THE "SPACE COMPETENCE" IN THE TREATY OF LISBON

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The Lisbon Treaty is the first European Union (EU) Treaty that provides a "space competence". However, it only represents a phase of a process still *in fieri,* characterized by a growing awareness of the importance of space for the EU. Art. 189 of the Treaty on the Functioning of the EU (TFEU) endows the EU with political capacity to conceptualise a space policy that therefore is no longer conceived as a tool for the implementation of other Union policies, but as a policy *per se*. The article provides the EU with the regulatory competence in the space field that may take the form of a European space program, excluding any harmonization of the laws and regulations of the Member States. Because of this limit, at first hand, art. 189 could seem a step backward, not only in respect to the corresponding article of the Constitutional Treaty (art. III-254), but also in respect to the previous policy and praxis of the EU. Generally speaking, harmonization could be an instrument to foster the European space industry, moreover its exclusion appears strange if we consider *inter alia* the existing problem of licence shopping and the regulatory tasks that the EU has to face for implementing programs such as GMES or GALILEO. The aim of this paper is to qualify and to frame the competence provided by art. 189, particularly clarifying the implications that the prohibition of harmonization could have on the development of a "European space law", thus determining the remedies to the problems that could arise.

INTRODUCTION

In the gradual transition from an essentially economic community to a political union the Treaty of Lisbon, entered into force on 1 December 2009, modifying the EU Treaty and the EC Treaty, now Treaty on the Functioning of the European Union (TFEU), represents a fundamental step.

For the first time in the history of the EU the TFEU provides in its art. 189 a specific competence in the space sector[i].

It is an important innovation which fits in a process still *in fieri* characterized by the growing awareness of the importance of space for the EU.

The European model of cooperation in the space sector is indeed the result of more than thirty years of joined efforts: the first cooperation was made on the inter-governmental level with the establishment of the European Space Agency (ESA), whose Convention, adopted in 1975, entered into force in 1980[ii].

ESA, according to art. II of its Convention, is responsible for the elaboration and implementation of a long-term European space policy and of the coordination and integration of the European space program with the national ones.

The European space policy developed by ESA represents now an *acquis* from which the EU cannot prescind: the TFEU outlines this Agency as a partner of the EU with which all the appropriate relations have to be established[iii].

In regards to the EU, it is notable that during the end of the 1900s there is a gradual surge in the awareness of the importance of space as an instrument with unique characteristics that must consequently be integrated into European policy: the European Council had already hoped in its conclusion of 20-21 March 2003 for a progress in the direction of a "*true European policy*" in the space area, where "true" seems to mean "within the EU itself" [iv].

1. THE LEGAL NATURE OF THE SPACE COMPETENCE

To qualify the nature of the new competence provided by art. 189 TFEU, this article has to be read next to art. 4 par. 3 TFEU according to which "*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*".

Therefore the first issue to be solved on the interpretative level consists in defining the typology of competence provided by art. 189 taking into consideration the contents of art. 4.

The legal system created by the Treaties is founded on the principle of conferral: according to art. 5 par. 2 EUT "*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*" with the corollary of art. 4 par. 1 which specifies that "*competences not conferred upon the Union in the Treaties remain with the Member States*" and with the logical consequence that the legitimacy of each action of the EU institutions has to be verified in the light of the competencens which the Member States have conferred to them through the Treaties.

Whereas before the Treaty of Lisbon a precise picture of the competences of the EU and of their extent was only deducible by an exam of the specific treaty dispositions, the TFEU now provides a list of areas in which the EU has competence to act, dividing them according to their relationship with the competences of the Member States, in order to bring clearness in this subject.

The competences listed in art. 3 are exclusive to the EU[v], those in art. 4 are shared with the Member States and, finally, those contained in art. 6 are parallel.

The last competences are so called because the actions of the EU on the one hand and the actions of the Member States on the other hand seem to travel on parallel lines: they are essentially listed in art. 6, however, even if they are not listed in this article[vi], the areas of research, technological development and space can also be brought to this category, because they are shaped in the same way[vii].

Exercising parallel competence the EU is entitled to support, coordinate or supplement the actions of the Member States in a given area. However, it cannot harmonize Member States' laws and regulations[viii] and in general supersede their competences, as defined by the principle of subsidiarity contained in art. 5 par. 3 EUT, which offers a dynamic criterion of repartition in the exercise of these competences[ix].

The two parallel actions, as art. 181 TFEU expressely affirms for the area of research and technological development, have to integrate each other on the basis of an obligation of coordination in order to "*ensure that national policies and Union policy are mutually consistent*".

Therefore an EU initiative in the field of technological and scientific research or space will not constitute a formal limit for the competence of the Member States which will remain free to undertake similar initiatives, whereas, if the competence was shared, the competence of the Member States could be exercised only "*to the extent that the Union has not exercised its competence*"[x].

Actually the real clarifying contribution of the new system of listed competences is doubtful: the picture is in any case generic, in particular when taking into consideration that the lists are not exhaustive, at least, for explicit admisson of art. 4 par. 2 TFEU, that of the shared competences.

Furthermore, the areas in which the institutions are called upon to exercise their competence are identified in a not uniform, often too generic and broad way to provide precise guidelines for the EU regarding the concrete limits of the extent of its competences.

As a well-known author has noticed, the articles of the TFEU list the sectors in which the EU exercises its competence, but not the competences which it effectively exercises in those sectors[xi], even if, according to art. 2 par. 6 TFEU, it is compulsory to have regard to the dispositions contained in the treaties and specifically dedicated to each sector to build up the effective extent of the corresponding competences and to outline their limits.

In any case it was not possible to build a rigid system of perfectly defined competences because, if in general every system of competences presupposes to some extent a certain degree of flexibility in its implementation and, above all, in its jurisprudential interpretation, this remark is *a fortiori* valid for the EU legal system, taking into account its well-known dynamic feature[xii].

Finally the competence provided by art. 189 TFEU has to be qualified as parallel, but this conclusion has to be made taking into consideration the previous remarks, from which it is possible to deduce that every qualification in the EU system is to a certain extent relative and open to evolution.

2. OVERVIEW OF ART. 189 TFEU

The point now is to examine art. 189 TFEU which, fit in the title XIX "*Research and technological development and space*", provides the EU *inter alia* with the power to elaborate an own space policy.

As it was noticed the new approach of the Treaty of Lisbon is the following: space policy is not seen any more merely as an instrument for the implementation of other EU policies, but as a policy *per se*[xiii]. In other words space policy has turned from a horizontal space policy to a vertical one.

Either way, it has to necessarily be exercised in an oriented manner in order to reach specific goals outlined in paragraph 1 of art. 189: to promote scientific and technical progress, industrial competitiveness and the implementation of other EU policies[xiv].

Nevertheless, it is challenging for the interpreter to define the content of art. 189, particularly because of the terminology and of the notions which have been chosen to describe the role and the powers of the EU therein.

In order to elaborate its space policy, according to the wording of art. 189, the EU can "*promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space*" [xv].

Art. 189 goes further to specify that the EU, in accordance with the ordinary legislative procedure, can adopt in the space area the measures, such as a European space program, that are necessary to reach its objectives, but with the exclusion of "*any harmonisation of the laws and regulations of the Member States*".

European space programs are one of the measures adoptable for reaching the objectives of par. 1, but do not exhaust them, as it is evident by the wording "*...which may take the form...*", which alludes to the possibility of adopting the "*necessary measures*" also in other forms.

Speaking of "measures" in general terms, the TFEU has provided the EU legislator with the power to choose from time to time the most suitable typology thereof, of course consistently to the principles of proportionality and subsidiarity[xvi].

As all the measures foreseen by art. 189 TFEU have to be adopted in accordance with the ordinary legislative procedure, they all assume the form and the value of legislative acts, and not of mere political acts of programmatic nature, in virtue of the wording of art. 289 par. 3[xvii].

Considering in particular the instrument of the program, it has to be noted that it is not new in the EU Treaties: it was indeed already foreseen, for example, by articles 166 ECT and 175 ECT.

They are acts, whether expressely foreseen by the Treaties or not, oriented to fix the guidelines of the EU on specific matters. Considering the absence of normative references which specify in a general and abstract way their juridical effects, they have to be

determined from time to time, taking into consideration the denomination of the instrument with which they are adopted[xviii]. It is evident that the demonstrated legislative value of the measures adopted ex art. 189 following the ordinary legislative procedure overhangs the program contained therein.

The legislative value of the "necessary measures" adopted ex art. 189 does not *per se* determine the hierarchical superiority of this act compared to a non legislative one, but its submission to a series of rules of transparency.

Indeed, the projects of legislative acts have to be transmitted to the national parliaments[xix] and are submitted to the procedure of control regarding the compliance with the principle of subsidiarity[xx], the legislative acts can be challenged in front of the European Court of Justice by the national parliaments or by the Committee of the Regions on grounds of infringement of that principle[xxi] and, finally, ex art. 16 par. 8 EUT, the sessions of the Council aimed to their adoption have to be public[xxii].

It is evident that this regime of transparency plays an essential role in assuring the balance of powers and the true parallel character of the "space competence".

3. THE EXCLUSION OF HARMONIZATION

Coming to the wording that excludes "*any harmonisation of the laws and regulations of the Member States*", it is necessary to assume that it is not an exclusive limit of the space sector because it is contained, with the same form, also in other treaty dispositions, since the Treaty of Maastricht, in its articles 149 (4) (education), 151 (5) (culture) and others.

These clauses could be defined as clauses of negative harmonization and, indeed, in order to focus their extent and to delimit the scope of the ban, it is useful to focus on the concept of harmonization itself, identifying the instruments to reach it and their limits.

Art. 3.1 (h) of the EC Treaty already foresaw "*the approximation of the laws of Member States to the extent required for the functioning of the common market*" among the activities of the EC[xxiii].

The main aim of harmonization was expressed in art. 3.1 (h) *id est* the gradual elimination of the differences between the national legislations as long as they can constitute an obstacle to the functioning of the internal market[xxiv], but it covers expecially nowadays a much wider area and in broad sense it is the instrument to achieve a common policy in many different fields.

For example, art. 91 TFEU (ex art. 71 ECT) and art. 100 TFEU (ex art. 80 ECT) constitute the bases to adopt harmonization instruments in the sector of transport, art. 169 TFEU (ex art. 153 ECT) in the area of consumer protection and art. 153 TFEU (ex art. 137 ECT) in matters of labour law.

In practice it is possible to distinguish different methods of harmonization, the most important being total harmonization and minimum harmonization, and then optional harmonization and mutual recognition.

Total harmonization, also referred to as full or complete harmonization, means that the Community measures deprive the Member States of the power to maintain in force national rules which are at variance with the Community measures, even stricter, even if it is still possible to appeal to the safeguard clauses contained in paragraphs 4 and 5 of art. 114 TFEU if the relevant conditions are met.

In the case of minimum harmonization the Member States must comply with the minimum requirements contained in the directive concerned, but are free to apply stricter or more far-reaching requirements in the area covered, to the extent that this does not infringe other dispositions of the Treaties and does not create obstacles prohibited by the free movement provisions of the Treaties.

In the case of optional harmonization the producers are left free to choose whether to apply national standards or harmonized standards, but free movement is only assured for products conforming with the harmonized requirements.

Finally the mutual recognition technique is a *sui generis* harmonization: it obliges the Member States to recognize the equivalence of rules and requirements imposed on products, services or persons by other Member States. If these products, services and persons meet the requirements of their country of origin, then the receiving State must accept them even if they do not necessarily entirely meet the requirements imposed by this country for its own products, services and persons.

It is true that no common European standard is set, but, on a closer examination, mutual recognition does turn out to be a form of harmonization: what is harmonized in this case are the national legal or administative rules concerning market access of products and services, or concerning the professional and trade activites of individuals and undertakings.

The ban on harmonization ex art. 189 TFEU in its peremptory and generality is such to cover all the examined forms of harmonization: total harmonization and minimum harmonization, optional harmonization and mutual recognition.

The instrument traditionally used for harmonizing is the directive[xxv], but the EU in its harmonization activity has also recourse to other measures such as regulations[xxvi] or, before the entering into force of the Lisbon Treaty, within the Third Pillar, to the framework-decisions, as they were aimed ex art. 34 par. 2 b) to the harmonization of the laws and regulations of the Member States: the general and broad wording of art. 189 TFEU is such to forbid every act, whatever its form is, if it has *in concreto* harmonizing effects.

The introduction of the exclusion of harmonization may be clarified considering that the ordinary legislative procedure imposed by this article is based on the adoption within the Council by qualified majority and not by unanimity.

This is the reason why the extension of the ordinary legislative procedure to sensitive sectors of the Treaty of Lisbon was possible only on the condition, introduced for the will of some Member States, to

associate to it a mechanism called metaphorically "emergency brake".

Indeed, in the areas of social security (art. 48 TFEU) and of judicial cooperation in criminal matters (art. 82 and 83 TFEU), where a member of the Council declares that a draft legislative act would affect important aspects of its relevant legal system, it may request that the matter be referred to the European Council and the ordinary legislative procedure shall be suspended. If within four months of this suspension no agreement is reached, the act originally proposed shall be deemed not to have been adopted.

Insofar, the ban on harmonization, similarly to the "emergency brake", plays a limiting function on the intervention of the EU in the Member States legal systems in a sector notoriously delicate and strategically neuralgic as the space one. It seems to be the counterweight of the introduction of the ordinary legislative procedure in art. 189 TFEU. The point is that, at a first reading, the Lisbon Treaty seems to have brought nothing more, but rather something less for the explicit prevision of a limit that did not exist before.

This evolution poorly accomodates itself with the necessity of harmonization that was strikingly emphasized by space operators and services providers of the sector[xxvii] within the consultation process of the Green Paper[xxviii] and with the demands of regulation that the EU has to face in the implementation of programs like GALILEO[xxix] or GMES[xxx].

Art. 189 seems to be a step backward not only in respect to the corresponding article of the Treaty establishing a Constitution for Europe (TCostE) (art. III-254), but also in respect to the previous policy and praxis of the EU.

Regarding the first point it needs to be noted that art. III-254 TCostE did not foresee the limit of the ban on harmonization.

Regarding the second point it is worthy to remember that in 2002, before the entering into force of the Lisbon Treaty, a process of harmonization in the field of telecommunications had already been started through the adoption, by the European Parliament and the Council, of a series of directives and of a so called "accompanying regime" whose object is to reach the coordination of the allocation of frequencies, the liberalization, the harmonization of the terrestrial segment and the abolition of exclusive and special rights in the provision of services of communication via satellite.

This normative production, the regulation 1321/2004 on the establishment of structures for the management of the European satellite radio-navigation programs[xxxi], the directive INSPIRE[xxxii], are sufficient to demonstrate that the EU, before the Lisbon Treaty, already made laws in the space area or in sectors with clear implications in the space field.

Finally, space was already included, *de facto*, among the competences of the EU[xxxiii].

Until the Lisbon Treaty, missing an express basis in the Treaty, the normative production of the Union in space matters was based *inter alia* on art. 70 TEC (transport), art. 154 TEC (trans-European networks) , art. 157 TEC (industry), artt. 163-173 TEC (research and technological development) and art. 95 TEC[xxxiv].

The praxis described above underlines a strong demand of harmonization of national space legislations: it is indeed an effective method to fostering space industry also because, if used, it could ease the activity of the operators that act on the international level, dispensing them with the need to know the details of a multiplicity of municipal legal systems[xxxv].

Nowadays each European satellite operator is subject to a different legal regime: HELLASSAT in Greece, HISPASAT in Spain, SES in Luxembourg are not subject to space legislations, while IMMARSAT in the United Kingdom and EUTELSAT in France are subject to space legislations that differ significantly in the requirements to be fulfilled and procedures to be followed[xxxvi].

Such a fragmented legislative landscape inevitably influences the way the space operators are structured, organized and located within the EU.

Indeed, the space treaties create a series of obligations of authorization, control, registration, and a peculiar regime of liability which, when translated on the national level, put themselves into bureaucratic procedures, technical controls, financial requirements charged to space operators.

The translation of these international obligations into an obstacle for private actors or, inversely, into an improvement of their position depends on the structure that the national space legislation assumes.

For example, regarding to liability, the prevision of a limit beyond which the obligation of compensation is assumed by the State has the effect of lightening the burden that the absence of a defined legal regime would otherwise make depend *in toto* on them.

As a matter of fact, a company operating in the space field can nowadays choose the legislation applicable to its activity (licence shopping and related forum shopping) and a space program can potentially be regulated by many national laws if it is undertaken by more companies belonging to different countries, with consequent problems of individuation of the applicable law, at the expense of legal security[xxxvii].

Finally the need of harmonization in the European context appears evident thinking that, to the extent that the EU becomes an actor in the space field, many States are concerned at the same time, all to be considered launching States, with consequent easy to identify problems relating to the liability regime[xxxviii].

4. CAN HARMONIZATION STILL BE REACHED?

In doctrine some authors tried to bypass the obstacle by saying that harmonization can take place only if there are national legislations to be harmonized. As nowadays only five States of the EU have a national space legislation[xxxix] and, moreover, these five national legislations do not regulate national space activities overall, in particular the commercial ones, they would leave place to the adoption of EU normative acts aimed not to harmonize, but to fill the gaps.

This is the reason why the adoption of a space legislation by the EU would not constitute

harmonization and would not fall under the ban of art. 189 TFEU, rather having the effect of introducing *ex novo* rules and principles not existing before[xl].

The point is that this thesis can not be shared in these terms because to fill the gaps, to impose a legislation where there was a legal *vacuum* before, does not constitute an *aliud* with respect to harmonization, but a *plus*, therefore distinguishing itself from harmonization, not on the quality level, but on the quantity one.

Also the legislative practice confirms this thesis because harmonization is often carried out in relation to subjects not yet regulated by Member States, *id est*, logically speaking, in total absence of legislations to approximate[xli].

The ban on harmonization cannot be cleared through the flexibility clause contained in art. 352 TFEU which has mitigated the rigour of the conferral principle. It allows the EU in certain conditions to adopt actions which seem to be necessary "*within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties*" in case the Treaties have not provided the necessary powers.

This circumstance actually is not about the missing provision of a power, but *tout court* about the ban on adopting measures of harmonization.

In other words art. 352 TFEU covers the situation in which the powers to adopt a necessary action are not inferable from a treaty disposition, neither on the basis of its extensive interpretation, but does not allow to deceive an express ban.

It is confirmed by the jurisprudence of the European Court of Justice[xlii], following which the clause cannot be used as basis for the adoption of dispositions which would substantially lead, having regard to their consequences, to a modification of the Treaty not respectful of the procedure foreseen by the Treaty itself[xliii].

Regarding the issue of harmonization and textual confirmation of the thesis here defended is paragraph 3 of art. 352 itself which now foresees expressely that "*measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation*".

Taking into account the previous remarks, the first relevant question to be raised is to establish the material context to which the expression "*excluding any harmonisation of the laws and regulations of the Member States*" refers to.

In doctrine some authors[xliv] have said that it cannot be interpreted strictly because it covers a lot of issues such as the diffusion of remote sensing data, the allocation of radio frequencies, intellectual property in the space field and others.

Nevertheless it seems that the exclusion of harmonization can be made less dramatic.

In primis, indeed, harmonization can be reached through intergovernmental agreements or following the method of informal consultations among States, and in this context the ESA can bring its precious contribution, in virtue of its mandate to promote and foster the cooperation among the Member States.

It is important to note that, in practice, those States which are drafting their space legislation, as the ones which already have it, are willing to consult among themselves, in particular in the European context[xlv].

Moreover, the adoption of a legislation by a Member State usually has indirect effects on the conscience of reform of the political powers and of the ministerial bureaucracies of the other Member States.

Indeed, harmonization follows a dialectic process along which the progress obtained in a Member State influences the EU activities which, in their turn, stimulate the reform initiatives in the other Member States.

Probably, the enhanced cooperation already used in the context of Schengen[xlvi] and of the Monetary Union[xlvii] could be a valid solution in the space sector as well.

Indeed, enhanced cooperation, now regulated in art. 20 EUT and in the part sixth of the TFEU[xlviii], can be carried out whatever the area of regulation is, thus including the space sector[xlix].

Also the Open Method of Coordination, incorporated in the Lisbon Treaty, could have beneficial effects in the space sector.

It is an intergovernmental method of political coordination, therefore not an harmonization instrument, through which the Member States identify and define the objectives to reach, for submitting them later to the Council for adoption: on these bases the European Commission elaborates guidelines which will be later translated into programs of national policy.

Taking into consideraton the reluctance of the Member States to give broad normative competences to the EU in the space field, the Open Method of Coordination could be used to create a coherent regime for space activities in the European context, also in delicate matters such as the procedure of authorization and subsequent control.

The point is that in a highly and intensely technological sector as the one of space, the elaboration of guidelines could be insufficient, in particular because of the incapacity of the Member States with limited experience in the space sector to elaborate an adequate implementing legislation.

However, even if this limit will be found, the necessary harmonization and the coherence of the space sector in the EU could be reached otherwise since the ban on harmonization does not implicate that any space regulation has to be excluded from the EU's competence.

Indeed, many sectors of regulation relevant for space activities, such as research and development, licenses, data protection, are already submitted to the EU law in virtue of other chapters and sessions of the Treaty such as those regarding internal market regulation, competition, State aids, telecommunications, and so on.

Therefore, as it happens for culture (art. 167 TFEU), where harmonization is excluded and, in spite of that, directives with cultural implications can be adopted on the basis of other competences interfering with culture, if they allow harmonization[l], also space has a

transversal dimension and harmonization instruments on space matters can be adopted on other bases.

The point is that it will be necessary to verify from time to time which is the prevailing competence considering that, following the well-known jurisprudence of the Court of Justice, even when an act is aimed to reach more goals, it solely has to be founded on the legal basis required by the aim which, characterizing its whole in a prevalent way, seems to be the main or preponderant one in comparison to the others[li].

It is a criterion of individuation of the legal basis, already used by the Court of Justice since the Titanium dioxide case C-300/89 and, even though not without difficulties in its application, it can offer precious guidelines.

A textual argument to support this thesis is offered by paragraph 4 of art. 189 itself, which affirms that this article shall be without prejudice to other provisions contained in Title XIX dedicated to research and technological development.

In fact, this title starts with an article, art. 179 TFEU, which provides the EU with broad powers within the sector of research and technological development, among them the definition of common norms[lii] and the removal of legal and fiscal obstacles to that cooperation, aimed to encourage research and technological development and to foster cooperation.

Paragraph 4 of art. 189 seems to have been introduced because of the fear that the ban on harmonization in the space sector was able to erode the competences provided by other dispositions of Title XIX.

To confirm these considerations it is relevant to recall art. III-254 TCostE in which this safeguard clause was not foreseen and neither, not by chance, the exclusion of the power of harmonization.

The safeguard clause of paragraph 4 preserves the powers given to the EU in the sector of research and technological development, as the definition of common rules, even when they are carried out in the context of space activities.

In other words, the prevailing competence for explicit prevision of the Treaty when research and development (artt. 179-188) and space (art. 189) intersect is the research and development competence, with the subsequent application of the related regime, which foresees broad powers for the EU.

The point is that space, scientific research and technological development are deeply linked, so much so that art. 189 starts affirming that the EU shall draw up its own space policy, also to "*promote scientific and technical progress*".

Therefore, it is possible to understand that, thanks to paragraph 4 of art. 189, the EU enjoys *de facto* and in spite of the explicit exclusion of an harmonization competence, broad normative powers in the space sector.

In this perspective, other observations must be made.

Art. 3 of the TEC, listing the instruments through which the objectives of the Community had to be reached, mentioned, next to the establishment of the internal market and to the prohibition, as between Member States, of custom duties, quantitative restrictions and all other measures having equivalent effect, "*a system ensuring that competition in the internal market is not distorted*".

As opposed to the TCostE, which contemplated the "*free and not distorted competition*" among the objectives of the EU, the Lisbon Treaty seems to have downgraded the competition policy, through the suppression of the quoted words, following the objection of France according to which fair competition would merely constitute one of the means of the establishement of the internal market, which represents the true objective of the EU.

Nevertheless, this change does not seem to have legal implications on the role of the competition policy within the EU in virtue of the Protocol 27 on the internal market and competition, attached to the Treaty of Lisbon, which expressely affirms that the internal market "*includes a system ensuring that competition is not distorted*"[liii]: this Protocol has the same legal value as the Treaties.

Therefore, considering the importance that the safeguard of competition has in the EU, it seems to be clear that harmonization measures aimed to reach this objective can be adopted, even with implications in the space sector, if the requirements imposed by the relevant provisions are fulfilled.

Indeed, the harmonization of the legislations of the Member States provided by art. 114 TFEU, which has as its object the establishment and functioning of the internal market, is not related to a specific area and gives the possibility to intervene on the regulation of a potentially large number of subjects.

It is not always easy to draw a clear line between the scope of the application of art. 114 TFEU and other relevant articles such as art. 189 TFEU because in practice art. 114 has become a general basis for the adoption of instruments of harmonization, in coherence with its par. 2[liv], from which it is possible to interfere that the power of harmonization there provided can be exercised also in matters concerning health, safety, environmental protection and consumer protection.

Particularly, throughout the 1990s art. 95 (now art. 114 TFEU) became, on the basis of the practice of the European institutions and of the jurisprudence of the Court of Justice an all-encompassing legislative competence as it was used for enacting Community measures on matters, which could seem to be only very indirectly linked to movement of goods or to internal market in general. It was used, for example, whether or not in combination with other bases, in the sector of energy policy[lv] and of the protection of privacy in relation to the processing of data[lvi].

Nevertheless this delimitation has considerable practical implications, in particular when art. 114 TFEU and the other potentially relevant article foresee a different legislative procedure and a different role played by the Council, the Commission and the European Parliament.

It was the case, for example, of art. 114 TFEU (at that time art. 100a TEEC) and of the environmental policy: in the Titanium dioxide case[lvii] the Court interpreted

art. 114 broadly, so that it was to be used as the basis for harmonizing national rules on waste which is harmful to the environment, even if, a few years later, the Court of Justice found, on the contrary, that the harmonization of national rules on waste substances came within the specific powers relating to environmental protection, and not the general harmonization competence contained in art. 114 TFEU[lviii].

A concrete example of the practical consequences derived from the identification of the legal basis was offered by the Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, adopted on the basis of art. 95 and object of a legal challenge brought by Germany in 1998: one of the main arguments to contest the legality of this Directive was that it constituted in reality a measure of health policy for which there was a prohibition of harmonization set by art. 152.4 ECT[lix].

As art. 95 itself recognized that internal market measures can also aim to reach further objectives such as the protection of public health, the goal was to verify whether the total ban on advertising of tobacco products was sufficiently connected to the functioning of the internal market or was to be considered as a measure of health policy and consequently forbidden by art. 154.4 ECT.

In the case of tobacco advertising of 2000[lx] the Court of Justice set limits to the broad scope of art. 95, as shaped by practice: the powers provided by this article can only be used to improve the functioning of the internal market, and therefore not simply to regulate it in general terms, and to eliminate appreciable distorsions of competition, and therefore only significant distortions of competition are relevant.

The conclusions that can be drawn from this case are clear: European institutions must now explain more carefully, in the Commission's explanatory memorandum and in the preamble of the final text of the directive, why the choice of art. 114 as legal basis has been made. In any case the scope of this internal market competence remains quite extensive and can be used in the space sector if the required conditions are met.

These considerations are confirmed by the content of an informative note of the Commission addressed to the *High Level Space Policy Group*, an informal meeting of ESA's member States and of the EU under the joined direction of the European Commission and of ESA's general director[lxi].

In this note the Commission defines the space competence as a shared competence in which the Commission itself enjoys a right of initiative and affirms that art. 189 TFEU "*is without prejudice to other provisions of the Treaty, such as those regarding the approximation of laws which have as their purpose the establishment and functioning of the internal market (article 114 of the TFEU), which may be relevant to space products or services*".

Mutatis mutandis for art. 116 TFEU that may be applied also in the space sector if an approximation of national legislations is needed because "*a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market*" and the resultant distortion needs to be eliminated, and for the foreign policy and common security sector because it is difficult to draw substantial limits to the action of the EU in pursuing the objectives outlined by articles 23-41 EUT.

FINAL REMARKS

It does not seem that the wording used by art. 189 TFEU has the effect of voiding the European space competence[lxii].

It is a parallel competence, therefore the EU can establish the basic regulation of the space sector following ordinary legislative procedure without infringing the ban on harmonization to the extent that it acts in its area of competence, outlined on the light of the principle of subsidiarity, without impinging on that of the Member States.

Moreover, the EU can approximate national space legislations indirectly on other bases, if these bases are considered as prevailing the space one.

As a consequence of the above, legal instruments can be adopted by the EU for the establishment of agencies in the space sector or for organizing inter-state procedures of cooperation and still for starting programmes funded by the EU[lxiii].

Concrete confirmations of this conclusion can already be found in the legislative practice of the EU: the regulation *Global Monitoring for Environment and Security* (GMES)[lxiv] is an act with clear implications on the space sector, adopted after the Treaty of Lisbon "*having regard to the Treaty on the functioning of the European Union, and in particular article 189 thereof*".

Both the GMES program and GALILEO program have required a substantial elaboration of regulation within the EU and therefore they demonstrate the regulatory capacity of the EU, despite the exclusion of the power of harmonization provided by art. 189 TFEU.

It is already feasible to talk about a "European space law".

This is the reason why it is not possible to share the thesis defended by some authors affirming that competences like those relating to culture, protection and improvement of human health, in which the EU can "only" carry out actions to support, coordinate or supplement the actions of the Member States, are weaker than the others and *not legislative* in character[lxv].

This thesis is not confirmed by practice and is against the wording of the relevant provisions. For example, art. 167 TFEU (culture), repeating the same expression used by art. 189, specifies that those actions shall be adopted "*in accordance with the ordinary legislative procedure*" and therefore, also in the light of art. 289 par. 3 TFEU, they cannot be deprived of any legislative value.

Moreover, art. 2 par. 5 TFEU, relating to the areas in which "*the Union shall have competence to carry out*

actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence", affirms that "*legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations*", so it clarifies that legally binding acts can be adopted, unequivocally confirming the normative competence of the EU in these areas.

These conclusions have to be nuanced by the following remarks.

Indeed, on the one hand the Member States only, and not the EU, are parties of the space treaties[lxvi], therefore, to the extent that national space legislations are the related implementation, the EU in its legislative activity should take into account the obligations deriving from space treaties on its Member States, in accordance with the customary principle of good faith and namely of art. 4 EUT which establishes a duty for the European institutions of loyal collaboration with the Member States[lxvii].

On the other hand, it does not seem that the ban on harmonization can be developed so that Member States are free to exercise their competence in full discretionality: also the exercise by the Member States of their exclusive competences is influenced by EU law.

The same has to be said for the aspects of an area of competence of the EU expressely left by Treaties to Member States'definition because they are connected to certain notions, the content thereof has to be necessarily object of their sovereign evaluation.

In these cases, the Court has indeed constantly reserved to itself the power to judge the evaluation made by national authorities to verify whether it has been suggested by motivations different from those which have justified the reserve of competence in favour of the Member States or in any case whether it is somehow suscetible to compromise the effectiveness of the EU law, for example infringing the general obligation of cooperation established by art. 4 par. 3 EUT[lxviii].

The Lisbon Treaty has defined the repartition of competences betweeen the EU and the Member States, but this repartition is not immutable, taking into account that the European legal system grows and feeds on the contributions of competences that the Member States decide to bring, evolving following to the demands, adapting itself to the different circumstances created by economic and social phenomena derived from the pressing globalization.

In addition the interpretation of the European Judge can play an essential role regarding this aspect, passing from a declaring interpretation to a creative one, as it has already happened with the building up of notions like common market, free circulation, progressively enhanced by the EU jurisprudence and later transfused into the treaties and into the derived legislation[lxix].

Finally, extending the scope of analysis from the EU to a global dimension, it is unavoidable to relativize the limit of the ban on harmonization: objectives of harmonization may and shall be achieved not only on the regional level, but also on the international one.

The United Nations, in particular the *UNCOPUOS Legal Subcommittee*, which has an agenda item specifically dedicated to national space legislations, can play in this matter a fundamental role.

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[i] "*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".

[ii] Convention for the establishment of a European Space Agency, Paris, done 30 May 1975, entered into force 30 October 1980, 14 ILM 864 (1975).
As it is known, there is not a complete overlap between ESA Member States and EU Member States.

[iii] Art. 189 paragraph 3.

[iv] The European Parliament had already adopted in 1979 a Proposition for a Resolution of 25 April 1979 on the Community's participation in space research (OJ C 127 of 21.5.1979, p. 42) and in 1981 the Resolution of 17 September 1981 on Europe's space policy (OJ C 260 of 12.10.1981, p.102), the first resolution on the European space policy.

[v] "*The Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts*". Art. 2 par. 1 TFEU

[vi] They are contained in art. 4 par. 3, *id est* in the article dedicated to the shared competences.

[vii] For the qualification of the competence provided by art. 189 TFUE as parallel cfr. S. Hobe, K. Kunzmann, T. Reuter, J. Neumann, *Forschungsbericht ESA-EU: rechtliche Rahmenbedingungen einer zukeunftigen kohaerenten Struktur der europaeischen Raumfahrt*, Berlin, 2006, p. 560.

[viii] Art. 2 par. 5 TFEU.

[ix] The adjective "*dynamic*" is used in the sense that the decision of not adopting an act on the European level because of the principle of subsidiarity does not

preclude the EU to exercise its competence afterwards, if different circumstances justify it.

[x] As consequence, as foreseen by Protocol 25 on the exercise of the shared competence, the freedom of States in exercising their competence will depend on the extent of the regulation which the EU institutions will decide to adopt in a given area, and therefore it will be suppressed when the European regulation is total.

[xi] R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione Europea*, Turin, 2010, p. 27.

[xii] P. Bilancia, *La ripartizione di competenze tra Unione Europea e Stati Membri*, in P. Bilancia, M. D'Amico, *La nuova Europa dopo il Trattato di Lisbona*, Milan, 2009, pp. 105-106.

[xiii] S. Marchisio, *Potential European space policy and its impact on national space legislation*, in S. Hobe, B. Schmidt-Tedd, K.U. Schrogl, M. Gerhard, K. Moll, *Towards a harmonised approach for national space legislation in Europe*, Proceedings of the Workshop, Berlin, 29-30 January 2004, p. 148.

[xiv] "*Space represents a significant element of Europe's Sustainable Development Strategy and is relevant to the Common Foreign and Security Policy, supporting their goals by providing vital information on critical global issues such as on climate change and humanitarian aid*". Resolution on the European Space Policy, Council of the European Union, May 16, 2007. DS 471/07.

[xv] It was noticed that "*this sentence may sound odd since promotion, support and coordination measures…are usually the result of the implementation of a policy rather than the means to draw up such a policy*". J.F. Mayence, *Entry into force of the EU Lisbon Treaty: a new era in the European space cooperation (?)*, Bulletin of the European Centre for Space Law, n. 37, October 2010, p. 11.

[xvi] Art. 296 TFEU. Therefore, when it is possibile to choose among many appropriate measures, the less restrictive one has to be adopted.

[xvii] The acts listed in art. 288 TFEU assume a different nature depending on the procedure with which they are adopted. Indeed, according to art. 289 par. 3 TFEU "*legal acts adopted by legislative procedure shall constitute legislative acts*". On the contrary, if the same acts are adopted ex art 290 TFEU, they will be "delegated acts" and, if adopted ex art. 291 TFEU they will be "implementing acts". Cfr. R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione Europea*, *op.cit*., p. 135.

[xviii] P. Mengozzi, *Istituzioni di diritto comunitario e dell'Unione Europea*, Padova, 2003, pp. 186-187.

[xix] As all the acts of the procedure that will culminate in their adoption. Protocol n. 1 on the role of national Parliaments in the European Union.

[xx] Protocol n. 2 on the application of the principles of subsidiarity and proportionality.

[xxi] *Ibidem*, art. 8.

[xxii] According to R. Adam, A. Tizzano by reading the Treaties it is possible to deduce that, when the legislative procedure is foreseen, the act to be adopted is aimed to fix the basic regulation of an intervention or of an area of EU competence. R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione Europea*, *ibidem*, p. 136.

The point is to verify if and how these remarks can be valid for art. 189 TFEU without infringing the ban on harmonization.

[xxiii] The terms "*harmonization*" and "*approximation*" are used in doctrine as synonyms.

[xxiv] The EC Treaty already used the term "harmonization" in articles such as 13, 93, 95.4.

[xxv] See M. Sanchez Aranzamendi, *Space and Lisbon. A new type of competence to shape the regulatory framework for commercial space activities*, Proceedings of the 61st Colloquium on the Law of Outer Space, Prague, 2010.

[xxvi] Kapteyn Verloren van Themaat, *The law of the European Union and the European Communities*, New York, 2008, p. 306; B. Beutler, R. Bieber, Joern Pipkorn, J. Streil, J. H. H. Weiler, *L'Unione Europea. Istituzioni, ordinamento e politiche*, Bologna, 1998, p. 491.

Harmonization can also be reached through the instrument of recommendations, as the Commission Recommendation 87/598/EEC of 8 December 1987, concerning a European code of conduct relating to electronic payments (O.J. L 365 of 24.12.1987). The adhesion to these instruments, however, takes place on a voluntary basis.

[xxvii] "*Common regulatory conditions are essential…harmonization and streamlined licensing procedures throughout the Union; harmonized spectrum allocation*". EC/ESA Joint Task Force Secretariat, Green Paper on European Space Policy, Report on the Consultation Process, BR-208, October 2003.

See also decision n. 676/2002/EC of 7 March 2002.

[xxviii] London Workshop, 20 May 2003,

[xxix] GALILEO sets up the first European system of satellite navigation. For an analysis of the GALILEO program cfr. S. Hobe, J. Cloppenburg, *Financial contributions of participating States to optional programmes of the European Space Agency (ESA)*, *ZLW*, 2003, pp. 297-313.

[xxx] Regulation n. 911/2010 on the European Earth monitoring programme (GMES) and its initial operations (2011 to 2013) of 22 September 2010. OJ L 276, 20 October 2010, pp. 1-10.

[xxxi] Council Regulation (EC) n. 1321/2004 of 12 July 2004 on the establishment of structures for the management of the European satellite radio-navigation programmes. OJ L 246, 20.7.2004, pp. 1–9.

[xxxii] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE). OJ L 108, 25.4.2007, pp. 1–14.

[xxxiii] J.F. Mayence, *Entry into force of the EU Lisbon Treaty: a new era in the European space cooperation (?)*, *op.cit.*, p. 11.

[xxxiv] For example the GALILEO program was set up by EU jointly with ESA on the basis of art. 154 TEC and is regulated by the Council Regulation n. 876/2002 of 21 May 2002. K. Lenaerts, P. Van Nuffel, R. Bray, *Constitutional Law of the European Union*, London, 1999, pp. 205-211.

[xxxv] M. Gerhard, K. Moll, *The gradual change from building blocks to a common shape of national space legislation in Europe-Summary of findings and conclusions*, in S. Hobe, B. Schmidt-Tedd, K.U. Schrogl, M. Gerhard, K. Moll, *Towards a harmonised approach for national space legislation in Europe*, *op.cit.*, pp. 9-10.

American Astronautical Society, Final report of the Workshop on International Legal Regimes Governing Space Activities, 2-6 December 2001, p. 13; M. Gerhard, K.U. Schrogl, *Report of the Working Group on National Space Legislation*, in K. H. Boeckstiegel, Project 2001-Legal Framework for the Commercial Use of Outer Space, Cologne, 2002, pp. 548-552.

[xxxvi] M. Sanchez Aranzamendi, *Economic and policy aspects of space regulations in Europe, Part I: The case of national space legislation –finding the way between commom and coordinated action*, Vienna, Report 21 September 2009, p. 27.

[xxxvii] H. Ersfeld, *National space legislation: industry views*, in S. Reif, M. Gerhard, *Need and prospects for national space legislation*, Proceedings of the Project 2001 Workshop on national space legislation, Cologne, 2001, p. 39.

[xxxviii] "*When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization*". art. VI Treaty on principles governing the activites of States in the exploration and use of Outer Space, including the Moon and other celestial bodies, done at Washington, London and Moscow, January 27, 1967; 610 UNTS 205, entered into force October 10, 1967.

[xxxix] In chronological order Sweden (1982), United Kingdom (1986), Belgium (2005), the Netherlands (2008) France (2008).

Germany has adopted only a specific act regulating remote sensing, while the final definition of the German space law is foreseen for 2013. Cfr. UNCOPUOS Legal Subcommittee, 49th Session, 22 March-1 April 2010, Statement by the German Delegation.

[xl] S. Marchisio, *Potential european space policy and its impact on national space legislation*, in S. Hobe, B. Schmidt-Tedd, K.U. Schrogl, M. Gerhard, K. Moll, *Towards a harmonised approach for national space legislation in Europe*, *op.cit.*, pp. 145-146.

[xli] *Ex pluribus* directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. *Official Journal L 178, 17/07/2000 pp. 1 – 16.*

[xlii] Opinion of the Court of 28 March 1996 n. 2/94, Accession by the Community to the European Convention for the protection of human rights and fundamental freedoms, European Court reports 1996, pp. I-1759.

[xliii] See also the Declaration n. 42 on art. 352 TFUE adopted by the Intergovernmental Conference that has approved the Treaty of Lisbon.

[xliv] J.F. Mayence, *Entry into force of the EU Lisbon Treaty: a new era in the European space cooperation (?)*, *op.cit.*, p. 12.

[xlv] F. Von Der Dunk, *Recent developments and status of national space legislation*, in S. Hobe, B. Schmidt-Tedd, K.U. Schrogl, M. Gerhard, K. Moll, *Towards a harmonised approach for national space legislation in Europe*, *op.cit.*, pp. 69-70.

[xlvi] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ EU L 239 of 22 September 2000.

[xlvii] Title VII TEC.

[xlviii] Artt. 326-334 TFUE.

[xlix] According to art. 20 par. 1 TEU the instrument of the enhanced cooperation is aimed to "*further the objectives of the Union, protect its interests and reinforce its integration process*" within the framework of the Union's non-exclusive competences.

As the enhanced cooperation requires the participation of at least nine Member States and the Council authorization ex art. 329 TFEU, it would be developed necessarily and tightly following to the parameters established and accepted by the Member States.

[l] For example, the directive 93/7/EEC on the return of cultural objects unlawfully removed from the teritory of a Member State had as specific objective the improvement of the functioning of the internal market of artistic works and, therefore, it was adopted on the basis of art. 100a EECT, even if it had, at the same time, clear cultural implications.

In this case the ban on harmonization was overcome because the content of the directive had a sufficient connection with the functioning of the internal market. Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State O.J. L 74 , 27/03/1993 pp. 74 – 79.

[li] *Ex pluribus* case C-211/01.

[lii] "*Norme comuni*" is indeed the wording of the Italian version of the Lisbon Treaty, while the English traslation uses the words "*common standars*". For the reconciliation of the two versions see art. 33.4 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980. UNTS, vol. 1155, p. 331.

[liii] Cfr. F. Denozza, *La concorrenza come mezzo o come fine*, in P. Bilancia, M. D'Amico, *La nuova Europa dopo il Trattato di Lisbona*, *op.cit.*, pp. 165-172.

[liv] "*The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection*".

[lv] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity. OJ L 27, 30.1.1997, pp. 20–29.

[lvi] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23/11/1995, pp. 31 –50.

[lvii] Case C-300/89, *Commission v. Council*.

[lviii] Case C-155/91, *Commission v. Council*.

[lix] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 213, 30/07/1998 pp. 9 – 12.

[lx] Case C-376/98, *Germany v. Parliament and Council*.

[lxi] European Commission/DG Entreprise and Industry – HSPG 22-2009, 1 December 2009.

[lxii] Therefore, it would be really possible to say that "*European Space Law would be capable of filling the gaps between national legislations*". M. Gerhard, K.U. Schrogl, Report of the Working Group on National Space Legislation, in K. H. Boeckstiegel, Project 2001-Legal Framework for the Commercial Use of Outer Space, *op.cit.*, pp. 548-552.

[lxiii] That is the reason why the reductive interpretation of art. 189 TFEU made by some authors can not be shared.

This doctrine assumes that the coordination of efforts, as mentioned in paragraph 1, has to be considered next to the exclusion of any harmonization provided by paragraph 2 with the consequence that, for example, the European space program cannot impose objectives or requirements which would limit the prerogatives of Member States in defining and implementing their own space programs.

From this premise they derive the conclusion that any coordination must take place within the cooperative (non-binding) intergovernmental framework provided by the European Space Policy.

Moreover, they think that Europe's space capacity at this stage essentially depends on national efforts, *id est* on EU Member States' and on ESA's space programs. Cfr. J.F. Mayence, *Entry into force of the EU Lisbon Treaty: a new era in the European space cooperation (?)*, *op.cit.*, p. 11.

[lxiv] Regulation n. 911/2010 on the European Earth monitoring programme (GMES) and its initial operations (2011 to 2013) of 22 September 2010, OJ L 276, 20 October 2010, pp. 1-10.

[lxv] P. Bilancia, *La ripartizione di competenze tra Unione Europea e Stati Membri*, in P. Bilancia, M. D'Amico, *La nuova Europa dopo il Trattato di Lisbona*, *op.cit.*, p. 109.

[lxvi] These considerations are linked to the issue of the opportunity for the EU to become part of space treaties, which would have important implications, as the possibility for the EU to register its own satellites.

[lxvii] Sentence 3 June 2008, Intertanko.

[lxviii] Sentence 8 July 1999, case C-186/98, Nunes e de Matos.

The Court has specified that, even if in principle the Member States themselves have to establish the appropriate measures to assure their internal and external security ex art. 346 TFEU, it does not mean that these measures are completely out of the scope of application of the EU law. Sentence 4 March 2010, Commission c. Portugal, case C-38/06.

[lxix] Also the rigidity of the principle of conferral has been mitigated by the jurisprudence of the Court of Justice which, having regard to the competences foreseen by the former EC Treaty, has always privileged such interpretations of the relevant norms able to extend their extent. *Ex pluribus* sentence 26 March 1987 case 45/86, Commission c. Council.

It was noticed, the harmonizing potentiality of the EU Court of Justice cannot achieve its positive effects on space law missing, at this stage, a jurisprudence in this field. U. Everling, *Rechtsvereinheitlichung durch Richterrecht in der Europaeischen Gemeinschaft*, in *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht*, 1986, p. 193.

But the inclusion of the space competence in the Treaty of Lisbon is the starting point of a new era in the "European spacescape".