SPACE AND THE COMPLEXITY OF EUROPEAN RULES AND POLICIES: THE COMMON PROJECTS GALILEO AND GMES – PRECEDENCE FOR A NEW EUROPEAN LEGAL APPROACH?

Dr. Annette Froehlich, LL.M., DESS
Senior Research Associate,
Institute of Air and Space Law, University of Cologne
annette.froehlich@uni-koeln.de

Albertus-Magnus-Platz
D-50923 Cologne, Germany

ABSTRACT

The two European space projects, Galileo and GMES, clearly show that the current existing legal rules of the two organisations involved (European Union and ESA) are not compatible. Moreover, it is quite impossible to implement a common project if every single organisation insists on the application of its own rules *strictu sensu*. Nevertheless, due to the political desire to advance these projects rapidly and to bring them to success, legal obstacles were overcome. Consequently, recently concluded agreements between ESA and the EU-Commission concerning the financial and governmental matters of the GALILEO and GMES implementation feature a new approach of cooperation between these two organisations. However, the question remains if they can be taken as precedence for a future institutionalized cooperation? It follows that the agreements have to be analysed in order to understand how a mutually acceptable agreement was reached despite the differences in the rules of both organisations. In this regard, especially the financial decision agreement concerning GALILEO in December 2007 shows a very interesting, unique way in applying EU-competition law. In the same way, the GMES-Delegation Agreement of spring 2008 is a good example how two different legal systems can be applied to bring a project to success. Additionally, the reasons and arguments of both organisations have to be considered, especially once the Treaty of Lisbon will be in force. As these two main projects of the European Space Policy are characterized by the desire for a successful European cooperation, they can be regarded as an important step forward to a new legal approach. A new system emerges which could be taken into consideration for further European common projects.

INTRODUCTION

Initially, the EU defined itself as an economic community and left the matters concerned with space to the ESA, which was expressly created for this purpose.[1] However, by now the EU has (despite lacking express competence in matters of space) already taken over Galileo and GMES (in co-operation with ESA) and thereby begun its first operations in the matter of space. Even though these projects

were declared pilot projects only, they will bind the EU for the long term.[2] Keeping in mind that the EU has included a separate budget for Galileo in the financial prospective for 2007-2013 and that the Treaty of Lisbon includes a shared competence in the area of space, one can conclude that there is an increased interest in this area by the EU, combined with a raised presence. Consequently, one can expect the EU Commission to put before the Council and the Parliament suggestions on how to realise the potential within the new EU competences.

Furthermore, the Treaty of Lisbon will break with the traditional "three pillar structure" of the EU, so that the EU will receive further competences in the area of foreign policy (such as a common defence strategy).[3] From that point onwards the EU may act in the military sphere and even award projects of a military nature to ESA. This would naturally lead to an extension of tasks of ESA which up till now may only carry out projects *for peaceful purpose* (art. II ESA-Convention)[4]. Therefore, one has to determine exactly the kind of competences belonging to the EU according to the Treaty of Lisbon and how they might reflect on the ESA-EU agreements already in force. This is especially relevant when bringing to mind the experiences already made in relation to the implementation of Galileo and GMES.

TREATY OF LISBON

For the first time ever, the Treaty of Lisbon, which was supposed to come into force in 2009, contains a codification of the competences of the EU in the area of space.[5] Following the preamble, a new title setting down the "Categories and Areas of Union Competence" was added to the treaty (Title I). Within this new title, article 2 b enumerates the areas in which the EU has exclusive competence (the customs union, the establishment of the competition rules, the common monetary policy, the conservation of marine biological resources under the common fisheries policy, the common commercial policy and the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence).

According to article 2 c) the EU will have only shared competence in areas of internal market, economic, social and territorial cohesion, agriculture and fisheries (excluding the conservation of marine biological resources), environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, further in the areas of common safety concerns in public health matters.

Additionally article 2 c) para. 3 expressly states a shared competence between the EU and the member states in the area of space: "*In 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.*"

Moreover, the title XVIII „Research and Technological Development" was amended to include the words "and space" as well as a new article 172 a): "*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.*"[6]

Lastly, article 3 states: "*The Union shall*

establish any appropriate relations with the European Space Agency".[7]

Therefore, art. 172 a) of the Treaty of Lisbon contains the legal basis for the EU to act in the area of space.[8] This new competence was desired by all member states, including those also belonging to ESA,[9] (even though research and development in the area of space traditionally belong to the domain of ESA).[10] Accordingly, the Resolution on the European Space Policy[11] from March 25, 2007 reaffirms *"the roles and responsibilities of the European Union, ESA and Member States, as identified in the Orientations of the second meeting of the 'Space Council'."*[12] The Orientations from the Space Council[13] (2nd meeting on June 7, 2005, point 3-2) set the framework for the relationship between the EU and ESA; particularly each party's role and responsibilities. As a result, the EU is obliged to ensure the availability and continuity of operational services of the European space infrastructure (at the moment Galileo and GMES), whereas ESA will develop space technologies and systems, supporting global competitiveness. *"Their activities will focus on exploration of space and on the basic tools on which exploitation and exploration of space depend: access to space, scientific knowledge and space technologies".*[14]

This division of competence between ESA and the EU as set down in the Orientations from the Space Council of 2005 and affirmed in the Resolution on the European Space Policy should be continued in the future. Even though the Treaty of Lisbon, as a superior source of law compared to the common ESA-EU agreements, states that the EU, *"may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space".*[15] In light of the prior agreement this text should be interpreted in a way as to say that the EU will support space research which will, as previously agreed upon, be initialised by ESA.

RESOLUTION on the EUROPEAN SPACE POLICY

In Chapter II "Further Steps – Programmes and Implementation", point F.12 "Governance", the Resolution on the European Space Policy describes the role of ESA when realising common projects. It envisages that ESA will play the role of a technical expert in relation to the EU-Commission, whereas the realisation of common projects will follow the EC-procedure. *"Such ESA role should also include: supporting the European Commission as technical expert in the elaboration of European Community initiatives involving space-related activities and relevant work programmes, and in the selection and monitoring of relevant work contractors, and the management by ESA of European Community space-related activities in accordance with the rules of the European Community".*[16]

In this context, the "rules of the European Community" mean that the EU competition law would be applicable to the area of space. The competition law itself can be found in art. 81-86 of the Treaty of the European Community, its purpose is to prevent a distortion of competition by member states or private entities.[17] Even though this represent one of the most basic aims of the Treaty,[18] it presupposes the existence of an effective competition within the relevant market,[19] implying *"the existence of the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirement and the attainment of the objectives of the treaty, in particular the creation of a single market achieving*

conditions similar to those of a domestic market".[20]
Still, the competition is not an end in itself; instead it is only a means to achieve the goals of the EC as laid down in art. 2. It follows that in certain constellations the protection of the pure competition may step back in favour of other important aspects.[21]
Considering that the market on space is not a market as traditional understood, but instead one that is strongly institutionalised, representing higher state policies which include interventions for the protection of the civilian population und the interest to keep the European space industry in competition with foreign countries,[22] the EU competition law has to give way to these other considerations at hand. Additionally, art. 2 of the Treaty of the European Community states that the implementation of the common market is not the only aim of the EC, the introduction of common policies which also include the advancement of research and development (art. 3, para. 1 lit. n of the Treaty) is also listed. Furthermore, of these declared aims neither one enjoys prominence over the other (art. 3 of the Treaty of the European Community).[23]

These considerations have been officially adopted by the Council in the Resolution on the European Space Policy from May 25, 2007. The Council declares in Chapter II "Further Steps – Programmes and Implementation" in point G.14 "Industrial Policy" explicitly an exception to the general competitive law, it: "*EMPHASISES in this context in particular the political and economic dimension of ESA's 'fair return' principle; and the importance to assess and improve, when necessary, the implementation of the 'fair return' principle in view of the future challenge for industry to remain competitive in a changing environment worldwide while maintaining, and possibly increasing, Member States' motivation to invest in space*".[24]
Even the Orientations from the European Space Council (2nd meeting on June 7, 2005) in its key principles (point 3-4) contain the statement that *"the implementation of the European Space Policy requires an industry policy tailored to the specificities of a sector subject globally to government influence. This policy should provide all stakeholders in Europe with the motivation (...) to make the necessary investment to maintain (...) a globally competitive space industry. This is central to the achievement of Europe's economic and political objectives, thus contributing to Growth and Employment*".[25]

Furthermore, the EU already has made extensive concessions in the application of its competitive law when negotiating the financing of its two projects, Galileo and GMES.

EU-DECISION regarding GALILEO 2008

The common project of Galileo and its Public-Private-Partnership has opened new ways of cooperation between ESA and the EU. The regulations regarding the implementation of the European Satellite Navigation Programs (EGNOS and Galileo)[26] from July 9, 2008 determine in article 17 that the *"following principles for the procurement of the activities of the deployment phase of the Galileo programme shall apply"* in order to guarantee transparency and equality among the competitors. These principles are meant to *"promote balanced participation of industry at all levels"*[27] in order to *"avoid possible abuse of dominance"*[28]. In order to achieve this aim, the tender proceedings declare that the *"procurement of the infrastructure shall be split into a set of six main work*

packages"[29]. Even more, a rule was established according to which *"one independent legal entity, or a group represented for this purpose by a legal entity belonging to that group, may bid for the role of prime contractor for a maximum of two of the six main work packages"*[30]. Furthermore, *"at least 40 % of the aggregate value of the activities shall be subcontracted (...) to companies other than those belonging to groups of entities that are prime contractors for any of the main work packages"*[31].

In establishing these rules, the Commission has taken into consideration how a public tendering procedure may lead to certain member states being privileged over others. Accordingly, the Commission has accepted a division of its market and certain flexibility in the application of its competition law. This resolution leads the way into a division of the Galileo project and its market, supported by an extensive reading of the EU competition law, even though art. 81, para. 1, lit 1 of the EU Treaty itself declares that to *„share markets or sources of supply"* was incompatible with the goal of a common market.

ESA-EU AGREEMENT concerning GMES FINANCING

In the course of implementing the common GMES project it turned out that the set of rules of each organisation couldn't simply be transferred to a co-project without alterations. Therefore, on February 28, 2008, the Commission interpreted the agreement with ESA as consistent with the EU financial regulation in order to allow for a continuation of the project.

CONCLUSION

When looking at the agreement at hand, it becomes obvious that where the EU Commission desires to have the EU Competition Law adapted to a specific situation, it may very well do so. Special agreements for further common projects in the area of space industry are especially prone for such an adaptation, due to the particularities of the subject matter. This approach gains even more relevance in light of other possible common projects like the project of Space Situation Awareness, where there remains plenty of room for actions.

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[1] Currently the area of satellite communication is the one most commercialised.

[2] Neither the Galileo nor the GMES project will be finished at the end of the FP7 (Seventh Research Framework Programme) in 2013, this may lead to issues of liability and other long time problems.

[3] Legal basis: art. 11 (a) Treaty of Lisbon: "The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence". This means that the competence of the EU in the area of common foreign and security policy now also includes the task of implementing a common defence, (cf. *Fischer*, Der Vertrag von Lissabon, p. 147 in relation to the article' cryptic phrasing, the author doubts whether the new art. 11 of the treaty may lead to a more efficient and effective common foreign and security policy). It follows that the competences of the EU in the area of common foreign and security policy now include all matters related to it, there is no inherent limitation. (cf. *Fischer*, Der Vertrag von Lissabon, p. 146).

[4] Convention on the European Space Agency, 1975, came into force on October 30, 1975.

[5] These terms were adopted unaltered from the Constitutional Treaty, cf. article I-14 of the Constitutional Treaty, "Categories and Areas of Union Competence".

[6] Para. 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 procedures, shall establish the necessary measures, which may take the form of a European space programme, excluding any

harmonisation on the laws and regulations of the Member States", Text according to C 306/43, Official Journal of the European Union, from December 17, 2007.
[7] Para. 4 „This Article shall be without prejudice to the other provisions of this Title".
[8] Cf. *Fischer*, Der Vertrag von Lissabon, p. 318.
[9] This anomaly leads to questions concerning the coherency of member states in matters of a "European Space Policy", especially regarding those member states with a double membership in the EU and ESA. However, one has to keep in mind that the member states did not discuss the matter of space during the negotiations to the Treaty of Lisbon, leading effectively to a dissent among those present.
[10] Cf. art. II and art. V ESA-Convention and the decision concerning the European Space Policy.
[11] The Resolution on the European Space Policy was preceded by the Communication from the Commission to the Council and the European Parliament, European Space Policy on April 26, 2007. An identical document was presented to the Council of the European Space Policy by its director-general. The Resolution on the European Space Policy can therefore be seen as the member states' reply to the Commission's Communication, whereby they recognise the outstanding work done by ESA and endorse its current institutional framework.
[12] Council of the European Union, Resolution on the European Space Policy, May 25, 2007, Chapter II.F "Governance", pt. 12.
[13] The Space Council consists of the Council of the European Union and the Council of the European Space Agency (ESA).
[14] Orientations of the second meeting of the Space Council, June 7, 2005, pt. 3-2.
[15] Art. 172 a, para. 1 Treaty of Lisbon.
[16] Chapter II Further Steps "Programmes and Implementation", pt. F.12 "Governance".
[17] Art. 3 para. 1 lit. g Treaty of the European Community demands a "system ensuring that competition in the internal market is not distorted".
[18] Cf. ECJ, Case 6/72, Continental Can, report 1973, 215, para. 25, *Lenz/Borchardt* (ed.), EU- und EG-Vertrag, Kommentar, 4. Edition 2006, p. 944.
[19] Cf. *Lenz/Borchardt* (ed..), EU- und EG-Vertrag, Kommentar, 4. Edition, 2006, p. 944.
[20] ECJ, Case. 26/76, Metro I, report 1977, 1875, para. 20.
[21] *Lenz/Borchardt* (ed.), EU- und EG-Vertrag, Kommentar, 4. Edition, 2006, p. 944.
[22] Cf. the statement by the EU-Commission, Communication from the Commission to the Council and the European Parliament, European Space Policy, April 26, 2007, pt. 5, p. 10 "A competitive European space industry is of strategic importance".
[23] *Oppermann*, Europarecht, 3. Edition, 2005, p. 311, at. 5.
[24] Decision of the European Space Policy from May 25, 2005, Chapter II, pt. G.14.
[25] Orientations from the second Space Council, 7 June 2005, pt. 3-4.
[26] Regulation (EC) No 683/2008 of the European Parliament and of the Council of 9 July 2008 on the further implementation of the European satellite navigation programmes (EGNOS et Galileo), L 196/1.
[27] Art. 17, pt. 2 a).
[28] Art. 17, pt. 2 b).
[29] Art. 17, pt. 3 a).
[30] Art. 17, pt. 3 b).
[31] Art. 17, pt. 3 c).