

**Workshop on Business Diplomacy:
Managing Non-Market Corporate Relationship Capital
EIASM Brussels, November 2008**

Regulating TV content: a source for conflict?

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The aim of this presentation is to describe, from the perspective of a satellite operator, some of the inevitable tension between the desire to regulate TV content and Eutelsat's commercial operations. Simply put, on the one hand, Eutelsat has an obligation to ensure wide and open access to its satellite capacity. On the other hand, the law and various authorities seek to exercise control over the operation by Eutelsat of its satellites and what is broadcast through our satellites: since the laws are regional or national and as the competent authorities do not all have the same standards or requirements, there is confusion in the definition of the conduct required of Eutelsat. Eutelsat has the difficult task of steering through the confusion and meeting its business and commercial objectives.

In the first part of the presentation, I will seek to describe the various sources for the regulation of TV content and their relevance to Eutelsat.

In the second part of this presentation, I want to describe the very particular situation in relation to the transmission of the Chinese dissident channel called New Tang Dynasty TV, financed by the Falun Gong sect. At present, Eutelsat is facing a very determined campaign from supporters of this channel aimed at forcing Eutelsat to resume transmissions of the channel on its fleet of satellites.

Eutelsat

Initially, Eutelsat's activities were conducted by an intergovernmental organisation, the European Telecommunications Satellite Organisation (the "IGO"). The IGO was founded by a number of countries in Western Europe to develop and operate a satellite telecommunications system for trans-European telecommunications purposes. On July 2, 2001, all the IGO's operating activities were transferred to Eutelsat, a corporation registered in and operating under the laws of France (the "Transformation").

The Transformation was motivated mainly by the liberalisation of the telecommunications industry in Europe, under the more specific framework laid out by the European Commission in its 1990 Green Paper. This recommended that the international satellite telecommunications organisations, including the Eutelsat IGO, should be reformed in order to liberalise final-user access to satellite capacity and ensure it could be freely commercialised by operators. The main purpose of the Transformation, therefore, was

to position the IGO's operating activity in a competitive environment with a view to an open satellite telecommunications market.

EUTELSAT IGO is retained as an intergovernmental organisation and currently has 48 member European countries. Today, the mission of EUTELSAT IGO is: (i) to ensure that the Eutelsat satellite fleet provides coverage for all Member States; (ii) to enable Member States to be in a position to ensure that their operators, service providers and broadcasters have equitable access to Eutelsat's services in terms of operational, commercial and financial conditions; (iii) to ensure the continuity of the collectively-owned rights and obligations of the Organization under international law, in particular the rights to use radiofrequencies and orbital locations which were assigned collectively to the Member States and the IGO prior to July 2001 and which are used by Eutelsat S.A. at present for the operation of its satellites; and (iv) to monitor relevant developments in national regulations and international agreements and ensure that Eutelsat S.A. is in a position to comply with their provisions whilst honouring its commitments to the Member States.

Eutelsat S.A. was the first satellite operator in Europe to directly broadcast television to households, and, in the mid-1990s, the company began to construct a premium satellite neighbourhood made up of the HOT BIRD™ satellites at 13° East, with the aim of providing capacity that could host several hundred channels at that orbital position, thereby amassing very large audiences in terms of the general public.

With a market share of 14% worldwide and of 29.4% in "Extended Europe" (namely, the whole of the continent of Europe, the Middle East, Russia, parts of central Asia, North Africa and Sub-Saharan Africa) and operating a fleet of 24 satellites in geostationary orbit (GEO), the Group is No. 3 in the world and European leader in the field of Fixed Satellite Services (FSS) in terms of the number of satellite television channels. The Group's service portfolio includes Video Applications (television-broadcasting services for the public and Professional Video Networks), communication solutions for Professional Data Networks, Value-Added Services (satellite broadband Internet access) and Multi-Usage Services.

The Group owns 19 GEO satellites and operates capacity on five additional satellites owned by third parties. With its fleet of satellites located at 20 orbital positions extending from 15° West to 70.5° East, the Group covers Extended Europe, major parts of the Asian and American continents, potentially giving it access to a very significant percentage of the world's population.

As of 30 June 2008, the Group was broadcasting more than 3,120 television channels and 1,080 radio stations to more than 164 million cable and satellite households.

Eutelsat's charter

Since the time of the Transformation, Eutelsat has committed to operate under certain so-called Basic Principles: (i) the obligation to provide public/universal service for telephone services connected to the international public network, (ii) the provision of audio-visual services pursuant to the provisions of the European Agreement on Television without Borders and national regulations, (iii) pan-European coverage of the satellite system and (iv) adhering to the principle of non-discrimination and fair competition in defining its strategy and carrying out its operations.

We will make further reference to these principles.

The operation of Eutelsat's fleet of satellites

I now want to briefly describe the regulations that exist in relation to the operation of Eutelsat's fleet of satellites. Overall, these regulations do not deal primarily with the content of material being broadcast, but rather limit themselves to the physical object in space.

Three international treaties have been enacted under the auspices of the United Nations and are relevant for the purposes of this presentation. These treaties tend to focus on the exploitation of space and the protection to be guaranteed by operators in relation to the technical operations in outer space:

the treaty of December 19, 1966 deals with the responsibility of states on the launching of a satellite and the subsequent damage which may be caused by a satellite on earth or in outer space;

the November 29, 1971 treaty establishes international rules and procedures relative to any damage caused on the launch of a satellite;

finally, the November 12, 1974 treaty calls for the keeping of a register of all objects launched into space and to ensure due regard for the first two treaties just mentioned.

Each of these treaties defines the relationship among the members of the UN. The treaties seek to regulate the operation of satellites as objects in space: they do not provide for the control of the content which may be transmitted through satellites. Nevertheless, the treaties do provide that member states may introduce more stringent regulation to ensure compliance with the treaties or complementary thereto. In France, such a space law was passed last year and we are waiting on the implementing decrees.

Fundamental principles relating to the transmission of content

We have just seen that there is a body of regulation covering the operation of satellites and imposing duties and obligations in that regard.

There is also a body of international law that governs certain fundamental principles relating to the transmission of programmes and content.

Of course, the 1948 Universal Declaration on Human Rights, now sixty years old, enshrines the principle of freedom of speech.

The December 16, 1966 International Covenant on Civil and Political Rights, which came into force in March 1976 provides as follows in Article 19:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art or through any other media of his choice.”

More recently, at its plenary meeting of December 10, 1982, the United Nations adopted Principles governing the use by states of Artificial Earth satellites for international direct TV Broadcasting. According to Article 1 of these Principles:

“Activities in the field of international direct television broadcasting by satellite should be carried out in a manner compatible with the sovereign rights of states, including the principle of non-intervention, as well as with the right of everyone to seek, receive and impart information and ideas as enshrined in the relevant United Nations instruments”

At least in France, I believe in conformity with the intention of the legislator, the courts have tended to decide that this body of broad principles should remain as such. Their respect and enforceability is, normally, a question for states.

As a preliminary conclusion, I think it can be said that the international and national laws and regulations that we have discussed necessarily remain broad principles. Those principles are indirectly applicable to Eutelsat and to its industrial and commercial operations, including the transmission of TV, but do not as such give rise to conflict.

The situation is not quite the same in relation to regulations aimed more specifically at the control of content, as we shall now examine.

Regulation of TV content in Europe

Content broadcast over Europe through Eutelsat satellites is monitored. How is this control operated?

First, the European Directive 89/552/CEE (the so called "Television Without Frontiers (TWF)" Directive), of October 3, 1989, amended by the Directive 97/36/CEE of June 30, 1997 is the main document framing the field.

This Directive:

describes the rules to be complied with by all channels broadcast over Europe; including mandatory requirements regarding protection of minors (i.e. pornography) and human dignity, prohibition of incitement to hatred on grounds of race, sex, religion or nationality, etc.

defines the principle of "country of origin", according to which, a channel originating from one member state and intended for reception in the European Union is regulated by the regulatory authority of its originating country. This regulation is operated "once-and-for-all" and no secondary control can be operated by any receiving member state.

defines the criteria determining the jurisdiction of a member state over channels originating from non-European countries: the channel will thus be regulated by a member state:

- a. if it uses downlink frequencies of this country,
- b. or if it is broadcast over a satellite registered in this country,
- c. or if it is uplink from this country.

The TWF Directive is not applicable to satellite operators but to TV broadcasters, therefore to the users of our satellite capacity. The Directive provides that programmes involving pornography or extreme violence are prohibited. This ban applies to all other programmes, which are likely to harm minors, unless they are broadcast at a time when minors will not normally see them or protective technical measures are in place, in the form of encryption devices and PIN codes. The Directive requires that certain content may only be transmitted during the night and with encryption aimed at preventing unauthorised or even accidental access to banned material.

The effect of these criteria results in most of the non-European TV channels broadcast over Europe using satellites that belong to Eutelsat, which as we have seen earlier is a French registered company, falling under the jurisdiction of French CSA (the "*Conseil Supérieur de l'Audiovisuel*").

The TWF Directive nevertheless lets member states free to edict stricter rules in the framework of their legislation, as long as the latter ensures respect of the provisions placed by the Directive.

Second, what does French law say?

all French channels have to get a license from the CSA before starting to be broadcast, and remain subject to a control of content broadcast afterwards.

non-European channels falling under French jurisdiction do not need any preliminary license, and are only subject to a control "*a posteriori*".

Third, the Directive 2007/65/CE adopted on December 11, 2007 changes criteria described above determining the jurisdiction of a member state over channels originating from non-European countries by deleting the reference to the use of downlink frequencies and by giving priority to the uplink criteria above the criteria of the nationality of the satellite. This has the effect of spreading out the responsibility for the regulation of non-European channels to many different member states, as many of the uplinks are operated from a wide range of European and non-European countries. This particular provision will enter into effect on December 11, 2009, simultaneously in all member states.

Generally speaking, we consider the national legislations in use in the European states less stringent than the French legislation.

Fourth, the regulation of non-European channels using non-European uplinks and satellites remains an open issue as no European authority has jurisdiction over them. Symmetrically, no regulatory means exist outside the EU to control satellite channels originating from Europe. This lack of reciprocity can lead to tensions, for instance, regarding pornographic content where standards of what is acceptable to prevailing public opinion differ widely.

The regulation of TV content in the Middle East

We have seen earlier that Eutelsat conducts a fair portion of its business in what we call Extended Europe: this region covers the Middle East.

On February 12 of this year, Arab information ministers adopted a charter that provides the tools to penalize broadcasters who attack leaders or air socially unacceptable content. The charter is broad ranging, covering news, political shows, and entertainment - even sports programs. In the weeks before the emergency meeting in Cairo, the Egyptian and Saudi information ministers lobbied their colleagues to pass the document, prepared by a committee of experts during the preceding six months. Even Syria signed off on the charter.

The charter attempts to appeal to a wide variety of interests, penalizing certain content but guaranteeing certain rights to information.

The core of the charter is the prohibition of content that would "damage social harmony, national unity, public order, or traditional values". A catchall provision against harming "national reputation" justifies a wide range of repressive measures.

However consistent the charter may be with current laws and practices, commentators have expressed the view that implementation is likely to be uneven among Arab countries. Egypt and Saudi Arabia own satellite operators Nilesat and Arabsat and, in theory, can disconnect undesirable channels. But Qatar declined to sign the charter, citing potential conflict with its own laws, and the Lebanese information minister called the charter a "guiding, not binding" document.

It therefore remains unclear whether the charter is merely a symbolic gesture or whether it constitutes a concrete step toward a repressive pan-Arab media policy regime.

The regulation of TV content in Asia

It is perhaps worth recalling that in October of this year, in a controversial passage through parliament, Indonesia passed a law aimed at restricting pornography. To be come effective, the legislation requires a favourable decision from the president. If enacted, the law aims at banning images, gestures or event talk deemed to be pornographic.

What does this mean for Eutelsat?

First, Eutelsat operates extensively through distributors. We sell capacity wholesale to distributors who in turn sell capacity either to resellers or to broadcasters. Therefore, at any point, we do not have an exhaustive view of the content being broadcast through our fleet. We cannot therefore be expected to police TV content.

Second, we are under pressure from lobby or other more radical groups, to unilaterally cease the transmission of TV channels which the group finds offensive. We have seen that Eutelsat, for a variety of reasons, does not have the right simply cut off access to our satellite fleet: you will recall the basic principles which underpin our very existence as a commercial operation, you will recall the various bodies of international law seeking to guarantee a right to transmit, finally you will recall that, in France, only the CSA, acting under instruction from the courts, can seek to force Eutelsat to cease to transmit.

On the other hand, lobby groups can exercise immense political and economic pressure the consequences of which would be of significant detriment to Eutelsat, its shareholders, its personnel and its customers.

Third, the CSA, an administrative body does not have the resources – in terms of money and in terms of personnel – to carry out the control of TV programmes to check if they are compliant. This places burden on Eutelsat and possibly encourages lobby groups who feel empowered to step in and show the CSA what it could or should do.

Fourth, the transmission of TV requires a very high quality of service and broadcasters need to have certainty in the continuity of transmission. The image and reputation of Eutelsat can be destroyed if it becomes the object of repeated orders to close down channels the administration has determined to be non-compliant. Our competitors, under less stringent control will of course benefit.

Fifth, there are serious operational issues. In technical terms, to cease transmission of an uplinked signal on a given transponder, the Group has to switch off the corresponding transponder on board the satellite, even if this transponder is carrying other, authorised television channels (a 36 MHz transponder can broadcast up to 10 television channels in digital mode). For this reason, it could be difficult to comply with any CSA injunctions without being forced to terminate contracts with other distributors that lease capacity to duly authorised channels.

So far, we have looked at the regulatory and legal context within which Eutelsat should operate. We have seen that there are certain procedures aimed at controlling the content of TV programmes generally. We have explored the circumstances whereby Eutelsat can receive a court instruction, at the request of the CSA, to stop the transmission of a programme.

Within Eutelsat, if there is an issue with content and notably if a procedure to ban content is commenced, a crisis team is established, comprising the following functions: commercial, communications, public affairs and legal. In the ordinary course, draft legislation or regulation is monitored by public affairs and by communications: lobbying efforts will then be defined, under instruction and guidance from the company's CEO.

I would now like to explore the circumstances where regulation could force Eutelsat to transmit.

To date, I have been unable to find the legal or regulatory source for any such obligation. Nevertheless, I now want to turn to a very particular situation, in relation to pressure being put on Eutelsat to once more carry a TV programme it has had to cease transmitting, for technical reasons.

NTD TV

New Tang Dynasty Channel (“NTDTV”), is a Mandarin speaking channel of US origin, funded by the Falun Gong.

On 16 June this year, our W5 satellite (the only one in our fleet with coverage of Asia) suffered a technical incident. The loss of one of the satellite's two solar panels (since confirmed as irreversible) left us no other option but to turn off a minimum of four of the on-board transponders used for television broadcasting, as they consume significantly more power than the amount needed for data transmission services. This measure was intended to preserve the power required to operate the remaining on-board transponders. Moreover, additional margin has been needed since the beginning of the eclipse season (mid-August), as more power is required to charge the batteries and operate the heaters aboard the satellite for proper thermal control. A fifth transponder has consequently been switched off to provide such margin.

As some customers affected by the shutdown of these transponders were exclusively interested in broadcasting to Asia, Eutelsat identified alternative solutions with a number of competing satellite operators who had capacity available to serve this region. A list of the operators able to replace the Eutelsat services over Asia was subsequently sent to RRSat, the service provider broadcasting a number of channels on W5, including EuroNews, C-Music and NTD TV. On 30 June, EuroNews resumed transmissions of its programmes to Asia via the AsiaSat 2 satellite and C-Music is also currently deploying an alternative solution.

Eutelsat holds no prejudice against the NTD TV channel, which has in every respect been treated in identical fashion to the other channels present on the W5 transponders that had to be shut down; indeed, NTD TV is still present on the Eutelsat satellites broadcasting to Europe. Moreover, as we have seen, our business as a satellite operator gives us no prerogatives for controlling in any way the content carried via the capacity rented by our clients. The question of broadcasting NTD TV had already been raised in 2005, but I wish to remind you that in this case too the decisions taken at the time were guided by considerations that were independent from any content related issue. In fact, they led to preserving the broadcasting of the channel.

Nevertheless, NTD TV and its funding sources are waging a very public and aggressive campaign against Eutelsat and its employees aimed at having Eutelsat somehow find capacity to once more resume the broadcast of the channel over Asia.

Conclusions

We have seen that there is a wide body of international, regional and national law designed to regulate and control the content of TV channels.

However, the language of the relevant texts is, understandably, relatively vague, leaving much room for interpretation. This approach can be justified, where there are different standards of what content is generally acceptable and what content should be prohibited. As you know, even still photos of scantily

dressed women generally will not give cause for concern in the West but will be widely condemned in, say, the Middle East.

Unfortunately, for a company like Eutelsat, the lack of a coherent picture and enforcement procedures that are not in harmony, diminish the impact of the law and regulation and weakens the effectiveness of the principles of free speech, the safeguard against the promotion of violence etc. It is not for me to suggest a ready-made solution – if one exists – in the light of these difficulties, but the situation constitutes a risk for Eutelsat's commercial operations.

Perhaps the solution is to be found in a voluntary code of conduct, where satellite operators could, among themselves, seek to establish "the rules of the game" which recognise the intention of the legal and regulatory context but which address the operational and commercial constraints I have described above.