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ESA-EU Relations:

The true meaning of the Treaty of Lisbon in the context of regional cooperation in outer space in Europe

Contribution to Chapter III, Present Status of Regional Cooperation – Europe

1. Introduction

Amongst several multi-state cooperation organizations within Europe, the European Space Agency (ESA) and the European Union (EU) are by far the most important when it comes to outer space. This contribution specifically focuses on the latter, reflecting on the entry into force of the Treaty of Lisbon¹ late 2009 which introduced a so-called ‘space competence’ of the European Union into the already complicated legal European ‘spacescape’. However, the proper role and meaning of that Treaty cannot be understood without understanding the broader environment of European space activities, notably as involving by ESA.

ESA was established in 1975 “to provide for and to promote, for exclusively peaceful purposes, cooperation among European States in space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space applications systems”.² Currently, the organization consists of twenty member states.³

Whilst the origins of the European Union go back considerably further than those of the Agency – notably to the 1957 EEC Treaty⁴ – its role in outer space is of much more recent date than that of ESA. It should further be noted that the Union currently comprises twenty-eight member states⁵; eight more than ESA, where moreover two ESA member states are not member states of the Union (Norway and Switzerland). The often-heard assumption that ESA is essentially ‘the space agency of the Union’ is therefore fundamentally incorrect, certainly in a formal sense.

2. The three phases of integrated European presence in outer space

In reality, based upon the respective roles of the two European organizations – ESA primarily representing an effort to pool material and scientific resources to conduct space activities, the Union as it evolved over the decades primarily aiming to establish a

1 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (hereafter Treaty of Lisbon), Lisbon, done 13 December 2007, entered into force 1 December 2009; OJ C 306/1 (2007).

2 Art. II Convention for the Establishment of a European Space Agency (hereafter ESA Convention), Paris, done 30 May 1975, entered into force 30 October 1980; UKTS 1981 No. 30; Cmnd. 8200; 14 ILM 864 (1975) *Space Law – Basic Legal Documents*, C.I.1.

3 See e.g. http://www.esa.int/About_Us/Welcome_to_ESA/What_is_ESA, last accessed 24 November 2014; these are Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

4 Treaty establishing the European Economic Community (EEC Treaty), Rome, done 25 March 1957, entered into force 1 January 1958; 298 UNTS 11.

5. See e.g. http://europa.eu/about-eu/countries/index_en.htm, last accessed 24 November 2014; these are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

separate legal order with, at the core, an Internal Market for most commercial products and services – so far roughly three phases of European presence in outer space can be discerned.

In the first phase, running from ESA's origins in the early 1960s⁶ until roughly 1986, ESA and its forerunners represented, even embodied the efforts at European integration of space activities, projects and programmes in a rather exclusive manner. An intricate system of mandatory and optional activities⁷ generated substantial and institutionalized cooperation while at the same time allowing individual states sufficient sovereign discretion as regards the extent in which they wished to contribute and be involved in such activities. Moreover, the right of the ESA Director General to propose programmes to the member states for execution in the context of ESA in practice ensured a considerable measure of actual Europeanization of the larger non-military space projects. This phase came to an end in 1986 when the then-European Community became formally and structurally involved in space activities. Not that ESA in any way diminished its activity and impact, but it no longer remained the only European flag-bearer in space and space-related activities. The Single European Act⁸ for the first time included 'space' (more precisely, 'space research') in the scope of competences of the European Commission, the primary executive organ of the Community – albeit principally for building and financing research and development framework programmes.⁹ At about the same time, a report from a European Parliamentary working group chaired by Mr. Toksvig addressed the potential relevance of space activities for broader European economic integration¹⁰, the core mission of the European Community.

These two developments heralded in the second phase, where now ESA and the Union were both promoting integration of relevant individual member state activities in or with respect to outer space – but with ESA clearly still in the leading position. The Community started building relationships with ESA, which it recognized as the prime European organization involved in space research and related activities; it saw its role as primarily a supportive and accommodating one.

In that vein, for example in 1993 a Space Advisory Group had been established to institutionalize cooperation and coordination between ESA and the Commission in matters of outer space.¹¹ Gradually, however, with increasing realization on the part of the Union's organs of the importance of space for the overall European cause, the balance began to shift. In 2000 a European Space Strategy was developed on a more or less equal basis as part of a first joint meeting of the ESA Council and the EU Council of Ministers (the two highest organs of the organizations¹²). This Strategy spelled out more precisely

6 Though ESA itself was established in 1975 only, the ESA Convention² effectively integrated its two forerunners ESRO and ELDO, which had been established in the early 1960s, into one Agency.

7 See Art. V(1)(a), (b), ESA Convention (n. 2).

8 Single European Act, Luxembourg/The Hague, done 17/28 February 1986, entered into force 1 July 1987; UKTS 1988 No. 31; Cm. 372; OJ L 169/1 (1987); 25 ILM 506 (1986).

9 See Art. 24, Single European Act (a, n. 8).

10 See Toksvig Report on European space activities, Doc. B 2 565/86, of 6 July 1986.

11 Cf. e.g. Preamble, § 5, Council Resolution on the involvement of Europe in a new generation of satellite navigation services – Galileo-Definition phase, of 19 July 1999; OJ C 221/01 (1999).

12 Cf. Art. XI, ESA Convention (a, n. 2), resp. Art. 16 Treaty on European Union as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (hereinafter consolidated version of Treaty on European Union), Lisbon, done 13 December

the perceived respective roles of the two – with the Union leading all efforts which should allow Europe to reap the benefits from space activities for economy and society, as opposed to scientific and research and development oriented policies, programmes and projects, where ESA was to remain in the driver’s seat.¹³

This second phase finally had morphed into a third phase by 2003, when the European Commission produced – on its own – its White Paper “Space: a new European frontier for an expanding Union – An action plan for implementing the European Space policy”.¹⁴ The call was expressly made for, *inter alia*, space infrastructures and applications to serve the needs of EU political objectives and to update the institutional structure to provide the Union with new powers to drive, fund and coordinate activities within this space policy.¹⁵ Though also according to the White Paper ESA still had to perform a major contributory role to the European space effort and the transformation of benefits therefrom to the member states’ societies and economies, the Union had now clearly taken the steering wheel. Nowhere did this become more visible than in the two European ‘flagship projects’ which were initiated by the Commission.

Already in 1994 the Commission had taken the policy decision to become involved in what was known as the Global Navigation Satellite System.¹⁶ This idea soon evolved into that of Europe (with the Union then leading and ESA as well as Eurocontrol¹⁷ following¹⁸) building its own full-fledged system, Galileo. By 2002 the first proper piece of EU law on the issue was initiated, a Regulation setting up a Galileo Joint Undertaking,¹⁹ followed in the years until the present by a number of other key Regulations increasingly reflecting EU leadership in and control over the project.²⁰

2007, entered into force 1 December 2009; OJ C 115/1 (2009).

13 See Council Resolution on developing a coherent European space strategy, of 2 December 1999; OJ C 375/1 (1999); and Council Resolution on a European space strategy, of 21 December 2000; OJ C 371/2 (2000).

14 White Paper – Space: a new European frontier for an expanding Union – An action plan for implementing the European Space policy, COM(2003) 673 final, of 11 November 2003.

15 See esp. §§ 2, 3, White Paper – Space: a new European frontier for an expanding Union (2003).

16 See Council Resolution on the European Contribution to the Development of a Global Navigation Satellite System (GNSS), of 19 December 1994; OJ C 379/2 (1994).

17 Eurocontrol was originally established by way of the Convention Relating to Co-operation for the Safety of Air Navigation, Brussels, done 13 December 1960, entered into force 1 March 1963; 523 UNTS 117; UKTS 1963 No. 39; Cmnd. 2014. To enhance technical and operational safety in European aviation – *inter alia*, once that became feasible, with the use of GNSS.

18 As formalized by the Agreement between the European Community, the European Space Agency and the European Organisation for the Safety of Air Navigation on a European Contribution to the development of a global navigation satellite system (GNSS), Luxembourg, done 18 June 1998, entered into force 18 June 1998; OJ L 194/16 (1998).

19 Council Regulation setting up the Galileo Joint Undertaking, No. 876/2002/EC, of 21 May 2002; OJ L 138/1 (2002).

20 Those concern Council Regulation on the establishment of structures for the management of the European satellite radio-navigation programmes, No. 1321/2004/EC, of 12 July 2004; OJ L 246/1 (2004); Regulation of the European Parliament and of the Council on the further implementation of the European satellite navigation programmes (EGNOS and Galileo), No. 683/2008/EC, of 9 July 2008; OJ L 196/1 (2008); Regulation of the European Parliament and of the Council setting up the European GNSS Agency, repealing Council Regulation (EC) No 1321/2004 on the establishment of structures for the management of the European satellite radio navigation programmes and amending Regulation (EC) No 683/2008 of the European Parliament and of the Council, No. 912/2010/EU, of 2 September 2010; OJ L 276/11 (2010); Decision of the European Parliament and of the Council on the rules for access to the public regulated

EU interests in practical applications of space soon led to another ‘European space flagship’ being developed together with ESA; the Global Monitoring for the Environment and Security (GMES), now redubbed Copernicus. The primary political decision was announced in 2001²¹; meanwhile, as of 2010 also EU legislation on GMES has begun to become enunciated²².

Many expected this third phase, of a Union leading ESA in the overall European space effort, to soon lead into a fourth phase, of full-fledged incorporation of the latter into the institutional structure of the former – as had already for example happened in the security field with the Western European Union (WEU).²³

The most specific effort at such inter-institutional integration, however, resulted in the 2003 Framework Agreement²⁴, an inter-organizational treaty-like agreement which did not subsume ESA or its operations under the EU institutional framework or force the former to comply with the latter’s legal order, but rather ended up providing an *à la carte*-approach to ESA–EU cooperation in space activities, programmes and policies²⁵. Most specifically, “each Party shall undertake, in compliance with its own prerogatives, legal instruments and procedures, such actions as are required to achieve the purpose of

service provided by the global navigation satellite system established under the Galileo programme, No. 1104/2011/EU, of 25 October 2011; OJ L 287/1 (2011); and Regulation of the European Parliament and of the Council on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council, No. 1285/2013/EU, of 11 December 2013; OJ L 347/1 (2013).

21 Council Resolution on the launch of the initial period of global monitoring for environment and security (GMES), of 13 November 2001; OJ C 350/4 (2001).

22 Those concern Regulation of the European Parliament and of the Council on the European Earth monitoring programme (GMES) and its initial operations (2011 to 2013), No. 1016/2010/EU, of 22 September 2010; OJ L 276/1 (2010); Commission Delegated Regulation supplementing Regulation (EU) No 911/2010 of the European Parliament and of the Council on the European Earth monitoring programme (GMES) by establishing registration and licensing conditions for GMES users and defining criteria for restricting access to GMES dedicated data and GMES service information, No. 159/2013/EU, of 12 July 2013; OJ L 309/1 (2013); and Regulation of the European Parliament and of the Council establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010, No. 377/2014/EU, of 3 April 2014; OJ L 122/44 (2014)

23 The WEU had originally been established by way of the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Brussels, done 17 March 1948, entered into force 25 August 1948; UKTS 1 (1949) Cmd. 7599; but from 1999 onwards was gradually integrated in the Union’s institutional structure.

24 Framework Agreement Between the European Community and the European Space Agency (hereafter Framework Agreement), Brussels, done 25 November 2003, entered into force 28 May 2004; (2004)53 ZLW 89 (2004).

25 For example, Art. 5(1), Framework Agreement (n. 24), stated that “the joint initiatives to be carried out by the Parties may take, without being limited to, the following forms: (a) the management by the ESA of European Community space-related activities in accordance with the rules of the European Community; (b) the participation by the European Community in an optional programme of the European Space Agency, in accordance with Article V.I.b of the ESA Convention, (c) the carrying out of activities which are coordinated, implemented and funded by both Parties; (d) the creation by the Parties of bodies charged with pursuing initiatives complementary to research and development activities, such as the provision of services, the promotion of operators formation and the management of infrastructures; (e) carrying out of studies, the organisation of scientific seminars, conferences, symposia and workshops, the training of scientists and technical experts, the exchange or sharing of equipment and materials, the access to facilities, and the support of visits and exchanges of scientists, engineers or other specialists.”

the cooperation provided for”²⁶, and this “with due regard to their respective tasks and responsibilities and their respective institutional settings and operational frameworks”²⁷. It is against this background finally that the efforts in the context of the Union to arrive at what was labeled a ‘European space competence’, ultimately finding its shape in the Treaty of Lisbon, have to be understood.

3. Towards a European space competence?

The mere battle-cry for establishment of a ‘European space competence’ suggests that there was no such thing as a competence of the Union and its key organs – from this perspective the Commission, the Council of Ministers and the European Parliament – to legislate on space. This, however, upon closer view turns out to be – at least – a rather fundamental misconception.

Obviously, outer space not being part of any (EU member) state’s territory,²⁸ it could also not ‘geographically’ form part of the EU realm, subject to the EU legal order to the extent it applied on a territorial basis. However, already for a considerable time before the discussions on a ‘European space competence’ took off in earnest in the early 2000s, the European Community, then Union had exercised jurisdiction regarding outer space activities in four distinct areas, albeit in somewhat indirect or almost accidental fashion.

Firstly, the effect of the 1986 Single European Act in charging the Community’s institutions with developing and financing huge research and development framework programmes involving space research as an important element has been mentioned above. By definition this was a matter of ‘competence’ to spend funds, which now principally rested with the Commission, requiring the formal amendment by the Single European Act of the existing treaties to come about.

Secondly, following rapid developments in the satellite communications sector in the late 1980s and early 1990s the European Commission had been quick to move into this most practical, most commercial and by any standards largest field of space applications. After a 1990 Green Paper²⁹ had applied the calls for liberalization and privatization in the general telecom sector of an earlier Green Paper³⁰ to this specific subsector, already in 1994 a first piece of EC law had resulted: the Satellite Directive³¹.

The Satellite Directive fundamentally provided the EU organs with the competencies to implement Internal Market principles in the satellite communications sector throughout

26 Art. 4(1), Framework Agreement²⁶, n. 24).

27 Art. 2(1), Framework Agreement²⁷, n. 24)

28 See Art. II, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), London/Moscow/Washington, done 27 January 1967, entered into force 10 October 1967; 610 UNTS 205; TIAS 6347; 18 UST 2410; UKTS 1968 No. 10; Cmd. 3198; 6 ILM 386 (1967).

29 Towards Europe-wide systems and services – Green Paper on a common approach in the field of satellite communications in the European Community, Communication from the Commission, COM(90) 490 final, of 20 November 1990.

30 Towards a Dynamic European Economy – Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, Communication from the Commission, COM(87) 290 final, of 30 June 1987; OJ C 257/1(1987); as per Council Resolution on the development of the common market for telecommunications services and equipment up to 1992, of 30 June 1988, OJ C 257/1 (1988).

31 Commission Directive amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (hereafter Satellite Directive), 94/46/EC, of 13 October 1994; OJ L 268/15 (1994).

the Union, for example imposing such principles as separation of regulatory and operational functions, the prohibition of concerted anti-competitive practices and the prohibition of abuse of dominant and monopoly positions in that market. It thus also allowed the Commission to both further elaborate that regime and enforce it – many Directives and Regulations followed, developing the regime further in addition to Decisions tackling perceived market-distorting practices by satellite communication service providers, and sanctioning them as necessary.³² Also, the privatization of the three major international satellite operators INTELSAT, INMARSAT and EUTELSAT was partially the result of these legislative developments.³³

Whilst in many respects the Internal Market for satellite communications has yet to be finalized, through such adoption of Directives, Regulations and Decisions the EU institutions have exercised a large measure of jurisdictional competence in this major area of the human space endeavour. Not technically speaking in outer space perhaps, but certainly with respect to, and having a great impact upon, relevant activities in outer space.

Thirdly, when in the 1990s space remote sensing came to be of interest also for commercial applications, a proper legal instrument to protect the investments in remote sensing was found wanting. The existing intellectual property rights protection regimes were not very appropriate or effective, and the Commission led an effort to develop such a legal tool, making certain that space-derived data would explicitly be encompassed in, and appropriately dealt with in the context of, the broader concept of databases which were in the end given special *sui generis* protection by Directive 96/9.³⁴ Again, perhaps not amounting to jurisdiction or direct competence *in* or *over* outer space, but certainly co-determinant with respect to the potential for the relevant category of activities in outer space to be successfully undertaken.

Fourthly, reference has already been made to the two European flagship projects, in both cases with the EU organs taking the lead – including by way of legislative measures – in

32 Some early examples of such legislation are: Commission Directive amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, 95/51/EC, of 18 October 1995; OJ L 256/49 (1995); Commission Directive amending Directive 90/387/EEC with regard to personal and mobile communications, 96/2/EC, of 16 January 1996; OJ L 20/59 (1996); Commission Directive amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, 96/19/EC, of 13 March 1996; OJ L 74/13 (1996); and Decision of the European Parliament and of the Council on a coordinated authorization approach in the field of satellite personal communications systems in the Community, No. 710/97/EC, of 24 March 1997; OJ L 105/4 (1997).

Some early examples of decisions enforcing competition policy in the area are: Commission Decision declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (IV/M.490 – Nordic Satellite Distribution), No. 96/177/EC, of 19 July 1995; OJ L 53/20 (1996); Commission Decision relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/35.518 – Iridium), No. 97/39/EC, of 18 December 1996; OJ L 16/87 (1997); and Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement (COMP/M.4403 – Thales/ Finmeccanica/Alcatel Alenia Space & Telespazio), of 4 April 2007; OJ C 034/5 (2009).

33 Cf. e.g. Art. 3, Satellite Directive (a, n. 31), in conjunction with the other articles of the Directive and the 1990 Green Paper effectively calling for abolishment of the various anti-competitive elements in the legal structures of these three organizations.

34 Directive of the European Parliament and of the Council on the legal protection of databases, 96/9/EC, of 11 March 1996; OJ L 77/20 (1996).

using apparent competences to make Galileo respectively GMES/Copernicus happen. It may partly depend on one's definition of 'space competence', but if that term is taken to refer to competences to legislate, adjudicate and enforce with respect to space activities in any meaningful sense, the above initiatives of the Union also in the context of space navigation and space remote sensing should qualify.

4. From Constitutional Treaty to Treaty of Lisbon

Even if thus for a number of years the EU institutions had somehow obtained and exercised various competences to draft EU legislation and adjudicate and enforce it in several areas of space activities, it was the ambitious exercise to draft a Constitutional Treaty presenting a vehicle for those contemplating true integration of the European space efforts which brought the fragmented character of those competences to light. Essentially, the competences so far had derived from underlying principles in the founding treaties of the Union, more precisely those dealing with Internal Market liberalization – not accidentally had the EU's competences become most pronounced and substantial in the area of satellite communications, by far the commercially largest space sector; instead of coming from any inherent or coherent approach to outer space and space activities, such as notably reflected in the term 'space policy'.

To be precise, ESA had always found itself operating in a complex environment when it came to 'space policy' as an overarching guide to all its activities, projects and programmes as well. Since the ESA Director General could, in addition to picking up member state proposals, also himself propose European space programmes developed by his staff,³⁵ ESA was often seen as not merely a platform for member states to integrate their national space policies, but as itself developing a European space policy – even if with regard to any such proposals it was still the member states which had to agree by two-thirds majority before they would be implemented.³⁶

To the extent that the totality of ESA's programmes thus agreed upon and executed could be deemed to constitute a proper 'space policy', however, it certainly was not one that the proponents of EU competence in space considered particularly coherent, logical and/or helpful. The ingrained inability of ESA to overcome key individual member state policy divergences, the 'geographical distribution' principle as main focus of the 'industrial policy' 'of' ESA³⁷, and the principled absence of competence for ESA to regulate any activities within the European 'spacescape' in any legal sense of the word all seemed to conspire to point at the timeliness of handing over the lead in the European space effort to the Union.

Following the earlier-mentioned efforts at coordination EU cooperation with ESA as well as the establishment of the Framework Agreement – which had all failed to provide the EU organs with the desired level of control over Europe's space policy or policies – the drafting of the Constitutional Treaty³⁸, which tried to move the process of European integration considerably forward on many fields and issues, now seemed the perfect carrier for the Union fully taking over the reins on the European space effort.

35 See Art. XII(1)(b), ESA Convention (n. 2).

36 Cf. Art. XI(5)(a) & (c), ESA Convention (n. 2).

37 See Art. VII, ESA Convention (n. 2) & (in particular) Artt. II, IV, V, Annex V.

38 Treaty establishing a Constitution for Europe (hereafter Constitutional Treaty), Rome, done 29 October 2004, not entered into force; OJ C 310/1 (2004).

And indeed the Constitutional Treaty provided for the clauses which, once that Treaty itself came to fail and a dressed-down follow-on drafting exercise resulted in the Treaty of Lisbon, survived that failure and were included in the latter. In particular Article 189 of the new Treaty on the Functioning of the European Union³⁹ (as per the Treaty of Lisbon fundamentally amending the old Treaty establishing the European Community) had essentially copied Article III-254 of the Constitutional Treaty, which had read:

- “1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.
2. To contribute to attaining the objectives referred to in paragraph 1, European laws or framework laws shall establish the necessary measures, which may take the form of a European space programme.
3. The Union shall establish any appropriate relations with the European Space Agency.”

There was one major exception⁴⁰ however: with respect to the EU competence henceforth to “establish the necessary measures, which may take the form of a European space program” the new Treaty’s Article 189 had now crucially added the phrase “excluding any harmonization of the laws and regulations of the Member States”.⁴¹ This consequentially requires a more profound look at what this ‘space competence’ now actually amounted to.

5. The EU space competence revisited: what does it mean?

5.1. EU competences in general

In the context of the Union, in a sense ever since its beginnings legal competences had constituted its core business. Such competences, originally all operating on a national level, could become ‘elevated’ to a European level by the inherently still-sovereign member states, and would normally be so ‘elevated’ in accordance with the principles of ‘conferral’, ‘subsidiarity’ and ‘proportionality’.⁴² Taken together, these principles mean

³⁹ Treaty establishing the European Community as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (referred to as the Treaty on the Functioning of the European Union), done 13 December 2007, entered into force 1 December 2009; OJ C 115/47 (2009).

⁴⁰ Art. 189 Treaty on the Functioning of the European Union (*supra*, n. 39) changed the reference in para. 2 of the Constitutional Treaty’s version to ‘European laws’ and ‘framework laws’, which were to replace the existing concepts of ‘Regulations’ respectively ‘Directives’, back to the ordinary general “legislative procedure” once that replacement was also added a para. stating: “This Article shall be without prejudice to the other provisions of this Title.” Both clauses however were more of a procedural than of a substantive nature.

⁴¹ Art. 189(2), Treaty on the Functioning of the European Union (*supra*, n. 39).

⁴² Art. 5 Consolidated version of the Treaty on European Union (*supra*, n. 12) provides on ‘conferral’ that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” (Art. 5(2)), on ‘subsidiarity’ that “in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” (Art. 5(3)), respectively on ‘proportionality’ that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” (Art. 5(4)).

that unless the competence to legislate on a certain issue has unequivocally, even if only implicitly, been transferred to the Union's organs the relevant power should still be deemed to rest with the national governmental authorities.⁴³ Thus, if doubt arises whether an issue could be regulated more effectively and logically at the European level or at the national level, the presumption under these principles is that the national level should prevail.

Further to this approach, basically three scenarios are possible with respect to any particular subject matter: one of exclusive competence at the EU level to be created in accordance with conferral, subsidiarity and proportionality, one of shared competence at the EU level to be equally so created – or one of no competence at the EU level at all.

Under the first scenario, “only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts”.⁴⁴ Under the second scenario, “the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”⁴⁵ In that case, following ‘subsidiarity’ and ‘proportionality’ again, the Union is to act only if action at EU level is required to achieve the objective at issue.

The Treaty on the Functioning of the European Union included ‘space’ in the shared competence, where “the Union shall have competence to carry out activities, in particular to define and implement programmes” but as it also added that “the exercise of that competence shall not result in Member States being prevented from exercising theirs” some observers concluded that this was not so much a shared competence but a ‘parallel competence’ – individual member states would retain sovereign discretion as such to draft and implement their own national policies and legislation in this area.⁴⁶

So the question indeed has to be asked: what did the Treaty of Lisbon actually add to the existing competences of the EU institutions to fundamentally and in a legal sense impact the European ‘spacescape’, and what consequently would be the envisaged further role of ESA in this specific context? In answering that question then, it should be realized that the key clauses of Article 189 of the Treaty on the Functioning of the European Union essentially contain no less than four, closely intertwined concepts.

5.2. ‘European space policy’

Firstly, it is asserted that “[t]o promote scientific and technical progress, industrial competitiveness, and the implementation of its policies, the Union shall draw up a European space policy”.⁴⁷

Of course, ‘(European) space policy’ is not a term of *legal* competence in the strict sense of the word. ‘Space policy’ refers to a slightly abstract and largely strategic formulation

43 Cf. also Artt. 5, 12, Consolidated version of the Treaty on European Union (*supra*, n. 12); Artt. 7, 352(2), Treaty on the Functioning of the European Union (*supra*, n. 39); Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

44 Art. 2(1) Treaty on the Functioning of the European Union (*supra*, n. 39)

45 Art. 2(2) Treaty on the Functioning of the European Union (*supra*, n. 39)

46 Art. 4(3) Treaty on the Functioning of the European Union (*supra*, n. 39)

47 Art. 189(1) Treaty on the Functioning of the European Union (*supra*, n. 39)

of overarching goals and objects, which may at some point be given shape by specific law or regulation – but are equally often given shape by non-legal, essentially political and policy instruments. This is also true of the ‘European space policy’ referenced in some key preceding EU documents as cited above, such as the 2003 White Paper.

Nevertheless, it often does constitute the point of departure for specific legislative and regulatory initiatives. In particular in the EU context, where ‘conferral’, ‘subsidiarity’ and ‘proportionality’ require careful legitimization of any EU-level legislative action as compared to leaving it for the individual member states to regulate, the recognition of an EU ‘competence’ to draft an overarching space policy can be seen as the first recognition that any further legislative initiatives, firstly, can not be dismissed off-hand when taken at the EU level and, secondly, to the extent still allowed to be taken at the individual member state level should essentially fit within the broad framework of such a policy.

5.3. European ‘joint initiatives’

Secondly, the text also provides that the Union for the purpose of the aforementioned space policy “may promote joint initiatives, support research and technological development, and coordinate the efforts needed for the exploration and exploitation of space”.⁴⁸ The two European space flagship projects of Galileo and GMES/Copernicus as discussed before essentially represented such joint initiatives, with a quite substantial focus on the ‘exploitation of space’.

Indeed, such programmes and activities would logically form part of a ‘space policy’, and usually are manifestations thereof at a more concrete and less overarching level. Thus, they reinforce the conclusion that by obtaining the ‘competence’ to draft (a) European space policy, the EU institutions have actually *prepared the ground for* truly legislative initiatives – rather than as such *taking* them. That is essentially still policy, not law, yet hugely important for the legal realm.

With a view to conferral, subsidiarity and proportionality, the legitimacy of the Union’s promotion (including, most notably, by means of its budget) of and leadership regarding such joint initiatives, research and development, and general coordinating activities now no longer depends upon a specific market-related need or requirement – as had most notoriously been the case with respect to satellite communications – but would in principle have to be broadly accepted across the spectrum of space activities and applications.

5.4. ‘European space programmes’ and other ‘necessary measures’

Thirdly, while the above ‘competence’ to promote joint initiatives, research and development, and general coordinating activities may still refer to fairly unspecific instruments to implement any space policy, the text of the Treaty on the Functioning of the European Union now also provides that for that same purpose the EU institutions may in addition “establish the necessary measures, which may take the form of a European space programme”.⁴⁹

Here, it may be noted again that the relationship between a ‘space policy’, as an overarching set of goals and objectives, and the specific ‘space programmes’ and projects, as the practical manifestation of that policy, has also led many to perceive *ESA*

48 Art. 189(1) Treaty on the Functioning of the European Union, n. 39)

49 Art. 189(2) Treaty on the Functioning of the European Union, n. 39)

as hitherto developing (a) European space *policy*. Many civil space *programmes* in Europe (certainly the more visible and sizeable ones), following the dichotomy of mandatory and optional programmes under the ESA Convention, are *ESA*, that is European, *space* programmes – and thereby are deemed to somehow constitute a European space *policy*.

However, this equation overlooks that often space programmes arise not (necessarily) as a consequence of some overarching, coherent and consciously articulated space *policy*, but as individual, quite autonomous answers to specific societal interests – or even, more simply, specific industrial or economic interests. More particularly in the ESA context, except for the mandatory programmes, individual states still remain at liberty to not participate altogether, and even with respect to the latter to determine their own level of participation.⁵⁰

The reference in the Treaty on the Functioning of the European Union to space programmes developed by the Union in the context of a space policy and supported, as necessary, by specific legal measures is by contrast considerably more coherent, and due to the reference in the same sentence to “the ordinary legislative procedure”⁵¹ clearly points to major space programmes (of which Galileo and GMES were already examples) as accompanied by the necessary legal framework, or even to *legal* measures considered desirable or necessary, properly taking ‘subsidiarity’ and ‘proportionality’ into due account.

By way of those clauses therefore, effectively the competence of the EU institutions to draft a European space *policy* to those extents has now been more or less silently acknowledged, in particular to the extent such a policy would tie in with the general remit of the EU institutions to further the economic and societal development of the member states within an ever more coherent Union⁵². Thus, from this perspective the competence of the Union to now (also) develop and implement European space *programmes* as per the Treaty of Lisbon is an extension of the ‘politico-programmatic’ competences of the EU institutions as relative to those of EU member state authorities – though not necessarily of a very revolutionary nature, as Galileo and GMES most clearly prove.

Whatever one’s evaluation of this, however, that still did not amount to a *legal* competence properly speaking – that is, indeed, where the Constitutional Treaty presented its largest innovation, as essentially copied by this particular part of paragraph 2 of Article 189 of the Treaty on the Functioning of the European Union.

Henceforth, the competence that the EU institutions with respect to space would have would no longer be completely dependent on sector-specific characteristics related to commercial markets and require application of the free market and competition principles relatively narrowly focused on a free and level playing field for commercial enterprise throughout the Union – as had happened, most elaborately, in the satellite communications sector. There, indeed the Commission essentially had set about harmonizing market access, state aid and licensing issues all in as far as distorting the

50 Cf. Artt. V(1), XI(5)(a) & (c), XIII(1) & (2), ESA Convention(2).

51 This procedure is spelled out in Art. 289(1), Treaty on the Functioning of the European Union (n. 39), as consisting “in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission”.

52 Cf. Preamble, § 9, Consolidated version of the Treaty on European Union(2).

Internal Market, only now and then inserting clauses protecting wider public interests such as public or universal services.

Had the Constitutional Treaty been accepted as drafted, the Commission would have had for the first time the competence to address ‘space’ and ‘space activities’ in their full measure, not only as commercial activities but also as a new area where scientific, commercial, societal and strategic interests would *all* have to be accommodated by more fundamental legislation and regulation.

5.5. No ‘harmonization of national law’

This brings analysis to the last element, where the Treaty of Lisbon added to – or, actually, rather detracted from – the Constitutional Treaty’s approach by way of an added, for many disappointing closing clause on the space competence which conditions the competence by “excluding any harmonization of the laws and regulations of the Member States”⁵³

Differently from other areas, where following ‘subsidiarity’ and ‘proportionality’ individual member states would no longer be entitled to draft their own legislation to the extent those competences had been transferred to the EU level and such transfer would *ipso facto* allow the EU institutions to guarantee a harmonized regime, if necessary by harmonizing existing national regimes, here such harmonization is not possible.

What this *means* from the other end is ultimately related to the extent in which (the) member states have already elaborated relevant domestic law on an issue of space activities – the Commission would only be able to fill in those areas into which member states have opted not to move.

One prominent example illustrating the conundrum this may pose concerns *private* space activities, and the licensing thereof. So far, six out of twenty-eight EU member states have established a national space law providing in any appreciable detail for a licensing system including for example liability and insurance obligations for licensees.⁵⁴ It would logically follow from Article 189(2) of the Treaty on the Functioning of the European Union, that no competence can exist anymore for the Union to try to harmonize those licensing, liability and insurance requirements with respect to private space operators.

On the other hand, currently one quite special new branch of private space activities seems about to be taking off – commercial *manned* spaceflight, also often (though

53 Art. 189(2) Treaty on the Functioning of the European Union, n. 39)

54 This concerns, in chronological order, Sweden (Space Activities, 1982: 963, 18 November 1982;

National Space Legislation of the World (2001), at 398; Space Law – Basic Legal Documents;

36 *Zeitschrift für Luft- und Weltraumrecht* (1987), 1) the United Kingdom (Outer Space Act, 18 July 1986,

1986 Chapter 38 *National Space Legislation of the World* (2001), at 293; Space Law – Basic Legal

Documents E.I; 36 *Zeitschrift für Luft- und Weltraumrecht* (1987), 1) 2 Belgium (Law on the Activities of

Launching, Flight Operations or Guidance of Space Objects, 17 September 2005, adopted 28 June 2005;

Nationales Weltraumrecht / National Space Law (2008), at 183), the Netherlands (Law Incorporating Rules

Concerning Space Activities and the Establishment of a Registry of Space Objects, 24 January 2007; 80

Staatsblad (2007), at 1) *Nationales Weltraumrecht / National Space Law* (2008), at 201), France (Law on

Space Operations *Loi relative aux opérations spatiales* 2008-518 du 3 juin 2008 official English

version 34 *Journal of Space Law* (2008), 453 and Austria (Austrian Federal Law on the Authorisation of

Space Activities and the Establishment of a National Space Registry *Weltraumgesetz über die Genehmigung*

von Weltraumaktivitäten und die Einrichtung eines Weltraumregisters (Weltraumgesetz) adopted by

Parliament on 6 December; Federal Law Gazette of 27 December 2007 *Zeitschrift für Luft- und*

Weltraumrecht (2012), 37-42, 56-61

imprecisely) labelled ‘space tourism’. In the absence of any specific reference, let alone adaptation to this sub-sector of private space activities in *any* of the six national space laws, with twenty-two more EU member states not at all having a national space law in place, one could validly pose the question whether in *this* specific respect there is any domestic law of substance which would bar Union legislative activity in this area.

6. Sea change or empty shell?

In an earlier analysis of the Treaty of Lisbon’s effect on any space competence for the European Union, the present author posed the question whether – as suggested by various commentators – the new provisions presented a sea change, the Union now finally having been given a full legislative role regarding the European space effort, as opposed to merely (co-)financing and supporting it, or whether conversely, this particular version was a bit of a disappointment – if not indeed an empty shell. Currently, it seems still difficult to comprehensively and decisively answer that question.

‘The proof of the pudding’ may indeed well be ‘in the eating’. In other words, will the EU authorities for example feel comfortable in addressing commercial manned spaceflight from an EU perspective by way of legislation in view of the above – and if they undertake an effort, will they be stopped in their tracks by member states referring to the above clauses?

At present, therefore, the most that can be said is that the ‘space competence’ currently looks more like a shell than a sea change; a shell, however, which is already filled to some extent and could become incrementally filled (and itself increase in the process) even more through the constant appropriate interaction between EU institutions and EU member states within the framework of ‘conferral’, ‘subsidiarity’ and ‘proportionality’. In any event, it does seem to provide another interesting feature of the complicated European ‘spacescape’, and at least to some extent another step forward to regional integration of space activities in that part of the world.