EU Competition Law Issues in the Satellite Sector

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About Us

Global law firm with 47 offices in 20 countries

More than 40 years of experience in regulatory and competition law issues in the communications sector

Best-in-class public policy practice

Trusted advisor for the satellite sector
## Agenda

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Satellite cooperatives (until mid-1980s)

Example:
- Comsat (Alpha Lyracom)

Restructurings (mid-1980s-2000s)
- Examples:
  - Eutelsat
  - Intelsat
  - Inmarsat

Consolidation?
Global Satellite Industry Indicators (SIA)

2017 Revenues

US$260.5 billion

- Ground Equipment
- Satellite Services
- Launch
- Manufacturing
Consolidation

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)
Consolidation

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)
Consolidation

**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?
Spectrum Allocation

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.
## Spectrum Allocation

### Potentially anti-competitive agreements

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<th>(Art. 101 TFEU)</th>
<th>Bid rigging and exchange of information during auction</th>
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<td>Private agreements to share spectrum and geostationary positions holdings to carve markets between competitors (Astra)</td>
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<td>Joint bidding between competitors whose combined market share exceeds 15%, unless necessary and justified on the basis of efficiencies</td>
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<td>Financial inducements to delay launch of satellite or to buy “paper filings” hoarding the spectrum</td>
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Spectrum Allocation

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?
## Spectrum Allocation

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<th>Potential abuse of single or collective dominant positions (Art. 102 TFEU alone or in conjunction with Article 106 TFEU)</th>
<th>Misuse of regulatory process</th>
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<td>Discrimination</td>
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<td>Spectrum “hoarding”</td>
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<td>Sham opposition to competitors’ filings</td>
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<td>Refusal to deal</td>
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<td>Denigration of competitors with customers</td>
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Spectrum Allocation

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
Net Neutrality

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
MSS Dispute

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
Conclusion

Public antitrust enforcement in the satellite sector is still rare

But increase in private antitrust enforcement (e.g. in the context of arbitration)

Need for antitrust counselling from the outset
Global Coverage

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Panamá
Peru
Turkey
Ukraine
Venezuela

Office locations
Regional desks and strategic alliances