transponders and concluded the customer contracts, direct contacts between the latter and Eutelsat being excluded by the terms of the operating agreement. Although the final allotment of space segment capacity is determined not by the individual signatory but by the Board of signatories, BT was at the time the joint-venture was concluded the signatory with the largest investment share. According to the notification, BT was providing more TV distribution services by satellite than any other European telecommunications organization; the fact that BT did not actually own the space segment capacity offered to customers does not mean, as it has argued, that it was not in competition with SES, given the context of the Eutelsat arrangements.

It is illustrative to note that the Eutelsat Assembly stated as a condition for Astra's coordination that there is an increased joint effort and aggressiveness by signatories ... in a drive to find new business ... in order particularly to make up for the loss of revenues originating from the implementation of the GDL (Astra) satellite. BT, as the UK signatory, had to reconcile this commitment with its obligation under the agreement with SES to make Astra the satellite of first choice.

(15) BT has furthermore stated that BT and SES could not be regarded as competitors because BT could not, in 1986 to 1987, offer customers medium-powered capacity, but only low-powered Intelsat and Eutelsat capacity; it was not until the middle of 1990 that the first medium-powered Eutelsat II series satellite was launched. This argument must be rejected in that it presupposes that there are distinct separate markets for low-powered and medium-powered capacity. In fact, low-powered and medium-powered satellites offer customers the same possibilities as far as geographic coverage is concerned and as regards transmission to cable head-ends; medium-powered satellites simply offer the added feature of enabling DTH reception by relatively small receive dishes. DTH transmission and transmission by cable can however take place simultaneously. In countries with well-developed cable systems where there is thus less need for individual reception, cable subscribers will not know whether the programmes they receive are being transmitted via low- or medium-powered satellites — or in fact by other means.

Recent statistics [1] indicate that 73 % of all European homes receiving Astra channels do so via cable (and smatv), the percentage in highly-cablized countries such as Belgium and the Netherlands going up to nearly 100 %.

BT itself stated in its reply to the statement of objections: it is clear that medium-powered satellites were competing with low-powered capacity, referring in that context to the Eutelsat coordination procedure aimed at determining the competitive impact of medium-powered capacity on low-powered capacity.

(16) Pursuant to the joint venture agreement and in particular Clause 6 (4) which provided that all UK originated programme channels uplinked to the Astra satellite would be marketed through the joint venture, SES agreed not to enter the market in question independently but in cooperation with a direct competitor, BT. The restriction of competition flowing from Clause 6 (4) was reinforced by specific clauses in the main agreement between the parties, which also constituted restrictions of competition in the sense of Article 85 (1), viz:

— Clause 6 (1), which obliged SES to consult with BT in setting the price charged to UK customers for the use of transponder space on the Astra satellite,

— Clause 5 (2) which obliged BT not to offer more favourable terms with respect to the use of other satellites for TV services than Astra.

Through these two provisions, the conditions for the use of transponder capacity on Astra and all satellites on which BT leased capacity could be aligned: Clause 6 (1) achieved such alignment with respect to other existing satellite capacity and Clause 5 (2) for future satellite capacity. Although Clause 5 (2) referred to the Eutelsat II satellites, this was by way of example only, and BT's obligation not to discriminate against the Astra satellite by its pricing policy or other policies extended to all other satellites for TV services. These arrangements involved an all-over and far-reaching price coordination between the two parties and deprived customers of a new, alternative source of supply for transponder capacity in the UK.

The gravity of this alignment was reinforced by the consideration that aside from its role in Eutelsat, BT was also in its own right a direct potential competitor of SES: given BT's financial position as well as its technical and commercial know-how in the satellite sector, BT would not experience any barriers to entering the market for the operation of satellites independently; its unwillingness until now to do so, which BT argued indicated it was not a potential market

[1] Cable & Satellite Express, 10. 7. 1992.

entrant, is a purely subjective consideration and cannot be relied upon in determining potential competition.

Furthermore, the restrictions regarding the supply of transponder capacity extended beyond:

1. the transponders covered by the agreement between BT and SES,

2. the UK and

3. the Astra satellite itself:

re 1. and 2.: Clause 6 (4) provided that all UK-originated programmes must be marketed through the joint venture with BT and that SES would not seek to divert UK-originated programmes to uplink outside the UK.

As clarified by one of the side letters, SES had also to refrain from encouraging programme providers to prepare their English language programmes in studios outside the UK. Even if customers were to do so, Clause 6 (5), which determined that customers uplinking from the UK outside the joint venture could not enjoy more favourable terms than joint-venture customers, ensured that there would be no benefit in circumventing the joint venture.

re 3.: Clause 6 (6) obliged SES not to utilize transponders on satellites other than the Astra IA satellite for programmes prepared in or uplinked from the UK while any of the transponders covered by the joint venture agreement remained available.

2. *Restrictions in the uplink market*

(17) UK programme providers who wished to lease transponder capacity on the Astra satellite were obliged do so via the joint venture. Although theoretically a licensed operator other than BT could have been used, SES's obligation to ensure the use of BT's uplink to the transponders (Clause 6 (5)), and the fact that the 10 % BT service charge would go to BT regardless of the licensed operator to whom BT Astra SA ultimately leased the transponder for further disposal to customers, meant that in reality the contract partner with whom programme providers were faced for access to Astra was BT. Pursuant to Clause 3 (1), the service offered to customers by the licensed operator comprised the transponder (s) and the uplink. Induced by more favourable conditions in the event they opted for long term leases, most customers (i.e. representing eight out of nine transponders leased at 1 December 1989) concluded 10 year customer contracts with BT. The arrangements involved the following restrictions:

Restrictions between the parties

— competition for uplink services between the parties: BT and SES are direct competitors in the uplink market, as both are licensed to provide uplinking services. Although the licences of BT and SES related only to their respective national territories, programme providers are not bound by national boundaries and could either transmit their programmes by conventional or other means to another territory for uplinking or establish studios in the locality where the conditions are the most favourable. At the oral hearing, SES has confirmed that four German television programmes were uplinked to satellites other than Astra in Germany, downlinked in Luxembourg and then uplinked again to the Astra IA satellite by SES. RTL-4, previously RTL-Véronique, a channel aimed primarily at Dutch-speaking audiences, set up a studio in Luxembourg to allow direct uplinking by SES to Astra IA.

However, various clauses in the main agreement between BT and SES eliminated any real competition between them as far as the uplink service was concerned: Clause 5 (1) obliged BT to consult with SES in setting the price for the uplink component, Clause 5 (2) obliged BT not to charge lower uplink fees in the event of uplink services to other satellites, e.g. Eutelsat II satellites, and Clause 6 (4) and 6 (5) sought to restrain SES from inducing programme providers to use its uplink facilities

in Luxembourg by providing commercially preferential terms either for the satellite capacity or for the uplink services.

Both parties have argued that these provisions did not have any practical consequences, as UK programme providers would not have been interested in an uplink by SES in Luxembourg anyway, either following transmission from the UK or directly in the case of relocation of TV studios. Transfrontier movement in the uplink market is, however, possible, as illustrated by the case of the German and Dutch television channels referred to above. The provisions of the joint venture and notably the side-letter to Clause 6 (4) were indeed precisely aimed at preventing this type of movement and cannot, as the parties suggest, have been without any practical significance. In fact, BT subsequently confirmed that the restrictions on SES as regards its uplinking activities in Luxembourg were inserted because there was a concern that there could be dumping of uplink prices which would then distort what would be the decision of an economically rational TV company ... It might have been in Luxembourg's interest given that most of the customers were distant to have priced that (uplink) capacity at an unrealistically low rate,

Restrictions vis-à-vis third parties

— foreclosure of other (potential) uplink providers: the fact that under the joint venture, most programme providers who signed the BT customer contracts are bound to BT for the uplink services during a period of 10 years represents an absolute 10-year foreclosure for other licensed UK operators from providing this service as regards the Astra satellite, which until three years after the arrangements were concluded was the only medium-powered European satellite. Furthermore, pursuant to Clause 6 (6), SES could not use transponders on other satellites (e.g. Astra IB) for programmes originated or uplinked in the UK as long as any of the transponders covered by the joint venture agreement remained available. Also, until the SAO arrangements referred to above under recital 5 (2) were introduced, other uplink providers did not have access to Eutelsat or Intelsat space segment capacity,

— limitation of customer choice: UK customers interested in broadcasting via Astra were obliged to accept the uplink service provided by BT, whereas they may have found or may find more favourable terms elsewhere. The tying of BT's uplink service to the satellite capacity on Astra was aggravated by the fact that under the customer contracts, most customers were obliged to pay one lump sum covering both elements of the contract; unaware of the price being charged for the uplink, respectively transponder capacity, customers were thus not in a position to negotiate the conditions imposed on them.

3. *Appreciability and effect on trade between Member States*

(18) For the above reasons, the agreements resulted in serious restrictions of competition which given the size of all parties concerned, including the customers involved, were appreciable. By the very nature of the service in question and also in view of the individual clauses aimed at discouraging or preventing cross-border activities in both the transponder and uplink markets, trade between Member States was affected and Article 85 (1) of the EEC Treaty was therefore applicable.

B. **Article 85 (3)**

(19) In order for the Commission to declare the prohibition of Article 85 (1) inapplicable pursuant to Article 85 (3), the requirements provided for in Article 85 (3) must all be met. In the first place, the restrictive agreement must result in certain benefits in terms of improving production or distribution, or promoting technical or economic progress, which outweigh the disadvantages for competition.

As a general argument, the parties have stated that any restrictions of competition resulting from their cooperation were outweighed by the benefits which ensued in terms of economic progress in the provision of satellite television services and

improved distribution thereof. Admittedly, Astra, as the first privately-owned satellite for international television services to compete with the Intelsat and Eutelsat satellites, and furthermore the first medium-powered satellite, contributed to increasing competition on the market for television transmission by satellite. However, in the Commission's view these benefits were a result of the existence of the Astra satellite as such and not of the arrangements concluded between BT and SES for the purpose of marketing and operating the satellite. The question is thus whether SES could have entered the market with the Astra 1A satellite independently of the arrangements with BT or, rather, as the parties have argued, that those arrangements were indispensable to enable a new competitor to the existing Eutelsat and Intelsat systems to emerge successfully.

(20) The parties did not argue that SES needed to cooperate with BT in order to overcome the first hurdles facing new market entrants in this sector, namely the heavy costs involved in acquiring the satellite itself and the costs of launching it. These costs SES was able to bear by itself and it has indeed stated that it had no wish to enter the market for the provision of satellite capacity for the transmission of television channels with any partner. However, the particular features of this market represented obstacles to market entry which SES concluded could only be overcome through the arrangements with BT.

(21) Specifically, the parties have argued that in order for SES to exploit UK demand, it had no alternative but to conclude a joint venture with BT, because:

— BT's position as the UK Eutelsat signatory enabled SES ultimately to obtain Eutelsat approval for the operation of the satellite; Eutelsat requires two signatories to embark on the coordination procedure, so that SES needed another signatory aside from the Luxembourg PTT, which supported the Luxembourg-based company. In view of the considerations regarding English language programmes (see recital 6 above) and BT's apparent interest in providing uplink services, BT was chosen,

— BT's position at the time the arrangements werde made as the sole effective uplink provider in the UK ensured potential customers that there would be no problem in obtaining the necessary uplink to the Astra satellite.

Although these considerations may well have resulted in SES's point of view at the time, they do not constitute valid objective reasons for the restrictive arrangements between the parties.

(22) The parties have submitted that although there are no provisions to this effect in the Eutelsat Convention, SES required a second signatory in order to embark successfully on the Eutelsat coordination procedure. It has also been established that more than a year before the main agreement was concluded, BT offered to contribute to the commercial success of the then-planned SES Astra satellite system by *inter alia* serving as the required second Signatory. BT clearly stated that this assistance would be given in the context of an agreement between BT and SES. It is therefore understandable that SES, as it has stated in reply to the Commission's statement of objections, did not expect BT to provide its services as signatory without some form of compensation.

There were, however, no objective reasons to justify the imposition of a partnership on SES as a *quid pro quo* for BT's assistance in the coordination procedure. Article XVI of the Eutelsat Convention merely states that a Signatory which becomes aware of any person within its territory intending to utilize non-Eutelsat space segment equipment, must furnish all relevant information in order to allow the Parties to establish whether there is likely to be any significant harm to Eutelsat. This provision does not in any way require the Signatory engaged in the coordination procedure to enter into some form of cooperation agreement with the applicant market entrants, nor are there any other provisions in the Convention or Operating Agreement which do so. In fact, as noted above under recital 8 (10), the Director-General of Eutelsat stated not to have any knowledge of the arrangements between BT and SES. In other words, when BT became aware of customer interest in the Astra satellite in the UK, that fact alone gave rise to BT's obligation to

coordinate under Article XVI; BT has submitted correspondence with programme providers dating back to well before the conclusion of the agreement with SES in which such interest was clearly expressed. One programme provider in a letter dated 9 October 1986 formally advised BT as the UK Signatory to Eutelsat of its very real interest in using Astra and expressed its concern that BT had not registered that interest at a previous Eutelsat meeting.

SES has noted that according to the OFTEL statement on the setting up of the SAO (see above recital 5 (2)) BT is entitled to a fee equivalent to 7 % of the space segment charge to cover its costs in providing its services as signatory; SES compared this fee to the 10 % BT service charge due under the notified arrangements. The Oftel statement cannot, however, be used as a point of reference in this case in that it refers to situations in which BT acts as an intermediary for applicants seeking space segment capacity on Eutelsat (and Intelsat) satellites and involves a far broader range of Signatory activities than its involvement in the coordination procedure alone. Furthermore, the arrangements between BT and SES went much further than the mere payment of the BT service charge and resulted in the serious restrictions of competition referred to in recitals 12 *et seq.*

In any event, an agreement concluded for the purpose of facilitating or complying with a procedure in which the entry of new competitors is subject to the approval of existing competing market participants cannot benefit from an exemption under Article 85 (3), the requirements of which relate to objective advantages such as improvements in production, distribution or technical and economic advances.

(23) The Commission cannot accept that the arrangements between BT and SES were indispensable in order to ensure that UK programme providers would be provided with the necessary uplinking services by BT, at that time the only *de facto* provider of such services for television distribution via satellite in the UK.

In the Commission's view, BT was obliged both by Conditions 1 and 5 of its licence under the Telecommunications Act 1984, and by the provisions of Community law, in particular Article 86, to provide the uplinking services without requiring to participate in the leasing of transponders on SES's satellite to customers, thereby collecting the 10 % BT service charge to be deducted from SES's revenues for the lease of the satellite capacity.

In reply to the Commission's statement of objections, SES argued that at the time the arrangements were concluded, it was far from clear that it could count on an obligation on the part of BT under its licence to provide uplinking services. It noted that Oftel's decision in the PanAmSat case, whereby it was established that BT's obligations arise as soon as it receives a request from a person in the UK for a given service, provided the customer is willing to pay a reasonable price, was not issued until March 1988. Furthermore, SES argued that even if Oftel's position on this point had been clear in the period preceding the conclusion of the joint venture agreement in December 1987, BT would probably not have been obliged to build an earth station if customers had not already entered into contracts for the supply of the service.

SES's arguments cannot be accepted. In the first place, if BT's obligations under its licence were not clear at the time SES needed to reassure customers that uplinking to the Astra satellite would be provided for, it was not by entering into restrictive arrangements with BT that the situation would be clarified. PanAmSat, which actually experienced difficulty in obtaining uplink services by BT, did not enter into a joint venture with the latter, but made representations to Oftel. SES, however, never put the issue to the test. Well before the arrangements between the parties were concluded, BT engaged in correspondence with programme providers who expressed a clear interest in the Astra IA satellite; in October 1986, one potential Astra client formally advised BT that it had a very real interest in using Astra (see above rectical 22) even on the basis of restricted downlink reception possibilities in northern European countries. In the absence of other uplink providers for television distribution at that time, all uplinking services to the Astra IA satellite from the UK would necessarily accrue to BT. However, before those customers could translate their interest into commitments firm enought to actuate BT's uplinking obligation (according to Condition

53.6 of BT's licence it is not necessary that a contract actually be concluded), the arrangements between BT and SES were finalized. Again, the issue was not put to the test. Furthermore, it is not clear why simply by virtue of the joint venture agreement with SES, BT did decide that the building of a dedicated earth station was justified; BT itself has stated that it installed a new dedicated uplink terminal to access the Astra IA satellite ... prior to BT securing any customers for service on the Astra IA satellite.

Finally, BT's capital investment in these installations represented ± 3 % of SES's total expenditure in satellite construction and launching costs. Some arrangement far less restrictive than the joint venture agreement must have been possible to ensure BT that it would recoup this investment.

As far as Community law is concerned in this connection, as a matter of general principle, it should be clear that in the telecommunications sector, characterized by activities which can only be carried out by operators such as BT licensed to do so, the provision of services under licence to market participants must be freely available and cannot be made subject to market entrants concluding restrictive agreements with the licensed operator. The fact that SES was not satisfied that Community law was sufficient to compel BT to provide uplink services does not justify the solution it finally opted for. Again, SES did not put the issue to the test.

(24) From the outset, the parties were informed that on the basis of the above arguments relating to Eutelsat coordination and uplinking services, the requirements of Article 85 (3) did not seem to be met. A further line of argumentation in support of the arrangements was subsequently developed, relating to:

— the benefits of a single packaged customer contract covering both uplink and transponder capacity,

— the need for BT's involvement in finding customers in the UK for Astra I A.

(25) According to the parties, a single customer contract comprising uplink facilities and satellite capacity placed the sole responsibility for the entire service on one entity, BT. For the customer, this was not only convenient but could lead to a quicker resolution of technical problems; under the packaged arrangement, BT would be most likely to take measures to restore degradations in signal quality, regardless of their origin, for example by strengthening the uplink signal in order to compensate for a weaker downlink signal, the latter deficiency otherwise not falling under BT's responsibility. If there were two separate contracts, the uplinker (BT) and the satellite provider (SES) would only monitor their own responsibilities and there would be no control of the service as a whole. Neither would be willing to take corrective action until it had been established on which part of the transmission path the fault lay.

(26) In the Commission's view, however, no reasons have appeared why a bundled contract offers technical advantages not available in the case of two separate contracts. In fact the following considerations run counter to this argument:

(a) in order to provide uplink services, an operator such as BT must have the benefit of a licence. In return for the privilege of being allowed to provide such services, the licensed operator must ensure, to the extent he is capable of doing so, that the service actually reaches the viewer in the form of clear and continuous reception of the television programmes on his screen. If the uplink provider is capable of influencing the quality of the end product ultimately received by the viewer, he is, in the Commission's opinion, obliged to do whatever is necessary in that respect. If it subsequently appears that extra efforts by the uplink provider were necessitated by defects in parts of the transmission path for which he is not directly responsible, the uplink provider is of course entitled to compensation from the entity responsible for the deficiency;

(b) the parties' contention that separate contracts would tend to slow down the remedying of signal problems ignores the fact that even under a packaged contract, whatever party

turns out to be responsible for the deficiency will be liable *vis-à-vis* the other party for any loss of revenue. It is thus directly in the interest of each party that faults are detected and remedied immediately, in order to limit their potential ultimate liability. This interest is not in any way linked to the presence of a bundled contract;

(c) in the statement by the Director-General of Oftel regarding the independent PanAmSat satellite (see above recital 23), reference is made to Condition 35 of BT's licence, which contains a general prohibition of linked sales. The Director-General notes that although in the case of Intelsat satellites (and the same reasoning would apply with respect to Eutelsat), users have no direct access to the satellite sector and BT as signatory is permitted to provide both the uplink and the satellite sector, this argument would no longer hold with the advent of independent satellite systems ... and unbundling would be required. If there was an alternative satellite system, ... customers would be free to make their own arrangements with the independent satellite operator. Nowhere in the Director-General's remarks is there any mention of a technical reason why uplink and satellite sector should be provided by the same entity.

The Commission's position was confirmed by programme providers using the Astra IA satellite. Users together leasing the largest number of transponders denied that there were any technical advantages to a bundled contract. To illustrate the fallacy of the argument that BT would be the single point of contact for customers in case of problems, programme providers cited the case of a technical incident which occurred in the spring of 1989. Having contacted BT as directly responsible under the customer contracts, one programme provider was subsequendly advises to contact SES to solve the problem, while another programme provider stated that at a later stage it also discussed the problem directly with SES because BT had been tardy in dealing with the matter.

(27) Also in support of the bundled customer contracts, the parties argued that it is contractually efficient to negotiate only one contract covering an entire service rather than engaging in separate contract negotiations for each element. Furthermore, a customer with a single contract for both uplink and transponder capacity is better placed to secure compensation for faults. For example, if the uplink service fails due to BT's fault, the customer will receive a rebate for the satellite part of the service as well as for the uplink. In the case of two separate contracts, one party would not be likely to make a rebate for the failure of the other party's service.

In the Commission's view, the efficiency which may result from negotiating only one contract does not outweigh the disadvantages which such tying arrangements entail, both for customers who are faced by bundled services and for competitors in the services concerned who are thereby foreclosed. With regard to the compensation for faults, the contractual arrangements involved in the case of separate contracts would admittedly have to contain provisions which ensure that customers are not obliged to pay for a service A they have not been able to enjoy not through any fault of their own but because a third entity providing a service B on which the execution of service A depends has not performed that service B satisfactorily or at all.

(28) In conclusion, the Commission considers that the bundled contract does not bring about any benefits which justify the arrangements between the parties. In reaching this conclusion, the Commission took into consideration the views expressed by the four programme providers using the Astra IA satellite via customer contracts with BT:

1. programme provider X which leased several transponders on Astra IA stated The principal issue raised in the meeting 'with Commission officials' is X's dissatisfaction with the

'bundling' of services in its agreement with ... BT ... The lack of transparency in packaging the uplinking and the transponders is a major objection; X came to agreement with BT only because it had no alternative ... The reason for this is that BT obtained exclusive rights to market a number of transponders on the Astra satellite to UK customers; As a buyer, X would have preferred dealing with SES;

2. programme provider Y stated that it would have preferred two contracts, because then there would have been room for negotiating different prices. Several months before finally signing a contract with BT for two transponders on Astra IA, Y wrote to Oftel concerning the severe problems we are having in obtaining competitive quotations for the provision of medium power satellite capacity ...; we at Y, along with other satellite television companies, have invited Eutelsat and SES Astra to submit bids for the provision of such capacity. Both organisations have informed us that we must deal through British Telecom International; What makes matters worse for us is that BTI require as part of the contract for satellite capacity that we use their earth station uplink site at Woolwich. We believe this is using their monopoly to make a linked sale;

3. programme provider Z stated that the view was taken that it was better to deal with one person for the overall contract and service. In assessing this statement, the Commission took into consideration

— the fact that no reasons were given why this view was taken; with regard to the technical advantage of dealing with one entity, Z's first reaction as to whom it would contact in case of problem was SES,

— Z was 25 % owned by BT at the time the customer contract was concluded; all important decisions, such as transponder leases, were taken unanimously by the three shareholders;

4. programme provider Q is a non-UK company which already prior to the emergence of Astra IA was obliged to locate its studios in London because it was not clear whether the TO in its own territory would provide uplink services to Intelsat space segment capacity, a service which BT was willing to provide. Q stated that as it had already located its transmissions to London, British Telecom was the only one who could provide Astra capacity. Although Q does cite certain advantages in having a bundled contract, its starting point appears to have been that capacity on Astra could only be acquired through BT; also, the advantages it cited had never been put to the test in practice.

The parties have argued that there was no customer interest in an unbundled service at the time and that statements made by programme providers now when market conditions have changed do not necessarily reflect what they requested at the time the agreements were concluded. It is true that the Commission has not found any evidence of written requests by customers to BT and SES for separate, unbundled services. As BT noted during the course of the procedure, however, BT was engaged in oral discussions concerning Astra IA with programme providers before the arrangements with SES were concluded, which were not, however, evidenced by any 'correspondence in the file'. In a letter to Oftel, however, quoted above under 2., one programme provider stated that it and others had applied to SES directly for the provision of satellite capacity, but had been referred to BT as the entity to deal through. In any event, customers would necessarily have been denied unbundled services in view of Clause 3 (1) of the main agreement which stated that 'The service offered to customers will comprise the transponders covered by this agreement and the addition of the uplink'.

SES has stated that by choosing for long-term contracts, customers have indicated that they were not injured by the bundled service. In the Commission's view, however, it was more likely the up to 50 % savings programme providers

enjoyed by opting for a long-term contract which prompted their choice.

(29) On the marketing side, the parties argued that the pooling of their respective skills, resources and experience was required in order to promote the use of the Astra satellite. BT with several years of experience in marketing and providing satellite services to UK television programme providers was responsible for finding customers, while SES's marketing responsibilities related to promoting the retail side, including both equipment manufacturers and viewers.

The Commission does not agree that SES could not have found customers itself in the United Kingdom, independently of BT's marketing efforts. The total number of television programme providers interested in satellite television in the UK was less than 10 at the time the joint venture was concluded, and there is no apparent reason why SES's commercial team could not have approached these potential customers itself. In fact, one programme provider has stated that SES's commercial director was very actively promoting the Astra satellite in the UK himself, several years before it was launched and before the joint venture was established. SES has argued that its initial contacts with customers were only translated into binding contracts with BT's assistance. Given the fact that potential customers were already at an early stage informed that they must deal through BT, well before the first customer contracts were signed, it is not possible to establish in retrospect whether customers felt BT's involvement was indispensable in this respect. It should be noted, however, that SES has sold the transponders not covered by the joint venture arrangements directly to programme providers in a number of countries, without the need for a joint venture with the local telecommunications organization.

Finally, BT's involvement in the sale of transponders on the Astra satellite admittedly facilitated the transfer of BT's Eutelsat and Intelsat customers to Astra thanks to the joint venture agreement provisions on double-illumination and early termination of existing customer contracts. However, several customers have noted that they believe the reduction in the satellite price which could have been achieved in the absence of BT's involvement in the Astra satellite would have amply offset the extra costs they would have had to bear in the absence of free of charge 'double-illumination'.

(30) The 'retail' marketing being carried out by SES is a continuation of an area of activity in which, according to the parties, it 'had already been active on a pan-European basis including the UK', and which in any event it would have pursued, also in the absence of the arrangements with BT.

Conclusion

(31) In view of the foregoing, the Commission has concluded that as the arrangements between BT and SES:

— did not bring about any improvements and benefits on the market in question, and

— were not indispensable in order to ensure SES's entry into the market for the provision of space segment capacity,

the notified arrangements were not eligible for exemption.

Under these circumstances, it is not necessary to examine whether the other requirements of Article 85 (3) are met.

C. Article 3 of Regulation 17

(32) Pursuant to Article 3 of Regulation 17, the Commission may, by decision, find that there is an infringement of Article 85 of the EEC Treaty and require the undertakings concerned to bring such infringement to an end. This implies not only the termination of restrictive agreements between the parties, but also the elimination of restrictive effects residing in contracts which have been concluded with third undertakings under the terms of the aforesaid restrictive agreements.

In the case at hand, after the parties had been heard in accordance with Article 19 (1) and (2) of Regulation No 17, they informed the Commission that the joint-venture agreement between themselves, and various ancillary agreements and side letters, were terminated on 30 January 1991; under the provisions of the termination agreement, existing customer contracts will remain in force, whereby the transponder lease takes place directly from SES to BT instead of passing through the

joint-venture company; upon expiry of such contracts, BT shall have no further rights with respect to the transponders concerned nor any others on Astra I A or Astra I B.

(33) The termination of the joint-venture agreement ensures the commercial autonomy of the parties for the future. However, the customer contracts which were concluded by BT under the joint-venture arrangements continue to be in force pursuant to Clause 5.1 (1) of the termination agreement without any modification.

These contracts perpetuate the restrictive effects resulting from the joint-venture agreement because customers who wished to transmit their programmes via the Astra IA satellite were not given the choice of concluding separate contracts for, on the one hand, uplink services and, on the other hand, the lease of transponder capacity. Furthermore, the terms of those customer contracts were determined by BT and SES in the context of the joint-venture arrangements, i.e. under conditions of distorted competition. This does not mean that the customer contracts, simply because of their links with the restrictive horizontal agreements, are also caught by Article 85 (1). However, the restrictive effects which these contracts perpetuate can only be eliminated when the customers have been given the right of readjustment. Therefore, they must have the option to remain committed to the customer contracts as signed with BT, to terminate those contracts or renegotiate the terms thereof. To this end, and within one month of the notification of this Decision to them, BT and SES shall inform programme providers who signed contracts with BT for international TV distribution services via the Astra IA satellite prior to 30 January 1991, that during the four months after having been so informed, they may, if they so wish,

— renegotiate the terms of the contract, or

— terminate the contract, taking into account a reasonable period of notice.

Customers who choose to renegotiate or terminate must in any event be ensured that the uplink services and the use of the transponder capacity will continue to be provided to them without interruption during the transitional period.

Customer contracts which at the choice of the customer continue to run under the original terms would only be restrictive of competition if they result in the foreclosure of uplink providers other than BT. However, in the light of current market conditions, in particular the accessibility of UK uplink providers to Eutelsat and Intelsat space segment capacity through the SAO and additional new space segment capacity, such as Astra IB, which has in the meantime become available, such a foreclosure would seem unlikely. If new elements were to appear, proceedings independent of those which have led to this Decision could be called for,

HAS ADOPTED THIS DECISION:

Article 1

The main agreement of 17 December 1987 between Société Européenne des Satellites SA and British Telecommunications plc, and all related side letters and agreements regarding the arrangements whereby the two parties cooperated in the joint provision of a television distribution service by satellite (collectively referred to as the agreements), constituted an infringement of Article 85 (1) of the EEC Treaty until 30 January 1991, the date on which those agreements were terminated.

Article 2

An exemption pursuant to Article 85 (3) of the EEC Treaty for the agreements referred to in Article 1 is hereby refused for the period during which they were in force.

Article 3

Within one month from the date of notification of this Decision, British Telecommunications plc (BT) and Société Européenne des Satellites SA (SES) shall inform television programme providers who concluded contracts with BT for television distribution services via the Astra I A satellite prior to 30 January 1991 in writing of the Commission's Decision and in particular Articles 1 and 2

thereof, and advise them that during a period of four months after having been so informed, such television programme providers are entitled, if they so wish, to

— renegotiate the terms of those contracts, or

— terminate those contracts, subject to a reasonable period of notice given by them to BT, which in its turn shall forthwith inform SES that such notice has been given.

When the letter pursuant to this Article is sent to television programme providers within the one-month time-limit referred to above, a copy of such letter shall at the same time be submitted to the Commission.

Article 4

This Decision is addressed to the following undertakings:

(a) British Telecommunications plc,
British Telecom Centre,
81 Newgate Street,
GB-London EC1A 7AJ;

(b) Société européenne des satellites SA,
Château de Betzdorf,
L-6815 Luxembourg.

Done at Brussels, 23 December 1992.

For the Commission

Leon BRITTAN

Vice-President