

2. The legal personality of the European Union and its effects on the development of space activities in Europe

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2.1. Introduction

2.1.1. General

With the advent of the Treaty of Lisbon, the legal personality of the former European Community has been transferred to the European Union. This is a logical transition, given that the awkward three Pillar divide across the Community and Union, introduced by the Treaty of Maastricht, has now been eliminated. With the Lisbon Treaty, the relations between the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have been finally put on a par.⁶²⁷ At the same time, the Lisbon Treaty introduces specific, but nevertheless limited powers for the Union in relation to its space activities.⁶²⁸ Moreover, the Union's space competences are to be exercised in parallel to those existing at national level.⁶²⁹ This limitation is significant, given that the European Union's two major space projects to date – Galileo and GMES – have been initiated using powers that existed prior to the introduction of the space competence in the Treaty of Lisbon. The Galileo project was based on the provisions of Art. 154 EC (Art 170 TFEU), while the GMES programme was introduced under the rules governing funding for research and development.⁶³⁰

This chapter reviews the transfer of legal personality from the Community to the Union, and offers some reflections on the form and extent of the Union's new space competencies since the Treaty of Lisbon entered into force.⁶³¹ It discusses whether the Union's new space powers stand to secure its space activities on a longer term basis, both from a programmatic and an institutional perspective.

2.1.2. European space organisations and activities

Over the past fifty years, Europe has developed significant technical and scientific achievements in space under the leadership of the various independent European

space organisations that were instated at inter-governmental level from the sixties onwards. Some of these organisations continue to operate within Europe at intergovernmental level,⁶³² others have since been privatised.⁶³³ Independent of their legal status, the capabilities that have emerged from these organisations leave Europe with a strong legacy of space experience and a well-developed industrial sector. These institutions and stakeholders manage and control key space assets that count towards Europe's civilian and strategic space effort.⁶³⁴ With telecoms and broadcasting as the major areas of commercial use of space, the European commercial satellite community is also well represented.⁶³⁵ Europe's intergovernmental European Space Agency (ESA), while independent of the EU, has been operating for several years as the backbone or the *maitre d'ouvrage* to the Community or Union in managing the Galileo GNSS project. This has taken place within the context of a special cooperation agreement concluded with the European Space Agency in 2003.⁶³⁶ ESA is an intergovernmental organisation that grew out of a recognised need among European States to coordinate and cater for technical expertise across the scientific and programmatic uses of space. These institutions and organisations were therefore well established and successful, even before the concept of a Community or Union space competence was first ventured.⁶³⁷

2.1.3. Tackling EU space activities

A discussion of the Union's legal personality and its space competences belies the question as to how Europe is currently tackling what should now become a structured approach to its space activities.⁶³⁸ The European Union's first efforts towards common space programmes and a space policy have been mapped out in key position papers over the past decade, now culminating in the provisions of Art. 189 and Art. 4 Treaty of Lisbon (TFEU).⁶³⁹ The provisions of Art 189(1) TFEU are as follows:

(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.

The subsequent subparagraph Art 189(2) provides for the Union to promulgate the necessary measures in support of these activities, while Art. 189(3) provides a treaty basis for institutionalising the current cooperation with ESA.⁶⁴⁰ These powers are at the same time circumscribed. Art 189(2) excludes the Union from undertaking legal harmonisation in the field of space, an aspect that could have



Fig. 2: *The Lisbon Summit* (source: EU Council).

helped align national space laws that are currently being promulgated within Europe and beyond.⁶⁴¹ Art 4(3) in turn restricts the Union's competence in the areas of technological development and space, by providing for Member States to retain their own competence in these areas.

2.1.4. The National and EU paradigm

While the EU's initial entry into space activities neatly averted issues of national sovereignty, the Lisbon Treaty provisions on a space competence suggest that there is at least consensus about the degree of convergence required among the Member States to meet the call for a coordinated space effort.⁶⁴² The EU, as an international organisation and supranational community of states, faces the challenge of catering for the paradigm, where national and Union competences co-exist. Both from a political and from a legal perspective, the EU and its Member States are required under Art. 5 of the TEU to position the activity at the level most suited – be this national or Union – when undertaking common efforts within an EU coordinated space programme. This requires an assessment as to efficiency and balance, based on the imperatives of subsidiarity and proportionality, legal tools that provide procedural and substantive control on the level of activities in question.⁶⁴³

The insertion of two main legal provisions into the Lisbon Treaties governing the Union's shared space competence, Art. 189 and Art. 4, is therefore a logical continuation from what has been a period of concerted efforts towards consolidating a valuable space sector for Europe at an EU level. While the EU did not belong to the original European international organisations involved in space, it now has the competence to coordinate space activities along with those of its Member States, as well as formulating its own space policy.⁶⁴⁴

2.2. Legal personality in international law

2.2.1. General

Legal personality is an attribute of power or competence, also expressed as capacity, for states and international organisations to act. In the context of international law, it ensures their recognition as full legal subjects. Legal personality is also conferred on international organisations, the limits to their powers being set by their founding constitutions.⁶⁴⁵ States, in contrast, have inherent national sovereignty over their territory and people, and are omnipotent, subject to the requirement that they conduct their international affairs within the confines of international law.⁶⁴⁶ One of the most common forms of exercising legal personality encountered is a state's treaty making powers.

The steady expansion of the Union's constitutional (and geographical) borders, however, begs the question of how a community that is not a fully-fledged federation may conduct or coordinate its space affairs at an international level, while its Member States hold their concurrent (sovereign) competences. International space law is a field with a comprehensive body of UN Convention law, and accompanying Declarations, Resolutions and other international soft law regulation.⁶⁴⁷ However, the extent to which the five UN space treaties bind the Union is an issue separate from whether or not the Union should formally accede to them. A State must consent to a treaty before it can be bound by its terms.⁶⁴⁸ The EU itself is bound by the principles of international law, and in this respect, already bound by the provisions of the space treaties, in so far as they represent general principles of international law.⁶⁴⁹ The Registration Convention specifically provides for international organisations to make declarations accepting its provisions, and ESA has done so in relation to the first test satellites for Galileo, Giove A and B.⁶⁵⁰ ESA has formally notified acceptance of its international treaty obligations under Article XXII of the Liability Convention,⁶⁵¹ as well as under Article VII of the Registration Convention (REG),

through a declaration on rights and liabilities. By virtue of its *sui generis* status as part of the international legal order, the European Union is bound by these principles as a matter of customary international law.⁶⁵² Whether accession to the UN space treaties is essential for the Union's own activities over and above ratification by its Member States begs the question of its legal personality in international law: firstly, the majority of the EU Member States are already signatories to these treaties;⁶⁵³ secondly, the progressive alignment of ESA Member States with those of the EU reduces the inconsistency between ESA and EU membership as regards those legal instruments that are binding on both the EU and its Member States.. Galileo belongs to the EU, which exposes it as owner and as a supranational organisation to international responsibility and liability under international space law for damage that may occur. There are precedents showing how international governmental organisations, notably the European Space Agency, have regulated their common liability for space activities in the past. The Declaration by Certain European Governments relating to the Guiana rocket launch site used by Vega, Ariane and Soyuz was based on the premise that France acted as launching state, with a ceiling and apportionment of concurrent liability being accepted by the European Space Agency towards France.⁶⁵⁴ Further open issues such as developing a liability regime for the Galileo Project to regulate issues of third party liability are currently under consideration, thereby completing a system of comprehensive liability for damage from Galileo space activities.⁶⁵⁵

2.2.2. Legal personality and the EU

With one simple sentence "*The Union shall have legal capacity*", Art. 47 of the TEU confers legal capacity and with this personality on the Union. Legal personality enables the Union, as it did the Community, to engage in international affairs, to enter into treaties and agreements at international level in the interest of the Union, in so far as these fall within its spheres of competence.⁶⁵⁶ In short, it confers recognition of the Union at an international level, and allows it to take action where prescribed by its governing treaties.⁶⁵⁷ Most importantly, the Union can speak on behalf of its Member States with one voice in those areas where common goals and policies are pursued. Such characteristics as these form part of the constitutional construct that has developed with the Communities', and now the Union's, powers over time.⁶⁵⁸

These characteristics contribute to the inalienable *acquis communautaire*, the foundation of community laws and legal relations that apply across the Union at any one time.

2.3. Personality, capacity and competence distinguished

2.3.1. Constitutionality

The Union can only accede to treaties where it has both the capacity and the competence to do so.⁶⁵⁹ This “dual” requirement is a lever on the exercise of powers devolved on the Union which is exercised by the European Court of Justice when the Community accedes to international treaties and agreements.⁶⁶⁰ Judicial review by the Court of Justice is of constitutional nature, involving an assessment of where the Union’s external and internal competences lie. Legal personality and capacity are pre-requisites to the assessment. The question is at all times “whether the intensity of the arrangement, whatever its denomination, is such as to involve a cession of national powers in favour of Community competence in the field of application of the rules concerned”.⁶⁶¹ Not only must the Union have the capacity to enter into the area of activity; its competence must derive directly from its governing treaties and the area of activity affected. Art. 1 of the TEU, with its reference to “the Union”, on which Member States confer competences to attain objectives they have “in common”, is a reminder that space now falls into this category of common goals. Member States refer to this in terms of parallel competences, an unwritten “constitutional” arrangement.

2.3.2. Jurisdiction of the Court of Justice

Most aspects of space activities have an inherently international component and fall into the area of external competences, or foreign affairs. The task of assessing whether the Union has the competence in its external relations to accede to international treaties has traditionally fallen to the European Court of Justice. Over the years, the EU has successfully concluded various forms of agreements ranging from foreign trade to more complex stabilisation pacts.⁶⁶² It has also concluded EU membership of international economic organisations, notably the WTO, where this has been seen in the Community’s interest.⁶⁶³ This particular group of agreements to which Member State and the EU belong together are referred to as mixed agreements. They signify the areas where the Community and now the Union occupied joint powers to act. Technically, therefore, it would be open to the Union to undertake such agreements relating to space activities, where the activity in question is seen to belong within the competence of the EU.⁶⁶⁴

This level of shared competence or at least agreement on objectives, has enabled the Union to develop relations with the European Space Agency already prior to



Fig. 3: *The European Court of Justice* (source: Wolfgang von Brauchitsch/Bloomberg News).

the advent of the Lisbon Treaty. The EU-ESA cooperation took the form of a simple cooperation agreement between two intergovernmental organisations, without any formal accession by one international organisation to the other. Much has been written about this agreement in European and international law, including proposals as to which organisation might legally accede to the other.⁶⁶⁵ Art. 189(3) may do away with discussions about inter-institutional cooperation but it offers no permanent combined organisational structure. Art. 189(3) empowers the Union to arrange its *modus operandi* with ESA, without the need for any further treaty amendment. However, the Position Paper of the ESA Member States in Preparation of the VII Space Council in 2010 is significant in that it clearly shows that Member States are not willing to see encroachments by the Union on ESA's remit.

2.4. Legal personality, the European legal order

2.4.1. Ambit of the new legal order

As indicated, the European Union and European law are squarely placed within the existing international legal order.⁶⁶⁶ Hailed as a “new legal order”, limited and for the benefit of those states which join, the Community (now Union), in contrast to public international law, boasts the notable distinction of granting enforceable rights, not only on the state parties to the Treaties, but also on their nationals.⁶⁶⁷ Such directly effective rights circumscribe an integrated legal community, which, although not a fully federal state, is crafting a union of diverse states towards ‘a new stage in the process of creating an ever closer union among the

peoples of Europe.⁶⁶⁸ Art 42 of the TEU however, goes beyond the Preamble to the TEU by prescribing a common security and defence policy as part of the Common Foreign and Security Policy (CFSP), formerly the 2nd Pillar.

In the context of foreign affairs, Art 24(3) of the TEU further prescribes that “Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.” These two provisions impose a clear obligation on Member States to actively support the Union, be this in space-based or other form of strategic cooperation.⁶⁶⁹ This provides some leeway for including security-related measures within the EU’s space policy.

2.4.2. Constraints on legal personality

International law imposes constraints on the European Union, to the extent that it must refrain from conduct that conflicts with existing international treaty obligations.⁶⁷⁰ This primacy dictate’s purpose is to ensure that its citizens and institutions are not prevented from enjoying the benefits to be derived from these provisions.

The Union’s capacity to act is therefore subject to a twofold limitation: firstly as dictated by international law and secondly by the limitations imposed on the Union by its Member States, as formulated within the consecutive treaties, protocols and declarations.⁶⁷¹ Taken together, they form the borders of its constitutional powers.⁶⁷² This too is relevant to space activities. As indicated, under Art. 4(3) TFEU, the Union’s powers to act are limited to acting in parallel to its Member States. Art. 4(3) TFEU cannot preclude or pre-empt action at a national level in relation to space. This needs a *modus vivendi* to identify the workable borderlines of national and European sovereignty.

2.4.3. Competence creep and sovereignty

With each new treaty, the activities at a European Union level have expanded beyond the original scope of its preceding stage of integration to move further forward. The constitutional bulwark between the various versions of the Treaties has facilitated subtle extensions of competence over time.⁶⁷³ This has inevitably led to an expansion of the sectors governed by Union law, and notably those areas which are *communitarised*. As the failure of the European Constitution showed, there are not only legal, but also inherent political constraints against an over-centralisation of activities at the supranational level. While the Lisbon

Treaty has not brought in any major substantive changes to the scope of the Union's powers, it concedes greater power and attention to its external and international affairs, seated within the Union. The appointment of a High Representative for Foreign Affairs and Security Policy and of a President of the European Union is witness to the importance of these fields and the concern to create an integrated and coordinated external policy. While the formal inclusion of space competence is perhaps new, the provisions limiting the Union's competence to a shared or parallel competence in space necessarily encroach on a field that is inherently linked to national sovereignty, namely foreign or external affairs.⁶⁷⁴ This step has called for the Member States to guard their own preserve, and the Treaty provisions are accordingly cautious.

The ultimate control over the legality of the Union's activities for actions under communitarian issues has traditionally been held by the judicial machinery.⁶⁷⁵ Actions at all levels by the Union, with the exception of actions falling within the Union's Common Foreign and Security Policy CFSP, are subject to judicial review.⁶⁷⁶ While this division has enabled the monitoring of the integration process, including potential or real encroachments or compromises on national sovereignty,⁶⁷⁷ it encounters its limits when addressing the scope of the Union's activities in outer space. These lie in the areas of activity that involve dual use and not only civilian use of outer space. A system for demarcating sovereign space powers between the Member States and the Union can only operate within the categories of "external and security" duties expressed in Art. 24(3) of the TEU. Many of the civilian aspects of space activities involve clear issues of dual use, making the cut-off between them difficult to define.⁶⁷⁸

2.4.4. Legal personality, European governance and integration

The lack of a clear demarcation between the national and Union space competence has to be seen as a response to what has been an incomplete process of constructing a system of governance for the European space community.⁶⁷⁹ This is currently occupied by the Space Council. The continued division of parallel space competences between national and European levels may even pose a stumbling block to creating clear structures for a future space agenda.⁶⁸⁰ Space activities are a classic sphere of political hegemony, clearly reflecting national ambitions in space. Aligning the membership of the European Union with that of its expert agency, the European Space Agency, is a comparatively minor step within what now appears a greater agenda, if the EU is to proceed and succeed with its further space programme.

2.5. Demarcation and conferral

2.5.1. Principles

Legal personality is accordingly only the first part of the equation as to whether powers exist and may be exercised at a Union level. The limits within which it can legitimately operate are prescribed by the Treaty.⁶⁸¹ According to the principle of conferral, or of the attribution of power enunciated in Art. 5(1) of the TEU:

“The limits of the Union’s competences are governed by the principle of conferral. The use of Union competences is governed by the principle of subsidiarity and proportionality.”

Art. 5(1) emphasises the dynamic nature of the European Union power spectrum against the balancing tools of subsidiarity and proportionality contained in Art 5(3) of the TEU.⁶⁸²

2.5.2. Conferral defined

The demarcation between Member States and the Union is therefore central to the operations of the EU; the activity in question must take place at the most appropriate level.⁶⁸³ The TFEU lists the areas in which the EU has either exclusive (Art. 2(1), Art. 3 of the TFEU), shared (Art. 2(2) of the TFEU), or supportive coordinating competence (Art. 2(5), Art. 6 of the TFEU).⁶⁸⁴

Two forms of collaboration in governance have developed within the Lisbon Strategy: the Open Method of Coordination (OMC) for economic and monetary union, alongside the new supportive and coordinating competence under Art. 6 of the TFEU. The former has developed as a form of governance-sharing for the EU: it allows “bridges to be built where there are black holes of non-decision”.⁶⁸⁵ It offers a flexible form of governance in areas which – were it not for OMC – might expand the limits of conferred powers too far. “It offers a broad legal base to transfer political will into EC policy and normative standards.”⁶⁸⁶

It would appear that the Union’s space competence, while clearly shared or parallel, falls to be handled with a similar supportive approach. Art. 6, with its inclusion of industrial and civil society concerns, would imply so. The EU polity is not only exposed to a competence creep, but to a concern to safeguard the achievements of existing inter-governmental organisations. This is why the Draft Position Paper of the ESA Member States indicates in no uncertain terms that there should be no encroachment by the EU on the work of the ESA. The differing procurement rules of the EU and ESA alone prohibit any overlap.

“The globalisation of economic activity has increased the opportunities of states and policy makers, as well as other stakeholders in the political policy processes, to learn from the experience of policy intervention elsewhere.”⁶⁸⁷

Ultimately the demarcation issues will turn on the civil and military interface for space activities. ESA, as an organisation solely competent to act for peaceful purposes, can facilitate this exercise in demarcation for future space activities.

2.6. Structure for regulating space activities in Europe

2.6.1. Challenges

The provisions of Art. 4 and Art. 189 of the TFEU must be read in the light of what the EU Commission President Barroso described in his “Ambitions of Europe in Space” speech as the “fundamental challenges” required to invigorate competitiveness and economic growth for the EU: by contributing to innovation and employment, by combating climate change, and by addressing major issues of transport and security, the European Union can secure a voice at a global level among the leading space powers.⁶⁸⁸ In doing so, it not only represents all Member States; it can also rely on the well-established space infrastructures which have paved the way to securing technological and scientific progress in space for Europe. This “late awakening” on the part of the EU to providing a complete space agenda may even be fortuitous: Member States may not have been ready to support such a step at an earlier stage. Although these are shared powers, they are flanked by other security-related issues, such as defence and space situational awareness.⁶⁸⁹

2.6.2. Civilian and military aspects of space

The strategic aspects of space make it an area of activity with strong geo-political overtones. The concern to develop a European Space Situational Awareness (SSA) has given rise to action at all three levels of the European Space Agency (ESA), the European Defence Agency (EDA) and the EU Commission (EC). Latterly, SSA has been included in the EU Space Work Programme of July 2009, with a view to creating independent space capabilities for the EU.⁶⁹⁰ SSA has aspects in common with defence capabilities under the Common Foreign and Security

Policy (CFSP). The provisions regulating CFSP were previously located under the since abolished 2nd Pillar on inter-governmental cooperation. Although the Union Treaty continues to retain a “small” IGC pillar in its Art. 24, these provisions now mandate the Member States’ commitment towards common action at an EU level.⁶⁹¹ In this respect, the de-pillarisation of CSFP has opened the way for space to become an EU competence, notably in defence and security issues. This in turn has opened the way for expanding further common aspects, such as common military procurement at an EU level.⁶⁹²

2.6.3. Common foreign and security policy and agencification

The European Union’s space agenda therefore includes not only civilian, but also military capabilities.⁶⁹³ The post-internal market *agencification* within the EU, while predominantly of internal market origin, has since seen the creation of the European Defence Agency and the European Satellite Centre in Torrejon, Spain, falling within the Council’s remit.⁶⁹⁴ Conceivably, such developments might not have found consensus at an earlier stage. Now, with Lisbon, the former 2nd Pillar and its field of Common Foreign and Security Policy (CFSP) has been given further legitimacy by the Member States as a common objective through Art. 24 of the TEU.

This provision confers competence on the EU in all areas of foreign policy. It includes the power to “conduct, define and implement a common foreign and security policy, based on the mutual political solidarity among Member States, . . . and the identification of an ever-increasing degree of convergence on Member State’s actions”.⁶⁹⁵ The inclusion of space within these parameters is a task for political consensus and action: it pays tribute to the boundaries of constitutionalism at EU level. Art. 24 reflects the significance of the EU’s presence in the international arena. Nevertheless, as the classic field where national hegemony and ambitions are prevalent, space activities remain subject to legitimacy and legal capacity. Art. 24 is clearly circumscribed by the consensus of the Member States under Art. 4(3) of the TFEU.

2.7. Conclusion

The European stakeholders in space have established an impressive track record in crafting European space activities. The immediate conclusions from the Joint EU

and ESA Space Council held on 25 November 2010 were to continue supporting the development of the Union's space policy, by moving forward with its space flagships, Galileo and GMES.⁶⁹⁶ The focus is now on several priority actions, from ensuring funding, promoting a healthy commercial space sector, to protecting satellites and radio frequencies.

The dynamics of European integration have varied over time, and despite the many attempts to analyse and classify the accompanying process of the developing polity, they depict the political and legal phenomena associated with complex forms of integration of states and the economic dimensions involved in creating a single market with its own currency. Such steps involve inherently political processes of transition and are no longer of economic or legal nature alone.

Nevertheless, a response to the effect of the new legal personality of the European Union on its space activities may well be found in their very economics: financing the European space effort almost inevitably involves some form of public funding. While the Member States are unwilling to dispense with their own sovereign and economic interests in space, a concerted effort at the EU level appears attractive, not only from a budgetary perspective but also in the interest of the various stakeholders ranging from institutions and agencies to satellite operators and the industry.

The European Union has undertaken important steps and made the necessary investment to warrant maintaining the level of expertise it has produced in its space activities. It has formulated various elements towards a definitive space policy. It must now ensure that its major civilian space projects move forward, so that it can respond to the future challenges that society faces and respond with the benefits that space offers. The inclusion of space activities within the Union's competencies under the Lisbon Treaty was a timely measure to sustain Europe's vital contribution to this sector.

⁶²⁷ Art. 4(1) TEU: "The treaties shall have the same legal value."

⁶²⁸ The Union's new space competences, regulated under Art. 189 and Art 4, co-exist with the other competences that originally served as a legal basis for the initial key space projects Galileo and GMES. Art 4(3) prescribes its limits.

⁶²⁹ Art. 4(3) TFEU: "In the areas of research, technological developments 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."

⁶³⁰ These activities were based on the provisions governing Trans-European networks under Art. 154 EC (transport, telecommunication and energy infrastructure). GMES was originally organised within the 6th, thereafter the 7th Framework Programme, Decision 1982/2006/EP and Council of 18 December 2006 concerning 7th Framework Programme of the European Community. Implementation of GMES is now governed by Regulation 911/2010 of European Parliament and Council of 22 September 2010, OJ L 276/1 of 20.10.2010.

⁶³¹ The Treaty of Lisbon entered into force on the 1 December 2009, one month after the final ratification by the last Member State, *in casu* Czech Republic.

⁶³² On the complex structures of the various satellite organisations in Europe (EUTMETSAT, ESOC), including their privatisation (EUTELSAT), see Francis Lyall, Larsen, P., *Space Law, A Treatise*, 2009, 356–364; for a history of the specialist international agencies and intergovernmental organisations, see P.I.Ph. Diederiks-Verschoor (ed. Kopal), *Introduction to Space Law*, 2008, ch. 1.

⁶³³ Some of these, notably EUTELSAT, have since been privatised, see Francis Lyall, *id.*

⁶³⁴ Among Europe's space assets figure not only the Giove A and B satellites, but the future Galileo satellite fleet. The prime location of the French territorial launching base, the Guiana Space Centre (GSC), Kourou, Guyana, is a key factor in maintaining an independent European space infrastructure.

⁶³⁵ For further information on the European Satellite Operators Association, see <http://www.eso.net/v2/>.

⁶³⁶ See Framework Agreement Between the European Community and the European Space Agency (hereafter Framework Agreement), Brussels, done 25 November 2003, entered into force 28 May 2004; OJ L 261/64 (2004).

⁶³⁷ Krige, J & Russo, A, *The story of ESRO and ELDO 1958–1973. A history of the European Space Agency, 1958–1987*, Vol I, retrieved from www.esa.int/esapub/sp/sp1235/sp1235v1web.pdf.

⁶³⁸ Since the conclusion of the Framework Agreement between ESA and EU, an annual Space Council has been instated as from 2004 allowing representatives of the Member States, the EU and ESA to deliberate together; for a complete overview of its agenda, see Council Resolution on Taking Forward the European Space Policy, 26/27 September 2008, approved by the Council of Ministers of the European Space Agency. Further, Nicolas Peter, *Space Power and Europe, in the Need for a Conceptual Framework*, 59th International Astronautical Congress, (IAC Glasgow) 2008.

⁶³⁹ The concept of a European Space Policy (ESP) was first promoted in a European Parliament Resolution of 17 September 1981 on Europe's Space Policy (OJ C 260/102, of 12 December 1981), but not followed through until the development of the Galileo project. See: European Commission, *Galileo – Involving Europe in a New Generation of Satellite Navigation Services*, of 10 February 1999, COM(1999) 54 final. Proposals for inter-institutional cooperation were subsequently formulated by the latter, see European Commission, *Towards a coherent approach for Space*, of 7 June 1999, SEC (1999) 789. Recent publications and legislation is available relating to ESP and Galileo, See Commission Communication of 26 April 2007 on European Space Policy, COM(2007) final; see further Regulation of the European Parliament and of the Council on the further implementation of the European satellite navigation programmes (EGNOS and Galileo), No. 683/2008/EC, of 9 July 2008; OJ L 196/1 (2008).

⁶⁴⁰ Art 189(3) TFEU: “The Union shall establish any appropriate relations with the European Space Agency.”

⁶⁴¹ Alignment of national space laws is a goal in itself, in that it achieves consistency with the treaties at international level. Some coordination is possible at UN level via the Legal Subcommittee of the UN Committee on the Peaceful Use of Outer Space, UNCOPOUS. For a comprehensive overview of the activities undertaken by the UN Office of Outer Space, see <http://www.oosa.unvienna.org/>.

⁶⁴² Gerda Horneck, Coriadini, A, Haerendel, G: *Towards a European Vision for Space Exploration*, Recommendations of the European Space Advisory Group, in: *Space Policy* (2010). For a critical assessment of the dilatory process of moving towards a definitive European space policy, see K. Madders, Thiebaud W., *Carpe Diem: Europe must make a genuine space policy now*, in: *Space Policy* 23 (2007) 7.12.

⁶⁴³ Art. 5(3)TEU; for further details, see below, p. 14 (**cross-reference**).

⁶⁴⁴ This was launched with the Report of the Three Wise Men, (Lothar Späth, et al), on which, see L.J. Smith/Hörl, K.U., *Constructing the European Space Policy*, in: P. Olla (ed): *Commerce in Space: Infrastructure, Technologies and Applications*, Univ. Michigan Press (2007), chap. 9.

⁶⁴⁵ The ESA Convention is available under <http://www.esa.int/convention/> It entered into force on 30 October 1980 but operated de facto from 31 May 1975.

⁶⁴⁶ Brownlie, Ian, *Principles of International Law*, 7. ed., 2008, Oxford, chap. 2, chap. 14.

⁶⁴⁷ For details of the signatories and ratifications of the UN Treaties, see <http://www.oosa.unvienna.org/oosa/en/SpaceLaw/gares/index.html>.

⁶⁴⁸ Brownlie, n. 20, above, 13–14; 611, unless these have already achieved the status of customary international law. This is the case, at least for certain provisions of the OST, see Francis Lyall, Larsen, P., n. 6 above, 70–80.

⁶⁴⁹ The initial findings of the Court of Justice on the relationship between community law as a *sui generis* part of the international legal order are to be found in Case 26/62, Van Gend en Loos v. Nederlandse Administratie Belastingen [1963] ECR 1. The ERTA judgment, case 22/70 Commission v Council (ERTA) discussed the extent to which the European Community (at that stage) had an implicit treaty making power in those fields of competence ascribed to it. Member states are not allowed to enter into international commitments which could prejudice either the standing or status of the Community's obligations.

⁶⁵⁰ ESA has registered the Giove frequency filings with the ITU. Of the IGOs that have accepted the rights and obligations under the space treaties, ESA and EUTMETSAT have made declarations under ARRA, LIAB and REG; EUTELSAT has accepted LIAB.

⁶⁵¹ Convention on International Liability for Damage Caused by Space Objects, 1972.

⁶⁵² The recognition of international law obligations has been accepted with regard to the European Union's overriding liability for the Galileo GNSS system, inspired by the Liability Convention, in Article 17 of Council Regulation (EC) on the establishment of structures for the management of European satellite radio-navigation programmes, of 12 July 2004, No. 1321/2004, OJ L 246/1 of 20.7.2004, as amended by Regulation on the further implementation of the European satellite navigation programmes (EGNOS and Galileo), No. 683/2008/EC, of 9 July 2008; OJ L 196/1 (2008).

⁶⁵³ As of January 2010, of the EU Member States, 22 have ratified the 1967 Outer Space Treaty (OST) and 23 have ratified the 1972 Convention on Liability for Damage from Outer Space (LIAB), while 17 have ratified the 1986 Registration Convention (REG). 3 have ratified the Moon Agreement (MOON). The EU's relationship to the United Nations and other specialised international agencies is regulated in Art. 220 TFEU.

⁶⁵⁴ A clear precedent can be found in the Declaration by Certain European Governments on the Launchers Exploration Phase of Ariane, Vega, and Soyuz, from the Guiana Space Centre, done at Paris, March 2007, reprinted as HMSO Command Paper Miscellaneous No. 10 (2009) Cm 7700.

⁶⁵⁵ For the background to the various liability issues involved, see Policy Aspects of Third Party Liability in Satellite Navigation ESPI Report 19, Alfredo Roma, Schrogl, K.U, Sánchez Aranzamendi, M.(eds), July 2009; further L.J.Smith, Facing up to Third Party Liability for Space Activities, Some Reflections, in *Proceedings of the International Institute of Space Law 2009* (2010) Where is Paradise? The EU's Navigation System Galileo – Some Comments on Inherent Risks (*or Paradise Lost*), in: IISL/AIAA Proceedings of the 50th Colloquium on the Law of Outer Space (2007), 346–358. A Commission Working Group on GNSS Liability was set up subsequent to presentation of a Draft EU Regulation for GNSS liability presented by Italy in 2007 and has already reported in: European Commission, Working Document, 'Global Satellite Systems (GNSS) Extra Contractual Liability', 24 June 2009, EGPC-09-07-06-02.

⁶⁵⁶ See judgments of the ECJ in: case 22/70 Commission v Council (European Road Transport Agreement), ECR [1971] 263; Opinion of ECJ, 1/91 Draft Agreement between EC and EFTA, [1991] ECR; Conferring legal personality on the Union was discussed during the deliberations on the European Convention, but it was felt premature at that stage to compromise sovereignty over foreign affairs, see Amato Report, CONV 305/02 of 1 October 2002, cited in: Philippe de Schoutheete, Andoura, S, The Legal Personality of the European Union, *Studia Diplomatica*, Vol LV, 2007, n. 1.

⁶⁵⁷ Art 3(6) TEU.

⁶⁵⁸ A notable trend towards measuring the "constitutionality" of integration is commented on by Erika Szyszczak, Experimental Governance and Open Method of Coordination, *European Law Journal* (2006), 486–502.

⁶⁵⁹ Where Community and now Union rules are adopted to achieve objectives of the Treaty, then Member States may not assume obligations outside the framework of the Treaties that could affect these obligations or alter their scope, see ECJ Opinion 1/91, EFTA, above n.29; Opinion 2/91, ILO [1991] ECR 1061.

⁶⁶⁰ Judgments of the ECJ are binding on the parties and to be followed by virtue of Art 260 TFEU.

⁶⁶¹ P.J.G. Kapteyn, Verloren van Themaat, P., (ed Gormley), Introduction to the Law of the European Communities, 3rd. English edition, 1260.

⁶⁶² E.g. There has been an Association Agreement between the EU and Turkey since 1963; Turkey is a candidate country to the EU, with a customs union in operation since 31. December 1995. A Stability Pact was concluded between the EU and the Balkans in 1999, and the Stabilisation and Association Process Dialogue is underway with Kosovo.

⁶⁶³ Opinion 1/94 related to the legality of the Community acceding to the WTO, see further Meinhard Hilf, The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise? [1995] 6 EJIL, 1–15.

⁶⁶⁴ The pre-Lisbon judgments all make clear reference to the differing competences between the Community and the Union, only the former being competent to accede, see n. 35, above.

⁶⁶⁵ F.G. von der Dunk, Towards one captain of the European spaceship – why the European Union should join ESA, 19 *Space Policy* (2003), 83–6; L.J. Smith & K.U. Hörll, Constructing the European Space Policy, Past, Present and Future, in P. Olla (Ed.), *Commerce in Space, Infrastructure, Technologies and Applications* (2008), 187–208; T. Hoerber, ESA + EU: Ideology or pragmatic task sharing, 25 *Space Policy* (2009) 206–8; S. Hobe *et al.*, Entwicklung der Europäischen Weltraumagentur als 'implementing agency' der Europäischen Union: Rechtsrahmen und Anpassungserfordernisse, in *Kölner Schriften zum internationalen und europäischem Recht*, Band 17 (2009), 282–339.

⁶⁶⁶ See cases at n. 23, above.

⁶⁶⁷ Case 21–24/72 International Fruit Company Produktschap N.V. v Produktschap voer Groenten en Fruit, [1972] ECR 1219. This has led to recognition of directly enforceable rights at Union level, by virtue of which legal or natural persons may be entitled, under specific conditions, to enforce rights acquired under European law against their national administrations or governments. Generally, there must have been some failure to transpose the particular provision of European law as provided. Case 26/62 Van Gend en Loos v Administratie der Belastingen, above, n 23.

⁶⁶⁸ Art. 1 sentence 2, TEU. The ECJ's jurisdiction to grant directly enforceable rights through varied case law relating to the requirements for vertical and even horizontal actions based on directly effective legal provisions, through to government liability, has filled many text books.

⁶⁶⁹ See Preamble to European Parliament resolution of 10 July 2008 on space and security (2008/2030 (INI)) at B: "Where the various political and security challenges which the Union is increasingly facing make an autonomous European Space Policy a strategic necessity . . .".

⁶⁷⁰ Case 41–44/70 International Fruit Company v Commission [1971] ECR 411; case numbers 89, 104, 114, 116, 117, 125–129/85 Ahlström Osakeyhtiö et al. v Commission [1988] ECR 19; T-115/94 Opel Austria v Council [1997] ECR II 39.

⁶⁷¹ The entirety of these provisions and documents combine to form the consolidated version of the Treaties. See Declaration 24 concerning the legal personality of the European Union.

⁶⁷² For a discussion as to how the constitutionality of the Union has been primarily developed through deliberative interpretation of the treaties, see Antoine Vauchez, The transnational politics of judicialization; Van Gend en Loos and the making of the EU polity, *European Law Journal* 16 (2010) 1–28.

⁶⁷³ S. Weatherill, Competence Creep and Competence Control, in P. Eeckhout & T. Tridimas (Eds.), 23 *Yearbook of European Law* (2004), 6–7: "EU action may 'creep outward' but it does not wholly foreclose State choice in the relevant area. Competence is shared (. . .) it is the Member states, within the EU framework, that have been the primary actors in the centralizing process of 'creeping competence'".

⁶⁷⁴ Jan Wouters, Space in the Treaty of Lisbon, *Yearbook of Space Policy*, 2009, 116–123; see further, Draft Joint Position of Member States to ESA on issues regarded as critical for the successful preparation of Space Council VII (final), 2010.

⁶⁷⁵ Antoine Vauchez, n. 47, above.

⁶⁷⁶ Art. 275 The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy, nor with respect to acts adopted on the basis of those provisions. For a critique of case law relating to the competence demarcation in external affairs, see: Christophe Hillion, Wessel, R, Competence Distribution in EU External relations

after ECOWAS: Clarification or Continued Fuzziness? *Common Market Law Review* 46 (2009) 551–586.

⁶⁷⁷ Many space applications have dual use capabilities that technically address military and not exclusively civilian uses.

⁶⁷⁸ This is a particular problem in transatlantic space practice as a result of the ITAR rules.

⁶⁷⁹ A. Gaubert, A. Lebau, *Reforming European Space Governance*, *Space Policy* 25 (2009) 37–44, 42.

⁶⁸⁰ *id.*

⁶⁸¹ Case 41–44/70 *International Fruit Company v Commission*, n. 45 above.

⁶⁸² Art 5(3) ‘under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States, either at central level or regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. This has led the EU to strive for better regulation, including better consultation, see European Commission, *Third Progress Report on the Strategy for Simplifying the Regulatory Environment*, COM (2009) 19.

⁶⁸³ For a discussion as to the methodology of the ECJ and its jurisdiction to rule on the limits of the competence issue, see the UK House of Commons Select Committee on European Scrutiny, 29th Report, session 2006–7, available online <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xxix/4102.htm>, on Opinion 2/94 on the EU’s Accession to Human Rights Convention. ‘In the course of the operation of the common market’ imposed little or no constraint on the use of the Article (308) and was not intended to do so. Since then, the Community has extended its objectives to include much that is not primarily concerned with the operation of the economic community. But the **purpose** [our emphasis] of Article 308 remains unchanged: to provide a necessary power, when none is available elsewhere in the Treaty, to attain any Community objective” The ECJ’s usual approach to the interpretation of the Treaty is to give effect to what it understands to be the Treaty’s purpose (purposive interpretation).

⁶⁸⁴ The powers are outlined in Art. 3 (exclusive competence); Art 4 (shared competence) and Art 6 (coordinated or supplementary competence).

⁶⁸⁵ Erika Szyszczak, n 31, above.

⁶⁸⁶ *id.* S 490.

⁶⁸⁷ *Id.* 490.

⁶⁸⁸ President José M.D. Barroso, “The Ambitions of Europe in Space”, Transcript, Speech 09/476, delivered during the Conference on European Space Policy, Brussels, 15 October 2009.

⁶⁸⁹ The EU has an early warning facility – Joint Situation Centre (SITCEN) – based in Brussels.

⁶⁹⁰ For details of the Space Situational Awareness, see http://www.esa.int/esaMI/SSA/SEMY-TICKP6G_0.html.

⁶⁹¹ Art 24(1) TEU: ‘The Union’s competences in matters relating to foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.

⁶⁹² Rules coordinating a large part of procurement for military equipment and services have been in force in the European Union since 2004. The latest reform of EU defence procurement legislation is Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, No. 2009/81/EC, of 13 July 2009; OJ L 216/76 (2009). The scope of the Directive is outlined in its Article 4. The Directive entered into force on 21 August 2009. See further, Anglo-French defence cooperation: Entente or bust, *Economist*, 14 October 2010.

⁶⁹³ Galileo was initially announced as a uniquely civilian project. While ESA’s activities are restricted to peaceful purposes, the EU’s own military capabilities are linked to its role within the WEU and the associated EDA.

⁶⁹⁴ The European Defence Army, EDA, European Satellite Centre ESC are attached to Council as part of the executive arm.

⁶⁹⁵ Art 24(3) TEU; cf. Art 24(1) TEU: “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence”. See also: Draft Road Map, ESDP and Space 2007, SEC European Space Programme.

⁶⁹⁶ See Note, Council of the European Union, Background, Competitiveness Council, Brussels 25 and 26 November 2010, 16253/10 of 17 November 2010.