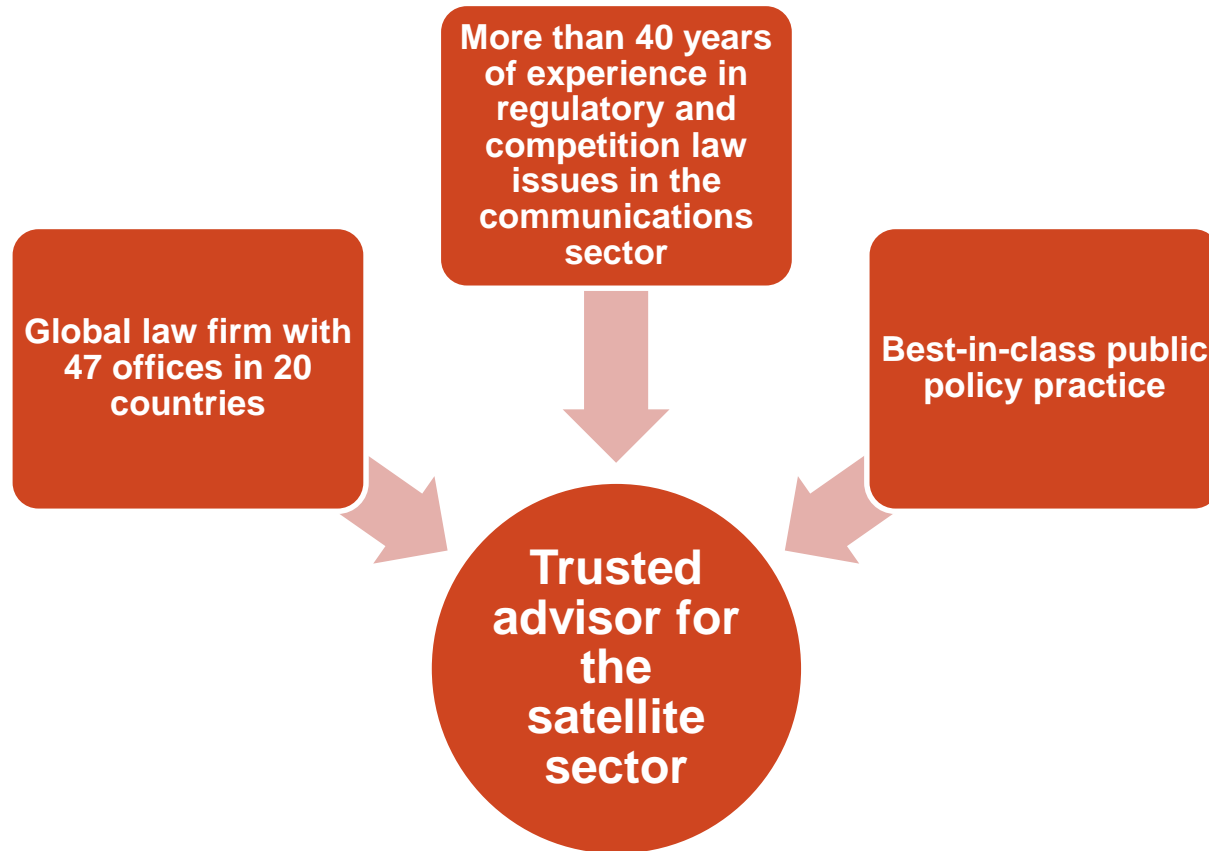


EU Competition Law Issues in the Satellite Sector

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History and Trends

Evolution of the satellite sector

Consolidation and Public Interest

How are satellite mergers likely to be assessed under EU merger control rules?

Spectrum Allocation

How are spectrum allocations likely to be assessed under EU competition rules?

Spectrum Coordination

How are spectrum coordination agreements likely to be assessed under EU competition rules?

Net Neutrality

How are EU net neutrality rules likely to be applied to satellite broadband?

EU MSS Spectrum Allocation Dispute

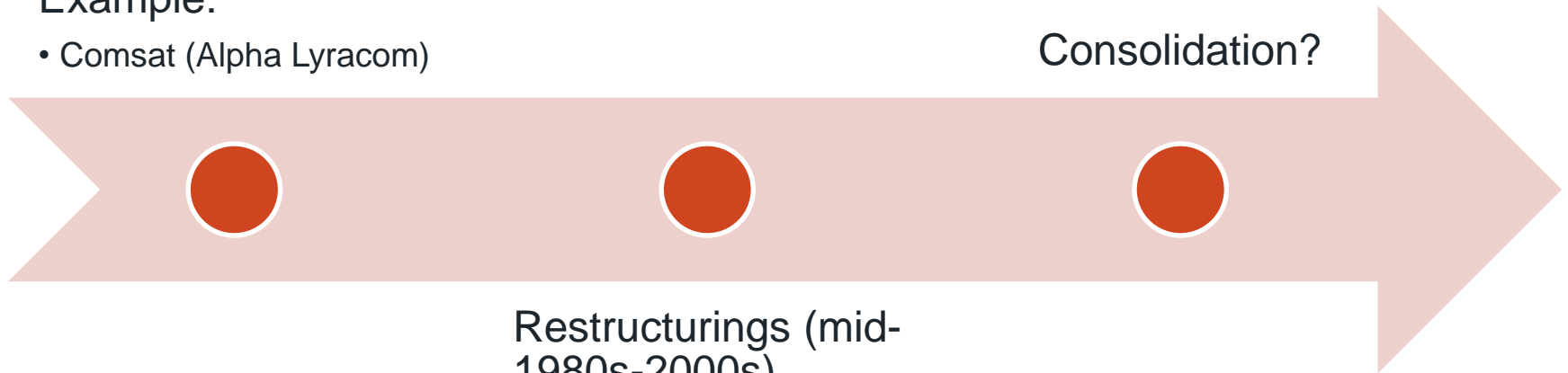
Viasat challenges

Satellite
cooperatives
(until mid-1980s)

Example:

- Comsat (Alpha Lyracom)

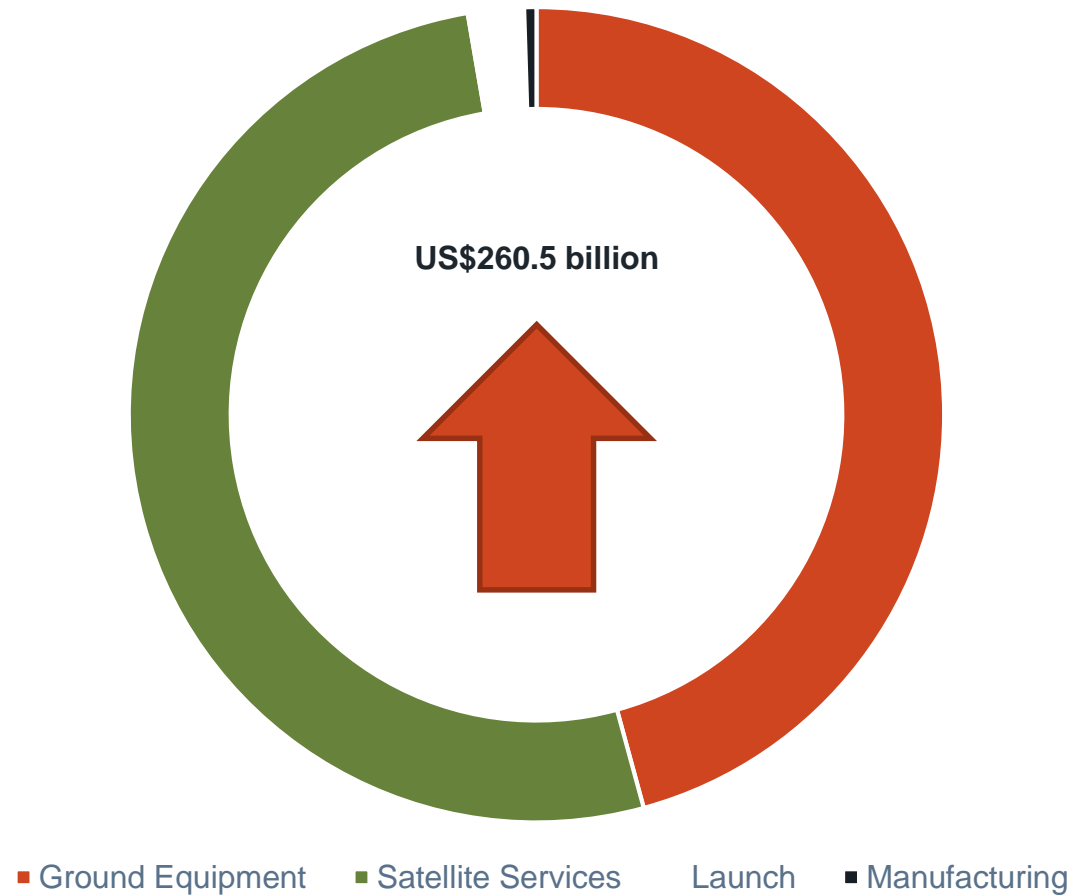
Consolidation?



Restructurings (mid-
1980s-2000s)

- Examples:
 - Eutelsat
 - Intelsat
 - Inmarsat

2017 Revenues



Likely within scope of EU Merger Regulation

- Turnover thresholds
- Referrals from member states, given transnational nature of the satellite sector (e.g. Apax Partners/TSS)
- EU Commission's experience in the satellite sector

Precedents

- **SES Astra/Eutelsat JV**
 - Broadcasting content to mobile devices (EEA-wide)
 - Two-way communications (global)
- **Apax Partners/Telenor Satellite Services**
 - Wholesale and retail two-way communications (global)
- **Astra JV**
 - Space segment capacity for distribution of TV channels (EEA-wide)
 - Satellite up-linking (EEA-wide)
- **International Private Satellite Partners**
 - International value-added services to large corporations (North America and EEA-wide)
 - Supply of bulk satellite capacity (North America and EEA-wide)
- **Inmarsat-P**
 - S-PCS (global)
- **Iridium**
 - S-PCS (global)

Relevant markets

- **Space segment capacity** (Astra)
- **Satellite up-linking** (Astra)
- **Satellite networks and transmission capacity** (IPSP, SES Astra/Eutelsat JV) – Possibly subdivided in segments (maritime and aeronautical)
- **Satellite services** (Inmarsat P, IPSP, SES Astra/Eutelsat JV, Iridium) – Possibly subdivided in segments (broadcasting, communications)

Competition issues

- **Is there direct competition between the parties?**
 - Are there alternatives in the market segments?
 - Competition with other networks (mobile, cable)?
- **Would one party have the ability/incentive to enter the other's markets?**
 - Technical and regulatory barriers?
- **Spectrum concentration?**
 - Is adjacent spectrum (e.g. within L-band, S-band, Ku-band, K-band) needed to provide certain services for which there is a growing demand (e.g. 5G)?

Public interest issues

- Exception to EUMR one-stop shop: National security
- Protectionism?

Article 44 ITU Constitution

Member States shall endeavour to limit the number of frequencies and the spectrum used to the minimum essential to provide in a satisfactory manner the necessary services. To that end, they shall endeavour to apply the latest technical advances as soon as possible.

In using frequency bands for radio services, Member States shall bear in mind that radio frequencies and any associated orbits, including the geostationary-satellite orbit, are limited natural resources and that they must be used rationally, efficiently and economically, in conformity with the provisions of the Radio Regulations, so that countries or groups of countries may have **equitable access to those orbits and frequencies**, taking into account the special needs of the developing countries and the geographical situation of particular countries.

Potentially anti-competitive agreements

Bid rigging and exchange of information during auction

(Art. 101 TFEU)

Private agreements to share spectrum and geostationary positions holdings to carve markets between competitors (Astra)

Joint bidding between competitors whose combined market share exceeds 15%, unless necessary and justified on the basis of efficiencies

Financial inducements to delay launch of satellite or to buy “paper filings” hoarding the spectrum

Dominant position

- Relevant markets
 - Services
 - Rebuttable presumption of dominance at < 50% market share, but dominance has been found also with > 20% market share, depending on the circumstances (barriers to entry)
 - Spectrum markets?

Special and exclusive rights

- Now abolished by EU Satellites and Competition Directives
- Rights acquired prior to abolition?

**Potential
abuse of
single or
collective
dominant
positions**

(Art. 102
TFEU alone
or in
conjunction
with Article
106 TFEU)

Misuse of regulatory process

Discrimination

Spectrum “hoarding”

Sham opposition to competitors’ filings

Refusal to deal

Denigration of competitors with customers

State aid

Selective economic advantage

(e.g. C-431/07
P, *Bouygues
Télécom*

*v European
Commission*)

Rights to use spectrum have an economic value that depends on the time when the right holder can enter the market and the use that can be made of the spectrum

Awarding spectrum at different times does not amount to state aid, provided that the operators receive the same treatment with regard to fees

Article 45 ITU Constitution

All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Member States or of recognized operating agencies, or of other duly authorized operating agencies which carry on a radio service, and which operate in accordance with the provisions of the Radio Regulations.

Each Member State undertakes to require **the operating agencies which it recognizes and the other operating agencies duly authorized for this purpose to observe the provisions** above.

Further, the Member States recognize the necessity of taking all practicable steps to prevent the operation of electrical apparatus and installations of all kinds from causing harmful interference to the radio services or communications mentioned above.

General antitrust principles for coordination meetings supervised by national regulatory authorities

- Participation in coordination meetings must be unrestricted and transparent
- The participation of each satellite company must not go beyond “normal lobbying”
- Participating companies must not exchange competitively sensitive information
- Compatibility standards ultimately adopted must be based on non-discriminatory, open and transparent procedures

No “state action” defence

Need for antitrust counsel from the outset

Inherent technical issues

- Limited capacity
- High latency
- Bandwidth limitations
- Cosmic atmospheric and solar influence on transmission

Exemption under FCC Net Neutrality Order

No exemption under EU Net Neutrality Regulation

- Possibility for exception?
- Legal uncertainty
- Need for case law
- Opportunity for review of the regulation in 2019

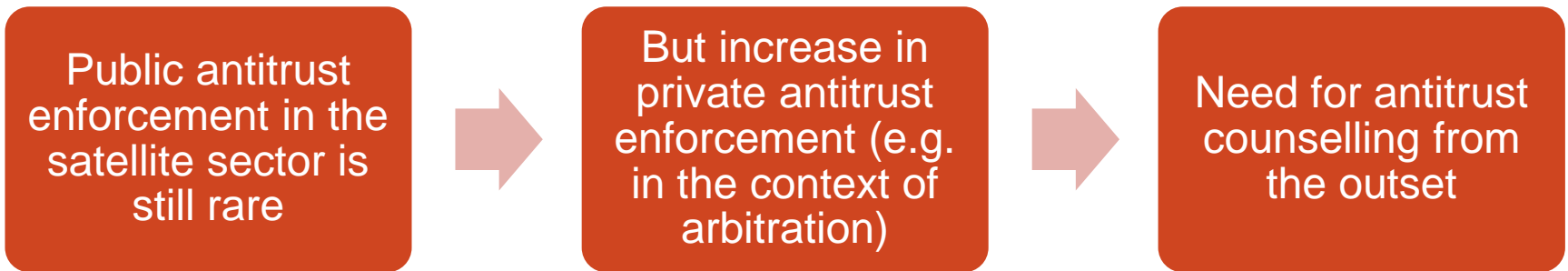
EU Decision selected Inmarsat and Echostar for provision of MSS in S-Band

National authorisations for use of S-Band and CGCs

Viasat challenge

- CGCs do not complement Inmarsat's EAN
- EAN does not provide MSS, but in-flight connectivity
- Breach of EU Decision and national authorisations conditions

Cases currently pending in Belgium, the UK and the EU



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■ Regional desks and strategic alliances

