**Selection and Authorisation of Systems Providing Mobile Satellite Services (MSS)**

**Comments of ICO Global Communications**

**30 May 2007**

## I. Introduction

ICO Global Communications ("ICO") hereby responds to the DG INFSO consultation working document issued on 30 March 2007.[1]

DG INFSO has requested feedback from stakeholders on aspects of its proposed MSS selection and authorisation framework. ICO is the most affected stakeholder in this proceeding, because it is ICO alone that has pursued 2 GHz MSS since even before the inception of the process started by the Community in 1997. For this reason, ICO wants to make clear at the outset that it submits these comments without prejudice to its continuing right to operate its 2 GHz MSS facilities and does not consider that the Commission has sufficiently resolved the issue of what spectrum might be authorized in this proceeding.

As noted in these comments, the Commission obliquely refers to the availability of 2 x 30 MHz radio spectrum for the 2 GHz MSS selection and authorization process. But that amount of spectrum is not available, because ICO is using part of it, in full compliance with international regulations. Thus, it is not possible for the Commission to implement a pan-European selection process for the entire 2 GHz allocation, without giving full recognition to ICO's legitimate pre-existing rights of use for that spectrum.

Other operators were also involved in the early stages of 2 GHz MSS, including some of ICO's competitors who have participated in the development of the Commission's consultation. Without exception, those operators dropped by the wayside and did not invest resources in 2 GHz MSS or work under the ECC and Community structure for satellite personal communication services. From 2001 onward, CEPT experts concluded there was no spectrum scarcity for 2 GHz MSS, as only ICO was pursuing network implementation. Now those same competitors argue that ICO's pioneering efforts and very substantial investment should be discarded and its operating network ignored to make room for themselves.

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[1] DG INFSO Working Document, "Consultation Document, Selection and Authorisation of Systems Providing Mobile Satellite Services (MSS)," 30 March 2007 (the "Consultation"). As called for in the Consultation, for identification purposes, the ICO contact person requested is identified at the end of this submission. No part of this document is considered confidential.

EU law does not permit this result. ICO has dedicated over $4 billion to implementation of its system and has the legitimate expectation that the existence of its satellite operations must be taken into account. ICO followed the legal requirements that applied at the time and met international legal standards accepted at the treaty level through the International Telecommunication Union ("ITU") for placing the ICO-P network into use. ICO today maintains an operating satellite in medium earth orbit in commercial use and is pursuing an active program to test and confirm service arrangements and launch the remaining satellites. Any attempt to prejudge this matter by assuming that the entire 2 GHz MSS allocation is available for a green field selection and authorisation process will collide with EU standards of fairness, proportionality and non-discrimination, as well as international law.

ICO will develop these concepts further in response to the DG INFSO questions outlined in the consultation document. This proceeding is likely to be the first in which pan-European electronic communications networks are authorised at the Community level. It would be prejudicial to all that follows if the Commission in this proceeding were to override established ITU Radio Regulations and act contrary to the structure that applies to Member States through the Electronic Communications Regulatory Framework, all in an effort to set a new standard for 2 GHz MSS that was labelled "a matter of urgency" as far back as in 1995 – but which only ICO pursued.

## II. Background

The ICO-P system was initiated in the context of the CEPT milestone review process established by CEPT and Community decisions adopted in 1997.[2] ICO believes that a fairly detailed statement of the history behind these decisions and ICO's own actions in response is required, in order to demonstrate that a proportionate and non-discriminatory response towards ICO's existing network is required.[3]

As events have demonstrated, the 2 GHz MSS Decisions failed to anticipate how the fledgling and innovative MSS technology would develop and the length of time it would take for systems to become established. Of the five systems listed in Decision (97)03

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[2] CEPT ERC Decision of 30 June 1997 on the Harmonised Use of Spectrum for Satellite Personal Communication Services (S-PCS) operating within the [2 GHz bands], ("Decision (97)03") and Decision No. 710/97/EC of the European Parliament and of the Council on a co-ordinated authorisation approach in the field of satellite personal communication services in the Community, O.J. L 105, 23 April 1997, page 4 ("Decision 710/97/EC"). Upon the expiration of its initial three-year term, Decision 710/97/EC was extended by Decision No. 1215/2000/EC of the European Parliament and of the Council of 16 May 2000, O.J. L 139, 10 June 2000, page 1, which remained in force until 31 December 2003. ICO refers to CEPT and Community Decisions jointly as the "2 GHz MSS Decisions."

[3] In response to a Commission mandate issued on 6 October 2005, the ECC submitted a report on the 2 GHz MSS in CEPT Report 113, July 2006 ("CEPT Report 113"). ICO is concerned that important information is missing from this report, especially on the reasons why the ECC process was unilaterally terminated in 2001 and ICO's efforts to inform the ECC of *force majeure* reasons for delay in its programme.

which proposed to implement 2 GHz systems, ICO-P is the only system that was brought into use in reliance on the 2 GHz MSS Decisions.[4]

In fact, ICO was and is the sole company to meet any milestones for a 2 GHz MSS system.[5] In addition to the substantial funding that ICO dedicated to this system, ICO constructed and launched two satellites (one of which was destroyed upon launch); constructed 10 additional MEO satellites, the majority of which are substantially completed; and established a number of Gateway Earth Stations in different locations around the world. ICO continues to expend substantial sums on a monthly basis to continue and maintain its operations.

At an early stage, ICO received acknowledgement from the Milestone Review Committee established under the CEPT structure ("MRC") that the company had met the first five milestones under Decision (97)03 and ICO continued to make progress towards meeting the remaining milestones.

However, in the year 2000, as a result of the severe decline in the telecom sector, ICO was forced to undergo financial restructuring, which led it to invest more than $1 billion in fresh capital in the system. ICO subsequently launched the F1 satellite, which failed to achieve its orbital position. In mid-December 2000, through the UK administration, ICO brought this situation to the notice of the MRC. ICO notified its inability to meet the sixth milestone by 1 January 2001 due to *force majeure*, stating:

> The ICO system will not meet this deadline due to a number of extenuating circumstances including a period of financial restructuring, a launch failure and delays due to circumstances outside the control of the network operator (within the meaning of S11.44 of the International Radio Regulations).[6]

In December 2000, the UK administration submitted to the MRC that "[g]iven these circumstances, the UK is [of] the view that it would be very helpful to ICO to have a 'comfort' document from the MRC which it could adduce, if necessary, when applying for authorisations."

The UK administration suggested that rather than a recommendation, the MRC could adopt an acknowledgement that "[i]n the light of these circumstances, there is no suggestion on the part of the MRC that the CEPT Administrations should withhold authorisations for ICO as a result of the missed 1 January 2001 deadline."

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4 The potential 2 GHz MSS operators were listed at Table 2, Annex 1 of Decision (97)03.

5 Minutes of the 30th ERC Meeting, CEPT/ERC/Doc. (01)50, 12-16 March 2001, at section 6.1., pages 20-21.

6 UK, "ICO Milestone Compliance," Doc. ECTRA-ERC MRC (00)02, 12 December 2000. Subsequent quotations in text to UK statements are taken from this document. The launch failure referenced in this report was the failure of ICO's F1 satellite on 12 March 2000; S11.44 was the prevailing ITU RR provision at the time that governed bringing into use a satellite network and which permitted an additional time of implementation in case of launch failure. At that time, Article 11 of the ITU Radio Regulations also acknowledged delays and allowed for extra time due to financial difficulties faced by the administration or operator.

The UK administration also sought for the MRC to encourage CEPT administrations "to recognise ICO's good faith efforts through:

(i) ensuring the continued regulatory certainty provided by the SPCS Decisions as they apply to ICO

(ii) acknowledging milestone compliance as ICO goes forward."

In response, and notwithstanding the UK suggestion, the MRC felt that there was no spectrum shortage and thus no requirement to provide a forward looking structure for 2 GHz MSS. The minutes from the December MRC meeting that considered ICO's situation concluded:

> [Mr. Montfort, from the French administration and chairman of the General Milestone Review group] stressed that, at this date of 1st January 2001, the situation which has to be explained is as follow[s]: no shortage of spectrum; after the cut off date, the situation will be back to the "normal" one ("1st arrived, 1st served").[7]

This view was confirmed in the minutes of the ERC meeting that followed the MRC in March 2001.[8] The CEPT spectrum managers discussed what approach to take towards the suite of MSS decisions, including Decision (97)03, but deferred any action to allow further review by a parallel project team (the Joint Project Team – Satellite or "JPT SAT"). At the subsequent WG FM meeting, the MRC chairman reported on these developments, noting:

> Mr. Montfort also informed the meeting, that there will be most likely a contribution to the ERC proposing that ERC DEC (97)03 should be modified and its annex 1 should be maintained. Once the ERC has decided on this initiative, the task might come back to WG FM. However, there is no urgency and WG FM noted the report from the MRC and concluded that there are currently no further activities of WG FM needed.[9]

At the subsequent July 2001 ERC 31st meeting, steps were initiated to close the MRC down. The JPT SAT's recommendations were accepted as follows:

- The Base Decisions [for S-PCS, including Decision (97)03] should be left as they are for the moment until they are due for their next periodic review.
- There is no need to ask WG FM to develop a separate Decision on the use of the specific subbands.

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7 Minutes of the MRC meeting, 18 December 2000, Doc. ECTRA-ERC MRC (00)06rev1.

8 Minutes of the 30th ERC Meeting, at page 21.

9 Minutes of WG FM Meeting, Doc. FM (01)062, 13 February 2001, paragraph 9.3(2).

- A review of the bands should be made before the end of 2003 to determine if a new Milestone Procedure for satellite systems is necessary.[10]

Decision (97)03 provides that the mobile earth stations of a system may operate on a provisional basis if that system "meets all the milestones up to and including milestone 6 … and becomes operational and ready to provide commercial service within the CEPT prior to 1 January 2001." The flaw in this structure was that no provision was made for the situation if no system met all the milestones or to accommodate a system that met these milestones after 1 January 2001.

Thus, the CEPT left Decision (97)03 in abeyance from 2001 until early 2007, when the ECC formally decided to take steps to abrogate the decision. This decision was taken over ICO's protest, as ICO considered that the project team that had reviewed the matter failed to comply with its own terms of reference, which required it to "[c]onsider operational requirements of new and current MSS applications…."[11] In ICO's view, PT10 at no time considered the operational requirements of the current ICO-P application.

ICO does not consider that this background has sufficiently been accounted for in the report of the ECC to the Commission or subsequent thinking on the topic of 2 GHz MSS. Before the CEPT January 2001 deadline expired, ICO responsibly asked for recognition that it would not meet that deadline due to reasons of *force majeure* even as it was moving towards bringing its system into use, at a time that Decision 710/97/EC as extended was fully in effect. The ICO system did indeed become operational soon afterwards within the meaning of international treaty obligations, with the launch and bringing into use of the ICO-P F2 satellite.[12] The MRC did not make any determination on this request and the body with jurisdiction, the WGFM, felt no urgency about updating or reviewing the situation because it felt there was no spectrum scarcity.

The sole conclusion that the administrations appeared ready to make during 2001 to 2007 about ICO-P was that there was no shortage of spectrum and the normal ITU rules would thus apply, i.e., a satellite network brought into use would be entitled to operate on the basis of its ITU Radio Regulations priority. During that period, ICO continued to rely on this conclusion. It incurred further substantial expenditures in operating its F2 satellite and sought to upgrade system parameters for expanded service using the ICO-P system. These actions fortify its legitimate expectation that the Community should recognise its existing rights of use already validated under international law through the ITU procedures.

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[10] Minutes of the 31st ERC Meeting, Doc. CEPT/ERC/(01)100, 2-6 July 2001, paragraph 7.4.

[11] See Doc. ECC(07)028, ICO Comments on PT10 Report, citing terms of reference established in Minutes of the 50th WG FM meeting, FM(04)141 Rev 1, Annex 24, 3 June 2004 and the original task given by the ECC to the WG FM in Doc. ECC(04)038 Annex 12, at the 7th ECC meeting in Vilnius.

[12] The UK administration has confirmed that the ICO network was "brought into use" under ITU standards by successful launch and operation of the ICO-P F2 satellite. UK, "Facts relating to the authorisation and deployment of the ICO-P satellite network," MSSEXP06-5 UK input on ICO, December 2006. See also CEPT Report 113 at section 6.2, "ITU rights for the ICO-P system," page 23.

## III. ICO's Existing Operations

In ICO's view, its pre-existing operations must be accounted for in any Community structure for selecting applicants for 2 GHz MSS. ICO's existing and operational network was established on the basis of a system that lawfully existed at the time, which was clearly based on Community law in the form of Decision 710/97/EC as extended.

It has been argued that ICO holds no rights to the spectrum in which it operates and, since no authorisation was granted through a Community instrument, the new selection process can essentially ignore ICO's operation. This view is incorrect on numerous independent levels.

### A. ICO's System is based on Community Law

ICO's early implementation of the ICO-P system was based firmly on Community law. The combination of Decision (97)03 with Decision 710/97/EC and related decisions, in the words of the EU Communications Committee, "created a common understanding and expectations in the whole communications sector, in relation to MSS systems."[13] The Community created the situation, through Decision 710/97/EC, that gives rise to ICO's legitimate expectation that its investments and operations will be taken into account in future selection procedures.

Decision 710/97/EC stated that if scarcity of spectrum made such actions necessary, it would be mandatory for Member States to coordinate their authorisation procedures. Until very early 2001, the Member States took precisely that approach and during that period ICO met the first substantial set of milestones established under Decision (97)03. Very shortly afterwards, the Member States determined that in fact there was no shortage of spectrum, at about the same time that ICO successfully launched its F2 satellite. Throughout this period, Decision 710/97/EC as extended was fully in effect.

Decision 710/97/EC also stated that its aim was to facilitate the introduction of satellite personal communications services. ICO did introduce its ICO-P system, and it is difficult to argue that the result did not rely on the legal structure set by this Community instrument.

### B. ICO's Network Must be Recognised under General Community Law

The fact that ICO has a satellite in orbit cannot be ignored. A basic requirement of EU law is that any decision on spectrum allocations or assignments must be proportionate and non-discriminatory. ICO submits that –

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[13] Communications Committee Doc. 05-48, 6 December 2005. The Radio Spectrum Committee's expert group concluded that no rights were granted to ICO under EC law. "Report from the 7th Expert Meeting on 2 GHz MSS, 7 March 2007," MSSEXP07-7-11 Report, 30 March 2007, at page 3. There is no apparent legal basis for this conclusion or discussion in the report that supports it. This type of assessment ignores that ICO's actions and investments were taken in reliance on and under the structure set by EC law, in the form of Decision 710/97/EC.

- Abrogating ICO's status would be **disproportionate** in light of the substantial expenditures and efforts it has made towards implementation of its S-PCS system. No appellate ruling body will uphold a policy to ignore this level of investment and an orbiting satellite.

- Creating a new structure for S-PCS milestones and placing ICO at the starting gate on the same level as other applicants would be **discriminatory** – none of the other potential applicants has taken firm steps while, by contrast, ICO has actually launched a satellite into orbit.

With respect to proportionality, "it is settled case-law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and *must not go beyond what is necessary* in order to achieve that aim…."[14] Nothing in the new 2 GHz proceeding requires that an existing system be jettisoned to make way for new systems that may or may not be built.

As remarked by the Advocate General Jacobs in the *AIMA* case,[15] application of the principle of proportionality implies a balancing exercise: the burden imposed on the undertakings concerned must be weighed against the benefit accruing to the Community in terms of the objectives pursued by the relevant measure. Because any selection process that ignores ICO's operations would impose an enormously severe burden on ICO, it would be necessary to show that the process made a correspondingly significant contribution to the objectives pursued by the EU authorisation approach. Even full recognition of ICO's existence would still leave substantial 2 GHz MSS spectrum available for a selection and authorisation process, so it is not possible to argue that ignoring a $4 billion investment can be justified by the balance of burden versus benefit.

With respect to discrimination, this term is not defined specifically in the electronic communications framework, but has a general understanding – "*discrimination can arise only through the application of different rules to comparable situations or the application of the same rules to different situations*."[16] No other operator has expended the resources that ICO did in order to develop 2 GHz MSS. To place ICO in the same position as other applicants at the starting point, or to overlook altogether the $4 billion and years of effort

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14 Case T-43/98 *Emesa Sugar (Free Zone) NV v Council of the European Union* [2001] ECR 11-3519, paragraph 64: "the principle of proportionality ... and the principle of protection of legitimate expectations … constitute rules of law conferring rights on individuals." See also Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 51, citing Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 15, and Case C-384/93 *Alpine Investments* v *Minister van Financiën* [1995] ECR I-1141, paragraph 45. See Treaty of European Union, Protocol (No. 30) on the application of the principles of subsidiarity and proportionality (1997).

15 Case C-256/90 [1992] ECR I 02651, Opinion at paragraph 30.

16 See inter alia Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 3; Case C-279/93 *Finanzamt Köln-Altstadt v Schumacher* [1995] ECR I-225, paragraph 30; and Case C-390/96 *Lease Plan* [1998] ECR I-2553, paragraph 34.

that ICO has dedicated to 2 GHz MSS would be seen as a discriminatory approach by any reviewing body.[17]

### C. ICO's Network Must be Recognised under the Electronic Communications Regulatory Framework

Any new selection process must take ICO's pre-existing operations into effect because of the requirements of the Electronic Communications Regulatory Framework. If the goals of the regulatory framework to encourage "effective and efficient use" are to be followed,[18] it is absolutely necessary to recognize the existence of a multi-billion Euro satellite network that is substantially built and partially in space.

From a policy perspective, ICO is the closest to implementing and using the spectrum designated for 2 GHz MSS. It would contradict rational policy and be inefficient to create a new set of hurdles for the company best placed to use this spectrum. Whatever "effective and efficient" might mean – and the terms are vague – they cannot mean throwing away a $4 billion investment.

Moreover, the regulatory framework states that one guiding policy objective is to ensure maximum benefits to users.[19] If full implementation of the ICO-P network can be achieved years in advance of service by other hypothetical 2 GHz MSS systems, it would be contrary to the goals of the regulatory framework – and to good policy in general – to forestall ICO's progress and thus delay service to users.

ICO has completed many elements of a full MSS system, including testing, coordinating, siting and constructing ground stations, and negotiating for many critical components of the full system. Other potential competitors in this process are mainly on paper. Because any full satellite MSS network will take years to implement, it is important for the Community to recognize and protect ICO's progress rather than to waste it.

### D. ICO's Authorisations are Protected Under National Law

Independent of any new selection and authorisation procedure, ICO holds a series of authorizations under UK law, including a licence to operate, an exemption order applicable to its mobile units, and an Outer Space Act licence. ICO's authorizations remain in good standing while it is currently required to make further efforts to demonstrate due diligence.

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[17] One of ICO's competitors has made the breath-taking assertion that because it did *nothing* under the previous regime for 2 GHz MSS, it would be discriminated against if ICO's investments were recognized. MSSEXP06-5-6, "INMARSAT on legacy systems," undated, posted 15 December 2006, at paragraph 3.4. This is a curious interpretation of the theory of what might be discriminatory.

[18] See *inter alia Framework Directive* Article 8.2.(d) and Article 9.2.; also see *Authorisation Directive* Article 6.5.

[19] *Framework Directive* Article 8.2.(a).

UK law would prevent any arbitrary withdrawal of rights previously granted to ICO, in compliance with the Electronic Communications Regulatory Framework, regardless of what new selection process is proposed. EU law would also require that any UK amendment to ICO's licence must be objectively justified and proportionate, under *Authorisation Directive* Article 14, as well as under other provisions of the Electronic Communications Framework.

E. ICO's Right to Operate is Protected Under International Law

On the premise that no ECC regime exists any longer, the pre-existing ITU structure is controlling. If the provisional authorization structure established in Decision 97(03) no longer applies, the "fall back" is the ITU coordination process, to which EU Member States have agreed and which holds the status of an international treaty. ICO is operating pursuant to ITU procedures and has fully complied to date with the requirements set in the ITU Radio Regulations.[20]

Decision 710/97/EC itself stated that Member States' final assignment of frequencies to individual MSS systems "should comply with established International Telecommunication Union procedures" (Whereas 9). The effect of a new selection and authorisation procedure would be inconsistent with those procedures unless ICO's pre-existing operation is also recognised.[21]

To ICO's knowledge, the Commission has never acted to harmonise a sector or select an economic undertaking to use a scarce resource while seeking to ignore the operation of an undertaking that already was using that resource. This 2 GHz MSS selection and authorisation proceeding is the first Commission effort to apply procedures for cross-European networks and services in the electronic communications field. ICO is concerned that the Commission should not start this effort at the outset with a mistake, by failing to consider the pre-existing operations of an operator that in good faith expended enormous funds under the previous regulatory structure.

20 The ECC has advised the Commission that "[i]t should be noted that, as the 2 GHz frequency band is subject to the ITU provisions for the coordination of the frequency assignments of the MSS systems and that for this frequency band, the 'first come- first served' principle applies, the ICO-P filing has regulatory precedence." CEPT Report 113 at section 6.1.1, "Information related to ITU filings," page 21.

21 The French administration submitted to the Commission's expert group on 2 GHz MSS that "[t]he implementation of a selection process at EU level should not contradict long established rules in the ITU on the basis of which investment has legitimately been made, and should not result in jeopardizing or freezing investment." Expert Group on MSS 2 GHz - Selection and Authorisation issues, Meeting of 21 November 2006, unnumbered document submitted by France, at page 2. While this paper was undoubtedly intended to support the modest investments made by ICO's competitors, it inadvertently provides important support for the principle that ICO's reliance on ITU rules also should be taken into account.

## IV. Response to Consultation Questions

It is against the preceding background that ICO comments on the specific questions laid out in the Consultation. ICO stresses that these comments are without prejudice to its overriding argument that its existing rights of use and legitimate expectations must be recognised in any authorisation of spectrum in the 2 GHz band, and ICO reserves its rights to take all measures, including legal measures, to protect those rights and expectations. ICO will not hesitate to take such measures in the event that the Commission's 2 GHz selection and authorisation process fails to give due recognition to ICO's status. Under these circumstances, ICO invites the Commission to indicate at what stage in the process the Commission will issue a decision on ICO's rights and legitimate expectations to a spectrum authorisation in the 2 GHz band.

***Question 1: What is your opinion on the approach proposed for the coordination of the MSS Selection and Authorisation Process at the EU level?***

ICO strongly encourages development of policy to facilitate the emergence of pan-European mobile services. Nevertheless, ICO has concerns over four aspects of the "Main Elements of the MSS Selection and Authorisation Framework" set forth in the Consultation. These concerns relate to the following:

- how the process will comply with the EU regulatory framework governing electronic communications;
- the appeal rights that stem from that framework;
- the assumption (contained in the Background section of the Consultation) as to available spectrum; and
- the standstill that the Commission adopted for use of 2 GHz MSS spectrum.

### A. Compliance with the Regulatory Framework

ICO is startled to see the Consultation state that "unless a dedicated binding regulatory instrument provides otherwise, any selection and authorisation process should be in accordance with the EU regulatory framework governing electronic communications."[22] ICO maintains that any 2 GHz MSS selection process should be consistent with the regulatory framework and there is no room for any "otherwise."

ICO understands that a decision on 2 GHz MSS could be adopted under Article 95 of the EC Treaty in such a manner to override the Electronic Communications Framework, including *Framework Directive* 2002/21/EC and *Authorisation Directive* 2002/20/EC.[23]

[22] Id. at page 6 (section 1.2).

[23] By contrast, no decision taken via Community commitology procedures under *Framework Directive* Article 19 could differ from principles established under the Electronic Communications Framework. Such a decision must support objectives set under *Framework Directive* Article 8 as a technical implementing measure. It could thus not differ in policy or objective from the framework.

The question remains, however, whether it should differ and, if it does, how that affects the transparency of this consultation.

The objectives of the regulatory framework were long-debated and the subject of close scrutiny by the Council and Parliament. They are viewed as necessary and sufficient to govern Member State regulation of the entire electronic communications regulatory field. It is difficult to understand why those same objectives should not be necessary and sufficient for a process managed by the Commission.

If there were to be any important differences in the principles followed by the 2 GHz MSS selection and authorisation process, these should be clearly defined and subject to consultation. Very substantial resources have been committed and long-term programs are being considered for 2 GHz MSS. Without complete understanding of the structure to be adopted, the process is neither transparent nor conducive to the investments needed for MSS development. ICO in particular is aware of how changing standards and rules can affect progress, from its experience with the ECC.

ICO would oppose any change to the regulatory principles already in force for its operation under the *Authorisation Directive*. For instance, *Authorisation Directive* Article 14, as well as other provisions of the regulatory framework, require that any amendment to ICO's licence must be objectively justified and proportionate. Other provisions discussed later in these comments are also important. It would require a very high burden of justification to change these principles, especially if they are to apply retroactively to a network authorisation for facilities already in operation.

### B. Rights of Appeal

One element of the Regulatory Framework that ICO seeks to see clarified for the 2 GHz MSS selection and authorisation process is the appeal procedure that would apply. This matter is briefly referenced at the end of the Consultation, at section 4.6, but it is an integral part of the regulatory framework and should be considered at the outset.

The *Framework Directive* requires in Article 4 that effective mechanisms exist at national level to give a right of appeal to any user or undertaking providing electronic communications networks and / or services. This right extends to compliance with authorisation conditions, under *Authorisation Directive* Article 10.7. The Consultation states merely that ordinary appeal procedures would apply. But this statement does not clarify what appeal procedures apply if or when a Community selection process has been used.

In addition, *Framework Directive* Article 21 provides for resolution of cross-border disputes. ICO seeks clarity whether Article 21 would apply in the event an operator of a new 2 GHz MSS disputes selection procedures for terrestrial systems in one Member State that affect operations for the system as a whole or in another Member State?

ICO believes it is important to resolve these items due to its experience with the previous regulatory regime for 2 GHz MSS, which left important issues undefined and slippery, to

the ultimate disadvantage of ICO that has invested $4 billion in a system based on that regime.

### C. Available Spectrum

With little or no discussion, the Consultation states that the 2 GHz MSS proceeding will apply to selection and authorisation for "…use of the identified radio spectrum (amounting to 2 x 30 MHz)".[24] This statement is opaque, because in a footnote clarification the Consultation says "this spectrum is available and planned to be used for MSS in accordance with decisions taken by the [ITU]…."

On the one hand the statement is correct, because it is a fact that the ITU Radio Regulations and Table of Frequency Allocations provide for 2 x 30 MHz of spectrum allocated to MSS. On the other hand, however, the statement is misleading, because ICO is operating a satellite with intentions to complement and add to its system in that spectrum, in compliance with the ITU rules.

As ICO states in the introduction to these comments, quite simply, the 2 x 30 MHz spectrum is only partially available for a new selection and authorisation process. It is not possible for the Commission to implement a pan-European selection process for the entire 2 GHz allocation, because ICO already holds internationally recognised rights to operate in part of that spectrum.

### D. The Standstill Provision

The Consultation states that its Decision designating the 2 GHz bands to MSS was –

> adopted on the common understanding that Member States would refrain from granting rights to use the 2 GHz spectrum until such time as the outcome of the co-ordinated selection process is known, and that Member States do their best endeavour for finalizing the MSS Selection and Authorisation Process by the end of 2008. The selection framework proposed therefore assumes that both competent authorities of Member States and prospective MSS operators will not seek to achieve authorisation of the spectrum nationally, in advance of the selection co-ordinated at the EU level.[25]

This "common understanding" is not apparently an official Commission decision, but it is reflected in various statements from the Radio Spectrum Committee.

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[24] Consultation at page 3.

[25] Consultation at page 7, un-numbered last paragraph in section 1.3, citing Commission Decision of 14 February 2007 on the harmonized use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services, O.J. L 43, page 32, 15 February 2007 ("*MSS Designation Decision*").

The effect of this unofficial common understanding is a regulatory standstill that in principle would prevent further use of the 2 GHz MSS spectrum until the Community selection and authorisation procedure is completed, whether it is accomplished at the end of 2008 or later. ICO's opinion is that this approach raises a substantial risk of disproportionality, at variance with explicit provisions of the regulatory framework.

ICO already holds authorisations to operate issued by the UK administration. It holds a trial authorisation for its Gateway Earth Station in Germany. Under normal procedures established by Member States pursuant to the *Authorisation Directive*, ICO would need no more than a notice in order to provide services in many Member States.

When ICO is in the position to expand its operations and provide service, it would be disproportionate to deny necessary authorisations to continue further. Such a standstill would conflict with requirements for efficient and effective use of spectrum, if an existing and in-orbit satellite system were to be prevented from operating on the hypothetical possibility that another satellite system may be authorised and placed into operation some years in the future, no earlier than 28 February 2009 (and likely to be later than that). Moreover, this approach would delay service to European citizens, which is inconsistent with regulatory requirements and good policy.

In any event, the alleged standstill did not last long. On the very day the Consultation was issued, the French Ministry of Economy, Finance and Industry adopted a legal instrument authorising a French company to use the 10º W satellite orbital position for 2 GHz MSS.[26]

***Question 2: What is your opinion on the proposed approach to selection (MRP followed by beauty contest)?***

ICO already holds authority to operate and has no comments on this aspect of the proposed selection process.

***Question 3: To what extent is the overall timing for the MSS Selection and Authorisation Process adequate to ensure that as many candidate systems as possible will have a fair and non discriminatory opportunity to take part in the selection process, whilst ensuring that the 2 GHz bands are brought into operation in a timely fashion? What is your opinion on the timings of specific phases of the MSS Selection and Authorisation Process?***

It is ICO's impression that the overall timing for this process, particularly at the front end, is ambitious and contains many tight deadlines that are unlikely to be met. The pressure of this calendar runs the risk that insufficient analysis and hasty action will be taken, which opens the unwelcome prospect of appeals or other delays.

[26] Arrêté du 30 mars 2007 autorisant la société Alcatel Mobile Broadcast à exploiter des assignations de fréquence pour le système satellitaire AMB à la position orbital 10 º W, J.O. __ (France) 8 April 2007.

The calendar of events permits the Commission only 30 days from the receipt of comments (on 30 May 2007) before it will propose the selection and authorisation framework (on 30 June). Either the Commission expects few comments, which is unlikely, or it will face a challenge of taking them fully into account. Notably, there is but one meeting of the Radio Spectrum Committee during this period (13-14 June) and it is doubtful that this meeting would be able to fully account for the comments by that time. This calendar does not appear to permit adequate time for Interservice Review or full legal assessment of the comments.

The calendar also presupposes that an Article 95 Decision can be adopted and published nine months after the proposal is issued (i.e., by 31 March 2008). ICO notes that the original 2 GHz MSS decision, Decision 719/97/EC, required over fourteen months from publication to adoption, and this was at a time when there may have been fewer institutional requirements to consider (e.g., now there exist 27 Member States and additional translation requirements).[27] Moreover, that decision was supported by underlying Council and Parliamentary Resolutions with a strong feeling of urgency. In light of that past practice, this new deadline is challenging.

Moreover, the calendar does not specify when the Commission will issue a decision on ICO's rights and legitimate expectations. It is not possible to avoid this matter – no decision on a selection and authorisation process can proceed until it is clear what amount of spectrum is to be authorised.

ICO notes that full evaluation of the responses will not be taken until the second test of spectrum scarcity, roughly starting on 31 December 2008 and lasting through 31 January 2009. Again, this period seems too short for a fair and procedurally complete assessment. Even if the Commission starts the process earlier, at 31 October 2008, with the receipt of detailed applications, it has scant time to make a full assessment (which must presumably be able to withstand appeals from frustrated applicants not chosen). In ICO's experience, no regulatory process to evaluate complex applications for multi-billion Euro satellite projects can be carried out in such a short timeframe.

The process associated with the Galileo satellite navigation programme may be instructive for assessing whether there is sufficient time assumed in the 2 GHz MSS selection and authorisation process. Some of the parties active in Galileo are also interested in the 2 GHz MSS process. The lack of expedition that has characterised the Galileo programme, and the political ramifications that have occurred from the resulting failure to meet deadlines, may counsel for adjustments in the 2 GHz MSS timeline. Moreover, the Community can ill-afford another such situation.

In order to ensure a fair process, the Commission must adhere to its statement that applicants manifesting interest in the first call for applications may indicate how they will meet milestones, but those submissions will not be used to eliminate any applicants (except for the baseline requirement to meet milestones 1-2). ICO is submitting these comments based on that understanding and the principle of protection of legitimate

[27] Compare the date of the proposal for what became Decision 710/97/EC, published in O.J. C15, 20 January 1996, page 6, with the adoption date of Decision 710/97/EC of 24 March 1997.

expectations. The final selection can be made only upon the basis of the final submissions responding to the second call for applications, and not upon any representations or information submitted in response to this Consultation or the first call.

***Question 4: What is your opinion on the milestones themselves and their sequence? To what extent are milestones 2 and 5 the proper ones to be met for, respectively, the first and second application?***

1. Submission of ITU request for co-ordination

> *The satellite system operator shall provide clear evidence that the administration responsible for an MSS system has submitted the relevant ITU RR Appendix 4 information.*

No ICO comment.

2. Satellite manufacturing

> *The satellite system operator shall provide clear evidence of a binding agreement for the manufacture of its satellites. The document shall identify the construction milestones leading to the completion of manufacture of satellites required for the commercial service provision. The document shall be signed by the satellite system operator and the satellite manufacturing company.*

While ICO generally supports this milestone, we note special circumstances that should be taken into account in assessing this milestone. ICO submitted clear evidence of a binding agreement for manufacture of its satellites years ago. The CEPT's MRC, established in compliance with Decision 710/97/EC, affirmatively ruled years ago that ICO had met this milestone. Subsequent events intervened, including litigation commenced by ICO's satellite manufacturer concerning ICO's satellites. ICO submits that its prior compliance with the past milestone arrangement should be given full faith and credit in satisfaction of this requirement.

ICO also notes that clarification is required for the term "binding agreement." In essence, the process appears to require that an operator enter into this binding agreement before there is any assurance that the selection process will result in that operator being granted authority to use the satellite(s). It is apparent that some element of contingency is required so that the operator is protected in the event its application is not chosen.

3. Completion of the Critical Design Review

> *The Critical Design Review is the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts. The satellite system operator shall provide clear evidence of the completion of the Critical Design Review in accordance with the construction milestones*

*indicated in the satellite manufacturing agreement. The declaration shall be signed by the satellite manufacturing company and shall indicate the date of the completion of the Critical Design Review.*

No ICO comment, subject to the same comments provided under milestone 2. It is not immediately apparent why this requirement is important, but ICO satisfied it years ago.

4. Satellite launch agreement

*The satellite system operator shall provide clear evidence of a binding agreement to launch the minimum number of satellites required to provide a continuous service within the territories of the EU Member States. The document shall identify the launch dates and launch services and the indemnity contract. The document shall be signed by the satellite system operator and the satellite launching companies.*

The term *"continuous service"* is subject to various interpretations and could be misconstrued in the absence of any clarifying recitals or past practice. If this term is entered in the contract between the system operator and satellite manufacturer as a requirement to fulfil this milestone it could lead to extra costs for the contract or litigation, with possible subsequent loss of service and hardship to consumers.

For example in any situation due to *force majeure* a system would be unable to provide "continuous service," even though the rights of the satellite operator would continue under the ITU RR on suspension of assignments.[28] This result could seriously impair terms for the financing of satellite systems and introduce an unnecessary level of uncertainty. Further, this term could require onerous contractual terms between satellite operators and manufacturers. The term "continuous service" should be deleted or if the term "service" must be qualified it should be replaced by *reliable* or *appropriate service.*

5. Gateway Earth Stations

*The satellite system operator shall provide clear evidence of a binding agreement for the construction and installation of Gateway Earth Stations that will be used to provide MSS services within the territories of the EU Member States.*

This milestone should be reworded to delete the implication that more than one gateway may be needed within the Community. It is technically conceivable and probable that only one such gateway may be required.

In addition, clarity is needed for the term "territories of the EU Member States." It is not clear whether, for instance, overseas territories of Member States, such as Martinique, French Guiana, Guadeloupe and Réunion, are included. Thus, it should be confirmed

[28] See ITU RR 11.49 (2004).

whether the EU outermost regions under Treaty Article 299 and Annex II are included or are derogated outside this milestone.[29]

The Consultation states that "achieving a required milestone would imply achievement of all the preceding milestones (e.g. achieving milestone 5 implies achieving milestones 1 to 5)."[30] This assumption is not necessarily correct and is not required for proper consideration of due diligence in the satellite construction and launch process. Moreover, in ICO's case it would be totally inappropriate. ICO has a functioning gateway earth station, so fulfilment of that milestone need not wait for any assessment of the preceding milestones.

6. Satellite mating

*The mating is the stage in the spacecraft implementation process at which the Communication Module (CM) is integrated with the Service Module (SM).*

*The satellite system operator shall provide clear evidence that the Test Readiness Review for SM/CM mating has taken place in accordance with the construction milestones indicated in the satellite manufacturing agreement. The declaration shall be signed by the satellite manufacturing company and shall indicate the date of the completion of the satellite mating.*

It is not immediately apparent why this requirement is important, and it may be inappropriate for NGSO satellite networks that may have multiple reviews because there are multiple satellites.

7. Launch of satellites

*(a) The satellite system operator shall provide documents confirming the first successful satellite launch and in-orbit deployment.*

*(b) The satellite system operator of an NGSO system shall also provide periodic evidence of subsequent launches and successful in-orbit deployment of the necessary number of satellites in the constellation to provide commercial service.*

This milestone lacks internal uniformity, because subparagraph (b) asks for commercial service, but there is no mention or similar requirement in subparagraph (a). This disparity could have the effect of discriminating against NGSO systems and in any event is inconsistent with international policy by focusing solely on "commercial" service, as ICO argues below. Such discriminatory treatment of NGSO systems is inconsistent with

[29] The definition of European territories also should be clarified for assessment of the selection criterion relating to pan-European coverage.

[30] Consultation at page 9.

requirements for technology neutrality, especially as NGSO systems may be particularly suited for non-commercial service.

8. Frequency co-ordination

*The satellite system operator shall provide documents relating to the successful frequency co-ordination of the system with respect to other MSS systems pursuant to the relevant provisions of the Radio Regulations. However, a system which demonstrates compliance with milestones 1 to 7 inclusive is not obliged to demonstrate at this stage completion of successful frequency co-ordination with those MSS systems which fail to comply adequately and reasonably with milestones 1 to 7 inclusive.*

The Consultation states that "potential applicants for the 2 GHz bands might have existing ITU filings but it is not intended that the priority invested to these systems under existing ITU filings will be reflected within the proposed selection process."[31] This statement is not clear: if it means that the EU will overlook ITU priorities established by treaty agreement, it is an unprecedented change. If it means the EU may select applicants that cannot realistically co-ordinate their networks due to ITU priorities, it will not work in practice.

This statement also would appear to conflict with milestone 8, because if an operator cannot successfully co-ordinate its network, it should not be selected. Moreover, it would seem to be inconsistent with *Authorisation Directive* Article 8 on harmonised assignments of radio frequencies, which refers to selection of undertakings "in accordance with international agreements and Community rules…." In light of these apparent inconsistencies, ICO suggests that further clarity is needed.

9. Provision of satellite service within the territories of EU Member States

*The satellite system operator shall provide notification that it has launched, and has available for the provision of service, the number of satellites it previously identified under milestone 4 as necessary to provide continuous commercial service within the territories of the EU Member States using parts of the frequency bands 1980-2010 / 2170-2200 MHz.*

This milestone suffers from multiple problems. First the terms "territories" and "continuous service" must be clarified, as already discussed above.

Second, the focus on the operator showing it has launched the number of satellites it previously identified under milestone 4 is misplaced. The evolution of satellite technology is ever changing. The example of Globalstar demonstrates that operators may substantially change initial plans in light of technical, market or other economic changes, including

[31] Consultation at page 18.

technical advances showing that the service could be provided by fewer satellites than originally proposed.

Third, milestones 4 and 9 are inconsistent. Milestone 4 refers to the "*minimum number of satellites required to provide a continuous service within the territories of the EU Member States.*" Milestone 9 refers to "*the number of satellites it previously identified under milestone 4 as necessary to provide continuous commercial service within the territories of the EU Member States.*" The term "commercial" appears in milestone 9 but not in 4.

ICO submits that the term "commercial" should be deleted wherever it appears, because it would limit the objective of MSS and could be detrimental for some satellite services. If, for example, a system operator had an objective of fulfilling social needs or services under the Tampere Convention in cooperation with international non-profit or similar agencies, there would be limited or no commercial activity in some areas. But the requirement for "continuous commercial service" would deny to the operator the opportunity to provide such non-commercial service on equal footing. An operator may well plan to focus non-commercial operation in certain Member States or territories, with commercial activity focused on others. This plan plus any other non-profit operation would seem be hampered if not precluded by the current wording.

For these reasons ICO submits the term "reliable" service should be inserted in place of "commercial."

***Question 5: What is your opinion on a possibility of removing the first call for applications phase from the MSS Selection and Authorisation Process?***

ICO opposes this option. The first call assists operators to assess the probability of success and identifies the serious applicants.

***Question 6: What is your opinion on the proposed ranking / spectrum award option? What is your opinion on the proposed limitation of the maximum amount of spectrum which any individual MSS system could be assigned to 15 MHz in each direction of transmission? Do you have any proposals for alternative methods which could be used to select successful candidate systems?***

ICO notes that part of the proposed ranking / spectrum option includes submission of a business plan for the system, and the Consultation provides an indicative format in Annex 3. This indicative plan appears to be highly intrusive, to contain extremely and unnecessarily detailed questions, and to require speculative assessments of future strategies and revenues that cannot be forecast with the level of detail that the plan seems to assume.

This high level of detail appears to be precisely the same kind of overly-detailed market entry requirement that the Commission advised the Member States to avoid when it proposed the electronic communications regulatory framework. Not so long ago, the Commission noted complaints from operators that some Member States "impose

cumbersome requirements for information to be provided prior to market entry."[32] Clearly some level of detail is needed in order to select among applicants for rights of use. Nevertheless, *Authorisation Directive* Article 11.1(c) only permits Member States to require information for that purpose that is proportionate and objectively justified. It is not immediately apparent that all the level of detail set forth in the indicative business plan would meet those limits. Among the elements of the business plan that might be questionable are the following

- 3.2 "Technical justification"– this section calls for a justification of why the operator is not using other technology. That decision is already made in the *MSS Designation Decision* and intrudes government officials too deeply into technology decisions.

- 3.2 bis "CGC roll-out plans" – this section requires applicants, where possible, to indicate the extent of CGC coverage within each country. Such a description, however, is entirely hypothetical and imposes artificial up-front costs on satellite operators while freezing their flexibility in later years to adjust to market realities. The impact of this requirement in essence turns the applicants into terrestrial operators that incidentally have a satellite element attached to their service.

- 3.4 "Service Descriptions" – this section is overly detailed and requires disproportionately specific predictions of future service roll out, related resources and funding requirements. Moreover, the requirement in the second bullet to assess "next best" technology duplicates already inappropriate section 3.2 and is discriminatory, as no other technology platforms must make this assessment in their applications.

- 3.5 "Market Analysis Description" – this requirement is overly detailed and would provide commercial secrets to too large a control group.

- 3.7 "Revenue Forecast" – this section is overly detailed and requests information unnecessary for any regulatory purpose – it is highly disproportionate and fundamentally unreliable to predict revenues on a country by country basis for a ten year period that for many applicants would only start in 2011.

- 3.10 "Full Financial Forecast" – aside from the fact that the Commission has not developed a format on which applicants can yet comment, there is no regulatory purpose served by this requirement.

[32] Commission, "Proposal for a Directive of the European Parliament and the Council on the authorization of electronic communications networks and services," COM(2000)386, 12 July 2000, at page 4.

These business plan requirements appear to echo the least common denominator of the most detailed national application process available. They represent a return to bad habits of the past where government officials chose "winners." They also are disproportionate and many elements serve no objective purpose. The indicative business plan should, therefore, be substantially pared down.

In any event, most elements of the business plan requirements are promises of future behaviour. The better criterion for ranking system proposals is to measure what resources the applicant or operator already has devoted to network build-out and operations. ICO's real expenditures give measurable evidence of the reality of its system and viability of its service concept.

***Question 7: What is your opinion on the proposed selection criteria?***

ICO submits comments of each of the following criteria that might be used for the 2 GHz MSS "beauty contest." As a starting point, however, ICO submits that these criteria discriminate against the ICO-P system, which was already established and partially launched in reliance on the previous selection process.

- **Ensuring the Pan-EU Geographic Coverage – 40% weighting**

  *This criterion would be used to assess the geographic service areas of specific candidate MSS systems. The criterion comprises two sub-criteria: number of EU Member States included in the service area and degree of geographical coverage in each EU Member State - based on the applicant's declaration on the service area of the mobile satellite system that will be completed at milestone 9 (as indicated in its application).*

At the outset, this criterion must be made consistent with the milestones. Is the service area "EU Member States" or "territories of the EU Member States?" Because this criterion derives from milestone 9, it is important that the milestone be corrected consistent with ICO's observations above.

In addition, this criterion seems to elevate purely geographical coverage above nearly all other considerations and to consider only coverage within the Community. While ICO understands and supports an emphasis on Community coverage, it should not exclude consideration of the international dimension and service to other less favoured regions of the world. It is contrary to Community policy to place such a disproportionate weighting on service to all parts of the EU, no matter whether they need the service or not, and to place no weight on global service, especially for developing countries.

The major impetus for satellite personal communications services, and a prime reason for the support that the 2 GHz MSS allocation at WRC-92, was the intention of serious operators to provide service to a substantial proportion of the world, including the less favoured regions. The current criterion appears to place no weight whatsoever on this factor, which will surely disappoint international supporters of MSS.

The Commission's recent communication on European space policy emphasises the Community goal to provide "first class contributions to global initiatives."[33] Clearly the primary focus of EU policy is to promote service to European citizens, but the Commission consistently has focused as well on the international perspective for the information society and Community policy to assist developing nations in bridging the digital divide.[34] Based on this policy, it is imperative for the selection criteria for 2 GHz MSS to include consideration of how networks can contribute to global services and in particular aid to developing countries.

In addition, ICO is concerned how this criterion will be interpreted and requests further clarification with respect to the role of CGC elements. The CGC is an integral part of a MSS system, under Article 3.2 and Whereas 9 of the *MSS Designation Order*. In principle, most MSS systems would cover all the European geography by virtue of coverage patterns. The additional impact of coverage through CGC infrastructure is not clear from the wording of this criterion.

As a final consideration, the idea of geographical coverage very much depends on the design of the system. An operator which does not provide satellite coverage should not be allowed to deploy CGC and claim that there is coverage – satellite coverage should be defined as the ability of an appropriate size terminal to communicate directly via the satellite in clear line of sight conditions.

- **Creating Consumer and Competitive Benefits – 20% weighting**

  *This criterion would be used to assess the consumer and competitive benefits which specific candidate MSS systems will provide, in addition to those consumer benefits identified within the other criteria. The definition of this criterion is therefore deliberately limited to the following three sub-criteria: infrastructural competition - different platforms and technologies can introduce competition between the providers thereby increasing choice of providers at competing prices; service competition – diversity and choice of services can increase demand; innovation creates further demand and can increase consumer welfare; date(s) of commercial service – earlier availability of services could provide additional consumer benefit.*

ICO is not confident that this criterion permits objective assessment or that the Commission will be able to distinguish between applicants using it. The sub-criteria appear to be generic to 2 GHz MSS as opposed to terrestrial platforms and it is not obvious

[33] "European Space Policy," COM(2007) 212, 26 April 2007 at page 3, see also page 12.

[34] For example, Decision 710/97/EC stated in Whereas clause 23 stated that "the global dimension of satellite personal communications systems [S-PCS] and services … play an important role in the Community's deliberations." When the Commission first proposed a Community structure for S-PCS, it noted the need for "world-wide co-operation with particular attention to less developed countries." COM(95)529, 8 November 1995, at section 5.2. A clear impetus to early efforts by the Commission to foster S-PCS was recognition that it could aid less-served regions in developing countries. COM(93)171, 27 April 1993, at page 6. Most recently, ICO notes that the 22 May 2007 resolution of the 4th Space Council includes as a key issue "making full use of satellite systems for sustainable development, namely in support of developing countries, in particular in Africa."

how operators might distinguish their systems one from another. At least the first two sub-criteria seem to be inconsistent with objectives of service and technical neutrality – government officials should not be in the process of "ranking" different services. The reference to "service competition" lends itself to puffery and public relations, based on service descriptions that cannot be checked and which are written years in advance of when the service will actually commence. ICO is concerned that this criterion in general will permit an excessive degree of subjective rating and reliance on national industrial policy.

ICO is also concerned that at least the first two subcriteria may discriminate against its existing operation and satellites. The design and construction of ICO's F2 satellite, for instance, were completed earlier, and thus should not be compared to newer (untested and on paper) satellite designs.

By contrast, the subcriterion of the date of commercial service (which ICO proposes should be changed to "reliable service"), and its recognition that earlier service could provide additional consumer benefit, is a prime reason why the operational status of ICO's system should be explicitly recognised at the outset.

- **Compliance with the Spectrum Efficiency Objective – 20% weighting**

  *This criterion would be used to assess spectrum efficiency of specific candidate MSS systems. The criterion includes four sub-criteria: total amount of spectrum required, effective management of frequencies, satellite system performance (satellite frequency re-use pattern and data rate per MHz) and coverage performance per MHz.*

This criterion would require the Commission to make a technical judgment on a difficult parameter that has not been defined with clarity. Total spectrum depends on the business plan in terms on applications, services, coverage, frequency reuse, technology and number of subscribers. These factors are difficult to assess quantitatively or predict for a ten year regulatory cycle. It is not clear how the Commission would decide on these and other technical and design factors to rate MSS applicants.

Effective management of frequencies for MSS systems involves assessment of optimised use of and trade-offs between (1) power and (2) spectrum. With CGC, an MSS system will optimise the use of frequencies and spectrum even further.

Satellite system performance involves a trade-off between the number of beams and the power and spectrum assigned to each such beam. In many cases the more powerful the satellite, the more efficient the spectrum is utilised (i.e., the system is bandwidth limited and not power limited). However, it is again difficult to judge as non-GSO satellites need less power for similar performance to a GSO from a power perspective.

- **Compliance with Other Public Policy Objectives – 20% weighting**

  *This criterion would be used to assess the extent to which specific candidate MSS systems contribute to achieving certain public policy objectives not dealt with by the three preceding criteria. The criterion comprises three sub-criteria: ensuring provision of vital public interest services (i.e., public protection and disaster relief), integrity and security of services and coverage of rural areas in the EU.*

The first subcriterion, while laudatory, seems impossible for objective selection, since there is no way to measure how the system will actually perform for vital public interest services, unless there is a dedication to certain non-profit or non-commercial applications (which brings in a conflict with milestone 9).

The second subcriterion is a quality of service objective that should be a normal business attribute of all systems and not especially favoured through the selection process. ICO also doubts there will be sufficient time and technical expertise within the selection process as it is configured to make an objective assessment of this matter.

The third subcriterion appears to be duplicative of the first main criterion on pan-EU geographic coverage and contributes to a serious over-weighting of this characteristic. If the system already covers the whole of the EU, then by definition it covers the rural areas. However, if this subcriterion is intended to assess terrestrial infrastructure (i.e., the CGC element), it is an inappropriate extension of the terrestrial into the satellite selection process.

Finally, it should be clarified that "other public policy objectives" includes only the sub-criteria or others that might be identified by the applicant. Many Community policies could be served or implicated by 2 GHz MSS systems, and it appears arbitrary to limit the entire category of "other" to only these three.[35]

***Question 8: What is your opinion on the use of scoring and weighting as an appropriate mechanism to select MSS operators? To what extent are these weightings appropriate? Have you any suggestions for a more appropriate mechanism which would meet the objectives of the assessment?***

As noted above, ICO supports 'scoring and weighting' as an appropriate mechanism but strongly feels that the due and principal weighting should be accorded to a system operator who has expended considerable resources in time and money as this will expedite the introduction of MSS services and give objective evidence of the reality of its system.

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[35] Careful attention to all general interest objectives would seem required under the *MSS Designation Decision*, Whereas clause 1, which in turn refers to Council Conclusions 15530/04 and 15533/04 of 3 December 2004. The first of these Council Conclusions concerns radio spectrum policy and emphasizes at several points the need to take into account general interest objectives.

***Question 9: To what extent are the proposed common conditions to be applied to the rights of use of the 2 GHz MSS spectrum sufficient and appropriate? What would be the appropriate maximum duration of these rights of use?***

At the outset, ICO observes that the level of detail given in the Consultation does not permit informed discussion or assessment of proposed common conditions. Common conditions relating to a commitment to meet the milestones is objective and understandable enough, but there follows in the Consultation a vague list of possible conditions that "may be attached" to MSS authorisations, including the entire list of conditions from the *Authorisation Directive*. Some further clarity is required before commenting parties can make any objective response to this question or an impact assessment can be completed.

***Question 10: What is your opinion on the proposed arrangements for the authorisation of CGCs?***

The Consultation states that:

> Some Member States have indicated their intention to allow bringing CGCs in operation before the satellite component starts functioning subject to safeguards ensuring the eventual operation of the whole MSS system.[36]

ICO favors early service to the public and thus supports Article 3.2 of the *MSS Designation Decision* requiring that "[a]ny complementary ground based station shall constitute an integral part of the mobile satellite system and shall be controlled by the satellite resource and network management system."

***Question 11: What is your opinion on the proposed arrangements for national authorisation fees?***

The approach briefly noted in the Consultation is that Member States "may levy fees, as appropriate under national authorisation regimes. This may include specific fees in relation to authorisation of CGCs.[37]" The Consultation's description provides insufficient detail to make any reasonable comments, but it is apparent that an opportunity to harmonize the enormous differences between national fee structures is not being taken. The Commission should devote careful attention to all such fees, in order to assure that the goals of the 2 GHz MSS process are not impeded by fees.

[36] Consultation at page 17.

[37] Id.

## V. Feedback

The Consultation also seeks specific feedback from industry, and in particular from **potential MSS operators,** on a series of points noted below. ICO is pleased to respond to these points, but accepts the Commission's note that any information provided in this response is without prejudice to its future application.

**1. The planned geographic and service coverage areas of their systems. The planned timetable for the steps to reach the planned maximum geographic and service coverage.**

ICO plans global coverage of land, sea and air with CGC where appropriate. Extensive coverage is achievable with the ICO-P MEO system – especially of high northern and southern latitude countries. Roll out of CGC will be a business decision and capacity (satellite and CGC) in given areas will be demand based.

**2. The planned services and dates for launching these services on a commercial scale. The planned intermediate steps (e.g., deployment of infrastructure) leading to such launching of services.**

ICO submits the following tentative schedule:

- Roll out of ICO mobile interactive media service (MIM) commercial and non-commercial services in North America in 2008.
- Roll out of MEO services – demonstrations started in March 2007 – further Alpha trials and services planned.

**3. The planned (minimum) requirements for radio spectrum (an upper limit of 2x15 MHz is proposed, see section 2.5 of the Consultation).**

ICO proposed 2 x 12.5 MHz minimum earlier but with new MIM services 2 x 15 MHz requirements are envisaged.

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As requested in the Consultation, please direct questions on this contribution to the following:

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