SUPRANATIONAL SPACE: WHY THE POWERS OF THE EU ARE NOT QUITE PARALLEL

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As of 1 December 2009, the European Union received new legal powers in space matters by the Lisbon Treaty. For European space lawyers, it is common knowledge that the competence is parallel but uncertainty remains about its precise content. The supranationalism debate of the Union's space competence has been yet avoided because supranationalism in space is a sensitive issue. The paper's line of argument starts with the four basic principles of the space competence: the instrumental function, the parallelism, the exclusion of harmonization and the coordination mandate. The paper argues that the newly introduced Article 189 of the Treaty on the Functioning of the European Union has supranational features, e.g. primacy. Equally important, the intergovernmental coordination mandate shows the dual nature of the space competence. The exclusion of harmonization should not be overemphasized. The Union has de facto harmonization powers because it can regulate its own programmes. Space assets may even introduce a new feature of supranationalism: supranationalism through infrastructure. In the tripartite space administration in Europe shared between the European Union, the European Space Agency and their respective member states, the Union contributes by its supranational powers. Moreover, the Union may eventually take the policy lead.

I. INTRODUCTION

Before and after every treaty reform, European lawyers debate the scope of newly introduced powers. The Lisbon Treaty[1] and the space competence are no exception. However, the space competence of the European Union (EU)[2] has been discussed in a close community[3] and has yet to attain a greater depth and consistency with EU legal theory. European scholars on the other hand have so far thoroughly neglected the impetus of the new space competence on the development of European law.

Law can only serve political will. The EU has nurtured this political will to be a space actor even before the entry into force of the Lisbon Treaty. As a political institution of growing importance and vocation the Union has a strategic interest in space. It wants to be both user and driver of space technology. When it embraced space matters, the EU stepped into a bipolar European space administration. The European space effort was mainly and successfully driven by the European Space Agency (ESA) and its member states. The latter retained a tight grip on the Agency and its thoroughly intergovernmental nature. It is in this context that the Union has to find its new role. The intergovernmental path of the European integration of space programmes explains the reticence of the EU Member States and the ESA towards the supranational nature of the EU. Supranationalization of space was conceived as a worst case scenario.

The fear of supranationalism, generally en vogue among eurosceptics, is one explanation for the limits of the EU space competence. But it is contested here that the exclusion of any harmonization and the parallelism of the space competence deprived it of its supranational character. Accordingly, the present paper sets out to start a coherent debate about the supranational features of the EU space competence. The question is far from being purely academic. The qualification "supranational" contains such legal principles as the primacy of EU law. It is essential for the scope and impact of EU space acts on EU Member States.

The methodology of this paper consists of contrasting the historical development and the basic legal principles of the EU space competence with the political and legal advantages of supranational features for European space law. The main task is to show how a partial supranationalism checks the parallelism and the exclusion of harmonization. The traditionalist European law perspective is complemented by a reverse approach. From a space lawyer perspective the new space competence adds to the corpus of EU treaty law and has repercussions on its constitutional understanding.

II. HOW THE EU EMBRACED SPACE

As a new space actor, the EU stepped into a European space administration landscape that was characterized by the successful partnership between the ESA and its member states. Emanating from two very different schools of thought, the ESA and the EU had to find a balanced relationship. Seen from the perspective of ESA-EU relations, the new explicit space competence is but another step in the continuing quest for a reasonable division of roles.

1. The ESA-EU Relations 1987-2011

At the beginning, the EU and the ESA had different mandates that did not overlap even though their membership was almost congruent.[4] The intergovernmental nature of ESA was necessary in view of sovereignty concerns of its founding states. Accepting the necessities of a cooperative European space effort, the states wanted to remain as much as possible in control of the programmes and ensured that their investment was returned via contracts to their home industry (industrial return).[5] One of the main tasks bestowed on the ESA was to implement an effective industrial policy which ensured a strong European space industry.

The EU started to embrace space after it was given a limited competence in research and development (R&D) in 1987.[6] The Commission started out as an observer of the bipolar space administration landscape in Europe and assumed a very critical approach at first.[7] Its criticism of the industrial return and aspirations to bring the European space activities into line with the internal market were not endorsed by the Council which carefully ignored its initiatives. In view of the Commission's criticism, the ESA nurtured an existential angst towards the ever growing Union and commissioned studies to prove its immunity of EU competition laws. This defensive attitude impeded cooperation.

While still defending its independence, the ESA found a way to cooperate with the EU. From 1998 on it was politically settled that the ESA would implement space programmes while the EU would co-finance application programmes and concentrate on "legal, economic and social fields" that affect space-related markets.[8] The two common application projects consisted of satellite navigation soon baptised Galileo and earth observation, the Global Monitoring for Environment and Security (GMES). The preparation of these projects and the necessary regulation of ESA-EU relations in a bilateral treaty were served by a strict separation approach. In the words of the ESA-EU Framework Agreement of 25 November 2003, their relations had to pay "due regard to their respective tasks and responsibilities and their respective institutional settings and operational frameworks".[9]

Thus, ESA's role as the implementing agency of the EU was settled but the EU still lacked an explicit competence in space. For its relations to the ESA and their common projects the Union used its competence for R&D as well as transeuropean networks in case of Galileo. But the shortcomings of this approach were apparent. The next treaty reform, the ambitious Constitutional Treaty should have provided the EU with an explicit competence in space matters. After the constitutional crisis following its failure, the main contents of the Constitutional Treaty including the space competence were rescued in the Lisbon Treaty that was signed on 13 December 2007. Since 1 December 2009 the Union finally has an explicit space competence albeit with limitations. This new competence was already used for the GMES regulation[10] but questions remain as to its scope. The scope of the new competence has equally to be addressed by the follow-up ESA-EU treaty when the Framework Agreement ends in 2012.

2. The Space Dimension of the Lisbon Treaty

The new space competence is not a traditional Union competence, it is exceptional in many ways. Already the wording of Articles 4 (3) and 189 of the Treaty on the Functioning of the European Union (TFEU) emphasizes its limits.[11] As a parallel competence,[12] space departs from the common division of competences. Even though it features in the Article on shared competences, it is exempt from the pre-emption mechanism as contained in Article 2 (2) TFEU: Member States remain competent in space matters. This treaty method was criticised.[13] However, the reformers did not aim at total systematization and the treaty text remains a political compromise despite all constitutionalization efforts. Lastly and most prominently, the space competence is limited by the exclusion of all harmonization of the laws and regulations of Member States according to Article 189 (2) TFEU.

As to content, the EU space competence is rather wide. The breadth of the aims of space policy in Article 189 (1) TFEU counterbalance the above mentioned limitations. Space is conceived as an instrument for the Union's other policies. The meaning of "space" remains undefined.[14] The measures by the Union can encompass the whole of "the exploration and exploitation of space".[15] While R&D is mentioned, the effect of the instrumental function will be an emphasis on applications, in line with the currently endorsed ESA-EU institutional model.

In order to appreciate the full extent of the EU space competence a more careful reading is needed than a simple enumeration and reproduction of the paragraphs of Article 189. Reading Articles 4 (3) and 189 (1) and (2) TFEU together, it is apparent that the Member States bestowed two different mandates on the Union.[16] First, the Union may implement its own space programmes in parallel with those of its Member States, programmes are explicitly mentioned in Article 189 (2) TFEU. These measures are best adopted by binding legal acts according to the ordinary legislative procedure.

Second, the Union's mandate to "draw up a European space policy" is to be understood in context with the explicit task to "coordinate the efforts [read: of

the Member States] needed for the exploration and exploitation of space". Article 4 (3) TFEU presupposes national space programmes and the ESA is equally conceived as a multilateral Member State space effort. With the backdrop of existing space programmes, the need of political coordination is the starting point of the TFEU. It is with this coordinative aim in mind that the Union has to adopt the European space policy.

Its own parallel competence has to respect the common space policy and play its complementary role. The two principles of coherence and complementarity are already known in the equally parallel competence in development cooperation.[17] As to the systematic standing of the space competence, a dual nature is characteristic: The EU has both a parallel, i.e. limited shared competence and a coordinating competence in space.

3. The Four Basic Principles of the EU Space Competence

Conceptualizing the scope of the Union's space competence, there are four basic principles: the instrumental function, the parallelism, the exclusion of harmonization and the coordination mandate. These four principles define the extent of supranationalism in the space competence.

a. The Instrumental Function

Article 189 (1) TFEU refers to the "implementation of [EU] policies". Bearing in mind the abolition of the pillar structure, the single European Union as a legal personality and in spite of the legal singularity of the Common Foreign and Security Policy (CFSP) this reference can only mean all of the Union's policies. Therefore, space can serve all EU policies including the CFSP.[18] That does not mean that a purely defence related measure may be based on Article 189 TFEU. But the European space policy must have a CFSP dimension and the CFSP has to consider the use of the (civil) space means provided by the space competence.[19]

The instrumental function of space is a common modern justification of the space effort. In an age of budget restrains, the expense of space can only be borne if justified by a visible benefit for the European citizen. Because space applications serve primarily this aim, it may be predicted that the thrust of the Union programmes effort will lie on applications.

b. The Parallelism

The parallelism of the EU space competence works both ways in the relationship between the Union and its Member States. It ensures the Member States their sovereignty in space matters. This negative character of parallelism helps the case for ESA's independence as any merger models would necessitate a treaty reform. The positive parallelism enables an independent EU space programme provided it respects its limits (subsidiarity, exclusion of harmonization) and its complementary role.

The respective independence of the EU and Member States' programmes is checked by the imperative of mutual loyalty, the principle of sincere cooperation.[20] The Member States have to refrain from impeding the success of EU space measures and apply the EU programme law in an effective manner. The Member States' sovereignty in space matters is additionally limited by the coordination mandate that they have bestowed on the Union. The coordination mandate interacts with the parallel competence, they both form the EU space competence. The EU's parallel competence is equally defined by the coordination mandate. Once the Union has adopted a European space policy for the tripartite group together with the ESA and the Member States in a cooperative manner, it has to fulfil its role in this relationship and its parallel programmes have to be consistent with the common policy.

c. The Exclusion of Harmonization

The exclusion of any harmonization in space matters was introduced by the Mandate to the 2007 Intergovernmental Conference,[21] a complicated political compromise text on those parts of the Constitutional Treaty that were to be rescued. Such harmonization exclusion clauses are featured on numerous places in the Treaties,[22] most prominently harmonization is excluded per definitionem for the third category of competences where the Union may only support, coordinate or supplement the actions of the Member States.[23]

The extent of the prohibition ends, however, with Article 189 TFEU. The Member States did not intend to shorten the Union's existing powers with the treaty reform, rather they were explicitly broadened. Accordingly, the pre-existing harmonization powers of the EU concerning the internal market, Articles 114 and 115 TFEU remain applicable to space matters. The benchmark for such measures is the usual justification of a particular legal base, in this case objective reasons that predominantly aim at the abolition of restraints in the space market.[24]

d. The Coordination Mandate

The coordination mandate given to the Union goes beyond its purely complementary role provided in the current ESA-EU institutional compromise. A coordination inherently entails a political lead and some influence. The parallelism of the Union and Member States in space is thus asymmetric. The Member States submit-

ted to the coordination of the Union in the exploration and exploitation of space in Article 189 (1) TFEU despite the language of Article 4 (3) TFEU. The adoption of the European space policy is part of the coordination mandate and the Union could use its coordination powers to monitor the implementation of the common space policy.

But the means of EU coordination actions are limited. While the Union may even adopt binding legal acts for its implementation, these acts must be of a coordinating nature only and fall short of harmonization. The main instrument of such coordination will be the common space policy. The Union has no powers to enforce policy, although it may adopt an extra-legal monitoring scheme to ensure its implementation. The coordination measures if adopted as legal acts would have very little impact, they presuppose Member States' actions and they are of an accessory kind. The emphasis of the coordination mandate is therefore on policy not regulation.

III. THE IMPORTANCE OF A SUPRANATIONALISM DEBATE IN SPACE LAW

Before scrutinizing the aforementioned four principles of the space competence for supranational features, the important question is what added value supranationalism may have for the European space administration. Some introduction to the European law terminology of "supranationalism" is necessary. Supranationalism is an academic term not a legal one. In short, it differentiates the EU from other international organisations because it can supersede ("supra-") state power ("national"). The current paper will not enter into the general debate what constitutes supranational powers. The common denominators as derived from case law and scholarly opinions are the primacy and direct effect of EU law over national law, decision making in the Council by qualified majority voting (QMV) and the mandatory and binding jurisdiction of the Court of Justice of the European Union (CJEU). Harmonization powers are enabled through these supranational features but harmonization is not a constituent element of supranationalism.

There is little debate on supranationalism in the space competence on the part of EU lawyers which matches their general neglect of or inexperience with the space competence. At the time when ESA and EU as well as several studies discussed institutional models, there was some debate about supranationalism and European space law, centred on two aspects. In the envisioned division of roles, the EU was to ensure a coherent space regulation for the commercial market and outside government programmes.[25] Here, supranational regulation was conceived as a positive aspect for European space law. On the other hand, ESA did not want to be swallowed by a supranational EU,[26] preserving its intergovernmental nature and independence as well as its industrial return. If a merger was necessary, a scenario yet avoided, the Agency and its member states could only imagine space as an intergovernmental policy.[27] Additionally, European states with bigger space budgets were reluctant to loose control over the expenditure and to submit to the scrutiny of the Commission and eventually the CJEU.[28]

In this semi-hostile environment for supranationalism in space, a fresh start is needed now that the EU has a specific competence. This debate has to concentrate on the situation de lege lata irrespective of any future reforms. Most importantly, the extent of primacy of legal acts under the new competence has to be addressed. The primacy of EU law[29] is best understood as an exigency of effectiveness: when EU and national law collide, the EU Treaties and the law adopted on their basis trump national law because this manner ensures the effectiveness of EU law.[30] A Member State and all of its agencies are bound by EU law and they have to apply it in an indiscriminative manner.[31] Additionally, the direct effect of EU law means that it may be invoked by individuals and applies depending on the nature and content of the legal act[32] directly to individuals.

Primacy and direct effect are the cornerstones of EU law, discerning it substantially from ESA law. The only way the ESA can impose regulations on individuals is through contracts. These contracts are confidential, it is not a proper regulation method in the terms of the rule of law. Other ESA legal acts, such as the Procurement Regulations,[33] have equally a limited effect even though they have maximum impact on the bidders. The ESA has no power to ensure a consistent application of its Regulations by government agencies. But even primacy and direct effect cannot be beneficial to European space law by themselves, they are but effective implementing means. Their impact depends on the strength of content, e.g. market freedoms, procedural principles, non-discrimination etc. Supranationalism is only a method, albeit a successful one in European integration.

Decision making in the European space administration can also benefit by QMV which may enhance the compromise. More importantly from a European lawyer's view, the CJEU would have jurisdiction over the EU space programme. For the first time, a court would be able to scrutinize the legality of a particular implementation of a programme, ensure the consistency in the application of programme regulations and interpret authoritatively both the programme regulations and the space competence. The Court can equally guard the Member States' programmes in the sense of the principle of parallelism and the exclusion of harmonization. For the first time, transparency would be ensured in the

implementation of European space programmes, bidders would have a course of action against breaches of procedure and discrimination. The delegation of implementing tasks to the ESA does not exclude the jurisdiction of the Court, the organ responsible would still be the Commission (management, delegated legislation) and the Council and European Parliament (legislation) respectively.

The ESA is well aware of the advantages of the EU as a system with the above mentioned beneficial supranational features although it tends to point to its disadvantages such as over-regulation and under-performance. The mutual reception of their legal schools of thought has already started. The ESA has undergone substantial reforms in order to adapt to a rule of law based cooperation with the EU. The EU has already influenced the ESA to establish a quasi-judicial review mechanism for its procurement branch[34] although it arguably would not pass the EU test of judicial review.[35] In the view of the present author, the jurisdiction of the CJEU over EU space programmes would enhance the transparency reform of the ESA, because as the implementing agency of the EU it would have to adapt to the former as far as it manages EU programmes.[36] The primacy and direct effect of EU programme law would also help the ESA as the EU Member States have an obligation to apply the EU space programme law in an effective manner. Individuals such as the European space industry would profit by legal certainty. In sum, supranationalism has a lot to offer to European space law.

IV. SUPRANATIONAL FEATURES IN EUROPEAN SPACE PROJECTS

Starting from the premise that supranational features may benefit the European case for space, any thorough scrutiny of the space competence has to take the different mandates of the EU into account. The mandate for parallel programmes has a stronger supranational bearing while the supranationalism of the coordination mandate has to be very limited. Because the two mandates form a single EU space competence, their supranational features and limits have to be viewed in context. Another methodological principle is that the EU is a very sophisticated legal system. Despite the drawbacks for its constitutional aspirations there is a living EU constitution and space has to find its place in this system.

1. Supranationalism, Parallelism and Space

While the general supranationalism debate for European space law is almost philosophical, the supranational features of the parallel space competence are straightforward. The regulations for an EU space programme adopted under Article 189 (2) TFEU have primacy, direct effect, are adopted with QMV and fall under the full jurisdiction of the CJEU. All three basic supranational elements are present.

Lawyers unfamiliar with EU acts other than harmonizing directives have doubted the direct effect of such programme regulations.[37] But space programme regulations are more than mere internal acts, they have a substantial impact on individuals, e.g. concerning bidding or data access. Apart from this impact in a government-citizen relationship, such space programme regulations may even affect private relationships. Even those regulations that found internal EU agencies for implementing tasks have external impact as the regulations bestow administrative authority on those agencies that affects individuals.

2. Intergovernmentalism and the Coordination Mandate

The search for supranational features in the coordination mandate is less straightforward. As already mentioned, the means of the EU are limited and mostly of a political nature. The main task of the EU is to adopt the European space policy. A "policy" cannot have normative nature, it must be implemented as a non-legal act. The elements of primacy and CJEU jurisdiction are simply inapplicable and QMV is merely accessory, not a core element. Therefore the drafting and adoption of a European space policy under Article 189 (1) first sentence TFEU is of an exclusively intergovernmental nature.

The coordination mandate consists of more than the European space policy, it encompasses monitoring tasks concerning the implementation of the said policy and coordinative measures concerning national and ESA space programmes. Such coordinative measures may take the form of binding legal acts. Because of their accessory nature and the importance of subsidiarity these coordination regulations cannot go beyond voluntary exchange schemes, funds and comparable projects. Coordination regulations would formally have primacy and direct effect but their limited content lessens their impact on the Member States. Therefore, the intergovernmental features prevail in the coordination mandate.

3. Supranationalism, Infrastructure and Space

The interim conclusion must be that supranationalism and intergovernmentalism are in a draw. At this stage the present paper leaves the traditional, legal features of supranationalism because space is much more than regulations. The opposite is true: regulations are but the common means to implement government programmes in a formalistic society. Space is about achievements, applications and discoveries. Assets on the ground and in space are corporeal, every space programme is conceived to deliver a certain product for

users. Whether science or applications, the main activity consists of executing the programmes. This is why the ESA is an executive agency not a regulative one.

a. Space Infrastructure and EU Ownership

Satellites and ground stations are elements of a space infrastructure. From a national legal point of view, such infrastructure is not different from other government-controlled infrastructure. For the EU the ownership of infrastructure is a novelty for it is commonly used to spending funds and regulating. For the first time, the EU will have a common infrastructure once Galileo and GMES are implemented. This novelty has also a bearing on the constitutional status of supranationalism in the space competence. A space programme inherently presupposes space assets. Moreover, the coordination mandate entailed on the Union and its vocation as a political European voice necessitate a significant budgetary contribution to the European space effort. The intra-Union impact of budgetary claims is a growing budgetary sensitivity. Leaving the debate on the amount of the EU space budget and cost overruns aside, there is consensus on the mandatory ownership of the Union once the Union has financed a project.

b. The New Role of the EU: Towards a "Capability Union"

The Community was set up as a regulating organisation with a limited economic mandate. Over the decades the Member States attributed more and more powers and political mandates to the Union but still, the thrust of its activities was regulation and the management of funds. It consisted of buildings, bureaucrats, paper and accounts. Everything substantial was retained by the Member States. European citizens are less prone to identify themselves with these but they can relate for example to a single currency and still do, despite its recent hazards. Space assets in contrast are substantial governmental means. The introduction of a space competence adds to the constitutional shift from a regulating and fund-managing Union towards a Union with important capabilities and commonalities.

Infrastructure can have harmonizing effect. Harmonization is rightly seen as the regulative power where the supranational features are most powerful. But the EU space policy does not necessarily need harmonization to have an even deeper impact on the European citizen. To be an owner of infrastructure assets and manager for the benefit of its policies, the Member States and citizens alike is even more state-like than harmonization. Despite the parallelism established by the TFEU, in reality, budgetary restraints will ensure complementary structures. By implementing its role in the complimentary partnership with the Member States, the Union will be able to enforce EU law in its share of the European space effort, e.g. satellite navigation. The Union can regulate the whole of its satellite navigation project and effectuate de facto harmonization. Its corporeal assets provide the EU with a new facet of power reaching even beyond the Union borders to third states. They cause a legal phenomenon of European law, not yet discussed: supranationalism through infrastructure.

V. A "CAPABILITY UNION": DE FACTO HARMONIZATION

The supranational and intergovernmental elements of the EU space competence must serve a coherent space policy approach. Again, supranationalism and intergovernmentalism are not aims in themselves but means to an end. The need for harmonized rules in the European space market is evident. The exclusion of harmonisation may not be as devastating for the EU space competence as foreseen,[38] but postponing all harmonization is not an option either if the EU wants to help the market for space applications and tackle its regulatory task. The Commission does not prepare any initiative to use the harmonization competences under the Articles 114, 115 TFEU. In these circumstances, supranational de facto harmonization and intergovernmental de facto harmonization may be valid current options.

1. Supranational De Facto Harmonization

The first lane of the above mentioned path of de facto harmonization is supranational de facto harmonization through the regulations that rule the EU's own space programmes under Article 189 (2) TFEU. As explained earlier, the EU has all of the supranational features at its disposal provided it abides to the principles that limit the content of such regulations, in particular the prohibition of de lege harmonization. In cooperative programmes where the Member States contribute in kind the Union can use exceptions in order to avoid de lege harmonization.[39]

The very act of implementing a space programme through the EU space competence has a harmonizing effect on the particular subject of the programme. EU legislation guarantees a unitary approach on all aspects of such a programme and the Member States have to abide to the EU way. Depending on the extent of the programme such programme law may have a visible impact. The current example is the European satellite navigation project where the EU has the role of regulatory authority.

The EU may use its space programmes as a test bed for a particular regulatory approach and gain regulatory knowledge in space matters. The ESA can ensure its standing and its interests as the technical advisor of the

EU. The industry can adapt to the EU approach, send signals to the EU whether reform is needed or even resort to litigation. The CJEU can ensure consistency with EU law, interpret EU space programme law and guard its uniform application throughout the Union area.

Supranational de facto harmonization must also be part of considerations on a harmonic division of roles in the European space administration. The stakeholders in the tripartite group have to take the effects of de facto harmonization into account in the assignation of EU tasks. The complementarity principle that avoids duplicity even enhances sectoral de facto harmonization. Even if legally empowered under Article 4 (3) TFEU, the Member States will not finance parallel programmes, e.g. in satellite navigation. If enough political will is mustered, the three partners may even deliberately use the Union's powers of de facto harmonization.

2. Intergovernmental De Facto Harmonization

De facto harmonization through intergovernmental means by way of the common space policy will be difficult because this policy can hardly lay out regulatory details.[40] Rather, it can harmonize general approaches. Other coordination action is better suited. Here, the EU may adopt non-binding recommendations. Drafting these recommendations, the EU has to account for all interests which is a core requirement of the coordination mandate. Extra-legal instruments could encompass registration or space debris. The Union can further their acceptance with supporting voluntary schemes.

Even external action may enhance de facto harmonization. As can be seen in the example of the EU proposal for a Code of Conduct,[41] the EU, its Member States and the ESA as technical advisor had to reach an internal compromise on the contents of the Code of Conduct as a preliminary step. These long internal debates necessitated space-related soul-searching on the part of the Member States. A common line for space diplomacy facilitates the way for internal de facto harmonization on space regulation.

VI. CONCLUSION

The limitation of supranationalism in the EU space competence did not extinguish its supranational features. However, its intergovernmental elements distinguish it from other EU competences. A space-related supranationalism debate is necessary because a better grasp of the Union space powers is due. It has been shown how supranational features may facilitate de facto harmonization. The juxtaposition of the supranational and intergovernmental element, common to the EU treaties, does not hinder a harmonized European space approach. The European case for space may even benefit by their combination. Moreover, the EU space infrastructure may further its standing as a legal system and pave the way to a capability Union. The Union has strong means at its disposal, but it must rise to the occasion.

[*] The views expressed in this paper are the author's alone and do not represent opinions on behalf of the Institute of Air and Space Law of the University of Cologne or any other institution the author happened to be affiliated with during her career nor are the opinions derived from any of the studies the Institute has carried out.

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal of the European Union (OJ) C 306 of 17 December 2007, 1. For the current law as of 1 December 2009, cf. the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Charter of Fundamental Rights of the European Union, published in the OJ C 83 of 30 March 2010, 1. All EU legal texts as well as cases and Commission communications are accessible at www.eur-lex.europa.eu, Council documents are accessible at http://register.consilium.europa.eu (30.08.2011).

[2] Reference is made to the European Union as single legal entity in accordance with Article 1 (3) Treaty on European Union (TEU). When addressing historical developments reference is equally made to the EU for simplicity reasons, disregarding the pre-Lisbon distinction between European Communities and the European Union.

[3] Sánchez Aranzamendi, Space and Lisbon. A New Type of Competence to Shape the Regulatory Framework for Commercial Space Activities, Proceedings of the 61st International Astronautical Congress, 2010, Paper IAC-10-E7.1.10; Wouters, Space in the Treaty of Lisbon, Yearbook on Space Policy 2007/2008, 116; for the Commission staff perspective cf. Information Note, Article 189 of the Treaty on the Functioning of the European Union, doc. HSPG/ 22-2009 of 1 December 2009, available at http://www.espi.or.at/images/stories/HSPG_Information
_Note.pdf (30.08.2011). The Cologne Institute of Air and Space Law leads the research on ESA-EU relations and has addressed the EU space competence as introduced by the Lisbon Treaty and contained in the failed Constitutional Treaty (in German with English summaries): Hobe, Heinrich, Kerner and Froehlich, Die Entwicklung der europäischen Weltraumagentur als implementing agency der Europäischen Union, 2009, 22-51; Hobe, Kunzmann, Reuter and Neumann, Rechtliche Rahmenbedingungen einer zukünftigen kohärenten Struktur der europäischen Raumfahrt, 2006, 200-238. For a policy perspective cf. Froehlich, European Space Policy Space and the complexity of European rules and policies: The common projects Galileo and GMES - precedence for a new European legal approach?, 66 Acta Astronautica (2010), 1262.

[4] The current EU 27 are Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Sweden, Slovakia, Slovenia, Spain, the Czech Republic and the United Kingdom. ESA's members are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Spain, the Czech Republic and the United Kingdom. Romania signed the accession treaty in 2011 and still has to ratify, Poland wants to initiate accession negotiations as of 2011/2012.

[5] For details on the return cf. Hobe, Hofmannová and Wouters (eds.), A Coherent European Procurement Law and Policy for the Space Sector. Towards a Third Way, 2011, 70 et seq.

[6] The Single European Act, signed on 17 February 1986, entered into force on 1 July 1987, OJ L 169 of 29 June 1987; for a short overview of the beginnings of ESA-EU relations cf. Hobe, Hofmannová and Wouters (eds.), op. cit. note 5, 2 et seq.

[7] Commission Communication “The Community and Space: A Coherent Approach”, COM(88)417 of 26 July 1988.

[8] Resolution on the reinforcement of the synergy between the European Space Agency and the European Community, passed by the Councils of the ESA and EU respectively on 22 June 1998, OJ C 224 of 17 July 1998, 1. Page restrictions hinder a comprehensive overview over all pertinent resolutions that led to the European Space Policy of 2007 and beyond, the interested reader is kindly referred to Hobe, Hofmannová and Wouters (eds.), op. cit. note 5, 6 et seq.

[9] Article 2 (1) Framework Agreement between the European Community and the European Space Agency, entered into force on 28 May 2004, OJ L 261 of 8 August 2004, 64.

[10] Regulation (EU) No 911/2010 of the European Parliament and of the Council on the European Earth monitoring programme (GMES) and its initial operations (2011 to 2013), OJ L 276 of 20 October 2010,1.

[11] Article 4 (3) TFEU: “In the areas of [...]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.“

Article 189 TFEU: "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 programme, excluding any harmonisation 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."

[12] While Wouters, op cit. note 3, at 121 still questions the term "parallel", equally impartial: Masson-Zwaan, Regulation of Sub-orbital Space Tourism in Europe: A Role for EU/ EASA?, 35 Air & Space Law 2010, 263, 268, a substantial part of European scholars prefers this descriptive term, cf. only Chalmers, Davies and Monti, European Union Law, 2nd edition, 2010, 209; Hobe, Heinrich, Kerner and Froehlich, op. cit. note 3, 355; exemplary for the majority of German commentators cf. Calliess, Die neue Europäische Union nach dem Vertrag von Lissabon, 2010, 190. Other commentators deny space its standing as a parallel competence because harmonisation is excluded, making it a mere supporting competence: Nettesheim in Grabitz, Hilf and Nettesheim, Das Recht der Europäischen Union, 43rd edition, 2011, Art. 4 AEUV, para. 26.

[13] Craig, The Lisbon Treaty: Law, Politics and Treaty Reform, 2010, 171; Hobe, Heinrich, Kerner and Froehlich, op. cit. note 3, 36; Lenaerts and Desomer, La récherche d'un équilibre pour l'Union, in: de Schutter and Nihoul (eds.), Une Constitution pour l'Europe: réflexions sur les transformations du droit de l'Union européenne, 2004, 82. Already the respective Article I-14 (3) of the Constitutional Treaty was criticised by none other than the Secretariat of the Intergovernmental Conference, doc. CIG 4/03 of 6 October 2003, 49: "in legal contradiction".

[14] The English TFEU text refers to "space" only, in line with its modern understanding as short for "outer space"; the French version equally uses the words *spatial/ espace*, while the German text refers to *Raumfahrt* and *Weltraum*. Other languages equally use one of the three terminologies, examples are: *ruimtevaart/ ruimte* (Dutch), *spaziale/ spazio* (Italian), *espacial/ espacio* (Spanish, Portuguese: *espaço*), *rymd* (Swedish), *rum* (Danish), *kosmicznej* (Polish), *oblast vesmíru/ kosmuckého* (Czech). The issue might come up when the EU considers regulating sub-orbital flights, cf. Masson-Zwaan, op. cit. note 12, 263 et seq.

[15] Article 189 (1), 2nd sentence TFEU.

[16] The present paper underlines the dual nature of the EU space competence combing the space policy and coordination mandates under the heading of coordination in order to contrast it with the EU space programme competence which is of a parallel nature. This approach facilitates the later juxtaposition of intergovernmental and supranational elements. The space competence may be validly described as containing three pillars, i.e. programmes, policy and coordination.

[17] Articles 4 (4) and 208 et seq. TFEU.

[18] Of the same opinion: Wouters, op cit. note 3, 122.

[19] The European Union Military Committee is already aware of the space competence, Concept for Air Operations in support of the Common Security and Defence Policy, EU Council doc. 8569/11 of 5 April 2011, para. 55.

[20] Article 4 (3) TEU.

[21] IGC 2007 Mandate, EU Council doc. 11218/07 of 26 June 2007, Annex, para. 19 lit. o).

[22] Articles 19 (2), 79 (4), 84, 149 (2), 153 (2) lit. a), 165 (4), 166 (4), 167 (5), 168 (5), 173 (3), 195 (2), 196 (2), 197 (2), 207 (6), 352 (2) TFEU.

[23] Article 2 (5) TFEU.

[24] Of the applicable CJEU case law cf. only *Germany v Parliament and Council*, 5 October 2000, Case C-376/98, [2000] ECR I-2247, paras. 84-88.

[25] Hobe, Heinrich, Kerner and Froehlich, op. cit. note 3, 345.

[26] Agenda 2007 – A document by the ESA Director General, October 2003, ESA doc. BR-213, 8.

[27] Agenda 2011 – A Document by the ESA Director General and the ESA Directors, October 2006, published as ESA doc. BR-268, September 2007, 25

[28] This reluctance generally related to the industrial return, cf. Hobe, Hofmannová and Wouters (eds.), op. cit. note 5, 5 et seq.

[29] The primacy of EU law is based on case law, the Treaty of Lisbon did not codify it but instead refers to the continuing authority of this case law, Declaration no. 17 concerning primacy.
[30] CJEU, *Costa v ENEL*, 15. July 1964, Case 6/64, [1964] ECR 585.
[31] Article 4 (3) TEU, successor of Article 10 EC Treaty.
[32] Article 288 TFEU enumerates three kinds of binding legal acts: regulation, directive and decision.
[33] ESA Council resolution ESA/C (2008)202 of 17 December 2008, published in ESA doc. ESA/REG/001, version of 30 July 2010, available at http://emits.esa.int/emits-doc/e_support/ESA-REG-001-Procurement-Regulations.pdf (30.08.2011).
[34] Articles 47 et seq. ESA Procurement Regulations.
[35] For a comparison of ESA and EU procurement reviews cf. Hobe, Hofmannová and Wouters (eds.), op. cit. note 5, 436 et seq.
[36] The implementation of EU space programmes via delegation has been one of the main concerns that led to ESA procurement reform, cf. Article 3 (2) lit. e ESA Procurement Regulations that exempts from return rules.
[37] The author thanks the fellow doctoral candidates for the lively supranationalism debate at the semi-annual seminar by our supervisor Prof. Dr. Stephan Hobe at the Cologne University in July 2011.
[38] Sánchez Aranzamendi, op. cit. note 3, 6.
[39] This was the regulatory method for the GMES Regulation where Article 9 (2) stipulates that the Commission may adopt delegated regulation on data access "without prejudice to national rules and procedures applicable to space and in-situ infrastructures under national control".
[40] More optimistic of harmonization through the European space policy: Sánchez Aranzamendi, op. cit. note 3, 6.
[41] Council conclusions and draft Code of Conduct for outer space activities,EU Council doc. 17175/08 of 17 December 2008, Annex II, revised by Council Conclusions concerning the revised draft Code of Conduct for Outer Space Activities of 27 September 2010 EU Council doc. 14455/10 of 11 October 2010, Annex.