The EU Space Competence as per the Treaty of Lisbon: Sea Change or Empty Shell?

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THE EU SPACE COMPETENCE AS PER THE TREATY OF LISBON:
SEA CHANGE OR EMPTY SHELL?
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Abstract

The entry into force of the Treaty of Lisbon late 2009 introduced a so-called ‘space competence’ of the European Union into the already complicated legal European ‘spacescape’. It has been hailed by some as a sea change, a watershed following which the EU finally and irreversibly has entered the realm of legislating for space, whereas others fail to see it as more than an empty shell, a fig leaf for politicians to be able to show at least some progress towards a united European approach and policy with respect to space.

Whilst some discussion has focused on whether this ‘shared competence’, a specific term of art in EU law, would not better be qualified as a sui generis ‘parallel competence’, no notable attention has been paid to the more fundamental question to what extent the inclusion of the relevant clause in the Treaty of Lisbon has resulted in a real change as to the legislative and regulatory side of space activities undertaken in the European context.

The present paper will therefore try to analyse in somewhat more detail what the real significance of this new ‘space competence’, is, might or will be. This analysis will be undertaken with reference not only to the terminology of the Treaty of Lisbon and a related clause of the preceding but aborted Constitutional Treaty, but also with reference to the previous legislative efforts of the European Union relevant to space, the few national space legislations of EU member states, and the role of ESA in this context.

1. The discussion on the EU space competence

The Treaty of Lisbon1 entered into force on 1 December 2009, following a decade-long effort to adapt the EU governance structure to new developments, notably including its expansion to 27 member states. Amongst its many innovative clauses there were a few which amounted to giving the Union what has been labelled a ‘space competence’. Thus, “[i]n the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs”.

This clause was part of the Article providing for the scope of shared competence between the Union and its member states, but the last part of the clause quoted has led some to conclude that this was not so much a shared competence but a “parallel competence”, as individual member states would retain sovereign discretion as such to draft and implement their own national policies and legislation in this area. More specifically,

“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, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space program, excluding any harmonization of the laws and regulations of the Member States.
3. The Union shall establish any appropriate relations with the European Space Agency.
4. This Article shall be without prejudice to the other provisions of this Title.

Various commentators hailed these provisions as 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. Others have pointed out that an earlier version of the clauses had been considerably more far-reaching; from this perspective this particular version was a bit of a disappointment – if not indeed an empty shell. The present paper presents an effort to evaluate and appraise the true value of these provisions as lying somewhere between those two ‘extremes’.

However, before such a proper evaluation and appraisal is possible, it is important to understand the background leading up to this Treaty, this particular competence clause and this extended discussion. Thus, firstly, the ‘prehistory’ leading up to the discussion on a European space competence will be briefly outlined before, secondly, the short ‘history’ of the evolvement of the relevant clauses will be scrutinised from that perspective – in order to then assess the clauses at issue as to their true merit: sea change or empty shell?

2. The ‘prehistory’ of the European space competence

In the whole discussion on a European space competence often the suggestion is made that before the failed Constitutional Treaty and the more successful Treaty of Lisbon were on the table 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. But was there really no ‘space competence’ at the EU level prior to the discussions regarding those (draft) treaties? Perhaps it all depends on how one defines ‘space competence’. Obviously, outer space not being part of any (EU member) state’s territory, it could also not ‘geographically’ form part of the EU realm. However, already long before the discussions on a Constitutional Treaty had started in earnest in the early 2000’s, the European Community, then Union had exercised jurisdiction regarding outer space activities in four distinct areas, albeit in somewhat indirect or ‘accidental’ fashion.

Firstly, in 1986 the Single European Act added Articles 130f through 130q to the EEC Treaty, whereby the EC institutions were charged with building and financing research and development framework programmes endowed with large funds, and develop other, partly legislative instruments to enhance research and development. References to research and development were widely accepted to include space as a relevant area, showing great potential for more down-to-earth technological, then also economic and societal spin-offs. Thus, the European Community also started building relationships with the European Space Agency (ESA), the
prime European organisation involved in space research and related activities. Secondly, following rapid developments in the satellite communications sector in the late 1980’s and early 1990’s the Commission was quick to move into this most practical, most commercial and by any standards largest field of space applications. After a 1990 Green Paper had applied the calls for liberalisation and privatisation in the general telecom sector by means of an earlier Green Paper to this specific subsector, in 1994 the first piece of EU law resulted: the Satellite Directive. The Satellite Directive provided the framework for implementation of Internal Market principles into the satellite communications sector throughout 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.

Many Directives and Regulations followed elaborating that regime, in addition to Decisions on perceived market-distorting practices by satellite communication service providers. Also, the privatisation of the three major international satellite operators INTELSAT, INMARSAT and EUTELSAT was partially the result of these legislative developments. Whilst in many respects the Internal Market for satellite communications has yet to be finalised, through such an 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 space perhaps, but certainly with respect to, and having a great impact upon, relevant activities in outer space.

Thirdly, when in the 1990’s space remote sensing came to be of interest also for commercial applications, a 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 then lead 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. Again, perhaps not amounting to jurisdiction 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, as the major role certain space applications could play in developing European economies and societies became clear, the Union also started to become a ‘space player’ in its own right. In 1994 it had already taken the policy decision to become involved in what was known as the Global Navigation Satellite System; an idea which soon evolved into Europe (with the Union leading and ESA following) building its own full-fledged system Galileo. By 2002 the Union was ready to enunciate its first proper piece of EU law on the issue, a Regulation setting up a Galileo Joint Undertaking, followed in 2004, 2008 and 2010 by more key Regulations.

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). The primary political decision was announced in 2001, meanwhile, also the first piece of EU legislation on GMES has been
enunciated – in 2010\textsuperscript{21}. It remains to be seen of course, to what extent the Union is effectively now abdicating its leading position in this respect, with GMES very recently being relegated back to the member states as far as crucial funding was concerned.\textsuperscript{22} Still, the increasing cooperation with ESA in the context of these two flagship projects (and the prospects of more flagship projects on the horizon) also gave rise to the Framework Agreement with ESA in 2003.\textsuperscript{23} This represented a treaty-like document between two international organisations of which one (ESA) still undoubtedly qualified as an \textit{intergovernmental} organisation, whereas the other (the Union) was a \textit{sui generis} halfway house between such an organisation and a supranational construct. In any event, apparently the EU institutions had now obtained a level of treaty-making powers with regard to space and space activities, coupled to a general (co-) leading role in the relevant policy area. As pointed out, it partly depends 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 in the context of space research and development, space communications, space remote sensing and space navigation should qualify. It is thus clear that even before the Constitutional Treaty came about, the EU institutions had somehow obtained \textit{and} exercised such competences to draft EU legislation and adjudicate and enforce it in several areas of space activities. From that perspective therefore, the question as to the real novelty of the new clauses of the Treaty of Lisbon remains principally valid: what sort or level of ‘space competence’ is actually added by the latter?

3. The ‘history’ of the space competence

The proper history of the space competence started in the early 2000s, where the ambitious exercise to draft a Constitutional Treaty presented a vehicle for those contemplating true integration of the European space efforts. Historically, ESA had taken care of such efforts by presenting a solid yet flexible framework for international cooperation. The ‘solid’ part was represented in particular by the ‘mandatory programmes’, the scientific and research and development programmes to which all states had to contribute at a predetermined scale.\textsuperscript{24} The ‘flexible’ part was represented in particular by the ‘optional programmes’, which usually involved actual launches and satellite operations – and allowed member states to opt out of a programme altogether (and then not contribute to it) or determine their scale of contributions at a different level from that applied as a baseline option – essentially the same predetermined scale as for the mandatory programmes.\textsuperscript{25} Since the ESA Director-General could also himself propose European space programmes,\textsuperscript{26} ESA was often seen as not merely a platform for member states to integrate their \textit{national} space policies, but also as itself developing a \textit{European} space policy – even as 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.\textsuperscript{27} 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’ ESA, and the principled absence of competence for ESA to regulate any activities within the European ‘spacescape’ in any legal sense of the word all conspired to point at the timeliness of handing over the lead in the European space effort to the Union.

There had been earlier efforts on the part of the European Union to take a more active, even leading role in defining European space policies. For example, in 1993 a Space Advisory Group had been established to institutionalise cooperation and coordination between ESA and the Commission in matters of outer space. In 2000, a European Space Strategy was developed as part of a first joint meeting of the ESA Council and the EU Council of Ministers (the two highest organs of the organisations) which spelled out 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 society and markets, as opposed to scientific and research and development oriented policies programmes, and projects. By 2003, the Commission had effectively taken the steering wheel, when it 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”. 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 enlarged Space Policy.

The ambitious effort to arrive at a Constitutional Treaty, which tried to move the process of European integration considerably forward on many fields and issues, now seemed the perfect carrier for fully taking over the reins on the European space effort. And indeed the Constitutional Treaty provided for the clauses which, once the Treaty itself came to fail and a much dressed-down follow-on drafting exercise resulted in the Treaty of Lisbon, survived that failure and were included in the latter.

There was one major exception however: Article 189(2) of the Lisbon Treaty as quoted above, had essentially copied Article III-254 of the Constitutional Treaty with respect to the EU competence henceforth to “establish (…) necessary measures, which may take the form of a European space program” – but had crucially added the phrase “excluding any harmonization of the laws and regulations of the Member States”.

If the ‘space competence’ under the Treaty of Lisbon is indeed not to be an empty shell, the key question clearly is: what ‘necessary measures’, including development of a ‘European space program’ could the EU authorities thus take when these could not result in harmonization of laws and regulations of EU member states?

4. The EU space competence: sea change or empty shell?

Thus finally returning to the question of what the Treaty of Lisbon actually added to the existing opportunities of the EU institutions to fundamentally and in a legal (or at least para-legal) sense impact the European ‘spacescape’, the key clauses of Article 189 should be seen to essentially
contain no less than four, closely intertwined concepts.

4.1. A European space policy.
Firstly, paragraph 1 provides 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”.

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

Nevertheless, it often does constitute the point of departure for specific legislative and regulatory initiatives. In particular in the EU context, where the principles of ‘subsidiarity’ and ‘proportionality’ require careful legitimisation 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, at the EU level should not be dismissed off-hand and secondly, as far as still possible at the individual member state level, should essentially fit within the broad framework of such a policy.

4.2. European joint initiatives.
Secondly, paragraph 1 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”.

Indeed, such programmes and activities would logically form part of a ‘space policy’; actually are manifestations thereof at a more concrete and less overarching level, thus reinforcing 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 policy, not law – yet hugely important for the legal realm.

With a view to ‘subsidiarity’ and ‘proportionality’, the legitimacy of the Union promoting – including, most notably, by means of its budget – such joint initiatives, research and development, and general coordinating activities now no longer depends upon a specific market-related need or requirement, but would in principle be broadly accepted across the spectrum of space activities and applications.

4.3. European space programmes and other necessary measures.
Thirdly, 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, but in addition now paragraph 2 provides that for that same purpose the EU institutions may also “establish the necessary measures, which may take the form of a European space program”.

It may be noted here 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 authors to discuss the role of ESA in development of 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 – in other words: 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 space policy, but as individual, quite autonomous answers to specific societal interests – or even, more simply and cynically, specific industrial or economic interests.

The reference in the Treaty of Lisbon 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” 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 Union. 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 – but not of a very revolutionary nature, as Galileo and GMES most clearly show. The recent events concerning GMES, moreover, may put into serious doubt whether that acceptance may not be equally ‘silently’ be allowed to slip away dropped (even if only for down-to-earth budgetary reasons).

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 a novelty, as essentially copied in this particular part of paragraph 2 of Article 189 of the Treaty of Lisbon. Henceforth, the competence that the EU institutions with respect to space would henceforth 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 harmonising market access, state aid and licensing issues all in as far as distorting the Internal Market, only now and then inserting clauses protecting wider public interests such as public or universal services.

Had the Constitutional Treaty been accepted, 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.
This brings analysis to the last element, where the Treaty of Lisbon added to – or rather detracted from – the Constitutional Treaty’s approach.

4.4. No harmonisation of national law.
So what then does the additional, for many disappointing clause of paragraph 2, mean, when it conditions the competence by “excluding any harmonization of the laws and regulations of the Member States”? Different 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 harmonised regime, if necessary by harmonising existing national regimes, here such harmonisation 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. One prominent example thereof concerns private space activities, and the licensing thereof. So far, six 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.36 It follows, that this now excludes a competence for the Union to try to harmonise those licensing, liability and insurance requirements.

On the other hand, currently one specific new branch of private space activities seems about to be taking off – commercial manned spaceflight, also often (somewhat imprecisely) labelled ‘space tourism’. In the absence of any specific reference, let alone adaptation to this sub-sector of private space activities, 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.

4.5. Sea change or empty shell?
As for example the last question above cannot yet be answered with definitive authority, whether the EU ‘space competence’ as resulting from the Treaty of Lisbon represents a sea change or an empty shell would also remain an open question as of yet. Here, ‘the proof of the pudding’ may well be ‘in the eating’ indeed. 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 could become incrementally filled (and itself increase in the process) through the constant appropriate interaction between EU institutions and EU member states within the framework of ‘subsidiarity’ and ‘proportionality’.

Endnotes


2. Art. 4(3), Treaty establishing the European Community as amended by


Cf. e.g. Art. 3, Satellite Directive, in conjunction with the other articles of the Directive and the 1990 Green Paper effectively calling for abolition of the various anti-competitive elements in the legal structures of these three organisations.


24. See Art. V(1)(a), ESA Convention. The contributions of the various member states were based on the respective Gross National Products; cf. Art. XIII(1).

25. See Art. V(1)(b), ESA Convention, in conjunction with Art. XIII(2).

26. See Art. XII(1)(b), ESA Convention.

27. Cf. Art. XI(5)(a) & (c), ESA Convention.


34. See Art. 5, Treaty on the Functioning of the European Union.


36. This concerns, in chronological order, Sweden, the United Kingdom, Belgium, the Netherlands, France, and Austria; see e.g. I. Marboe & F. Hafner, Brief Overview over National Authorization Mechanisms in Implementation of the UN International Space Treaties, in F.G. von der Dunk (Ed.), National Space Legislation in Europe (2011), 29-73.