

PROJECT 2001: RECOMMENDATIONS AND RESULTS CONCERNING THE PROCESS OF PRIVATISATION AND ISSUES OF ECONOMIC LAW

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Abstract

During the term of the Project 2001 a number of general legal as well as factual developments took place concerning the privatization of space activities, which were discussed and handled in the Working Group on Privatization. In contrast to the technical Working Groups which were reviewing detail problems, focus in the Working Group Privatization rather was placed on the identification of development trends, model structures and action requirements for the development of a general legal framework for space activities.

One of the general developments as defined above covers the privatization of the International Governmental Organisations (IGO's) in the field of telecommunications. At UNISPACE III, special attention was given to the interaction between public, semi-public and private actors in the space business. This is exactly the point where the current discussions about Public Private Partnership (PPP) concepts start from. In particular in hybrid forms of public/private cooperation an item requiring special attention is the safeguarding of the public interest, irrespective of any private economic structures.

I. Introduction

The Working Group on Privatisation had been created to examine regulatory needs and possible improvements of the law with respect to general issues of private space activities as well as development trends and models used in privatisation and commercialisation policies by governments.¹ On a global scale the methods to encourage private enterprises in space business are quite different.

The individual national R&D and technology policies are making use of these tools with different priorities. The comparison is not only of interest from a theoretical point of view but also from a practical one with respect to the limiting factors of competition and antitrust law.

The most interesting and at the same time the most difficult complex is the set-up of combined structures (GALILEO attempt). In those areas the public and the commercial sectors reserve their own definition of objectives. The reason for the parallel investment is either that the partners are not able to act on their own (volume of investment too large) or an interdependence (the investment of one partner is the basis for the activity/decision of the other one).

II. Development Trends and Concepts

1. National Space Legislation and Private Law

Due to the increasing interest of entrepreneurs and financiers to undertake commercial space activities and government policies to withdraw from those space activities which are commercially viable, policy makers, legal scholars as well as law practitioners are faced with numerous issues, as to which further legal development might be desirable. Some general topics remain pertinent with respect to any or most private activities or processes of privatisation.

During the course of the project and in particular as a suggestion during the WG's workshop, it has become more and more evident, that the existence of a clear, but not over-regulative, legal framework on the national level is not only vital for creating a consistent and supporting legal framework for the commercial use of outer space. The creation of such a national frame for private activities has long been neglected by many space-faring nations. As yet, only a few countries worldwide have national space laws. In several European countries the question of required legislative action is being assessed.² This is possibly the essential basis for all private space activities.

Furthermore in connection with commercial space activities individual questions relating to private law arise which, due to their space law context, are lending themselves for special legal regulations. Some of those questions relating to private law arise which, due to the international and peculiar character of the matter, cannot be adequately settled by the use of the available tools of national law and conflict of law rules. Examples are legal matters of security for the financing of space property as well as the legal compatibility of customary cross-waiver

clauses in the context of national legislation related to general terms and conditions. Here the recommendation is to establish an original legal regime on the basis of a convention to be coordinated and agreed between the international partners, by analogy to the UNIDROIT approach.³ On the other hand, it should, however, be emphasized that not every related subject which is difficult to solve by national regulations and the application of usual conflict of law rules justifies a space-specific special regulation.

2. Methods to encourage private enterprises

In addition to the classical tools of an encouragement of private actors by financial support or contracting out a broad spectrum of approaches is available. The interdependences of those instruments (Subsidies/Establishment of R&D infrastructures/Set-up of research programs/PPP/Participations of the public sector in High-tech investments) has to be analysed. The international commercial law and in particular the competition law is subject to a dynamic development leaving many questions which are as yet unresolved.⁴ Therefore, mention should also be made of some discussions relating to competition legislation which are of relevance for practical applications. A comparative consideration of the different support concepts shows that there is a relationship between the government's roles as customer, as grantor or as participant which determines the peculiar character of each national support policy. An offensive policy supporting industrial space applications makes use of the total range of possibilities available depending on the requirements of each individual case. A restrictive control of an individual area, such as the research support quota, can set up unnecessary obstacles.

3. Privatisation of IGO's/GALILEO

One major development during the term of Project 2001 was the privatization of the IGO's in the field of telecommunications.⁵ The model structures established here are also taken into consideration in other sectors, e.g. in the set-up of the European satellite navigation system (GALILEO).⁶ UNISPACE III, held in July 1999 represented an outstanding forum for the handling and discussion of those questions.⁷ Special attention was given to the interaction between public and private actors under a mixed Galileo Infrastructure. The overall structure might have different levels from the GALILEO Agency down to the service providers including a public entity and an operating company under private law. The model should integrate the financial interests of investors and the need to protect the public interest.

4. CNES-Statutes

During the Vienna Workshop different national privatisation experiences were presented, e.g. the special role of the French space agency CNES in the privatisation of commercial space applications and the participation in a multitude of companies. The legal basis for such activities is provided by the law of 19 December 1961 which assigned a double character to CNES upon its establishment: on the one hand it is a public body and on the other hand it has an industrial-commercial orientation. CNES exercises a national integrative and coordinative function in the field of space activities.⁸

5. German sponsorship regulations

The sponsorship regulations governing grants issued by the individual national research ministries have an indirect, but not less important function in the support of private space applications.

In Germany, there has been a change in paradigm⁹ to improve the promotion of innovations, which is of exemplary interest.

Under the former sponsorship regulations in effect before 1999, the grantee usually only had a non-exclusive right to use the results, and it could occur that licenses had to be issued to competitors. The underlying policy was that a wide distribution of the results would give the best benefit in terms of national economy. In fact, however, these conditions had as a consequence that applications for grants were submitted for uncritical scientific investigations, rather than for market-relevant innovations. In this respect, a fundamental modification was introduced in 1999. Now the grantee is given an exclusive right to use the result; this right is, however, connected with the obligation to exploit the result. The exploitation is implemented on the basis of a self-determined exploitation plan which is an integral part of the application for grant. If the results are not exploited adequately, the exclusiveness of the right can be cancelled.

6. US commercialization policy

The USA have in many respects been a pioneer in the commercial use of Outer Space.¹⁰ In 1984, under the Reagan Administration, a commercialization policy was introduced into the National Aeronautics and Space Act (NASA Statute) of 1958. Congress "declares that the general welfare of the United States requires that the National Aeronautics and Space Administration seeks and encourages to the maximum extent possible, the fullest commercial use of outer space."

In the following years, a number of related detail laws were adopted which cover different kinds of space applications and commercial space opportunities. A decisive mark was set by the Commercial Space Launch Act of 1984 (amended in 1988 and 1994).

In 1989 McDonnell-Douglas performed the first commercial launch of a private US

launch provider, with the authorization of the US transport department. Under economic-technical aspects, the capabilities of the private launch providers are based on the long years of know-how acquired under government contracts. The enormous contract volume of the public and in particular of the military sector in the United States alone has a promoting effect in the high-tech space area. The "contracting out" requirement imposed on NASA and other government agencies is used as an additional deliberate means of commercialization. Characteristic examples are the guidelines of the NASA Commercial Space Policy, issued in October 1984, and especially No. 4 "the government should invest in high leverage research and facilities (but) should not expend tax dollars for endeavors the private sector is willing to underwrite". The Commercial Space Competitiveness Act of 1992 is going even further by prohibiting "reimbursable" use of NASA and other federal agency facilities unless equivalent commercial services are not available on reasonable terms", in order to encourage growth of the US commercial space service sector. Baseline for US commercialization activities today is Section 101 of the Commercial Space Act of 1998 which directs NASA to identify and report on opportunities for commercial providers to play a role in Space Station activities. Further promotion items are the GPS standards, the data collection from US commercial providers and plans for the potential privatization of the Shuttle.

III. Tools/Systematic View

Privatization is not an end in itself. Its objective rather is to establish sound, self-supporting structures for the commercial use of outer space. On a global scale, the methods to reach this objective are characterized by quite different features.

The individual national approaches depend on the social and economic-political baselines and, in terms of concrete law, on the marginal conditions of financial and public policy. On the basis of the actual examples presented above, an attempt to provide a systematic view of the tools in the form of a table will be made in the following. The individual national R&D and technology policies are making use of these tools with different focuses and priorities. At the same time, the table is intended to show the interdependence of the individual measures.

To sum up, a broad spectrum of approaches is available, in addition to the classical tools of an encouragement of private enterprises by financial support or contracting out. In addition to the subsidies and grants, there are a large number of integrated concepts.

The problem in sponsoring commercial activities of space utilization does not lie in the fact that there would be a lack of fantasy to develop novel, possibly combined, instruments of awarding grants. On the international level, the actual problem frequently is related to the mechanical and/or rigid application of competition laws or subsidy regulations. During discussions, representatives of European industrial companies have repeatedly pointed to the problem of rigid quota applied to the allocation of grants to industrial/commercial projects. These quota do not sufficiently take into account the economic peculiarities of space business (e.g. commercial use of ISS). Today, sponsorship arrangements which have proven to be successful in the past, are increasingly called into question under formal aspects of competition / subsidy legislation. At the same time, the political sector demands to look for new creative approaches (PPP discussion).

Designation	Material content/Objective	Role of publ.sector	Role of private sector and /or contract partner
A. Financial Support: Subsidies State aids	Promotion of an external entrepreneurial interest (not located in the public area) for national economy/research policy reasons	Grantor of subsidies	Recipient of subsidies; Entrepreneur/scientist (definition of objectives)
B. Establishment of a (R&D) infrastructure a) Large research facilities/infrastructures b) Set-up and maintenance of R&D institutions/IGO affiliations	Administration of provisions/services, use of public scopes of organization and action (interaction with the economic sector via procurement contracts)	The State as acting „entrepreneur“ within the framework of his own responsibilities (administration of service)	Beneficiary of public Investments (as a rule use on the basis of full cost reimbursement, with initial investment being state-funded)
C. Acting of the public (R&D) infrastructure in the economic environment under contract, esp. on the basis of specific research programs; some of these explicit to promote the economy (technology transfer/marketing)	Initiation of developments in areas which otherwise would have been neglected for lack of return of investment; planned handling of areas within political programs outside the market's self-regulatory power	Customer	Contractor
D. Participations and affiliations of the public sector (with different quota and intervention possibilities)	Participation in an entrepreneurial objective which is independent in terms of organization and corporate law (e.g. as initiator with the perspective of increasing private-sector participations or for a permanent safeguarding of the public interest within a privatized task).	Co-partner (founding partner; partner with a golden share)	Co-partner (successor Affiliate of a privatized Company)
E. Public Private Partnership (PPP)	Merging of two independent objectives (public and private) to achieve a common aim within a cooperative engagement, which otherwise would not be possible by one partner alone. in default of the critical amount of resources (primary application: large infrastructure projects with long-term public and private utilizations)	Independent co-entrepreneur within his own original responsibilities (under public law) with his own definition	Co-entrepreneur within his own original interests (private) with his own definition of objectives

IV. PPP-approach¹¹

PPP is a form of cooperation between the public and the private sectors involving at least two independent partners with equal rights and their own objectives. It does not cover the public support of private objectives, nor does it include an exchange-

of-service relation (public procurement contracts awarded to the private sector or contracted research of (semi)public research establishments for the industry). Another form of cooperation, which is not considered here, is the pure participation in an enterprise which does not pursue any intentions going beyond the defined

entrepreneurial goal. So, within the framework of a defined project/activity, PPP is the cooperative pursuit of an objective by public and private partners, maintaining their own responsibilities and identities.

V. The Working Group's Conclusions and Recommendations

1. In connection with the private space applications, individual specific questions relating to private law arise (security rights, concepts of liability and indemnification/cross waiver) which, due to the international and peculiar character of the matter, cannot be adequately settled by the use of the available tools of national law and conflict of law rules. Here the recommendation is to establish an original legal regime on the basis of a convention to be coordinated and agreed between the international partners, by analogy to the UNIDROIT approach.
2. The UNISPACE III recommendations suggested the active development of new forms of the interaction of the public and private sectors. Such forms should take into consideration both the principle of fair trade/non-discriminatory access and the public interest concerning the use of limited resources (coordination requirement) or sensible information. In the telecommunications area - the forerunner of the commercial use of outer space - the modification of the ISO's into a core-IGO, limited to the realization of the public interest and the safeguarding of the public service obligations in connection with private operator companies, has established itself as a practicable model. An aspect not solved as yet is the discrepancy between the remaining public-national liability and private investment responsibility resulting from the new limitation of liability under private/social law.
3. An active privatization policy must find an appropriate and uncomplicated mechanism for transferring the public responsibilities and obligations in terms of liability and protection to private bodies. At present, this is impeded by the multiple public responsibilities (several launch states, licensors per case). An approach for a multi-level hierarchy of primary and secondary responsibilities (concentration on a principal entity in charge) is both in the public and private interest.
4. For a long-term co-existence of public as well as private requirements, another model having emerged for the interaction between public sector/commercial sector is Public Private Partnership. In spite of the national differences based on the individual support policies, the PPP model is suited whenever the public sector and the commercial sector have their own investment interest, especially in large infrastructure projects, but are not prepared to implement such projects on their own and pool their resources. The dual function of the government in research and infrastructure investments, being either customer or grantor, is relativized. This necessitates an adjustment of the relevant administrative regulations which in many agencies and research ministries is already in discussion or in implementation.
5. A comparative consideration of the different support concepts shows that there is an overriding relationship

between the government's roles as customer, as grantor or as participant which determines the peculiar character of each national support policy. An offensive policy supporting industrial space applications makes use of the total range of possibilities available depending on the requirements of each individual case. A restrictive control of an individual area, such as the research support quota, can set up unnecessary obstacles.

¹ Cf: Proceedings of the Project 2001, Workshop on Legal Issues of Privatising Space Activities, 19 July 1999, Vienna (ISSN:1616-6272)

² Cf: Proceedings of the Project 2001, Workshop Need and Prospects for National Space Legislation, 5/6 Dec. 2000, Munich; Frans v.d. Dunk, Private Enterprise and Public Interest in the European 'Spacecape', Towards harmonized National Space Legislation for Private Space Activities in Europe, Leiden 1998

³ Hans-Georg Bollweg/Karl F. Kreuzer, Entwürfe einer UNIDROIT/ICAO-Konvention über Internationale Sicherungsrechte an beweglicher Ausrüstung und eines Protokolls über Luftfahrtausrüstung, ZIP 2000, p. 1361

⁴ Peter Malanczuk, The Relevance of International Economic Law and the World Trade Organization (WTO) for Commercial Outer Space Activities, Proceedings Workshop Vienna, op.cit.fn.1, p. 40

⁵ Background information in Proceedings of the 3rd ECSL Colloq. 'International Organisations and Space Law' (Perugia 6-7 May 1999), ESA SP-442, Noordwijk 1999, Session III p. 125 et seq.

⁶ Cf: Marco Ferrazani, European Institutional Scenario, IBA Outer Space Newsletter, Feb. 2000, p. 3-5

⁷ Thomas C. Barrett, The Galileo Task Force on Public Private Partnership, Proceedings Workshop Vienna, op.cit.fn1, p. 59; General overview: Volker Liebig/Kai-Uwe Schroggl, Space Applications and Policies for the New Century, Frankfurt/M. 2000, p. 6 (UNISPACE III)

⁸ B. Schmidt-Tedd, Staatliches Engagement bei partiell marktfähigen Raumfahrtanwendungen und die organisatorische Verankerung des öffentlichen Interesses bei kommerziellen

Raumfahrtanwendungen, in: Liber Amicorum Karl-Heinz Böckstiegel, Air and Space Law in the 21st Century, Cologne 2001, p. 424 (437 seq.)

⁹ Overview by Klaus M. Uckel, Abfluss-Denken weicht Management, in: Wissenschaftsmanagement, No. 2, March/April 1999, p. 29

¹⁰ Robert M. Stephens, United States Policy and Framework, Proceedings Workshop Vienna, op.cit.fn.1, p. 53

¹¹ ESA-Definition: ESA/C/CXLVII7Res. 1 (Final), On the Agency's framework for public-private partnerships, adopted on 19 Oct. 2000; ESA/C(2000)62; Bernd Vogel/Bernhard Stratmann, Public Private Partnership in der Forschung, HIS GmbH Hannover 2000; Yves Beguin/B. Schmidt-Tedd, Une approche pragmatique du partenariat public privé (PPP) en France, ZLW 2001 (I), p. 68; Stephen P. Osborne, Public-Private Partnerships, Theory and practice in international perspective, Route ledge, London 2000