The Lisbon Treaty and the Evolution of European Space Governance

Julien Béclard

The long road to Lisbon

Until the adoption of the Lisbon treaty in December 2007, there was no explicit reference to space in the EU’s constitutive documents. While the European Space Agency has been active in space since the mid-1970s, the Union’s policy remained without a legal basis for space activities. Parallel to the treaties’ evolution however, the EU’s competences never stopped expanding to new fields, bringing it ever closer to space and its various applications. Creativity and dynamic uses of these existing competences have allowed the EU to progressively interfere with the space sector and to get closer to ESA.

In 2004, a Framework Agreement between the EU and ESA formalized the cooperation between the two institutions with the ambition to “link demand for services and applications using space systems in support of the Community policies with the supply of space systems and infrastructure necessary to meet this demand”. According to this division of roles, the EU would work on the demand side for space-related services and applications, while ESA would work on the supply side. One can clearly point out some kind of “implicit agreement” in which the EU would see the scope of its responsibility in the European space governance directly linked to its ability to increase funding for space-related programmes.

1 BECLARD Julien, “With the head in the air and the feet on the ground: The EU’s actorness in international space governance”, Global Governance, 19, 2013, pp.466-467.
If this Framework Agreement represents a first draft of a renewed European space governance architecture, it only formalizes a relationship between two institutions. The stated goal of finding a new European space policy is thus closely associated with the need to clarify the respective powers of the Union and ESA and the establishment of an institutional framework for effective cooperation between the two entities.

In the absence of an explicit legal basis and a clear institutional framework, the actions of the Union in the space domain have remained problematic however. The Constitutional treaty was supposed to compensate for these difficulties with a “space clause” recognizing for the first time that the EU had a competence in the space domain. The successive French and Dutch refusal of the treaty in 2005 struck a blow to the advancements conceded by States in space policy, but articles related to space were introduced in the Lisbon treaty on the basis of this space clause.

“Article 189” The Space Clause of the Lisbon treaty

Unlike the Constitutional treaty, the Lisbon treaty does not merge the various EU treaties into one text. Nevertheless, it looks forward to creating a legal framework for the EU’s actions in fields that were not covered before, such as space. It takes over the mandate given by the June 2007 European Council to the Intergovernmental Conference and limits the scope of the space clause.

A number of changes reflect a strengthening of the influence of the European Commission. On the one hand, at the initiative level, the Commission is now able to make proposals to regulate or complete space activities or even to propose initiatives in ground-breaking areas for the EU. On the other hand, the Commission is now assigned an important role in the co-decision procedure, along with the European Parliament who can henceforth approve the proposals of the Commission.

However, a meticulous reading of the space clause seriously relativizes the actual scope of this competence. By explicitly mentioning for the first time “space” in a treaty, this clause represents an important concession of the Member states, but it is difficult to interpret its exact impact. Indeed, Member States decided that space competences would not include harmonization of the legislative and regulatory dispositions and, as a consequence, this competence could not be regarded as a real “shared competence” as defined in the treaty. It seems that one should consider space as a “support or coordination competence” in spite of the fact that it is explicitly mentioned in the shared competences.

Furthermore, although it represents a significant breakthrough in confirming for the
first time the existence of competence of the EU in the space sector, the treaty of Lisbon does not ultimately provide additional clarification as to the structure of the European space governance since it merely notes that: “The Union shall establish any appropriate relations with the European Space Agency”.

As stated by Bertrand de Montluc: “The progress made in the concrete synergy of European efforts in the matter of governance has been relatively poor”\(^8\). While it has been renewed until the year 2016, the Framework Agreement can not be limited to modeling the joint exercise of two parallel space policies. Having two space policies in the European field is not a sustainable situation in the long term, especially for the members states of ESA who are also members of the EU. An evolution of the relationship and a strengthening of the synergy between ESA and the EU institutions, including the structural level, seem now required to enable the EU to make the most of the strengths of ESA and conversely.

**The 2012 Naples Ministerial Council**

The 2012 Ministerial Council in Naples was the first Ministerial meeting held after the entry into force of the Lisbon treaty. While on the EU side, discussions had already started on the relationship between the EU and ESA (the European Commission had adopted a Communication on 14 November 2012)\(^9\), Ministers of ESA also started to discuss the question of the European space governance.

ESA Member States recognized that since the entry into force of the Lisbon treaty, the EU had become one of the three key actors of the European space triangle. While taking into account the evolution of the context in which the agency was operating, the Members States have clearly stressed the need for an increased overall efficiency and an improved competitiveness of the space sector: “ESA must evolve, in coherence and complementarity with the other actors, towards a European space agency that best serves Europe in a competitive world-wide environment”\(^10\).

Therefore, the Ministers representing the Governments of the 20 ESA Member States mandated the Director General to work with the European Commission in order to provide, in a long term perspective, a common evaluation on the situation of the European space sector and a shared vision on its evolution aspiring at building up coherence, convergence and complementarity among the different actors. They also tasked him to elaborate and evaluate different possible governance scenarios.

**Ways forward – Possible governance scenarios**

Since Naples, both ESA and EC have launched internal reviews on the possible evolution of their relations. Different scenarios have traditionally emerged from the literature and the debates surrounding this question.

\(^8\) DE MONTLUC Bertrand, “What is the state of play in European governance space policy”, *Space Policy*, 28, 2012, p.75.


\(^10\) Political declaration towards the European Space Agency that best serves Europe, ESA/C-M/CCXXXIV/Res.4 (Final), p.2.
The **first scenario** is the status quo. Since ESA and the EU are clearly aware of the limits of the current situation and the need to make a step forward, it is very unlikely that this will be the most privileged option.

In a **second scenario**, often regarded as eccentric in this institutional configuration, the EU would become a member of ESA, in the same way that the EU is a member of the World Trade Organization. This option is supported by those who consider that, in this arrangement, ESA would remain the cornerstone of European space policy. This model, though attractive in many ways, seems unrealistic according to many observers of the EU as a political system.

In a **third scenario**, some would like to see ESA incorporated as deeply as possible in the structure of the EU, becoming an agency that executes and implements the EU decisions. This option, similar to what has been done for the Western European Union, while interesting in the eyes of the European Commission, includes difficulties. Over the years, ESA Member States have been cautious to preserve the independence and autonomy of the Agency. Some observers have highlighted that, as much at the organizational level as at the operational level, this configuration would be problematic because of the subordination of the well-oiled machinery of ESA to some of the Commission’s officials. Despite these difficulties, some have already proposed the possible steps of such a process leading to the inclusion of the agency inside the structure of the EU.

In the short term, the first step would be for ESA to act as an agency for the European Union. In this way, ESA would become the only European agency for R&D, technology and for the development of space systems and offer its competences, expertise and infrastructures to support the European Union’s policies. This would imply that, at the EU level, measures should be taken to ensure that ESA would systematically be chosen as the agency in charge of the development and implementation of the European Union’s operational space programs. While, at ESA level, this first step requires that an appropriate management and control mode for the programmes delegated by the EU would be devised.

At a practical level, this option would require that, within ESA, next to the mandatory and optional space programmes, a third kind of programmes should be created with a set of harmonized rules which allow to carry on these programmes in a manner consistent with the actual regulations.

In the medium term, the second step of this process would be for ESA to become one of the agencies of the Union. Based on the experiences of EU decentralised agencies such as EDA, EASA, GSA, JRC or EU executive agencies as REA, ESA would become an agency of the European Union allowed to work with all the current members of ESA while preserving the culture and characteristics that made its

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14 An illustrative example of its possible features can be found in the proposition made by Paul Magnette for Belgium at ESA Ministerial Council:
15 Ibidem.
success, starting with a number of rules inciting the States to invest in R&D, technology and the development of space infrastructures, such as the rule for “fair geographical return”. The purpose is not for ESA to become one of the Commission’s DGs nor to loose the benefits of some of the dispositions contained in the actual ESA Convention.

This scenario is basically the transposition of some of the dispositions that were included in the “Wise Men” report of 2000 in which three experts concluded that it made sense to seek an enhanced institutional integration to ensure space its place in the overall evolution of EU policies: “There is a need for changes, especially in the relationship between ESA and the EU. With space no longer being a separate and exclusive issue, it makes sense to aim for a closer institutional integration, thus ensuring the place of space issues in the overall evolution of European policies (…) we also need for a process of institutional convergence that does not exclude bringing the present ESA within the treaty framework of the European Union”\textsuperscript{17}.

Key issues

In the reflexion surrounding the future of the European space governance, the European industry has underlined some serious issues that still need to be tackled. One of these relates to the definition of the future operational needs of the EU. Should the demand be expressed by the EU and afterwards translated into a solution developed by ESA? In this case, the EC would have to act as an “educated customer” and get involved in the development phase (such as Eumetsat). Or, on the contrary, should ESA anticipate the EU needs, develop the solutions and assure the transfer? In this case, the EC will need some capacity of counter-expertise\textsuperscript{18}.

Another issue relates to the structures and procedures for management and control that should be put in place to enable the EU to participate efficiently. While in the future the EU will become the main institutional buyer in some segments (as for launchers or navigation), it seems logical that EU should be able to contribute to the definition of the objectives that concern it directly\textsuperscript{19}. This topic touches upon the importance of the stability of public procurement for the space industry. Only a small fraction of the space sector can rely on a commercial basis, therefore there is a strong need for public funding\textsuperscript{20}. One can surely assure that the EU control and management capacity will, to a large extent, rely upon its capacity to maintain a constant flow of funding for space while taking into account the specificity of that kind of programmes (long-term and high risks).

Last but not least, the setting up of the operational schemes required for space programmes in the long-term must be addressed, in order to ensure a proper interface between the space agencies, services-providers and end-users or to maximise opportunities for the development of commercial services\textsuperscript{21}. ESA has certainly an important role to play in assisting non-space companies desiring to benefit from space-expertise and business-development support in order to expand their business, or in encouraging entrepreneurs to turn space-connected business

\textsuperscript{17} BILDT Carl, PEYRELEVVADE Jean, SPATH Lothar, Towards a space Agency for the European Union, Report to the ESA Director-General, November 2000, p.7.
\textsuperscript{18} Interview with Olivier Lemaître, July 2013.
\textsuperscript{19} Ibidem.
\textsuperscript{20} “European space governance: The outlook”, Conference organized by IFRI and the Secure World foundation, Brussels, September 13, 2011, p.3.
\textsuperscript{21} Interview with Olivier Lemaître, July 2013.
into commercial companies. In this regard, one of the most effective tools ESA is using to assist technology transfer is that of Business Incubation Centres (BICs).22

22 “Business facilitators and happiness in ESA – How senior expertise can be made available to market entrants from countries aspiring to ESA Membership”, ESPI Executive Brief, March 2012, p.1.