

## Chapter 15

# Regulation of Space Activities in the United Kingdom

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### 15.1 General Philosophy and Processes of Government Regulations

#### 15.1.1 *The United Kingdom Legal System*

The United Kingdom (UK) was created in 1801, by the union of Great Britain and Ireland. It took its current form in 1922 when Ireland was partitioned into the Republic of Ireland (Eire) and Northern Ireland. The United Kingdom of Great Britain and Northern Ireland comprises four countries: England, Wales, Scotland and Northern Ireland. It has three distinct legal systems, one for England and Wales, with Scotland and Northern Ireland each having their own. Each has its own court system and legal profession.

Therefore, strictly, there is no UK legal system. Although the national systems that makeup the UK legal system are based in common law, they have different pedigrees. For instance, Roman law heavily influences the law of Scotland, while the laws of England have their roots in Norman law. In most matters, legislation is nevertheless extended to apply equally throughout the UK, although it is administered differently in each of the component jurisdictions.

The UK joined the European Economic Community, now the European Union<sup>1</sup> (EU) in 1973. Since then it has been required to incorporate European legislation into UK law, and to recognise the jurisdiction of the European Court of Justice (ECJ) in matters of EU law.

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<sup>1</sup>See the Maastricht Treaty 1992.

### 15.1.2 Background and Constitution

Neither the UK nor its component countries have a written constitution. The constitutional law of the UK consists of statute law and case law. Judicial precedent is applied in the courts by judges interpreting statute law. A third element consists of constitutional conventions that do not have statutory authority, but that are, nevertheless, treated as having binding force. Much of the relationship between the Sovereign and Parliament is conventional rather than statutory.

The Queen is the Head of State, although in practice the supreme authority of the Crown is carried by the government of the day. The Government is made up of the Prime Minister, who is the leader of the majority party in the House of Commons, and ministers with departmental responsibilities who are chosen by the Prime Minister. Of these, the Ministers of State form the Cabinet.

The UK Parliamentary legislature comprises the House of Commons, with 659 Members of Parliament (MPs), elected by simple majority vote in a general election, and The House of Lords.<sup>2</sup> Since 1997 there have been significant constitutional reforms, making it necessary to exercise caution in any reliance on earlier descriptions of the UK legal system. As part of these reforms, certain aspects of government were devolved to the component countries of the UK. A separate Scottish Parliament and a Welsh Assembly were established. Northern Ireland already had its own Assembly. To distinguish the UK Parliament from these new legislatures, it is usually referred to as *Westminster*.

### 15.1.3 Organisation of National Space Activities

Until recently, unlike most countries active in space, the UK had no independent space agency. One of the Government ministries, the Department of Business, Innovation and Skills (BIS), was primarily responsible for the development of UK space policy and regulation of space activity. On 1 April 2010 the UK Space Agency was established.

It will continue to discharge this responsibilities of the British National Space Agency (BNSC). But, the Agency will bring all UK civil space activities under one single management. It also acts as the UK point of contact with the European Space Agency (ESA), the European Commission, and other space agencies and countries.

The main task of the BNSC was to coordinate the space activities of its Partners. The BNSC was connected with ten Government Departments and non-departmental

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<sup>2</sup>Until recently the House of Lords consisted of life peers, awarded peerages for public service, and a large number of hereditary peers. The current Government is in the process of reforming the House of Lords.

public bodies<sup>3</sup> (NDPBs), with a remit to co-ordinate UK civil space activity; support academic research; nurture the UK space industry; and work to increase understanding of space science and its practical benefits.<sup>4</sup> The Agency will do the same.

The BNSC's objectives were to enhance the UK's standing in astronomy, planetary and environmental sciences; to stimulate increased productivity by promoting the use of space in government, science and commerce; and to develop innovative space systems, in order to deliver sustainable improvement in the quality of life.

The BNSC advised the Government on policy issues through the BNSC Policy Unit, which ultimately emanates from the Space Advisory Council, having filtered through a series of committees and boards.<sup>5</sup> The main bodies involved are the UK Space Board, composed of high level officials from each of the five BNSC majority funding Partners, and the Space Advisory Council.

The Agency is to have its own funding. A new Space Leadership Council is formed to advise on policy and priorities. [See [www.ukspaceagency.bis.gov.uk](http://www.ukspaceagency.bis.gov.uk)]

#### **15.1.4 Law Governing Space Activity**

The Outer Space Act 1986 (OSA) provides the legal and regulatory framework for space activities by organisations established in the UK and by UK nationals,<sup>6</sup> wherever conducted.<sup>7</sup> The Act has been extended to Guernsey, the Isle of Man, Jersey (all Crown Dependencies) and (with modifications) to Gibraltar, Bermuda and Cayman

<sup>3</sup>BNSC Partners are: Department for Business, Innovation and Skills, (BIS); Department for Children, Schools and Families, (DCSF); Department for Transport, (DfT); Ministry of Defence, (MoD); Foreign and Commonwealth Office, (FCO); Department for Environment, Food and Rural Affairs, (Defra); Natural Environment Research Council, (NERC); Science and Technology Facilities Council, (STFC); Met Office; and Technology Strategy Board, (TSB).

<sup>4</sup>[www.bnsc.gov.uk](http://www.bnsc.gov.uk) (accessed: 15 November 2009).

<sup>5</sup>The Committee and Board structure is described in the Consultation Document on Funding and Management of UK Civil Space Activities; See [www.bnsc.gov.uk](http://www.bnsc.gov.uk) (accessed: 15 November 2009).

<sup>6</sup>OSA, Section 2 provides:

- (1) This Act applies to United Kingdom nationals, Scottish firms, and bodies incorporated under the law of any part of the United Kingdom.
- (2) For this purpose "United Kingdom national" means an individual who is-
  - (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas), or a British Overseas citizen,
  - (b) a person who under the British Nationality Act 1981 is a British subject, or
  - (c) a British protected person within the meaning of that Act.

<sup>7</sup>OSA, Section 1(a).

Islands (British Overseas Territories).<sup>8</sup> Jurisdiction under the OSA is, therefore, *in personam*, rather than *territorial*, or *subject-matter* jurisdiction.

All space activities<sup>9</sup> carried out by individuals or organisations established in the UK or its Crown Dependencies and Overseas Territories need to be licensed<sup>10</sup> under the OSA.

The OSA confers licensing<sup>11</sup> and other powers on the Secretary of State for Business, Innovation and Skills, who exercises them through the Agency. The OSA seeks to ensure compliance with the UK's obligations under international treaties and principles covering the use of outer space, including liability for damage caused by space objects, the registration of objects launched into outer space and the principles for the remote sensing of the Earth.

All persons to whom the OSA applies, whether licensed or not, must indemnify the UK Government against any claims for damage or loss arising out of licensable activities.<sup>12</sup> This is a mandatory statutory obligation, on which no financial limit is set.<sup>13</sup> At the time of its enactment, this obligation was consistent with that under US

<sup>8</sup>OSA, Section 15(6); Outer Space Act 1986 (Guernsey) Order 1990 S.I. 1990/248, Article 2; Outer Space Act 1986 (Isle of Man) Order 1990 S.I. 1990/596, Article 2; Outer Space Act 1986 (Jersey) Order 1990 S.I. 1990/597, Article 2; Outer Space Act 1986 (Gibraltar) Order 1996 S.I. 1996/1916, Arts. 1, 3, Sch; Outer Space Act 1986 (Cayman Islands) Order 1998 Statutory instruments 1998 2563 Applicants from one of the UK's Overseas Territories to which the Act has been extended (Cayman Islands, Gibraltar, Bermuda) will need to apply to their own Governor's office for an OSA licence. For the distinction between Crown Dependencies and Overseas Territories see [http://en.wikipedia.org/wiki/Crown\\_Dependencies](http://en.wikipedia.org/wiki/Crown_Dependencies) and [http://en.wikipedia.org/wiki/British\\_overseas\\_territory](http://en.wikipedia.org/wiki/British_overseas_territory).

<sup>9</sup>OSA, Section 1 provides:

This Act applies to the following activities whether carried on in the United Kingdom or elsewhere-

- (a) launching or procuring the launch of a space object;
- (b) operating a space object;
- (c) any activity in outer space.

"Procuring" is not defined. However, examples of licences under the OSA define "Licensed Activity" as "procuring from a launch service provider a service comprising the launch and deployment into ... orbit of the Satellite ... and operation of the Satellite." See <http://www.bnsc.gov.uk/assets/channels/industry/OSA2008Example.pdf> (accessed: 15 November 2009).

<sup>10</sup>OSA, Sections 3(1) and 4. No licence is required by employees or agents, or in case of activities whereby the UK's international obligations are discharged by arrangements with another country or otherwise; OSA, Sections 3(2), (3).

<sup>11</sup>OSA, Section 3(1).

<sup>12</sup>OSA, Section 10.

<sup>13</sup>OSA, Section 10(1) provides:

A person to whom this Act applies *shall* indemnify Her Majesty's government in the United Kingdom against any claims brought against the government in respect of damage or loss arising out of activities carried on by him to which this Act applies. [Emphasis added]

legislation. The US soon thereafter amended its laws<sup>14</sup> to limit the obligation, but the UK is yet to do the same. Whether such limitation would constitute an illegal subsidy under EU competition laws remains debatable.

Many of the general provisions of the OSA, and of licences, are more fully discussed below in relation to launch services.

## 15.2 Legal Issues Related to Launch Services (Space Transportation Systems)

Launch activities are not currently carried on in any part of the UK or of its dependent territories. There is no specific regulation of launch services as an activity *per se*. As stated above, they are regulated only if conducted by a person to whom the OSA applies. Launch services and related acts conducted anywhere in the world by UK nationals,<sup>15</sup> companies formed under the laws of the UK, including Scottish firms, need to be licensed.<sup>16</sup>

Before a launch is conducted or procured by a person to whom the OSA applies, it is necessary for that person to obtain a licence. An application for the licence is made to the Agency at least six months before commencing the relevant operation.<sup>17</sup> Those intending to carry out a launch need to demonstrate that they have clear understanding of the hazards involved in the planned space activity, and that a reasonable attempt has been made to limit those hazards.<sup>18</sup>

A Licensee is obliged to comply with certain oversight and terms imposed by the Licence. These fall into three broad categories. The Licensee needs to ensure that the space environment is preserved for all; that the international obligations of the United Kingdom are not breached; and that the BNSC, acting for the United Kingdom government, maintains control and supervision of the space activities.<sup>19</sup> The terms of the Licence will, therefore, include requirements that the Licensee:

1. Prevent contamination of the space environment and changes to that of the Earth;
2. Avoid interference in the space activities of others;
3. Dispose of the Licensed space object appropriately at the end of the licensed activity and inform the Agency of the disposal and termination of the activity;

<sup>14</sup>See 49 U.S.C. 70112 and 70113.

<sup>15</sup>OSA, Section 2; See *supra* footnote 8.

<sup>16</sup>See *supra* footnotes 8 and 12.

<sup>17</sup>Application is made in the specified Form provided by the Agency; See [www.bnsc.gov.uk/assets/channels/industry/OSA2008App.pdf](http://www.bnsc.gov.uk/assets/channels/industry/OSA2008App.pdf) (accessed: 15 November 2009).

<sup>18</sup>See Annex A to the Revised Guidance for Applicants, Outer Space Act 1986; [www.bnsc.gov.uk/assets/channels/industry/OSA2008Guide.pdf](http://www.bnsc.gov.uk/assets/channels/industry/OSA2008Guide.pdf) (accessed: 15 November 2009).

<sup>19</sup>Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, done 27 January 1967, "OST" or "Outer Space Treaty," Article VI.

4. Avoid any breach of the UK's international obligations;
5. Inform the Agency of any change in the licensed activity (e.g. change of orbit, change of owner) and seek approval prior to the change being made;
6. Obtain insurance against third party liabilities (currently to £100 million) arising from the licensed activity – the UK Government should be named as an additional insured and insurance should be for the launch and in-orbit phases of the mission;
7. Preserve the national security of the UK; and
8. Permit reasonable access to documents and inspection and testing of equipment and facilities by the Agency or its advisors as appropriate.

The Agency does not treat certain activities as licensable.<sup>20</sup> These are the leasing of space segment satellite capacity (transponders) for use by the lessee or by a person sub-letting the capacity; and the utilisation of space segment capacity using earth stations for either transmission or reception purposes. This exception does not apply to persons involved in telemetry, tracking and control of satellites in orbit.

### **15.3 Legal Issues Related to Satellite Telecommunications, Including Satellite Broadcasting**

#### ***15.3.1 Law Governing Satellite Communications***

The combination of spectrum management and content regulation creates a large body of rules and procedures affecting communications. Satellite communications in the UK are regulated under laws applying to telecommunications and those governing broadcast services. Telecommunications systems and services are regulated under the Communications Act 2003, which has given effect to a set of EU Directives,<sup>21</sup> modifying and substantially replacing the earlier legislation,<sup>22</sup> and creating a unified regulatory authority, the Office of Communications (Ofcom).

<sup>20</sup>Revised Guidance for Applicants, Outer Space Act 1986; [www.bnsc.gov.uk/assets/channels/industry/OSA2008Guide.pdf](http://www.bnsc.gov.uk/assets/channels/industry/OSA2008Guide.pdf) (accessed: 15 November 2009).

<sup>21</sup>Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services – Framework Directive (*EUOJ* L 108, 24.4.2002, pp. 33–50); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services – Authorization Directive (*EUOJ* L 108, 24.4.2002, pp. 21–32); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities – Access Directive (*EUOJ* L 108, 24.4.2002, pp. 7–20); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services – Universal Service Directive (*EUOJ* L 108, 24.4.2002, pp. 51–77); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector – Directive on privacy and electronic communications (*EUOJ* L 201, 31.7.2002, pp. 37–47).

<sup>22</sup>Telecommunications Act 1984 and the Broadcasting Acts 1990 and 1996.

In regard to the telecommunications sector (as distinct from the broadcasting sector which Ofcom also regulates), the Communications Act abolished the requirement for telecommunications operators to hold a licence to provide telecommunications networks and services. Instead, a self-certification scheme was introduced whereby operators ensure compliance with a set of general conditions in order to operate and provide service.<sup>23</sup> However, the use of spectrum continues to require a wireless telegraphy licence,<sup>24</sup> administered by Ofcom.

Individuals, companies or other organisations located in the UK, British Overseas Territories, the Channel Islands and the Isle of Man, wishing to submit applications through the UK for the management and processing of satellite filings, must follow Ofcom's procedures.<sup>25</sup> These include providing details for coordination and registration, in order to achieve international recognition under the ITU rules.<sup>26</sup>

Operators with significant market power<sup>27</sup> (SMP) have additional conditions applied to them. These include conditions requiring network and service access and access pricing,<sup>28</sup> to ensure dominant operators do not restrict competition. Broadcasters are also subject to conditions relating to the nature and content of the service they provide.<sup>29</sup>

Satellite television services<sup>30</sup> must be licensed<sup>31</sup> by Ofcom if they provide a *television licensable content service* (TLCS)<sup>32</sup> for reception by the public and, if

<sup>23</sup>There are over twenty conditions to which operators must conform.

<sup>24</sup>Wireless Telegraphy Act 2006, Section 8.

<sup>25</sup>See Management of Satellite Filings in Section 2 below.

<sup>26</sup>Radio Regulations, Articles 9, 11, 30 and 30A.

<sup>27</sup>An operator is deemed to have SMP in a particular economic market if 'either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'; 2003 Act, Section 78.

<sup>28</sup>2003 Act, Sections 87–93.

<sup>29</sup>2003 Act, Sections 211 *et seq.* and 232 *et seq.*

<sup>30</sup>This covers programming or programme guides; 2003 Act, Sections 232(1)(a) and (2).

<sup>31</sup>2003 Act, Section 211(2)(b).

<sup>32</sup>See 2003 Act, Sections 362(1) and 232.

As general guidance, a TLCS is a service broadcast from a satellite, distributed using an electronic communications network, or made available by means of a radio multiplex, which meets two basic criteria:

- a. The service consists of "television programmes or electronic programme guides", or both. "Television programmes" includes conventional programmes, advertisements, text and still and moving images, as well as any ancillary services (like subtitling, audio-description or interactive programme enhancements) associated with them. "Electronic programme guides" are services that consist of the listing or promotion of programmes and programme services and provide access to them.
- b. The service is "available for reception by members of the public". If a member of the public is able to receive the service (whether free to air, by paying for a subscription or buying a piece of receiving equipment) the service normally meets this criterion. See 2003 Act, Section 361

they are provided by a person under the jurisdiction of the United Kingdom, for the purposes of Television without Frontiers Directive.<sup>33</sup> The licence required is a TLCS Licence, which is a uniform licence for all such services, containing the same conditions.<sup>34</sup>

The nature of a TLCS can be editorial,<sup>35</sup> tele-shopping or self-promotional.<sup>36</sup> In each case, the licence obliges the licensee to, among other things, comply with the Code on the Scheduling of Television Advertising (COSTA).<sup>37</sup> The COSTA sets out how much advertising a service may carry and deals with other matters such as where and when advertising can be inserted in the service.

Some other conditions may apply to specific types of broadcaster. Broadcasts intended exclusively for reception in third countries, and which are not received directly or indirectly by the public in one or more EU Member State, are not

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See Ofcom's *Television Licensable Content Service: Guidance Notes for Licence Applicants*, Para. 41, 8 June 2009; [http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance\\_notes\\_and\\_apps/tlcs/guidance062009.pdf](http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance_notes_and_apps/tlcs/guidance062009.pdf) ("TLCS Guidance Notes"); see also 2003 Act, Secs. 362(1) and 232.

TLCS licences are granted in respect of a particular licensable service, rather than in relation to a particular service provider. A service provider providing three separate services will therefore need three licences. The policy of one licence per service applies equally to services which utilise only part of a cable or satellite channel or, as with a near video-on-demand service, comprises programming spread across a number of channels. There is no limit to the number of TLCS licences which can be held by one person; TLCS Guidance Notes, Para. 44.

<sup>33</sup>The European Television Without Frontiers Directive, 89/552/EEC, (amended by European Directive 97/36/EC), the Directive, provides for freedom of retransmission and reception for television services within the European Economic Area. A service licensed (or otherwise appropriately authorised) in one Member State does not need separate licensing in any other Member State. Dual licensing is not permitted. Ofcom can only license a service if the provider of that service ("the broadcaster") falls under UK jurisdiction in accordance with the Television Without Frontiers Directive. In order to assess where a broadcaster is established and whether it falls under UK jurisdiction, applicants will need to apply the criteria in Article 2 of the Television Without Frontiers Directive. Applicants should also have regard to the European Convention on Transfrontier Broadcasting and its amending Protocol (ETS132 and ETS171).

See [http://ec.europa.eu/avpolicy/index\\_en.htm](http://ec.europa.eu/avpolicy/index_en.htm) See Ofcom's *Television Licensable Content Service: Guidance Notes for Licence Applicants*, Paras. 49 and 50, 8 June 2009; [http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance\\_notes\\_and\\_apps/tlcs/guidance062009.pdf](http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance_notes_and_apps/tlcs/guidance062009.pdf); (accessed: 15 November 2009).

<sup>34</sup>See Ofcom's *Television Licensable Content Service: Guidance Notes for Licence Applicants*, Para. 23, 8 June 2009; [http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance\\_notes\\_and\\_apps/tlcs/guidance062009.pdf](http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance_notes_and_apps/tlcs/guidance062009.pdf) (accessed: 15 November 2009).

<sup>35</sup>The majority of television channels' programmes are *editorial services*, with conventional programme material and scheduled advertising breaks. These must not include transactional gambling, where viewers are offered rewards for participating.

<sup>36</sup>Tele-shopping and self-promotional programmes are essentially advertising services. They pay different fees to Ofcom.

<sup>37</sup>See [www.ofcom.org.uk/tv/ifi/codes/code\\_adv/tacode.pdf](http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf) (accessed: 15 November 2009).

normally licensable by Ofcom.<sup>38</sup> Certain public service channels<sup>39</sup> may be required to offer their programming for carriage by satellite services.<sup>40</sup>

The Secretary of State has power to designate a *foreign satellite service*<sup>41</sup> as unacceptable for reception in the UK, on the basis of a determination by the Independent Television Commission or of the Radio Authority,<sup>42</sup> Designated Service. Such designation can only be made if the Secretary of State is satisfied that it would be in the public interest and compatible with the international obligations of the UK.<sup>43</sup>

It is an offence for any person in the UK to directly or indirectly supply (or arrange for another person to provide) for the purposes of the Designated Service, any goods or services, including programmes, advertising, or decoders.<sup>44</sup>

### 15.3.2 Management of Satellite Filings by Ofcom

#### 15.3.2.1 Background

International regulation of communications by the ITU distinguishes between planned and unplanned frequencies. Planned frequencies (e.g. the broadcasting satellite service<sup>45</sup>), comprise the worldwide frequency allotment and assignment plans with associated procedures and technical data.<sup>46</sup> Ofcom's procedures conform to the requirements of the ITU rules and regulations, and differ in appropriate respects in relation to planned and unplanned frequencies. These are outlined below.<sup>47</sup>

<sup>38</sup>TLCS Guidance Notes, Para. 54.

<sup>39</sup>This provision applies also to public tele-text services; see also 2003 Act, Section 64.

<sup>40</sup>2003 Act, Sections 272–275.

<sup>41</sup>“Foreign satellite service” means a service which consists wholly or mainly in the transmission by satellite from a place outside the United Kingdom of television or sound programmes which are capable of being received in the United Kingdom; 2003 Act, Section 177(6).

<sup>42</sup>A foreign satellite service is only determined to be unacceptable where the Independent Television Commission or the Radio Authority are satisfied that the service *repeatedly* contained in programmes included in the service material that offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or be offensive to public feeling; 2003 Act, Section 177(3).

<sup>43</sup>2003 Act, Section 177(4).

<sup>44</sup>2003 Act, Section 178.

<sup>45</sup>Planned frequencies are a priori allotments set aside by the ITU, for specific services, in each of the ITU Regions, enabling each country to have access to the relevant frequencies irrespective of their economic development. The unplanned frequencies are those that are subject to the *first come – first served* rule, regarded less equitable to developing nations.

<sup>46</sup>See ITU Radio Regulations, Appendices 30, 30A and 30B.

<sup>47</sup>See Sections e and f below.

As the satellite administration for the UK, Ofcom's functions include those under the ITU Radio Regulations.<sup>48</sup> These are incorporated in the Procedures<sup>49</sup> for handling satellite filings made by operators through the United Kingdom.<sup>50</sup>

Ofcom's Procedures must be followed by companies or other organisations located in the United Kingdom (UK), in the British Overseas Territories, in the Channel Islands and the Isle of Man making satellite filings through the UK. The Procedures document includes details of coordination and registration, necessary for achieving international recognition under the ITU Radio Regulations.

In late 2007 Ofcom proposed a number of changes to the Procedures, of which three areas were of concern.

The first relates to recovery of costs incurred by Ofcom in processing filings. Ofcom proposed to apply the cost recovery powers<sup>51</sup> to the full cost of processing satellite filings. The second issue affecting satellite operators was the due diligence and milestone requirements. These have an impact on several of the commercial decisions to be taken by the applicant who makes a filing through Ofcom. The third was the role of Ofcom in withdrawal of filings where an operator decides not to proceed. Ofcom reviewed the Procedures<sup>52</sup> and issued amendments.<sup>53</sup>

#### 15.3.2.2 Cost Recovery by Ofcom

Following the review, Ofcom decided to continue with the old basis of cost recovery.<sup>54</sup> It is not clear if, or to what extent, Ofcom could legally recover overhead and other charges, given that many of the functions performed are legal obligations under international treaties.

<sup>48</sup>ITU RR 2008 Edition; Article 5 (Frequency allocations); Article 9 (Procedure for effecting coordination with or obtaining agreement of other administrations); and Article 11 (Notification and recording of frequency assignments, including advance publication, coordination and notification under Appendices).

<sup>49</sup>See below; Procedures for the Management of Satellite Filings – a Statement on Amendments to Procedures, Ofcom, 30 May 2008; <http://www.ofcom.org.uk/consult/condocs/filings/statement/statement.pdf> (accessed: 15 November 2009).

<sup>50</sup>Procedures for the Management of Satellite Filings, Ofcom, 27 March 2007, "Procedures", [http://www.ofcom.org.uk/radiocomms/ifi/licensing/classes/satellite/procedure\\_manuals/spectrum\\_filings/satellite\\_filings.pdf](http://www.ofcom.org.uk/radiocomms/ifi/licensing/classes/satellite/procedure_manuals/spectrum_filings/satellite_filings.pdf). The functions of the Radiocommunications Agency were transferred to Ofcom on 29 December 2003, following the Communications Act 2003, Section 22.

<sup>51</sup>Section 28(1) of the 2003 Act, provides that Ofcom may provide a service to any person on such terms "as they may determine in advance" or "as may be agreed between that person and Ofcom."

<sup>52</sup>Procedures for the Management of Satellite Filings: Charges and Amendments to Procedures, 8 November 2007, Closing Date 20 December 2007, ("2007 Consultation").

<sup>53</sup>Procedures for the Management of Satellite Filings: A Statement on Amendment to Procedures, 30 May 2008, ("2008 Statement").

<sup>54</sup>2007 Consultation, Sections 1.9 and 5.4. Ofcom would charge fees depending on the stage reached in the life cycle of the satellite filing and would be based on 3 stages: initial application; co-ordination phase; and post notification phase – in the period when the satellite network is operational. The charges would be scaled to reflect the different levels of support required during the life of the satellite network.

### 15.3.2.3 Due Diligence Requirements by Ofcom

Ofcom has an obligation to carry out due diligence, and to provide to the ITU certain information not later than 6 months prior to a satellite being brought into use.<sup>55</sup> To discharge that obligation, Ofcom requires satellite operators to provide specific deliverables, prior to coordination being carried out.

The purpose of these due diligence requirements is to ensure that filings are only submitted to the ITU where there is a reasonable prospect that the proposed networks will be brought into operation within the relevant time periods. They also serve to address the problem of reservation of orbit and spectrum capacity without actual use. Together with other relevant mechanisms, these requirements are intended to reduce paper filings and to bring more transparency to the filing process.

The timing and detail sought under the Procedures were a cause for concern. In particular, it is not always the case that a satellite construction and launch contract will be signed prior to commencement of coordination.<sup>56</sup> In order to address these issues, following the 2007 Consultation, Ofcom amended the due diligence deliverables and their timing.<sup>57</sup> The deliverables are required for both non-planned and planned bands. However, the process may occur in a different order for planned and for non-planned bands.

Any change to the business plan, including the key milestones, must be communicated to Ofcom by the applicant immediately. The Procedures give examples of key milestones to be met by the operator,<sup>58</sup> and how a typical application may proceed.

### 15.3.2.4 Ofcom Action When Operator Relinquishes Filing<sup>59</sup>

Under the Procedures,<sup>60</sup> Ofcom proposed to publicise relinquishment of a filing by the operator and to invite expressions of interest from other eligible operators. If more than one such expression of interest was received, Ofcom would conduct an award process.

Many satellite operators are global in scope and are in competition with each other. Therefore, Ofcom decided not to pursue the retaining of the filing as a UK asset. The prospect of a filing on which co-ordination effort had been expended falling into the hands of a competitor was a disincentive for operators to relinquish filings voluntarily. Also, in some cases, allowing a relinquished filing to be acquired by another operator could make it more difficult for the original operator to pursue other filings. This would be a further disincentive to relinquish filings.

<sup>55</sup>ITU RR 2008, Article 9.1, Resolution 49.

<sup>56</sup>Procedures, Table 1.

<sup>57</sup>2008 Statement, Section 4.4.

<sup>58</sup>Procedures, Annex 2.

<sup>59</sup>2008 Statement, Sections 4.7–4.11.

<sup>60</sup>Procedures, Sections 12.2 and 12.3.

If the operator concerned wishes to relinquish its filing, Ofcom will now suppress a UK filing at the ITU, without inviting expressions of interest in the filing from other eligible operators.<sup>61</sup>

Further changes to these Procedures may be made once the EU communications and satellite regimes, are finalised and implemented.

#### 15.3.2.5 Non-Planned Frequency Assignment

As long as an application is valid, Ofcom will submit it to the ITU, without publishing details of the application.<sup>62</sup> However, notification data about the application will only be submitted by Ofcom if it is satisfied that coordination has taken place with any affected UK network with higher regulatory precedence.<sup>63</sup>

A network with prior assignment may be brought into use after that of the applicant, before completion of coordination. However, if the former suffers harmful interference from the applicant network, the latter will have to mitigate the interference.<sup>64</sup> Failing such mitigation, Ofcom may cancel the assignment.<sup>65</sup>

#### 15.3.2.6 Planned Frequency Assignment

On receiving applications<sup>66</sup> to bring an unmodified UK assignment or allotment into operation, Ofcom will publish a notice indicating that an application has been received, and will invite other proposals. If additional applications are received, Ofcom will then carry out an award process to determine which application, if any, to accept.

Similar rules apply where a satellite filing is not technically compatible with an unused assignment or allotment. However, there are some differences in the way Ofcom proceeds. These may include the modification of the assignment to accommodate the successful application, in accordance with the ITU procedures.<sup>67</sup>

In cases of technical incompatibility, Ofcom will require evidence of a coordination agreement with the operator of that existing usage or the existing proposed usage before submission to the ITU.<sup>68</sup>

For certain new applications requiring modification of a plan, with impact on existing UK assignments or allotments in that plan (including British Overseas

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<sup>61</sup> Sections 12.1, 12.2 and 12.3, and consequentially 12.8, 13.4, 13.5 and 13.9 of the Procedures are amended.

<sup>62</sup> This is so even where there is a technical conflict with other existing UK filings; Procedure, Para. 6.5.

<sup>63</sup> Procedure, Para. 6.3.

<sup>64</sup> Procedure, Para. 6.4.

<sup>65</sup> Procedure, Para. 12.

<sup>66</sup> See generally Procedure, Para. 6.

<sup>67</sup> For the slightly different position in relation to British Overseas Territories see Procedure, Para. 6.12.

<sup>68</sup> Procedure, Para. 6.10.

Territories), the application will be treated in a similar manner to an application in the non-planned bands, i.e. Ofcom will not initiate a competitive process.<sup>69</sup>

## 15.4 Earth Observation Services, Including Data Processing and Distribution

The UK is a leading participant in the development of satellite remote sensing technology.<sup>70</sup> Its contributions are largely through ESA and other partnership missions.<sup>71</sup> As a member of ESA, the UK also benefits from international arrangements between ESA and other international agencies and partners.

There is no specific UK law dealing with collection and distribution of Earth Observation data. However, such activity is still subject to regulation. Earth Observation is subject to the UK requirements of national security,<sup>72</sup> database protection rights<sup>73</sup> and data privacy.<sup>74</sup>

### 15.4.1 National Security

One of the requirements of the OSA is that outer space activities conducted by UK entities and nationals<sup>75</sup> not be permitted if they impair national security.<sup>76</sup> Therefore, no licence will be granted by the Agency to conduct remote sensing satellite operations that are likely to jeopardise UK national security. Consequently, such activity will be an offence under the OSA.<sup>77</sup>

Additionally, export controls restrict the overseas dissemination of sensed data, as well as export of sensing equipment on board a satellite.<sup>78</sup> These controls are in part the result of international agreements and EU policy and law.<sup>79</sup>

<sup>69</sup>Procedure, Para. 6.9.

<sup>70</sup>UK scientists and industry are at the forefront of the development and operation of ENVISAT, the largest and most sophisticated European remote sensing satellite; [www.bnsc.gov.uk/Our-Planet/Activities/Envisat/9231.aspx](http://www.bnsc.gov.uk/Our-Planet/Activities/Envisat/9231.aspx) (accessed: 15 November 2009).

<sup>71</sup>BNSC funded GIFTSS, Government Information From The Space Sector, and participates in CEOS, Committee on Earth Observation Satellites and ESA's GMES, Global Monitoring for Environment and Security; [www.bnsc.gov.uk/Our%20Planet/The%20environment/Earth%20observation/10309.aspx](http://www.bnsc.gov.uk/Our%20Planet/The%20environment/Earth%20observation/10309.aspx) (accessed: 15 November 2009).

<sup>72</sup>OSA, Section 4(2)(c); See BNSC Licence conditions, Para. (b) above.

<sup>73</sup>Copyright, Designs and Patents Act 1988, Sections 3(1)(d) and 3A.

<sup>74</sup>Data Protection Act 1998.

<sup>75</sup>OSA, Sections 1 and 2(2).

<sup>76</sup>OSA, Section 4(2)(c).

<sup>77</sup>OSA, Section 3(1).

<sup>78</sup>Export Control Act 2002; Export Control Order 2008.

<sup>79</sup>See [www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/legislation/index.html](http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/legislation/index.html) (accessed: 15 November 2009).

### 15.4.2 Database Rights

These are discussed in the next section.

### 15.4.3 Privacy

Depending on the detail of the images, it may be that the privacy rights of an individual are breached by satellite earth observation activities.<sup>80</sup> In general, there is a breach when the data is such as to identify the individual and disclose personal information relating to the individual.

Public authorities have a positive obligation to make available environmental information held by them.<sup>81</sup>

## 15.5 Intellectual Property and Transfer of Technology

### 15.5.1 Copyright and Database Right

Remote sensing activities by European operators raise the question of how to protect data from Earth observation satellites. These are very costly programmes and a legal tool is needed to enable satellite operators to protect their investment and to commercialise Earth observation data. No private investors will engage in the creation of computer products derived from data unless they are certain that the legal tools exist to recover their investment.

A study carried out on behalf of the European Commission confirmed the confusion about which type of law should be applied (copyright, trade secrets or ownership rights), and that existing European legislation did not cover remote sensing data.<sup>82</sup>

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<sup>80</sup>Data Protection Act 1998; Civil Procedure Rules 1998 (SI 1998/3132); Civil Procedure Rules 1998 (SI 1998/3132); European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; *Murray v Big Pictures (UK) Ltd* [2008] 2 FLR 599, *Campbell v MGN* [2004] 2 AC 457; *Von Hannover v Germany* (Application No 59320/00) (2005) 40 EHRR 1, ECHR.

<sup>81</sup>The Environmental Information Regulations 2004, Statutory Instrument 2004 No. 3391; Directive 2003/4/EC of the European Parliament and the Council of 28th January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p26); Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) 1998 – United Nations Economic Commission for Europe (UNECE).

<sup>82</sup>See Sa'id Mosteshar, Report commissioned by the European Commission presented in March 1993, *Conditions of Access to Earth Observation Data: Legal Aspects* – United Kingdom and Irish Republic Chapters, ECSL, April 1993.

Following the study, the European Commission issued the Directive on Protection of Databases,<sup>83</sup> implemented in the UK in 1997.<sup>84</sup> This amended the 1988 Copyright Act by adding databases to the definition of works entitled to protection<sup>85</sup> under the Act. It also created a *database right*<sup>86</sup> belonging to the *owner*,<sup>87</sup> which makes any unauthorised extraction or re-utilisation of all or a substantial part of the database content an infringement of the database right.<sup>88</sup> The right is aimed at protecting those who take initiative in obtaining, verifying or presenting the contents of a database.<sup>89</sup>

Other specific rights under the 1988 Copyright Act are also applied to databases.<sup>90</sup>

### 15.5.2 Technology Transfer

For a brief discussion of technology transfer regulations see Export Control above.

## 15.6 Satellite Navigational Services

There are no specific regulations on satellite navigation services. Rules dealing with data protection and export control discussed in previous sections of this chapter are applicable to them.

<sup>83</sup>Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; OJ L 077, 27/03/1996 P. 0020 – 0028.

<sup>84</sup>The Copyright and Rights in Databases Regulations 1997 (S.I. 1997/3032); Copyright, Designs and Patents Act 1988, 1988 Copyright Act.

<sup>85</sup>1988 Copyright Act, Sections 3 and 3A.

<sup>86</sup>SI 1997/3032, Regulation 13 provides:

#### 13 Database right

(1) A property right (“database right”) subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

(2) For the purposes of paragraph (1) it is immaterial whether or not the database or any of its contents is a copyright work, within the meaning of Part I of the 1988 Act.

<sup>87</sup>SI 1997/3032, Regulations 14 and 15.

<sup>88</sup>SI 1997/3032, Regulation 16.

<sup>89</sup>See definition of *maker*, SI 1997/3032, Regulations 14(1) and (5).

<sup>90</sup>SI 1997/3032, Regulation 23.