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LIST OF ABBREVIATIONS AND ACRONYMS:

CFSP: Common Foreign and Security Policy

CNES: Centre national d'études spatiales

COPERS: Comité Préparatoire des Recherches Spatiales

COPUOS: Committee for Peaceful Uses of Outer Space

CSDP: Common Security and Defence Policy

EC: European Community

EEAS: European External Action Service

EGNOS: European Geostationary Navigation Overlay Service

ELDO: European Launcher Development Organization

EO: Earth Observation

ESC: European Space Council

ESDP: European Security and Defence Policy

ESP: European Space Policy

ESPI: European Space Policy Institute

ESRO: European Space Research Organisation

ESS: European Space Strategy

EU: European Union

EUMETSAT: European Organisation for the Exploitation of Meteorological Satellites

EUSC: European Union Satellite Centre

EUTELSAT: European Telecommunications Satellite Organization

GEOSS: Global Earth Observation System of Systems

GGE: Governmental Group of Experts

GLONASS: Globalnaja Nawigazionnaja Sputnikowaja Sistema

GMES: Global Monitoring for Environment and Security

GNSS: Global Navigation Satellite Systems

GOVSATCOM: Government Satellite Communications

GPS: Global Positioning Satellite

GSA: GNSS Supervisory Authority
HLSPG: High-Level Space Policy Group
HR: High Representative
JSSAG: Joint Space Strategy Advisory Group
JTF: Joint Task Force
MEO: Medium Earth Orbit
NASA: National Aeronautical and Space Administration
OST: Outer Space Treaty
PECS: Plan for European Cooperating States
PPP: Public Private Partnership
PSC: Political and Security Committee
R&D: Research and Technological Development
SEA: Single European Act
TEC: Treaty of the European Community
TFEU: Treaty of the Functioning of the European Union
UN: United Nations
UNGA: General Assembly of the United Nations
UNIDIR: United Nations Institute for Disarmament Research
UNODA: United Nations Office for Disarmament Affairs
US: United States of America
USSR: Union of Soviet Socialist Republics
WEU: Western European Union

Article 189 TFEU: Much ado about nothing?

Laura Jamschon Mac Garry (¹)

INTRODUCTION:

The Lisbon Treaty has marked one of the many important landmarks in the life of the European Union (EU) after the failed Constitutional Treaty. Of particular relevance to this thesis is the introduction of the so called ‘space clause’ in Art. 189 of the Treaty on the Functioning of the European Union (TFEU).

The title ‘Article 189 TFEU: Much ado about nothing?’ gives a hint to the reader that the content of this thesis will endeavour to take stock of the space clause at the 10th Anniversary of the adoption of the Lisbon Treaty and provide some ideas on the progress made in the space field due to the competences enshrined in the European Treaties.

The thesis is structured into four chapters, the first two chapters deal with the lead-up and the aftermath of the space clause respectively. The third chapter outlines the two European flagship programmes and the last chapter describes the role of Europe as a global actor in space matters.

During the 60’s space activities were mainly designed and carried out at the national level by a very reduced number of States until the European involvement became a reality through three international organizations: the European Launcher Development Organization (ELDO), the European Space Research Organization (ESRO) and the European Space Agency (ESA), which replaced the former two ones. These organizations played an important role in shaping the aspirations to a European Space Policy (ESP) and, therefore, a brief description of them will be part of Chapter I .1.1. The second part of Chapter I (1.2) describes the European space efforts now within the framework of the European Community/European Union (EC/EU) institutions and accounts in particular for the role played by

¹ The author has been the Alternative Permanent Representative of Argentina to COPUOS since 2013 to the present. She was the acting Chair in the fifty-sixth session of the Legal Subcommittee of COPUOS and the task force leader of the Group of 77+China and of the Group of Latin American and the Caribbean (GRULAC). However, this thesis is written in her personal capacity and do not necessarily reflect the position of the Argentine Republic.

the Commission and by the European Parliament in this field. The last section of Chapter I (1.3) draws on the two previous sections in that it provides a synthesis of the relation between ESA and the EU.

The questions that the author endeavoured to address in this first chapter were if the European efforts in space field started to develop as a consequence of the Lisbon Treaty or if the Lisbon Treaty was a reaction to an already existing development. Further questions at stake were: which EC/EU institution was the driving force in the space efforts; how the Commission engaged in space matters before the Lisbon Treaty and why cooperation between ESA and the EU became so important for the ESP.

Chapter II examines the European space efforts after Art. 189 TFEU. For that purpose, a first section is devoted to the analysis of the precedents of the space clause, i.e. Art. III-254 of the Constitutional Treaty and the qualification of the space competences under the scheme of competences established in the Lisbon Treaty (Chapter II.2.1.2). One of the core issues when dealing with space and the fragmentation of stakeholders involved is the one of governance, what in turn requires to address the relations among Member States, ESA and the EU and possible scenarios for overcoming the resulting governance problems (Chapter II.2.2.2). The final part of this second chapter is focused in the steps given to complement the ESP.

The rationale behind this chapter was to find answers to questions such as: what was the contribution of Art. 189 TFEU to the already existing efforts in space?, did Art. 189 TFEU solve the problem of governance?, what was the impact of Art. 189 TFEU in the advancement of the ESP? and why did the EU address the issue of space activities?

It is not possible to address the European space efforts without making reference at least briefly to the two flagship programmes: GALILEO and COPERNICUS. The purpose of the third chapter is not to go into detail about them because they may be themselves a topic for a thesis. This chapter simply describes their main aspects and attempts to answer what they owe to Art. 189 TFEU, if anything.

Chapter IV deals with the characterisation of Europe as a global actor in the space field with particular emphasis on the participation of the EU in the Committee for the Peaceful Uses of Outer Space (COPUOS). The European External Action Service (EEAS) was established by the Lisbon Treaty and has also had an important impact in the multilateral participation of the EU in space matters. The main questions underlying this chapter were how the voice and the participation of the EU in COPUOS

evolved after the adoption of the Lisbon Treaty and what the European Code of Conduct meant to the international participation of the EU.

The methodology adopted for this thesis is the empirical-deductive. Since the architecture of the EC/EU institutions is laid down to a large extent on the European Treaties, these will inevitably be part of the primary sources, together with other international instruments establishing international organisations of particular relevance for this thesis. Additional valuable primary sources were the legal acts of the European institutions, reports and working documents of the EU and ESA, oral recordings and transcripts of COPUOS sessions. Literature on the European space policy has served as a secondary source.

CHAPTER I: European space activities before Art. 189 TFEU

1.1. Space efforts without the EC/EU institutions:

1.1.1. *ELDO AND ESRO:*

The space age began with the launch of the Sputnik in 1957 by the Soviet Union and the Apollo 11 Programme by the United States that installed a space bipolarity in line with the geopolitical background.² Hence, space became a battlefield where to show the counterpart its superiority in political, military and technological terms. Europe was far from being in conditions to enter the competition with these two space superpowers. In effect, in the 50's European space activities were mainly conducted at the national level by a few space-faring nations, namely, France, the United Kingdom, Germany and Italy.

The need to become a third power after the Soviet Union and the United States motivated European States to explore an alliance among themselves to tackle, on the one hand, the dependence on the American launching services and, on the other, the development of a European space programme that would cover both application satellites and scientific programmes.

It is against this background that in the late 1950's and early 1960's a few initiatives led to the creation of the European Launcher Development Organization (ELDO) on 29 March 1962 and the European Space Research Organisation (ESRO) on 14 June 1962, both facilitated by the European Preparatory Commission for Space (COPERS, in French), established by the Meyrin Agreement on 27 February 1961.³

² The so called 'space race' refers to the rivalry between the USSR and the United States for the supremacy in space capabilities. It originated and developed in the framework of the geopolitical tense situation between the two powers during the Cold War.

³ The Meyrin Agreement was signed on 1 December 1960 without reserve by representatives from Belgium and the Netherlands, Norway and Sweden, and the United Kingdom, and subject to reservation by representatives from Denmark, France, Italy, Spain, and Switzerland.

It is worth remarking that the number of Member States of both organizations was not identical, however, all the members of ELDO became also members of ESRO (i.e. Belgium, France, Germany, Italy, the Netherlands, the United Kingdom). Denmark, Spain, Sweden and Switzerland were only members of the latter.

Moreover, both international organizations targeted different purposes: while ELDO was tasked with the development of a European launcher that would supersede the British failed Blue Streak Missile,⁴ and that would provide Europe with independence from the American launchers, ESRO would become an international organisation with the aim to provide and promote collaboration among European States in space research and technology *exclusively* for peaceful purposes. Both organizations would be together responsible for designing an incipient European space programme and their joint legacy would pave the way to the creation of the European Space Agency (ESA).

ESRO's fate was sealed by two 'package deals': the first one agreed on December 1971 which incorporated applications programmes (telecommunications, aeronautical and meteorological satellites) that would be optional for Member States (ESRO was formerly entrusted only with *mandatory science* programmes). The first package deal led to the reform of the ESRO Convention in June 1972 which introduced in Art. II the need to coordinate national and European programmes and avoid duplication. The second package deal was brokered in 1973 and encompassed the Ariane launcher, Spacelab and Marots.⁵ Shortly thereafter, a working group was set up to draft the convention of the future ESA, an international organisation that would absorb ELDO and ESRO.

The decline of ELDO began as soon as the reluctance of some European States to build a European launcher (mainly based on cost reasons) increased. However, this fact did not preclude Belgium, France and Germany from continuing their efforts in that direction, what ultimately enabled Europa I

⁴ The Blue Streak was a British medium-range ballistic missile that preceded the Europa launcher, developed by ELDO.

⁵ Ariane is the name given to a series of a European civilian expandable launch vehicles that was created originally to replace the failed Europa series of launchers. The first one was launched in 1988 and the last one (sixth) is under development. Ariane is 'Ariadne' in French, in Greek mythology was a mortal who used a thread to guide Theseus out of a labyrinth inhabited by the Minotaur.

Spacelab was a laboratory created as a result of a memorandum of understanding signed by NASA and ESRO in 1973 that allowed scientists to perform experiments in microgravity in earth orbit.

Marots ('Maritime Orbital Test Satellite') was one of the core programmes of ESA in its early years, designed to launch a dedicated maritime satellite.

and Europa II⁶ to come into existence. Unfortunately, their lifetime was not successful: while the former (launched from the base in Woomera, South Australia) did encounter only minor technical difficulties, Europe II (launched from the then new equatorial base in Kourou, French Guiana) was a complete fiasco.

The driving force behind these efforts was to gain independence from certain unfavourable clauses that the National Aeronautics and Space Administration (NASA) imposed on them, such as the use by the United States of images produced by the European satellites launched by American rockets. The relations between NASA and Europe were clearly construed on the basis of mutual advantages: while Europe would be able to launch its satellites at a lower cost, the Americans would be able to show a collaborative spirit in a hostile international environment and discourage western countries to get into cooperative space relations with the Soviet Union.

Discrepancies among European States as to the need to build an own launcher increased and the United Kingdom decided to abandon ELDO while Germany was doubtful as to push ahead with the launcher programme. Both along with Italy were of the idea that it was more economical to obtain American launchers than to develop a European one. On the other hand, they were more interested in engaging in the post-Apollo programmes led by the United States and gaining experience and skills from NASA experts.

Conversely, France was still convinced of the need of a European launcher, therefore, its national space agency (hereinafter 'CNES') presented the design of a national three-stage launcher LIIS (the French national launcher that was to become Ariane), which would be developed in the future within a European framework. Shortly after, the launchers Europa II and III were stopped and the assets of them were transferred to LIIS/Ariane, which became property of ESA.

1.1.2. THE EUROPEAN SPACE AGENCY:

⁶ The Europa series of launchers were developed by ELDO. The first two launches (Europa I and II) were unsuccessful, the third one (Europa III) was cancelled and the fourth one (Europa IV) was designed only for study purposes and finally cancelled in 1973. Europa also owes its name to the Greek mythology.

The Convention establishing the European Space Agency (hereinafter, 'ESA Convention') was signed by ten European States on 30 May 1975 (Belgium, Denmark, France, Germany, Italy, The Netherlands, Spain, Sweden, Switzerland, and the United Kingdom)⁷. Ireland signed the text on 31 December that year. In December 1978, Canada became a Cooperating State in terms of Art. XIV.1 of the ESA Convention. In October 1979, Austria signed an Association Agreement with the Agency. Until the entry in force of the ESA Convention, the organization functioned '*de facto*' and became a legally existing entity only after France deposited its instrument of ratification on 30 October 1980, when the Convention entered in force.

Three features need to be highlighted when comparing ESRO and ESA Conventions: Firstly, there are some key elements in the ESRO Convention that remained in the ESA Convention: the purpose to provide and promote collaboration among European States in space research and technology *exclusively* for peaceful purposes, the '*juste retour*' principle, incorporated upon a request made by Austria to COPERS and the combination of mandatory and optional programmes (Art. 25 of both instruments).

Secondly, compared to the reformed ESRO Convention, the ESA Convention went a step further in some aspects: it established in Art. II.c) that the Agency would not only coordinate European and national programmes, but would also integrate 'the latter progressively and as completely as possible into the European space programme, in particular with regard to the development of applications satellites'. Moreover, ESA was not conceived as a mere coordinator but was empowered to elaborate and implement a long-term European space policy (Art. II.a). Additionally, the ESA Convention did not only provide that its State Parties would strive to make best use of their existing facilities (Art. VI) but it added that they 'shall not set up new facilities or services without having first examined the possibility of using existing means' (Art. VI). Finally, it incorporated the activities of the second package deal (Art. V1bi and V1bii).

Thirdly, there were some novelties in the ESA Convention: the reference to operational application systems in its preamble and in Art. V.2 and the inclusion of a provision on launchers (Art. VIII). It is

⁷ At that time, the following States were members of the European Communities: Denmark, Belgium, France, Germany, Ireland, Italy, Luxembourg, Netherlands and the United Kingdom.

worth recalling that during the 60's launchers were much connected to the space race marked by the rivalry between East and West which ended in 1975 with the American-Soviet joint mission Apollo Soyuz.

The negotiations on a European launcher deserve a special comment. As already outlined in the previous section, everything seemed to be straightforward regarding the transfer of LIIS/Ariane to ESA until France proposed that the running costs of the Guiana Space Centre should be covered by ESA and that it should be 'Europeanised'. This project was not very well received by the other European colleagues, who expressed their reluctance in the 1975 meeting convened to sign the ESA Convention.

The French arguments were strong in the sense that the Kourou base would be indispensable for launching all payloads developed by ESA. In addition, France considered that putting the best of national capabilities at the European disposal was part of the spirit of the ESA Convention embedded in Art. VI.2.

Many discrepancies aroused again among European States as to whether the costs of Kourou should be covered within the Ariane programme (Germany) or not (Belgium, Spain and the Netherlands). The United Kingdom for its part was not inclined to contribute to a European base at all.

France wanted to keep the ownership of the base and to manage it through its national space agency CNES. Since this was not an accepted solution for the others, France dropped the idea of Europeanising Kourou and thus, retained managerial control over it while ESA would only monitor that control.

1.2. Space efforts with the EC/EU institutions:

As a starting point when dealing with the European space efforts, the question that first comes up is why space activities attracted the attention of the EC/EU. An uncontested answer is that space could

play an important role in the construction of the European identity.⁸ The Commission put it clearly as follows:

‘...what is at stake is a degree of independence and sovereignty’.⁹

Moreover, in words of Wulf von Kries (former Director of International Affairs of the German Space Agency):

‘...space is a means to various ends, and not an end in itself’.¹⁰

Indeed, there are several reasons that made space attract the attention of the EC/EU institutions. The Parliament stressed the benefits connected to space activities when it first addressed the Commission on the need to develop a space policy.¹¹ The Commission also recognised that a space policy would impact on many aspects of the economic, industrial and cultural life of the European society.¹²

Nowadays there is a great degree of awareness in the international community as to the benefits that may be derived from space activities for the socioeconomic and technological development, for instance, in areas such as agriculture and food security, climate change adaptation and mitigation, disaster management and emergency response, education, environment and natural resources, navigation, development of human settlements, humanitarian assistance, meteorology, global health, communications, water and transport. Furthermore, space may play an important role in the economic, social and cultural development of societies and hence, contributes to poverty eradication.

The link between space and socioeconomic benefits is one of the issues addressed with particular interest by COPUOS under the agenda item ‘Space technology for socioeconomic development in the context of the United Nations Conference on Sustainable Development and the post-2015 development agenda’ and by its Scientific and Technical Subcommittee, under the agenda item ‘Space

⁸ Commission (EC), Communication ‘The Community and Space: a Coherent Approach’, COM (88) 417 final, 26 July 1988, p. 10.

⁹ Commission (EC), Working Document ‘Towards a coherent European approach for space’, SEC (1999) 789 final, 7 June 1999, p. 5.

The Parliament made reference to the Commission’s warning in: European Parliament (EC), Report on the Commission working document ‘Towards a coherent European approach for space’, Final A5-0119/2000, 19 April 2000, p. 10.

¹⁰ Wulf von Kries, ‘Which future for Europe’s space agencies?’ (2003) 19 Space Policy 157, 160.

¹¹ European Parliament (EC), ‘Resolution on Community participation in space research’, OJ C 127, 21 May 1979, pp. 1 and 2; European Parliament (EC), ‘Resolution on Community participation in space research’, OJ C 190, 20 July 1987, para. 3.

¹² COM (88) 417 final, *supra* note 8, p. 10.

technology for sustainable socioeconomic development'. Moreover, the General Assembly in its annual resolution on international cooperation usually refers to this aspect.¹³

Space is not only a cross-sectorial strategic asset but it is also a policy instrument.¹⁴ The Commission acknowledged that space could support EU policies and objectives such as faster economic growth, job creation and industrial competitiveness, enlargement and cohesion, sustainable development and security and defence.¹⁵ Moreover, space serves to cement the EU's position as a major player on the international stage.¹⁶

Another relevant aspect of space activities is the security dimension (which has only been dealt with within the Western European Union (WEU)). The European summit in Helsinki towards the development of the European Security and Defence Policy (ESDP) prompted the EU to take space capabilities into account, for instance, in the monitoring and planning of the Petersburg tasks.¹⁷

In addition to all these factors, some other grounds to develop space capabilities could be briefly mentioned here: a growing number of emerging world players in this field and the need for Europe to be a full player both as a partner and as a competitor; the blurring boundaries between civil and military applications of space technologies and the awareness that single States are not able to meet the necessary requirements of a credible space policy.¹⁸

1.2.1. EC/EU institutions involved in space activities:

¹³ See for example: UNGA Res 71/90 (6 December 2016) UN Doc A/RES/71/90, preamble; UNGA Res 70/82 (9 December 2015) UN Doc A/RES/70/82, para. 24; UNGA Res 69/85 (5 December 2014) UN Doc A/RES/69/85, preamble; UNGA Res 68/75 (11 December 2013) UN Doc A/RES/68/75, para. 23.

¹⁴ European Commission and the European Space Agency Joint Task Force, Report 'Towards a European Space Policy', COM (2001) 718, 7 December 2001, p. 30.

¹⁵ Commission (EC), 'A new European frontier for an expanding Union – An action plan for implementing the European Space Policy' (White Paper), COM (2003) 673 final, 11 November 2003, p. 5.

¹⁶ Commission (EC), Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Towards a Space Strategy for the European Union that Benefits its Citizens' COM (2011) 152, 4 April 2011, p. 2.

¹⁷ Commission (EC), Communication to the Council and European Parliament 'Europe and Space: Turning to a new chapter', COM (2000) 597 final, 27 September 2000, p.2.

¹⁸ European Economic and Social Committee, 'Opinion on the Communication from the Commission to the Council and the European Parliament: European Space Policy', COM (2007) 212 final, 13 February 2008, para. 2.4.

Once considered the relevance of space activities in the political, economic and societal realm, it is relatively easier to understand why EC/EU institutions involved actively in the efforts to institutionalise space activities within Europe. At the dawn of their development under the Community Treaties, they were channelled through the provisions on research and technological development (hereinafter, 'R&D'). For this reason, a brief introduction to their evolution is of utmost importance to better understand the background of Art. 189 TFEU.

The Treaty of Rome that established the European Economic Community (TEC) in 1957¹⁹ was aimed at creating a common market and a customs union, hence the only provision that mentioned research was Art. 41 and only in connection with the common agricultural policy. At the time when there was no explicit provision on R&D, the legal basis for the adoption of research programmes by the Council upon the initiative of the Commission was Art. 235 TEC (implicit powers).

The first innovative change in the field of R&D was the Single European Act (SEA) that entered in force on 1 July 1987,²⁰ one year before the first Communication of the Commission on space affairs. The SEA introduced a whole title on R&D into the TEC, whereby the Community became bound to implement R&D programmes, promote cooperation in that field, disseminate and optimise the results of activities related thereto and stimulate training and mobility of researchers (Art. 130 g). The legal basis for the functions vested on the Commission to coordinate activities between the Community and Member States was enshrined in Art. 130 h) TEC.

The title on R&D was amended by the Maastricht Treaty, that came in force on 1 November 1993.²¹ The new Art. 130 h) TEC became very clear as to the competence of the Commission to coordinate Community and Member States R&D activities with the aim to ensure consistency. While the multiannual framework programme (Art. 130i.1 TEC) would be adopted by co-decision of the Parliament and the Council (the latter acting unanimously) the specific programmes would be agreed by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee (Art. 130i.4 TEC). In addition, a

¹⁹ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

²⁰ Single European Act, 1987 O.J. L 169/1 (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

²¹ Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1.

new Art. 130 p) imposed the obligation to the Commission to send an annual report to the Parliament and to the Council including information on R&D activities and disseminating the results obtained during the previous year and information on the work programme for the current year.

The Amsterdam Treaty entered in force on 1 May 1999.²² It slightly modified once again the method for adoption of the multiannual framework programme: it would continue to be adopted by co-decision but the Council would act now by qualified majority and not by unanimity (Art. 166.1 TEC). The implementation of that programme would follow also this procedure (different to the previous method of cooperation). This treaty kept in Art. 170 TEC the consultation process referred to in Art. 300 TEC for international agreements on cooperation, whereby the Commission conducted negotiations and the Council concluded the agreements after consulting the Parliament.

Finally, the Lisbon Treaty entered in force on 1 December 2009 and renamed the TEC Treaty on the Functioning of the European Union (TFEU).²³ This instrument clarified the competences of the EU and included R&D and space within the shared competences described in Art. 4.3 TFEU. It also incorporated the notion of ‘European research area’ in Art. 179.1 TFEU and renamed the co-decision procedure ‘ordinary legislative procedure’ (Art. 294 TFEU). An important change was the one concerning the international agreements on cooperation (Art. 186 TFEU): the Lisbon Treaty replaced the consultation process by the consent method established in Art. 218 TFEU.

Be noted that a detailed consideration will be given in Chapter II below to the provision incorporated by the Lisbon Treaty that explicitly incorporated space within the competences of the EU (Art. 189 TFEU), the cornerstone of this thesis.

The evolution of the provisions of the European treaties on R&D demonstrate that the Commission has played a vital role in this field: first as initiator of R&D programmes under the framework of the TEC and based on its implicit powers. In the SEA, the Commission was tasked with the coordination of the Community and Member States programmes and its competences were further expanded by the Maastricht Treaty that allowed it to submit proposals for programmes to the Council and to report to

²² Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.

²³ Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.

the Parliament. The Commission was also empowered to conduct negotiations for agreements on international cooperation both in the Amsterdam Treaty (Art. 228) and in the TFEU (Art. 186). As a consequence of these competences, the role that this European body will play in shaping the ESP will be more than significant.

1.2.2. The role of the Parliament:

Although the Commission played an active role -as previously explained-, the Parliament also contributed considerably to the development of the European space activities, primarily due to its ability to use its budgetary powers and by making its opinion known to the Council under the consultation procedure in space matters.

The co-decision procedure introduced by the Maastricht Treaty endowed the Parliament with stronger powers and a greater capacity to influence due to the fact that the Parliament could then insist on amendments to a proposal made by the Commission and, if no agreement between them was reached and if the conciliation committee could not settle the disagreement, the proposal failed.

Sigalas²⁴ considered that the Parliament became involved into space through a number of Commission reports and communications such as the communication entitled ‘The Community and space: a coherent approach’.²⁵ However, it must be underscored that the Parliament had a fundamental role that preceded the initiatives of the Commission, a role that was based on the development of an overall Community policy for science and technology.

Indeed, the Parliament was the first to stress the importance of the benefits that the Community could derive from space in the short term.²⁶ Furthermore, it clearly expressed that Europe could not depend on outside sources to meet its own needs²⁷ and considered that the Community could expect to play a decisive role in space only by drawing up a space policy with long-term objectives.²⁸

²⁴ Emmanuel Sigalas, ‘The role of the European Parliament in the development of a European Union space policy’ (2012) 28 Space Policy 110, 112.

²⁵ COM (88) 417 final, *supra* note 8.

²⁶ European Parliament (EC), OJ C 127, *supra* note 11, para. 1.

²⁷ *Ibid.*, para. 3

²⁸ *Ibid.*, para. 5

In line with these premises, the Parliament asked the Commission to consider space research activities by establishing relations with ESA and urged the former to assist the latter in drawing up a comprehensive programme.²⁹ This reveals the real motorising function that the Parliament had in the late 80's.

In 1981, the Parliament reiterated the need to develop a space policy and called upon to take into account the needs of developing countries,³⁰ a new element introduced in the concept of international cooperation developed until that moment. In that opportunity, the Parliament urged the Council to call as soon as possible a European Space Conference at ministerial level to formulate and implement programmes to achieve the space ambitions.³¹ It finally set very clear deadlines to the Commission: six months to submit proposals for a more encompassing space policy to be formulated by ESA³² and to report within a year on the course of action that the Community should take in the space field.³³

A step further was given by the Parliament in 1987 (preceding the already referred 1988 Communication of the Commission) when it introduced very important elements that would determine the European involvement in space activities: it recognised ESA as the principal instrument of the European cooperation.³⁴ In addition, it identified three guiding principles of space policy, namely, the peaceful purposes (and not *exclusively* peaceful purposes) of space activities, the expectation of benefit and the international cooperation.³⁵ Finally, it requested measures for ensuring capacity-building in the space field.³⁶

An additional issue that the Parliament addressed in that occasion was the relationship between ESA and the Community: it then proposed the membership of ESA in the European Community and

²⁹ Ibid., pp. 6 and 7.

³⁰ European Parliament (EC), Resolution on Community participation in space research, OJ C 102, 12 October 1981, para. 3.

³¹ Ibid., para. 5.

³² Ibid., para. 8.

³³ Ibid., para. 9.

³⁴ European Parliament (EC), OJ C 190, *supra* note 11, para. 3.

³⁵ Ibid., para. 5.

³⁶ Ibid., para. 6.

requested the Commission and the Council to prepare the appropriate negotiations to pave the way in that direction.³⁷ This position will be maintained by this European institution throughout the years.³⁸

As already demonstrated, these first steps given by the Parliament were decisive to activate the Commission and to trigger the institutional mechanisms to strengthen the cooperation with ESA to develop a coherent ESP. Although the Parliament envisaged already in 1979 a solution for the problem of the space governance, this is an issue that remains problematic until nowadays and that probably represents the reason for the shortcomings in the European space policy. The discussion around governance issues will be further developed in Chapter II.2.

1.3. The links between EC/EU institutions and ESA:

In the 1988 communication to the Council entitled ‘The Community and Space: a coherent approach’, the Commission enhanced the need to put democratic legitimacy behind the ambitious programmes designed by ESA and expressed that the links with it should be strengthened.³⁹ Having acknowledged the expertise of ESA in the field, the Commission made clear that the Community should ensure consistency and complementarity with ESA and other international organizations (such as EUTELSAT, EUMETSAT, etc.) and respect for each one’s competences.⁴⁰

The Commission clarified that the principle of complementarity implies that the EU should not substitute ESA in formulating the ESP but should contribute to the full development of it.⁴¹ References to the complementary relations between the EU and ESA may be found in several European EC/EU’s

³⁷ Ibid., para. 15.

³⁸ European Parliament (EC), Report on the Commission communication to the Council and the European Parliament on Europe and Space: Turning to a new chapter (COM (2000)597 - C5-0146/2001 - 2001/2072(COS)), 6 December 2001, para. 18.

³⁹ Commission (EC), Communication ‘The Community and Space: a Coherent Approach’, COM (88) 417 final, 26 July 1988.

⁴⁰ Ibid. p. 4. The need for complementarity between the Community and ESA will be mentioned in most of the future Communications.

⁴¹ Commission (EC), Communication to the Council and the European Parliament ‘The European Union and Space: fostering applications, markets and industrial competitiveness’, COM (96) 617 final, 4 December 1996, p. 1.

documents, expressed in terms of the ‘need to strengthen synergies’;⁴² ‘mutually reinforcing strengths’,⁴³ ‘need for formal links’⁴⁴ and ‘close and effective cooperation’.⁴⁵

The practical foundation of this complementarity is, on the one hand, the need to avoid duplication of efforts and, on the other, the need to divide and strengthen the respective roles (ESA has a long standing technological expertise and the EU is able to add the policy element) and responsibilities of each organization (ESA is in particular responsible for elaborating and implementing a long-term ESP, activities and programmes in the space field and the industrial policy appropriate to each programme, while the EU has competences in legal, economic and social fields which affect the regulation of space-related markets).

Mazurelle, Wouters and Thiebaut⁴⁶ contend that ESA’s technical nature has adversely affected its policy-making abilities: it is not politically-responsive because it has no formal political link with the European society as a whole. The EU system, to the contrary, through its institutions and organs, has a clear substantial connection to the European society itself. They conclude, therefore, that the EU is more suitable to provide Europe with an ESP.

1.3.1. First joint milestones:

The need to better coordinate the roles and responsibilities of the Community and ESA became urgent and this time again the Parliament took the lead and called on the Commission to work on the formation a European Space Council (ESC) in 1994.⁴⁷ Four years later, the Parliament renewed this recommendation in a resolution of 1998.⁴⁸ However, the setup of the ESC had to wait a decade after

⁴² Council (EC), ‘Resolution on the reinforcement of the synergy between the European Space Agency and the European Community’. OJ C 224, 22 June 1998.

⁴³ Council (EC), ‘Decision on the Signing of the Framework Agreement between the European Community and the European Space Agency’, 12858/03, 7 October 2003, preamble.

⁴⁴ COM (2000) 597 final, *supra* note 17, at. 5.1.

⁴⁵ European Parliament (EC), 2001/2072(COS)), *supra* note 38, at 5.

⁴⁶ Florent Mazurelle, Jan Wouters and Walter Thiebaut, ‘The evolution of European Space Governance: Policy, Legal and institutional implications’, (2009) Working Paper No 25 of the Leuven Centre for Global Governance Studies. Available online at: <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp135e.pdf> (last accessed on 12 August 2017).

⁴⁷ European Parliament (EC), ‘Resolution on the European Community and space’, OJ C 205, 25 July 1994, para. 9.

⁴⁸ European Parliament (EC), ‘Resolution on the European Union and space’, OJ C 34, 2 February 1998, para. 15.

the first call of the Parliament, when the 2004 Framework Agreement entered in force (see below 1.3.2.1).

In line with the 1998 Parliament resolution, both the Council of the European Union (Council of Ministers) and the ESA Council (representatives of Member States) adopted respectively a resolution on the reinforcement of synergy between ESA and the European Community.⁴⁹

The year 2000 became an important milestone in the consolidation of the relationship between the EC and ESA: both organizations presented a joint document on a European Space Strategy (ESS) which outlined the three main objectives of their joint work: (1) to strengthen the foundation for space activities in Europe, (2) to enhance scientific knowledge for a better understanding of our planet, the solar system and the Universe and (3) to reap the benefits for markets and society through exploitation of technical space capabilities.⁵⁰

According to the Communication of the Commission that contained this joint document, the ESS was not intended to be a detailed roadmap of space activities but rather a tool to provide a strong political support for public and private stakeholders to act in the space field.⁵¹ Furthermore, the Commission announced that a joint task force would be set up in order to enable a new operational phase of the cooperative work with ESA.⁵²

The Council called on the Commission to set up by the end of 2000 a Joint Task Force (JTF) involving the Commission and the ESA Executive.⁵³ However, it was not established until 1 March 2001 with the mandate to monitor the implementation of the ESS, to propose a framework enabling ESA to act as the implementing agency with respect to EU policy on space and to prepare a report on European space activities for submission to the EU and ESA Councils and the European Parliament by the end

⁴⁹ Council (EC), 'Resolution on the reinforcement of the synergy between the European Space Agency and the European Community', OJ C 224, of 22 June 1998, pp.1-2. ESA Council resolution on immediate measures and preparatory steps towards the Council meeting at ministerial level related to the agency's new programmes and its evolution, ESA/C/CXXXVI/Res.1, 24 June 1998.

⁵⁰ COM (2000)597, *supra* note 17, p. 2.

⁵¹ *Ibid.*, p. 3

⁵² *Ibid.*, p. 4.

⁵³ Council (EC), 'Resolution on a European Space Policy', OJ C 371, 16 November 2000, para. 10.

of 2001. The JTF was assisted by the Joint Space Strategy Advisory Group (JSSAG) and both were in place until the adoption of the 2004 Framework Agreement.

At the end of that year, the Commission released the first JTF report attached to a communication, indicating that the future ESP should be integrated by the ESS, a European Space Programme and a set of implementing rules.⁵⁴ In this report, the JTF set very concise short- (up to 2002), middle- (up to 2003) and long-term (beyond 2003) objectives. In the short term a framework agreement should be drafted to take forward the development of the future ESP where ESA would be the ‘implementing agency’ and the ESC should hold the first meeting. The presentation of the ESP to the European Council (Heads of State or Government) would be a middle-term objective, and amendments to the EC and ESA treaties should be considered in the long-term.⁵⁵

To reach those aims, the Commission and ESA prepared the Green Paper in January 2003,⁵⁶ a document that put forward questions regarding the management of space activities and established the beginning of a period of consultations until the end of May. All these preparations would pave the way towards the White Paper, a document that would propose an extended ESP (driven by demand to support EU policies) and a course of action for its implementation.⁵⁷ In the first phase of implementation of the ESP, the activities under the 2004 Framework Agreement would be executed. The second one would be marked by the Constitutional Treaty, establishing space as a competence shared by the EU and its Member States. In addition, ESA would come into the EU structure and the ESA Convention would be modified accordingly.⁵⁸ In addition, according to the White Paper the EU should take up the responsibility for defining and representing the external dimension of the European space programme.⁵⁹

⁵⁴ COM (2001) 718, *supra* note 14, p. 22.

⁵⁵ *Ibid.*, pp. 23-24.

⁵⁶ Commission (EC), ‘European space policy’, COM (2003) 17, 21 January 2003.

⁵⁷ COM (2003) 673 final, *supra* note 15.

⁵⁸ *Ibid.*, p. 37.

⁵⁹ *Ibid.*, p. 21.

1.3.2. The crystallisation of the cooperation with ESA:

The previous section has briefly accounted for the developments that preceded the 2004 Framework Agreement. It took a decade to make the necessary arrangements for the design of a ESP. It is worth noting that the 2004 Framework Agreement was framed within the powers of the Community under the R&D title (Art. 170 TEC) and was concluded by the Council,⁶⁰ acting by qualified majority on a proposal from the Commission (Art. 300 TEC).

1.3.2.1. The 2004 Framework agreement:

The 2004 Framework Agreement signed by the European Community and ESA was a milestone in the institutionalisation of their mutual cooperation towards a coherent ESP. It would serve the purposes of addressing the problems derived from the fragmentation of space actors. This still remains a shortcoming due to the fact that the diversity of stakeholders (the Member States via their space agencies, the ESA, EUMETSAT and the EU) makes difficult the effective decision-making or implementation.⁶¹

The preamble of the 2004 Framework Agreement deserves two comments: firstly, it enhances the role that space has as a tool to contribute to the European cohesion and economic growth and its cross-sectorial influence (as was already described in section 1.2 above). Secondly, it reiterates the complementarity and mutually reinforcing relations between the Community and ESA (as highlighted in section 1.3 above).

This relatively short instrument (only twelve clauses) finally established the Space Council as the regular joint and concomitant meetings of the Council of the EU and the Council of ESA at ministerial level. The ESC was entrusted with the coordination and facilitation of the cooperative activities and would be assisted by the Secretariat (which replaced the JTF), composed of officials of the Commission and of the ESA executive (hereinafter, ‘EC-ESA Secretariat’). The Secretariat had to

⁶⁰ Council Decision (EC) 2004/578 on the conclusion of the Framework Agreement between the European Community and the European space agency’, OJ L 261, 6 August 2004.

⁶¹ Commission (EC), Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions ‘Towards a Space Strategy for the European Union that Benefits its Citizens’ COM (2011) 152, 4 April 2011.

consult a High-Level Space Group (that replaced JSSAG), composed of representatives of the EC and ESA.

Of particular relevance is the fact that the 2004 Framework Agreement expressly excluded in its Art. 5.3 the application of the rule of 'geographical distribution' of the ESA Convention. Although this instrument was envisaged to remain in force for four years from the date of its entry in force on 28 May 2008, it has been systematically extended until nowadays due to its automatic clause.

The Space Council meetings have played an important role in the progressive development of the 2007 ESP, which -as already explained- should contain the ESS, a European Space Programme, a commitment of the roles and responsibilities of the main contributors and the key principles of implementation (in line with the conclusions of the first report of the JTF from 2001). The result of the discussions in these meetings will lay the foundations of the future ESP.⁶²

1.3.2.2. The European Space Policy (2007):

Based on the orientations of the first Space Council meeting in 2004 and after having exchanged views with the High-Level Space Group, the EC-ESA Secretariat produced a document⁶³ with preliminary elements for the future ESP, that would be submitted to the third Space Council meeting.

Two years later, the Commission materialized the ESP in the Communication (2007) 212,⁶⁴ a document jointly produced with the Director General of ESA, containing the elements that had been present in most of the previous space-related documents (the strategic value of space, the European programmes, science and technology, access to space, industrial policy, security and defence, governance and international relations).

In 2007, the Council passed a resolution welcoming and supporting the document on the ESP and invited the Commission and the ESA Director General to propose an implementation plan for it. This

⁶² Council (EC), Press Release of the 2665th Council meeting, 9501/05, 6-7 June 2005, pp. 15-19.

⁶³ Commission (EC), Communication to the Council and the European Parliament 'European Space Policy - Preliminary Elements', COM (2005) 208 final, Brussels, 23 May 2005.

⁶⁴ Commission (EC), Communication to the Council and the European Parliament 'European space policy', COM (2007) 212, 26 April 2007.

resolution contained surprisingly two very innovative elements in the preamble: first, there was a strong commitment to the Outer Space Treaty (OST) principles, however, it mentioned a modified version of the principles enshrined in that instrument. Indeed, a reference was made to the ‘use of outer space for *exclusively* peaceful purposes’ (it is worth recalling that the word ‘*exclusively*’ is only present in the ESA Convention and not in the OST). Second, there was an express support to the work of COPUOS,⁶⁵ the UN body with a specific mandate on space affairs.

The Commission dealt with the implementation of the ESP in a working document from 2008,⁶⁶ which includes an annex with elements for a European Strategy for International Relations in Space. That section presents a detailed mechanism for coordination of the European position in the multilateral fora, an aspect that will be further addressed in Chapter IV.

2. CHAPTER II: European space activities after Art. 189 TFEU

2.1. The text of Art. 189 TFEU

The Lisbon Treaty brought about some changes to the European law of particular impact in the space field. The most relevant for this thesis is the introduction of the ‘space clause’ in its Art. 172a, whose text is reproduced in Art. 189 TFEU (the Lisbon Treaty named the TEC Treaty on the Functioning of the European Union, TFEU). In addition, the Lisbon Treaty merged the ‘three pillars’ construction in one single EU, which succeeded the European Community in its relations with ESA, including those emanating from the 2004 Framework Agreement and the other legal instruments regulating the cooperation between ESA and EC.

As outlined in the previous chapter, it is important to recall that before the space clause the EC/EU institutions involved in space activities under the framework of the R&D title, which did not contain

⁶⁵ Council (EC), ‘Resolution on the European Space Policy’, 10037/07, Brussels 25 May 2007, preamble.

⁶⁶ Commission (EC), Working Document ‘European space policy progress report’, COM (2008) 561, 11 September 2008.

any expressed reference to the space competences. Therefore, it becomes of utmost importance to elucidate the contribution of this clause to the European action in space matters.

The response is that Art. 189 TFEU has brought some novelty to the European law due to the fact that it incorporated *explicitly* the elaboration of a ESP and the adoption of European laws in the form of a European Space Programme among the functions of the EU. In other words, it created a specific legal basis for the action of the EU in space matters and reinforced the EU's legitimacy and political leadership in space policy-making.

Sigalas has considered that Art. 189 TFEU has brought about a 'partial supranationalisation' of the space policy because the space clause involved the EU in this field without antagonising or displacing existing national space policies.⁶⁷

2.1.1. The Art. 189 TFEU and Art. III-254 of the Constitutional Treaty:

Although Art. 189 TFEU brought some novelty to the European law as mentioned before, it should be underscored here that the Lisbon Treaty was not the first attempt to give space activities a specific legal basis in the EU Treaties. To the contrary, Art. 172a of the Lisbon Treaty draws on Art. III-254 of the Constitutional Treaty, which never entered in force due to its rejection by the French and the Dutch in the respective referenda.

Art. III-254 was included in the Ninth Section (Research and Technological Development) of the Constitutional Treaty. Its text is reproduced below to facilitate the comparative analysis with Art. 189 TFEU:

1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.

⁶⁷ Emmanuel Sigalas, 'The role of the European Parliament in the development of a European Union space policy' (2012) 28 Space Policy 110, 111

2. To contribute to attaining the objectives referred to in paragraph 1, European laws or framework laws shall establish the necessary measures, which may take the form of a European space programme.

*3. The Union shall establish any appropriate relations with the European Space Agency.*⁶⁸

Upon the failure of the Constitutional Treaty, the wording of the space clause underwent some slight but relevant changes that reduced its scope, following to the mandate given by the European Council to the Intergovernmental Conference in June 2007.⁶⁹ Art. 172a of the Lisbon Treaty reads 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.

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.*⁷⁰

As a preliminary comment, the new text of the space clause kept the first and the third paragraphs of Art. III-254 of the Constitutional Treaty intact, introduced the wording ‘*excluding any harmonisation of the laws and regulations of the Member States*’ at the end of the second one (what hinders any possibility of a uniform space legislation within the EU) and added a fourth paragraph reading ‘*This Article shall be without prejudice to the other provisions of this Title*’.

⁶⁸ Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified).

⁶⁹ Presidency of the Council (EC), ‘Conclusions of the Brussels European Council (21-22 June 2007)’, 11177/07 REV.1, 23 June 2007, Annex 2, para. 19 o).

⁷⁰ Consolidated Version of the Treaty on the Functioning of the European Union art. 189, 2008 O.J. C 115/47.

For a deeper analysis of the space clause, it may be useful to resort to a document entitled ‘Space in the Lisbon Treaty’,⁷¹ issued by the European Space Agency Council. In particular, this document gives an insight into the main loopholes of the provision:

First, while the specific competence in the space domain under Art. 189 TFEU entails mainly actions of support to R&D, coordination and promotion, the Lisbon Treaty does not provide guidance on the definition of the appropriate instruments and mechanisms for future European space activities. Second, Art. 189 TFEU does not provide any indication on what the ‘necessary measures’ and the ‘European space programme’ invoked in its second paragraph are. And third, although the third paragraph conveys a clear message regarding the role of ESA as the EU’s interlocutor in space matters, it provides no elements to qualify what ‘appropriate relations’ with ESA imply. In any case, the acknowledgment of ESA’s role remains in line with the 2004 Framework Agreement and is therefore a sign of continuity.

Some similarities between Art. 189 TFEU and the ESA Convention could be pointed at here: Firstly, both the EU and ESA have the competence to elaborate (ESA) or draw up (EU) ‘a European space policy’. The utilisation of the indefinite article ‘a’ in both the TFEU and the ESA Convention leads to infer the possibility of coexistence of more than one policy, although it has not been the case so far.

Secondly, the objectives of promoting science and technological development are common to the EU and ESA. However, the distinctive feature in the ESA Convention is that such development shall be ‘for *exclusively* peaceful purposes’, a qualification that is absent in Art. 189 TFEU.

Thirdly, Art. 189 TFEU second paragraph foresees that the EU will establish a ‘European space programme’ while the ESA Convention foresees that the Agency’s purpose is pursued by ‘elaborating and implementing activities and programmes in the space field’.

The last paragraph of Art. 189 TFEU (not included in the draft Constitutional Treaty) implies that the limitations to the EU action in space activities should not be interpreted extensively applicable to the other EU competences in R&D.⁷²

⁷¹ European Space Agency Council, Information Document ‘Space in the Lisbon Treaty’, ESA/C (2008) 19 Paris, 6 March 2008.

⁷² Ibid.

An additional source of interpretation of Art. 189 TFEU was provided in December 2009 by the High-Level Space Policy Group (HLSPG)⁷³ in an information note.⁷⁴ According to that document, Art. 189 TFEU establishes an *obligation* to draw up a space policy (because the verb used is ‘shall’) and gives a clear mandate to the European Commission to exercise its right of initiative with a view to pursuing the goals of the European Space Policy.⁷⁵

The information note comments on every single paragraph of Art. 189 TFEU. With regard to the first one, it highlights the expressed mention to ‘joint initiatives’ as a sign of the importance that the Lisbon Treaty attaches to the collaboration and synergies in the field of space. In fact, it should be born in mind that cooperation is the underlying principle in the relations between ESA and the EU, what is materialized in the 2004 Framework Agreement.

Due to the fact that the first paragraph of Art. 189 TFEU refers to exploration and exploitation of space, the information note explains the difference between them: while the former reflects the goal of discovery, the latter covers space-based applications and services.⁷⁶

Some clarification is provided to the reference to ‘research’ in Art. 189 TFEU. In that regard, the document points at the specific title under which this provision is located: ‘research and technological development’. This is coherent with the EC/EU existing practice to deal with space matters within R&D competences. The particularity of this is that after the Lisbon Treaty, space received a differentiated treatment in a separate article. The interpretation given by the HLSPG is that space research might be conducted either within or outside the classic framework for research programmes.

The second paragraph of Art. 189 TFEU provides guidance as to which the institutions involved in the development of the European Space Programme are: the European Parliament and the Council which acting in accordance with the ordinary legislative procedure (defined in Art. 289 TFEU) shall establish the necessary measures. Although there is no indication as to which these measures are (this

⁷³ The Article 8 of the Framework Agreement signed in November 2003 between the EC and ESA established a High-Level Space Policy Group, co-chaired by the EC and ESA. It gathered high-level representatives of the EU and ESA Member States. Its objective is to reach a common understanding on the implementation of European Space Policy, in particular the preparation of the future European Space Programme.

⁷⁴ Commission (EU), Information Note ‘Article 189 of the Treaty on the Functioning of the EU’, High Level Space Policy Group, HSPG/22-2009, 1 December 2009.

⁷⁵ Ibid.

⁷⁶ Ibid.

is again one of the many gaps left open by Art. 189 TFEU), the HLSPG interpreted that although such wording is broad, it gives a clear indication of the possible scope of the European Space Programme and that the EU is not obliged to approach the legislator on every occasion but rather where the necessary measures so require.

As explained above, the phrase ‘excluding any harmonisation of the laws and regulations of the Member States’ is an element which was introduced in Art. 189 TFEU that was missing in the text of the Constitutional Treaty. It is worth mentioning that the TFEU contains a similar provision in numerous articles⁷⁷ so it should not be regarded as something exclusively reserved to space policies.

The comments on paragraph three do not add anything new to what had already been interpreted by the ESA Council, however, the HLSPG emphasized that this provision gives a mandate to the EU to establish appropriate relations with ESA without affecting the existing arrangements between them such as the 2004 Framework Agreement.⁷⁸

The interpretation of the last paragraph of Art. 189 TFEU differs somewhat from the understanding of the ESA Council. Indeed, the HLSPG considers that Article 189 TFEU cannot be in contradiction to or prevail over other provisions in the same title of the treaty and points out that this fact confirms that some of the other provisions under the title do apply. As an example, it indicates that Art. 189 TFEU does not affect Art. 181, which provides that the EU and the Member States shall coordinate their R&D activities to ensure that national and EU policies are mutually consistent and applicable to space.⁷⁹

As a final note, the HLSPG concludes that this provision should be interpreted as providing the possibility to address space in the wider context of the Community’s general framework programmes for R&D, as a complement to those measures that might be implemented based on Art. 189 TFEU. This will be very useful for the EU to give a legal basis to space applications for defence and security purposes (this topic will be addressed in Section 2.3.2).

⁷⁷ Cf. Articles 19(2), 79(4), 84, 149, 153(2)a, 165(4), 166(4), 167(5), 168(5).

⁷⁸ Commission (EU), Information Note, *supra* note 74, p. 3.

⁷⁹ Ibid.

2.1.2. *The competences of the European Union:*

It is not possible to undertake a complete analysis of the space clause without making a brief reference to the discussion about its characterisation as a shared competence under the TFEU. It is worth recalling that before the Lisbon Treaty, the competences of the EU and those of the Member States were not clearly established in the European Treaties and its definition was a task developed by the European Court of Justice.

The Lisbon Treaty -based on the Constitutional Treaty - tried to shed some light on the matter in a two-fold manner: on the one hand, it included in Art. 2 TFEU definitions of the different types of competences (exclusive, shared and what has been labelled ‘supporting’ competences). On the other hand, it listed areas in which the EU would have exclusive competences (Art. 3 TFEU) and shared competences (Art. 4 TFEU). Space was incorporated in the third paragraph of the latter.

It is important to bear in mind that pursuant to Art. 2.2 TFEU when a competence is shared, ‘...*the EU and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*’. In addition, Protocol No 25 (on the exercise of shared competence) adds that ‘...*with reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area*’.⁸⁰

As already mentioned before, the novel element in Art. 189 TFEU is the exclusion of any harmonisation of the laws and regulations of Member States, which is a language present in Art. 2.5 TFEU that refers to the so called ‘supporting’ competences. This provision reads as follows:

⁸⁰ Protocol No 25 on the exercise of shared competence, OJ 2008/C 115/307.

In certain areas and under the conditions laid down in the Treaties, 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 in these areas.

*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.*** (emphasis added)

The last part of the sentence reproduces almost the same language added into Art. 189(2) TFEU, what brings about a confusion as to the categorisation of space as a shared or as a supporting competence: while the definition of exercise of the space competence in Art. 189(2) corresponds with the definition of supporting competences, Art. 4.3 TFEU included space as a shared competence.

Space had already been envisaged by the Commission in 1996 as a field in which the Community may only intervene if and to the extent that the aims of the proposed activity cannot be achieved more satisfactorily by the Member States.⁸¹ That definition corresponds to that of the principle of subsidiarity enshrined in Art. 5.3 TEU, a principle that applies when the competence is not exclusive (namely, when it is shared or supporting).

A better definition was provided by the Commission in the White Paper when it announced that the Constitutional Treaty would include space as a shared competence.⁸² In effect, the Constitutional Treaty did place space within the shared competences in Art. 1-14 but without any exclusion of harmonisation. The introduction of this exclusion in the Lisbon Treaty may be interpreted as a desire of the EU Member States to retain the control over their national space policies.

However, what is a shared competence in the space field? A document produced by the European Space Policy Institute (ESPI) in 2005 (before the definition provided in Art. 4.3 TFEU) answered this question in the following way: ‘Shared competences imply that space agencies consider program matters under the aegis of the EU, but without prejudice to purely national and bilateral activities that did not form part of the EU space policy’.⁸³ It further explained that the Commission should define

⁸¹ COM (96) 617 final, *supra* note 41.

⁸² Commission (EC), ‘European Governance: a White Paper’, COM (2001) 428, Brussels, 25 July 2001, p. 4.

⁸³ European Space Policy Institute, ‘A new paradigm for European Space Policy: a proposal’, Report 1, November 2005, pp. 26-27.

the regulatory framework under which space activities are conducted and be the custodian of any European space policy by guaranteeing a long-term (ten year) plan for funding beyond the normal annual budgetary round.⁸⁴

The already referred confusion has led to divergent opinions regarding the categorisation of the EU space competence. The ESA Council in the information document that interprets Art. 189 TFEU qualifies space as a shared competence.⁸⁵ To the contrary, some authors consider that the space competence could not be regarded as a real ‘shared competence’ as defined in the treaty and that it should be considered a ‘supporting or coordinating’ competence despite being defined as a shared competence in the TFEU.⁸⁶ A third view considers space a ‘parallel competence’, a *sui generis* category that applies to areas of research, technological development and space, where Member States cannot be prevented from exercising their competence even if the EU exercises its own competence as well.⁸⁷

For its part, the Commission has considered that the EU competence does not prevent Member States from exercising their own and that under Art. 189 TFEU, the EU has the mandate and the capacity to coordinate Member States’ actions and to make this complementarity more effective.⁸⁸ In a similar approach, Sigalas considered that Art. 189 TFEU supports joint and coordinated initiatives instead of own ones.⁸⁹

The main issue underlying the discussion on the qualification of the space competence is whether the EU has the power to legislate and to override national legislation in the space field. In this regard, there are also different views: Marchisio made clear that under the Lisbon Treaty, the EU has no

⁸⁴ Ibid.

⁸⁵ Commission (EU), Information Note, *supra* note 74, p. 4

⁸⁶ Julien Béclard, ‘The Lisbon Treaty and the Evolution of European Space Governance’, The Europe & Space Series, N°12, July 2013. Available online at: <https://www.ifri.org/en/publications/enotes/lisbon-treaty-and-evolution-european-space-governance#sthash.LuRhyTST.6dWqUTHL.dpbs> (last accessed on 12 August 2017); Florent Mazurelle, Jan Wouters and Walter Thiebaut, ‘The evolution of European Space Governance: Policy, Legal and institutional implications’, (2009) Working Paper No 25 of the Leuven Centre for Global Governance Studies, p. 26. Available online at: <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp135e.pdf> (last accessed on 12 August 2017)

⁸⁷ European Space Policy Institute, ‘The EU dual approach to Security and Space’, Report 45, August 2013, p. 38. Available online at: http://www.espi.or.at/images/stories/dokumente/studies/ESPI_report_45.pdf (last accessed on 12 August 2017).

⁸⁸ COM (2011) 152, *supra* note 61, p. 11.

⁸⁹ Emmanuel Sigalas, *supra* note 67, p. 111.

normative authority and has no power to harmonize national legislation in space matters. However, the EU may continue to harmonize under different legal grounds matters that have an indirect relevance to space activities, such as telecommunications.⁹⁰

For its part, Von der Dunk considers that the phrase '*the Union shall draw up a European space policy*' implies first the recognition that any further legislative initiatives at the EU level should not be dismissed off-hand and second, that individual Member States' initiatives should essentially fit in the broad framework of such a European policy.⁹¹ Moreover, he is of the opinion that by obtaining the competence to draft a ESP, the EU institutions have actually paved the way to truly legislative initiatives.⁹²

Beyond the diversity of opinions, there is one uncontested issue: States retain the control of their national space policies, however, they still have to remain under the umbrella of the applicable European law.

2.2. Governance issues:

The categorisation of the space competence is not the only controversial aspect when dealing with the space clause. An issue that is of particular relevance when dealing with the involvement of different actors in the same activity is the one relating to the governance. This issue is implied in Art. 189 TFEU, however, the shortcomings of the European space governance are not solved there.

Mazurelle, Wouters and Thiebaut -based on the definition of 'European Governance' made by the Commission⁹³- have defined 'European *space* governance' as 'the combination of the legal norms that emanate from international, European and national legal frameworks which, together, organise a coherent European decision-making process in both space policy and programmatic activities'.⁹⁴

⁹⁰ United Nations/Thailand Workshop on Space Law, 'Member States of the European Space Agency', 16-19 November 2010, Bangkok, Thailand, p. 7. Available online at: <http://www.unoosa.org/pdf/pres/2010/SLW2010/02-10b.pdf> (last accessed on 12 August 2017).

⁹¹ Frans G. von der Dunk, 'The EU Space Competence as per the Treaty of Lisbon: Sea of Change or Empty Shell?', *Proceedings of the International Institute of Space Law* (2011), p. 382. Available on at: <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1065&context=spacelaw> (last accessed on 12 August 2017).

⁹² Ibid.

⁹³ Commission (EC), 'European Governance: a White Paper', COM (2001) 428, Brussels, 25 July 2001, footnote 1.

⁹⁴ Florent Mazurelle, Jan Wouters and Walter Thiebaut, *supra* note 86, p. 8.

The problem of governance is not a novel one, nonetheless, the Lisbon Treaty does not ultimately provide additional clarification as to the structure of the European space governance and instead it merely notes that: '*the Union shall establish any appropriate relations with the ESA*'. After the Lisbon Treaty came in force, the Parliament stressed the need for clear governance in relation to space policy and called for EU relations with ESA and the national agencies to be redefined.⁹⁵

An important challenge in the development of an efficient European governance lies in the number of stakeholders involved in space activities (mainly the EU, ESA and the Member States) and in the diversity of their approaches, interests, capabilities and legal frameworks.⁹⁶ These asymmetries will be further addressed in the next section.

2.2.1. Asymmetries ESA-EU:

Although ESA-EU relations are based in a cooperative approach, they encounter certain difficulties due to the particularities of both international organisations. Indeed, there are a series of structural asymmetries in their relations that need to be addressed in order to improve and strengthen the cooperation between them. Upon the request made by the Parliament to redefine ESA-EU relations, the Commission issued a document entitled 'Establishing appropriate relations between the EU and the European Space Agency', where a series of obstacles in the bilateral relation were identified.⁹⁷

First, Member States are not the same in ESA and in the EU. At the present, twenty EU Member States are Members of ESA⁹⁸. ESA's members include Norway and Switzerland, which are not EU Members. Slovenia is an Associate Member. Canada has a bilateral cooperation agreement with ESA, like Bulgaria, Cyprus, Lithuania and Malta. Latvia and Slovakia are participating in the Plan for European Cooperating States (PECS). The only EU Member that has no connection with ESA is Croatia.

⁹⁵ European Parliament (EU), Resolution on a space strategy for the European Union that benefits its citizens, P7 TA (2012) 0013, 19 January 2012.

⁹⁶ Chritophe Venet, 'European Space Governance: the outlook', (2012) 28 Space Policy 59, 60.

⁹⁷ Commission (EU), Communication to the Council and the European Parliament 'Establishing appropriate relations between the EU and the European Space Agency', COM (2012) 671, 14 November 2012.

⁹⁸ Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, The Netherlands, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom (due to the application of Art. 50 TEU the United Kingdom will -in principle- formally leave the EU on 29 March 2019).

As the collaboration between the EU and ESA grows, this asymmetry combined with a voting system where each Member State has one vote in the ESA Council (Art. XI.6.a) and the key decisions within this body are adopted by unanimity gives ESA Members, which are not members of the EU (i.e. Norway and Switzerland), disproportionate leverage over matters that may affect the EU. This asymmetry complicates discussions particularly as regards security and defence.

In addition, the EU and ESA are represented at different levels (specialized ministries) and despite the coordination effort conducted at national level, this different setting does not facilitate the coherence of national positions.⁹⁹ Mazurelle, Wouters and Thiebaut add that ESA Members are generally represented by their research ministries rather than by more strategy-minded national policymakers and in any case the ministerial meetings in the Council take place every few years (Art. XI.2 of the ESA Convention).¹⁰⁰

Second, the EU and ESA have different rules for funding. ESA's largest programmes are funded primarily through Member States' subscriptions and ESA applies the *juste retour* rule enshrined in the ESA Convention.¹⁰¹ '*Juste retour*', 'fair return' or 'georeturn' consists in proportioning the amount of industrial contracts to the level of participation of the contributing Member States. By its very nature, it is incompatible with the rules of open competition enshrined in the European primary and secondary legislation.¹⁰²

This is the reason why the 2004 Framework Agreement excluded in its Art. 5(3) the application of the geographical distribution contained in the ESA Convention. Indeed, for the implementation of the EU programmes ESA is obliged to follow the EU rules and the strict principle of best value embodied in the EU Financial Regulation.¹⁰³ This has given rise to difficulties, particularly whenever programmes are funded through mixed ESA and EU appropriations.

Third, Gaubert and Lebeau explain that the Space Council set up by the 2004 Framework Agreement adopts resolutions which assert a space policy in terms of principles and objectives but -they contend-

⁹⁹ Lucia Marta, 'National visions of European space governance: Elements for a new institutional architecture', (2013) 29 Space Policy 20, 22.

¹⁰⁰ Florent Mazurelle, Jan Wouters and Walter Thiebaut, *supra* note 86, p. 17.

¹⁰¹ Convention for the Establishment of a European Space Agency, Art. IV.

¹⁰² Florent Mazurelle, Jan Wouters and Walter Thiebaut, *supra* note 86, p. 30.

¹⁰³ Regulation (EC, Euratom) No 1605/2002, as amended by Regulation (EC, Euratom) No 1081/2010.

it has not real power over space projects because the EU does not have a dedicated budget line and because decisions about ESA's programme and budget are the exclusive responsibility of the ESA's Council of Ministers.¹⁰⁴ Everything lies, therefore, on the coherence of the positions taken by Member delegates in these two councils.

Fourth, the relations between the EU and ESA are affected by the asymmetry regarding political accountability. The fact that ESA has no formal link with the European Parliament deprives it of the direct link with citizens that any EU policy enjoys.¹⁰⁵ Similarly, in terms of financial accountability, the Commission is the institution responsible for the implementation of the budget under Article 317 TFEU, therefore, the Commission is fully accountable before the European Parliament and the Council for any delays or cost overruns incurred in the EU flagship programmes, while ESA operationally manages these programmes on its behalf through delegation agreements. As acknowledged by the Commission itself,¹⁰⁶ since the responsibility lies on her, this reduces the incentive for ESA to deliver the programmes on time. On co-funded programmes, the EU has had only limited impact on technical decisions made by ESA. If the initial phases of a space programme are funded by ESA only, it may be difficult for the Commission in later stages of the programme to ensure that EU funds are used to implement its policies.

The last incompatibility to be mentioned here is the reluctance of ESA to deal with security programmes due to the fact that its own Convention establishes that cooperation in space research and technology shall be *exclusively* for peaceful purposes (ESA Convention, Art. II). As already mentioned, Art. 189(1) TFEU explicitly refers to a European space policy that promotes, among other things, the implementation of EU policies. In addition, Art. 42 TEU has made Common Security and Defence Policy (CSDP) a EU policy as well as an integral part of the Common Foreign and Security Policy (CFSP), consequently, the EU shall also pursue security and defence through the ESP.

Despite all the asymmetries mentioned, there is an issue of utmost importance that needs to be once again highlighted and it is the complementarity of both organizations: while ESA is the technical body

¹⁰⁴ Alain Gaubert and André Lebeau, 'Reforming European space governance', (2009) 25 Space Policy 37, 43.

¹⁰⁵ COM (2012) 671, *supra* note 97, p. 4.

¹⁰⁶ Commission (EU), Report 'Progress report on establishing appropriate relations between the European Union and the European Space Agency (ESA)', COM (2014) 56 final, 6 December 2014, p. 5.

with the role of setting up space programmes and, together with the EU, the ESP, the EU remains the political body with policy powers.

2.2.2. Different options to the space governance:

Having outlined the asymmetries and difficulties in the relationship between the EU and ESA, the Commission advanced in its communication on the relations between them that it would start working on a study on possible options for a rapprochement of ESA towards the EU. Furthermore, it considered that such a target should be accomplished between 2020 and 2025.¹⁰⁷

The Council recognised that the 2004 Framework Agreement and its governance elements may, in its present form, no longer provide the most appropriate tool with which to ensure an efficient and effective ESP that fully utilises in a coherent manner the respective competencies of both the EU and ESA.¹⁰⁸

In 2013, the European Parliament called on the Commission to investigate very carefully whether ESA could, for instance, in the future be linked to the EU's governance structures as an inter-State organisation in case it is not deemed appropriate to convert ESA into a European agency.¹⁰⁹

In response to these requests, the Commission issued the 'Progress report on establishing appropriate relations between the European Union and the European Space Agency (ESA)'¹¹⁰ at the beginning of 2014, where it described the possible four options for the future relations between ESA and the EU:

Option one: The EU and ESA remain two separate entities without efficient mechanisms to ensure greater coherence or coordination. Programmes would be developed on the basis of specific agreements which would be negotiated phase-by-phase, making use of the general tools available in the EU financial regulations.

¹⁰⁷ Commission (EU), Communication to the Council and the European Parliament 'Establishing appropriate relations between the EU and the European Space Agency', COM (2012) 671, 14 November 2012.

¹⁰⁸ Council (EU), 'Conclusions on Establishing appropriate relations between the EU and the European Space Agency (ESA)', 6571/2013, 19 February 2013, para. 3.

¹⁰⁹ European Parliament (EU), 'Resolution on EU space industrial policy, releasing the potential for growth in the space sector', P7 TA-PROV (2013) 0534, 10 December 2013, para. 10 on institutional affairs.

¹¹⁰ COM (2014) 56 final, *supra* note 106, p. 5.

Option two: The EU and ESA remain two separate entities but the interface between them is adapted, based on amendments to the existing 2004 Framework Agreement. Coordination would be ensured through the development of a new framework agreement. This agreement would be adopted by the ESA Council and the EU Council with the consent of the European Parliament.

Option three: The ‘EU pillar’ would be ‘hosted’ within ESA but without affecting the functioning of the remaining departments of the intergovernmental ESA as it exists today. This option would necessitate a more in-depth analysis of the legal and institutional aspects, in particular, those regarding political accountability and discharge procedures. Finally, this approach would have to be implemented in full compliance with the applicable financial rules and, in particular, the budgetary principles enshrined in the Financial Regulation.

Option four: In this option ESA becomes an agency of the EU. This EU space agency would maintain certain structures to facilitate intergovernmental cooperation (i.e. optional programmes, different from the EU programmes, funded directly by Member States outside the EU budget). The agency would have an EU legal basis and would be governed according to the EU rules.

These options address the limitations in the current EU-ESA relations in different degrees of effectivity. Indeed, there is an inverse relation between options one and four in terms of effectiveness and feasibility: while option one is easy to implement, it does not address the difficulties in the relations. Although transforming ESA into an agency of the EU could be the most effective, that option is the most complex and the least feasible since it implies a heavy implementation process and requires political consensus which -to both the Commission¹¹¹ and the Council¹¹² - may be difficult to reach in the foreseeable future.

It is worth underscoring that none of these options envisages the possibility of the EU becoming a Member of ESA, what is besides not allowed by the ESA Convention (pursuant to Art. XXII, only States may accede the ESA Convention). However, this was considered by Hobe¹¹³ and by Von der

¹¹¹ Ibid., p. 8

¹¹² Council (EU) Press, ‘Conclusions towards a shared EU-ESA vision for space fostering competitiveness’, 26 May 2014, para. 8.

¹¹³ Stephan Hobe, ‘Prospects for a European space administration’, (2004) 20 Space Policy 25, 26.

Dunk¹¹⁴ as an option for the cooperation between the EU and ESA before the 2004 Framework Agreement, and by Hoerber¹¹⁵ almost in parallel with the Lisbon Treaty.

In December 2014, the Council invited the Commission to seek the emergence of a long-term vision shared by Member States and ESA to meet the long-term needs of the European users, particularly, in EU and national policies.¹¹⁶ This virtually led in October 2016 to a ESA-EU joint statement on the shared vision and goals for the future of Europe in space.¹¹⁷

The document mentions three goals: to maximize the integration of space into the European society and economy, to foster a globally competitive European space sector and to ensure European autonomy in accessing and using space in a safe and secure environment.¹¹⁸ To achieve these goals, the EU and ESA emphasized their intention to reinforce their cooperation in the future, as foreseen in the 2004 Framework Agreement and to further develop it, taking into particular account Art. 189 TFEU and Art. 2 and 5 of the ESA Convention.¹¹⁹

Building on this joint statement, it is possible to conclude that there was no agreement on revolutionary changes in the relations between the EU and ESA, probably as a result of the different views of the European space-faring nations. To better understand the stalemate in the governance issues it is useful to understand what the positions of France, Germany, the United Kingdom and Italy are.

Marta¹²⁰ explains that while France favours the integration of ESA into the EU, partially or totally, Germany considers ESA as the main pillar of action in Europe for space policy and ponders space cooperation and governmental space strategy as the second pillar. She considers that this different

¹¹⁴ Von der Dunk, 'Towards one captain on the European spaceship -why the EU should join ESA?', (2003) 19 Space Policy 83, 86.

¹¹⁵ Thomas Hoerber, 'ESA+EU: Ideology or pragmatic task sharing?', (2009) 25 Space Policy 206, 208.

¹¹⁶ Council (EU) Press, 'Underpinning the European space renaissance: orientations and future challenges Competitiveness Council meeting', 5 December 2014.

¹¹⁷ Joint Statement on shared vision and goals for the future of Europe in space by the EU and ESA, 26 October 2016. Available online at: http://www.esa.int/About_Us/Welcome_to_ESA/Joint_statement_on_shared_vision_and_goals_for_the_future_of_Europe_in_space_by_the_EU_and_ESA (last accessed on 12 August 2017).

¹¹⁸ Council (EU), Authorization to the Commission to sign the "Joint Statement on Shared Vision and Goals for the Future of Europe in Space by the European Union and the European Space Agency, 12808/1/16 REV 1, Brussels 11 October 2016, para. 4.

¹¹⁹ Ibid., para. 5.

¹²⁰ Lucia Marta, *supra* note 99, 23-25.

approach lies on the fact that Germany emphasises the scientific and technological aspects of space activities, while France has a more politically and strategically oriented approach.

With regard to Italy, she describes its position as a middle ground between the German and the French positions: although it defends ESA's central role, it advocates a stronger political role for the EU. Although Marta's publication was written before the Brexit, it suggests that the United Kingdom already at that time (2013) was not interested in investing efforts in the EU management of space programmes and preferred to increase investment in the ESA projects.

Once the United Kingdom leaves the EU, the asymmetries already mentioned regarding membership in the EU and ESA will be intensified, with the particularity that the United Kingdom is an important space player. However, this fact might contribute to rebalance the differences between France, Germany and Italy and facilitate an agreement on the space governance issues.

2.3. Complementing the European Space Policy:

2.3.1. The European Space Strategy (2016):

As already explained, the idea of the need to develop a space strategy is nothing novel, however, it became even more urgent after Art. 189 TFEU strengthened the political dimension of space in Europe. In line with this purpose, the Council passed the resolution 'Global challenges: taking full benefit of European systems', reflecting the orientations endorsed by the Space Council in 2010.¹²¹

In that resolution, the Council invited the EU, ESA and their Member States to further develop, together, an overall space strategy in order to a) enable new economic growth and job creation in Europe, foster the innovation potential and support world class scientific progress; b) respond to public policy objectives and user needs at regional, national and European level and c) contribute to the development of scientific and technical vocations in Europe.¹²²

¹²¹ Council (EU), Resolution 'Global challenges: taking full benefit of European space systems', 16864/10, 26 November 2010.

¹²² Ibid., para. 1.

A new step in this direction was given in 2011 with the Communication ‘Towards a space strategy for the European Union that benefits its citizens’¹²³ where the Commission identified the European priorities: the implementation of the flagship programmes (see Chapter III), security and space exploration. The Council¹²⁴ and the Parliament¹²⁵ welcomed the communication and both made further recommendations.

In its work programme of 2016 the only reference the Commission made relating to space matters was that it would present a strategy for releasing the full benefits of the European space programmes such as GALILEO and COPERNICUS for the European economy and citizens.¹²⁶

More detailed was the Roadmap for a Space Strategy for Europe, where the Commission explained the reasons why a space strategy was necessary and important, namely, that it would provide the overall strategic vision for the Union's activities in space it would ensure a proper coordination and complementarity with the activities pursued by Member States and ESA.¹²⁷

The European Space Strategy was finally adopted in October 2016 by the Commission.¹²⁸ Building on Art. 189 TFEU, four strategic goals were proposed: 1) maximising the benefits of space for society and the EU economy; 2) fostering a globally competitive and innovative European space sector; 3) reinforcing Europe’s autonomy in accessing and using space in a secure and safe environment and 4) strengthening Europe’s role as a global actor and promoting international cooperation.

With regard to the first one, the Commission’s aim was to optimise the benefits that space brings to society and the wider EU economy. The Commission was therefore focused on strengthening the dissemination of Earth observation data generated by COPERNICUS. This goal recognises that space

¹²³ Council (EU), Conclusions on 'Towards a space strategy for the European Union that benefits its citizens', 10901/11, 31 May 2011.

¹²⁴ Council (EU), Conclusions on ‘Towards a space strategy for the European Union that benefits its citizens’, 10901, Brussels 31 May 2011.

¹²⁵ European Parliament (EU), P7 TA (2012) 0013, *supra* note 95.

¹²⁶ Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Commission Work Programme 2016’, COM (2015) 610 final, 27 October 2015, p. 8.

¹²⁷ Commission (EU), ‘Roadmap for the Space strategy for Europe, December 2015. Available online at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_grow_007_cwp_european_space_strategy_en.pdf (last accessed on 12 August 2017).

¹²⁸ Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, Space Strategy for Europe, COM (2016) 705 final, 26 October 2016.

and satellite communications can play an important role in the connectivity for Europe's digital society and economy. The Commission also emphasised that the private sector would only use and invest in space solutions if users and businesses are confident that services and data provided by COPERNICUS, EGNOS and GALILEO would continue in the future. For this reason, the Commission confirmed its commitment to provide stability to the EU space programmes.

For the second objective, the Commission committed itself to support R&D and ensure competitiveness in the industry chain.

The third objective is aimed at ensuring freedom of action and autonomy. The Commission acknowledged that there is a need to have access to space and to use it safely. In addition, it stressed that European satellite systems and operators must be ensured access to spectrum that is protected from interference from other systems.

Within the fourth objective, the Commission will work alongside the High Representative and Member States in promoting international principles of responsible behaviour in outer space in the framework of the United Nations and other appropriate multilateral fora and will strengthen its bilateral and multilateral space policy dialogues pursued closely with Member States.

2.3.2. *Defence and Security issues:*

The space clause has no express reference to defence and security matters, however, it has already been explained above that Art. 189(1) provides that the EU shall draw and ESP to implement its policies, and one of them is the policy dealing with defence and security (CFSP). On the other hand, it is important to recall that the mandate of ESA is for *exclusively* peaceful purposes, what excludes military uses of space.

Civil and defence aspects of space are interlinked in most space-faring nations outside Europe but in Europe they have always been dealt with on a national basis.¹²⁹ This situation was already identified in 1996 by the Commission in its communication 'The EU and space: fostering applications, markets and industrial competitiveness,' where it devoted a chapter to defence and dual use of space

¹²⁹ COM (88) 417 final, *supra* note 8.

technologies and called upon the EU, Member States, the WEU¹³⁰ and ESA to adopt a coordinated approach towards dual use of space technologies.¹³¹

In 2000, the Commission acknowledged again that space has a security dimension, which has only been dealt with within the WEU, and announced that the steps taken at the European Summit in Helsinki towards the development of the European Security and Defence Policy (ESDP) were prompting the EU to take space capabilities into account, for instance, in monitoring the Petersberg tasks.¹³²

In the same year, the Council passed a resolution in which requested the Commission to set up a joint high level task force and recommended that the ESDP should be taken into account in its work.¹³³ The report of this task force concluded that ESA's activities should be extended to programmes related to the development of a Common Foreign and Security Policy.¹³⁴

A further step in this direction was given by the Council in 2001 when it established the European Union Satellite Centre (EUSC) under the supervision of the Political and Security Committee (PSC). Its mission is to support the decision-making of the EU in the field of the CFSP, including EU crisis management operations, by providing, as appropriate, products resulting from the analysis of satellite imagery and collateral data, including aerial imagery and related services.¹³⁵

The Council recognized the need to consider the security dimension in space matters again in 2003.¹³⁶ Moreover, the already mentioned White Paper for the ESP devoted chapter 3.4 to 'Space as a contribution to the CFSP, the ESDP and to the anticipation and monitoring of humanitarian crises'¹³⁷

¹³⁰ WEU is an international organization created by the Treaty of Brussels in 1954, whose tasks and institutions were gradually absorbed by the ESDP.

¹³¹ COM (96) 617 final, *supra* note 41, chapter 9.

¹³² COM (2000) 597 final, *supra* note 17, p.2.

¹³³ Council (EC), 'Resolution on a European space strategy', OJ C 371, 14 December 2000, para. 11.

¹³⁴ European Commission and European Space Agency Joint Task Force, Report 'Towards a European Space Policy', COM(2001) 718, 7 December 2001, p. 31.

¹³⁵ Council joint action of 20 July 2001 on the establishment of a European Union Satellite Centre amended by Joint Action 2006/998/CFSP, Joint Action 2009/834/CFSP and Council Decision 2011/297/CFSP, OJ L 136, 24 May 2011, Art. 1, 2 and 3.

¹³⁶ Council (EC) 12858/03, *supra* note 43, para. 3.

¹³⁷ Commission (EC), 'European Governance: a White Paper', COM (2001) 428, Brussels, 25 July 2001, pp. 19-20.

and the 2016 Space Strategy also devoted a section to reinforcing synergies between civil and security space activities.¹³⁸

Other European institutions also echoed this need: the European Economic and Social Committee gave an opinion on the ESP and concluded that a European space policy should aim at peaceful objectives, including safeguarding collective security;¹³⁹ the European Parliament noted the inclusion of a legal basis for the European Space Policy in the Lisbon Treaty.¹⁴⁰ In another resolution, it called on the Council and the Commission to encourage synergies between civilian and security developments in the field of space and pointed out that the European security and defence capabilities depend among other things on the availability of satellite-based systems and that access to these is crucial for the EU.¹⁴¹

Short before the entry in force of the Lisbon Treaty, the President of the Commission, Durão Barroso, expressed in the European Conference on Space Policy in 2009 that Europe needs ‘more security *in* space and *from* space’.¹⁴² The entry in force of the Lisbon Treaty provided in Art. 189 TFEU the legal basis for space activities in the field of defence and security. Indeed, as already mentioned above, Art. 42 TEU affirms that the CSDP ‘shall provide the Union with an operational capacity drawing on civilian and military assets’. Since space has to contribute to the implementation of all EU policy, this means that the EU space programmes will be also provide a tool for the implementation of security and defence policies.

More recently, the High Representative Mogherini underscored the strategic role of space in defence and security during the 9th Annual Conference on European Space Policy. She expressed:

‘...Strategic autonomy in this field [space] would not only benefit our citizens and our Member States, but also our partners, because the development of the full spectrum of security capabilities will make us a stronger partner – not only a global player relevant to the security

¹³⁸ COM (2016) 705 final, *supra* note 128, section 3.4.

¹³⁹ European Economic and Social Committee, Opinion on the Communication from the Commission to the Council and the European Parliament (EC): ‘European Space Policy’, COM (2007) 212 final, 13 February 2008.

¹⁴⁰ European Parliament (EC), ‘Resolution on Space and security’ (2008/2030 (INI)), 10 July 2008, para. 4.

¹⁴¹ European Parliament (EC), ‘Resolution on the European space policy: how to bring space down to earth’, P6_TA (2008)0564, 20 November 2008, para. 8.

¹⁴² President of the Commission, Speech by José Manuel Durão Barroso, SPEECH/09/476, 15 October 2009.

of all Europeans but also for our friends around the world that are demanding more and more from the European Union to be a security provider around the world...'¹⁴³

A final comment deserves the Governmental Satellite Communications (GovSatcom), which has been defined by the European Council in December 2013 as one of the four capability development programmes.¹⁴⁴ It is an initiative of the Commission, foreseen for the end of 2017 as a follow-up to the European Defence Action Plan and the Space Strategy for Europe.¹⁴⁵ Its objective is to ensure -in both the civil and military environment- reliable, secure and cost-effective satellite communication services for the EU and the national public authorities managing security critical missions and operations.¹⁴⁶ The Commission is still undertaking an impact assessment to inform stakeholders about its work in order to allow them to provide a feedback on the intended initiative and to participate effectively in future consultation activities.¹⁴⁷ The Council stressed recently the need to assess all possible aspects before issuing such an initiative, including the ongoing Impact Assessment.¹⁴⁸

In concluding, as long as the need to exploit space capability for defence and security goals becomes stronger for the EU, it will become urgent to address the governance issues arising out of them in order to ensure an effective implementation of the CFSP.

3. CHAPTER III: THE EUROPEAN FLAGSHIP PROGRAMMES

3.1. EGNOS – GALILEO:

The origin of the European developments in the field of global navigation satellite systems (GNSS) may be traced back to December 1994, when the Council invited the Commission to initiate or support

¹⁴³ High Representative, Speech given on occasion of the 9th Annual Conference on European Space Policy, 'Space strategy for Europe: the road ahead', Brussels, 24-25 January 2017.

¹⁴⁴ European Council Conclusions EUCO 217/13, 20 December 2013.

¹⁴⁵ Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2017 'Delivering a Europe that protects, empowers and defends, COM (2016) 710 final, 25 October 2016.

¹⁴⁶ Ibid.

¹⁴⁷ Commission (EU), Inception Impact Assessment, 18 October 2016.

¹⁴⁸ Council (EU), Conclusions on 'A Space Strategy for Europe', 9817/17, 30 May 2017, para. 17.

work on the development and implementation of a European complement to existing systems and support or initiate the preparatory work needed for the design and organization of a global navigation satellite system for civil use and under civil control.¹⁴⁹

Thus, the European policy in GNSS was designed in two phases: the first one (GNSS 1) would be marked by the operation of the European Geostationary Navigation Overlay Service (EGNOS)¹⁵⁰ that would complement and improve the reliability of the already services provided by the American Global Positioning System (GPS) and the Russian GLONASS, as requested by the Council in 1998.¹⁵¹ The second phase (GNSS 2) would consist in the development of the own European GNSS: GALILEO.¹⁵²

The objective of EGNOS was to get full autonomy in satellite navigation.¹⁵³ Again in this case, the strategic reasons played an important role: for Europe, it was important not to rely exclusively on GPS and GLONASS, both under foreign military control. The Commission put it clearly in a communication where it called upon the EU to build its own GNSS: ‘There are serious problems of both sovereignty and security if Europe's navigation systems are out of Europe's control’.¹⁵⁴

The Commission highlighted a two-fold advantage of having a European GNSS: technical and political.¹⁵⁵ As to the former, EGNOS would enable the EU to develop a technical capability and know-how in the advanced sector of satellite radio navigation. As to the political aspect, EGNOS would imply the accomplishment of the first phase of the European policy on GNSS, as defined by the Council in 1998. In addition, not only new Member States of the EU would benefit from EGNOS

¹⁴⁹ Council Resolution (EC) on the European contribution to the development of a Global Navigation Satellite System (GNSS) – OJ C 379, 19 December 1994, paras. 2 y 3.

¹⁵⁰ The EGNOS system is an infrastructure monitoring and correcting signals emitted by existing global satellite navigation systems. It consists of earth stations and several transponders installed on geostationary satellites.

¹⁵¹ Council Decision (EC) 98/434 of 18 June 1998 concerning the Agreement between the European Community, the European Space Agency and the European Organisation for the Safety of Air Navigation on a European contribution to the development of a global navigation satellite system (GNSS), OJ L 194/15.

¹⁵² The system established under the Galileo programme is an autonomous global navigation satellite system (GNSS) infrastructure consisting of a constellation of satellites and a global network of earth stations

¹⁵³ Commission (EC), Communication to the European Parliament and the Council, ‘State of progress of the Galileo programme’, COM (2002) 518 final, 24 September 2002.

¹⁵⁴ Commission (EC), Communication to the European Parliament and the Council ‘Towards a Trans-European Positioning and Navigation Network’, COM (1998) 29 final, 21 January 1998.

¹⁵⁵ Commission (EC), Communication to the European Parliament and the Council, ‘Integration of the EGNOS programme in the Galileo programme Brussels’, COM (2003) 123 final, 19 March 2003.

services, since coverage would extend to all the territories of the candidate countries for enlargement, but it would also be a useful tool for many developing countries with limited infrastructure in the area. Finally, EGNOS was going to be a clear evidence of the fruitful cooperation mainly with the United States and the Russian Federation.¹⁵⁶

In February 1999, the Commission recommended the development of GALILEO, a system that would constitute an open, global system, fully compatible with GPS, but independent from it, with a significant participation of the Russian Federation.¹⁵⁷ It should be based on medium Earth orbit (MEO) satellites and be developed as a public private partnership (PPP), with significant funding at the European level (from the EU and ESA).¹⁵⁸

GALILEO would be an indispensable tool for airspace and airports management and would guarantee transport control. It would also impact positively on the employment, the industry, the economic development and the international influence of the EU.¹⁵⁹ It would allow Europe enter in the market of satellite navigation products and services, totally dominated by other players led by the United States. This, in turn, would have a positive impact on the competitiveness of the European industry.¹⁶⁰

GALILEO was designed to provide different types of services: an open free basic service (involving applications for the general public and services of general interest), a commercial service (to facilitate the development of professional applications), a vital service (for safety-critical applications, such as aviation and shipping), a rescue and search service, and finally a public regulated service (reserved principally for the public authorities responsible for civil protection, national security and law enforcement).¹⁶¹

¹⁵⁶ The Commission COM (2000) 755 final (p. 21) refers also to talks with other countries, such as, Canada, Switzerland, Ukraine, Australia, Israel and other countries from different regions. The Commission COM (2002) 518 final also mentions Japan, India and China (see 'Relations with third countries' in the Communication).

¹⁵⁷ Commission (EC), Communication 'Galileo - Involving Europe in a new generation of satellite navigation services', COM (1999) 54 final, 10 February 1999.

¹⁵⁸ Ibid.

¹⁵⁹ Commission (EC), Communication to the European Parliament and the Council on Galileo, COM (2000) 750, 22 November 2000, p. 8.

¹⁶⁰ Ibid., p. 29

¹⁶¹ COM (2002) 518 final, *supra* note 153.

Since GALILEO is a crucial instrument of the common transport policy and the ‘trans-European transport networks’ initiative, the funding at the development stage¹⁶² was provided by the Community budget with contributions of ESA; the following stages are funded by a PPP.¹⁶³

In its initial stage, GALILEO was managed jointly by the Commission (responsible for the political aspects) and by ESA (in charge of the technical issues). But soon thereafter, the Council set up a Joint Undertaking, an international organisation created under Art. 171 TFEU. Its aim was to ensure the unity of the administration and the financial control of the project for the research, development and demonstration phase of the GALILEO programme.¹⁶⁴ Its Supervisory Board was composed of one representative of each Member State of the EU and of the representative of the Commission at the Administrative Board of the Joint Undertaking.¹⁶⁵

In 2003, the Commission recommended that EGNOS should be continued and be used both as a precursor of GALILEO and as an instrument enabling it to penetrate rapidly the market for the various satellite radio navigation services and hence, EGNOS programme should be placed under the control of the Joint Undertaking.¹⁶⁶ This Joint Undertaking was originally envisaged to be in place for four years, however, its deadline was extended until 31 December 2006.¹⁶⁷

One year later the Council characterised EGNOS as ‘independent from and complementary to GALILEO’¹⁶⁸ and set up the European GNSS Supervisory Authority (hereinafter ‘the Authority’), a Community agency tasked mainly with the licensing *vis-à-vis* the private concession holder responsible for implementing and managing the deployment and operational phases of GALILEO and

¹⁶² The development phase began in 2001 and was followed by the deployment phase, starting in 2005. The operation phase was planned for 2008 onwards.

¹⁶³ Commission (EC), Progress report on the GALILEO programme, SEC (2001) 1960, 5 December 2001, p. 8.

¹⁶⁴ Council (EC) No 876/2002, ‘Resolution setting up the Galileo Joint Undertaking’, OJ L 138, 21 May 2002, Art. 1.

¹⁶⁵ Ibid.

¹⁶⁶ COM (2003) 123 final, *supra* note 155.

¹⁶⁷ Council Regulation (EC) No 1943/2006, amending Regulation (EC) No 876/2002 setting up the Galileo Joint Undertaking, OJ L 367, 12 December 2006, Art. 1.

¹⁶⁸ Council Regulation (EC) No 1321/2004 on the establishment of structures for the management of the European satellite radio-navigation programmes, OJ L 246, 12 July 2004, preambular para. 3.

the funding management.¹⁶⁹ The Authority became the owner of all the tangible and intangible assets created or developed by the concession holder during the deployment and operational phases.¹⁷⁰

In 2007, the Council warned about the five-years delay in the setup of GALILEO operational phase and reviewed once again its importance as a tool contributing to the EU policies in areas such as transport, financial services, energy, navigation, civil protection and humanitarian missions, agriculture, fisheries. In addition, it asserted that ‘...GALILEO is a pillar of the emerging European Space Policy and signifies Europe's ambitions in space, technology, and innovation’.¹⁷¹

In order to overcome the delays and difficulties in the start-up activities, the Commission proposed that the deployment phase of GALILEO be carried out and financed by the Community.¹⁷² On that basis, the Transport Council confirmed that the Commission would assume the direct responsibility on the programme management, and expressed:

‘... the Commission will have to be able to act as an 'intelligent buyer' *vis-à-vis* European Space Agency (ESA), determine on the basis of user needs the technical and performance characteristics of Galileo as well as their continuous evolution, perform the trade-off between technical and programmatic changes on the one hand and possible costs and delays on the other, oversee ESA and the GNSS Supervisory Authority (GSA), and report to Council and European Parliament’.¹⁷³

In that line, the Council adopted a resolution describing the development of GALILEO in four phases: a definition phase that had ended in 2001; a development and validation phase until 2010; a deployment phase that would run from 2008 until 2013 and finally an exploitation phase that would

¹⁶⁹ Ibid., Art. 1 and 2.

¹⁷⁰ Council Regulation (EC) No 1942/2006 amending Regulation (EC) No 1321/2004 on the establishment of structures for the management of the European satellite radio-navigation programmes, OJ L367, 12 December 2006, Art. 1(2).

¹⁷¹ Commission (EC), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘GALILEO at a cross-road: the implementation of the European GNSS programmes’, COM (2007) 261 final, 16 May 2007, p. 7.

¹⁷² Commission (EC), Communication to the European Parliament and to the Council ‘Progressing GALILEO: Re-Profilng the European GNSS Programmes’, COM (2007) 534 final, 19 September 2007.

¹⁷³ Political go-ahead for GALILEO, 3 December 2017. Available online at: <https://ec.europa.eu/docsroom/documents/11867/attachments/1/translations> (last accessed on 12 August 2017).

begin in 2013.¹⁷⁴ Development, validation and deployment phases were financed by the Commission with the possibility of contributions from Member States and third countries.¹⁷⁵ Due to the significant cost overruns and delays, as well as serious governance problems, the Commission took over the ownership and control over all tangible and intangible assets created or developed under both programmes.¹⁷⁶

EGNOS has been in service since October 2009 with its three geostationary satellites and forty ground stations spread over Europe and North Africa.¹⁷⁷ The Commission established in 2010 an action plan for EGNOS and GALILEO until to 2013.¹⁷⁸

The in-orbit validation phase of GALILEO started on 21 October 2011 with the launch of the two first operational satellites and continued one year later with the launch of two additional satellites from the European Space Port in Kourou, French Guiana. The definition phase, development, and In-Orbit Validation phase of the GALILEO Programme were carried out by ESA and co-funded by the EU and ESA.

Since 2014, GALILEO's full operational capacity satellites are being launched; six launches so far, the last one having been on 17 November 2016; fourteen satellites are already in orbit and sixteen more are expected to be launched until 2020. This phase is fully funded by the EU and managed by the European Commission. The Commission and ESA have signed a delegation agreement by which ESA acts as the design and procurement agent on behalf of the Commission.

3.2. GMES - COPERNICUS:

¹⁷⁴ Regulation of the European Parliament and of the Council (EC) Regulation No 683/2008 on the further implementation of the European satellite navigation programmes (EGNOS and Galileo), OJ L 196, 9 July 2008, Art. 3.

¹⁷⁵ Ibid., Art. 4.

¹⁷⁶ Ibid., Art. 8.

¹⁷⁷ Commission (EU), Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Action Plan on Global Navigation Satellite System (GNSS) Applications', COM (2010) 308 final, 14 June 2010.

¹⁷⁸ Ibid.

The Global Monitoring for Environmental and Security (GMES) supports Europe's goals regarding sustainable development and global governance.¹⁷⁹ It is worth underscoring that the security component does not involve military matters, but relates to the security and protection of citizens against environmental threats.

The reason behind GMES was also of a strategic nature:¹⁸⁰ the programme was envisaged to address the problem of fragmented and uneven environmental and security information.¹⁸¹ For that purpose, the programme coordinates the cooperation of many stakeholders¹⁸² and draws from the international cooperation of many countries such as the Russian Federation, the United States, Canada and Japan, among others.¹⁸³

GMES plays a significant role in the fulfilment of EU policies, in particular, the prevention and reaction to crises related to natural and technological risks in Europe, humanitarian aid, conflict prevention including monitoring of compliance with treaties, surveillance of borders and European policies in the fields of CFSP and ESDP.¹⁸⁴

Not only is GMES relevant internally but also externally: the programme contributes to develop the European leadership in the practical application of Earth Observation (EO) for climate and

¹⁷⁹ Council Resolution (EC) on the launch of the initial period of global monitoring for environment and security (GMES), OJ C 350, 13 November 2001, para. 3.

¹⁸⁰ Commission (EC), Communication to the European Parliament and the Council, Global Monitoring for Environment and Security (GMES): Establishing a GMES capacity by 2008 - (Action Plan (2004-2008)), COM (2004) 65 final, 3 February 2004, p. 7.

¹⁸¹ GMES Vision and targets 2008 and Work progress of the Initial Period of the GMES Action Plan (2002-2003) Information document for the participants of the 3rd GMES Forum, May 2003. Available online at http://copernicus.eu/sites/default/files/library/GMES_Vision_and_progress.pdf (last accessed on 12 August 2017).

¹⁸² These stakeholders are: the European Environmental Agency, the national public environmental and civil protection organisations of the EU and ESA Member States, EFTA and Candidate Accession Countries, the national space agencies and EUMETSAT, private industry and the academic sector also had a role, as well as various Non-Governmental Organisations.

¹⁸³ Commission (EC), Communication to the Council and the European Parliament 'Global Monitoring for Environment and Security (GMES) Outline GMES EC Action Plan (Initial Period: 2001 – 2003)', COM (2001) 609 final, 23 October 2001.

¹⁸⁴ Position Paper of the GMES Working Group on Security, The security dimension of GMES, 29 September 2003. Available online at: http://copernicus.eu/sites/default/files/library/Security_Dimension_of_GMES.pdf (last accessed on 12 August 2017).

environment monitoring and civil security.¹⁸⁵ Furthermore, it is the European contribution to the Global Earth Observation System of Systems (GEOSS)¹⁸⁶ and to the Kyoto Protocol commitments.¹⁸⁷

Before going into the details of the programme, it may be useful to make a brief introduction describing the facts that paved the way to the inclusion of EO within European space activities.

In the already referred resolution of 1979, when the European Parliament first addressed the need for a European involvement in space activities, it also stressed the importance of EO capabilities to support key Community policies.¹⁸⁸ For its part, the Commission considered EO as one of the six action lines for the future and in its first communication regarding space activities expressed that ‘...if Europe wishes to be able to hold its own in both international cooperation and international competition, it is high time that European efforts in this area were given a new dimension’.¹⁸⁹

Furthermore, in 1992 the Commission acknowledged that certain measures (particularly the development of EO applications and new sensors within the Community Framework Programme for R&D¹⁹⁰) were necessary to address the conversion of EO data into operationally useful information in order to be able to meet user demands.¹⁹¹

In 1994, the Parliament called on the Commission to stimulate the design and development of advanced instrumentation of interest to the EU¹⁹² and in 1998 it reiterated the need for a European policy to promote the use of EO data.¹⁹³

In that year, an important meeting took place in Baveno, Italy, with representatives of the Commission, ESA, EUMETSAT, the industry sector and the space agencies of Germany, France, Italy and the

¹⁸⁵ Commission (EC), Communication to the Council and the European Parliament, Global Monitoring for Environment and Security (GMES): From Concept to Reality, COM (2005) 565 final, 10 November 2005, pp. 4-6.

¹⁸⁶ COM (2007) 212, *supra* note 64, p. 6.

¹⁸⁷ The Baveno Manifesto expressly says: ‘The Manifesto proposes the idea that a global environment information service would represent a significant European contribution to the implementation of the Kyoto Protocol’ (See Gérard Brachet, ‘From initial ideas to a European plan: GMES as an exemplar of European Space strategy’, (2004) 20 Space Policy 7, 10).

¹⁸⁸ European Parliament (EC), OJ C 127, *supra* note 11, para. 1.

¹⁸⁹ COM (88) 417 final, *supra* note 8, pp. 17-18.

¹⁹⁰ Commission (EC), Communication to the Council and the European Parliament ‘The European Community and Space: challenges, opportunities and new actions’, COM (1992) 360 final, 23 September 1992, para. 92(a).

¹⁹¹ *Ibid.*, para. 30.

¹⁹² European Parliament (EC), Resolution on the Community and Space, OJ C 205, 6 May 1994, para. 7.

¹⁹³ European Parliament (EC), OJ C 34, *supra* note 48, para. 4.

United Kingdom. The outcome of this meeting was the Baveno Manifesto, the cornerstone of what was later known as the GMES programme.

In its communication on Europe and space (2000), the Commission expanded the concept of EO concept by adding civil security aspects and thus, created the idea of global monitoring for environment and security (GMES).¹⁹⁴ One year later, it presented a long-term strategy dovetailing policies for economically, socially and ecologically sustainable development upon a request made by the European Council in December 1999. As part of this plan, the Commission recommended that ‘the Community should contribute to establishing by 2008 a European capacity for global monitoring of environment and security (GMES)’.¹⁹⁵

The programme was finally launched in 2001 and its initial period lasted until 2003, when the implementation period began and continued until 2008. The pre-operational period took place from 2008 to 2010, the initial operation was developed from 2011 to 2013 and it is fully operating since 2014, when the first satellite (Sentinel) was launched.

An important milestone was the already mentioned communication of the Commission that established the preliminary elements for the ESP, which described GMES as the second EU flagship programme after GALILEO.¹⁹⁶ The 2007 ESP put GMES (as well as GALILEO) under the EU leadership in the overall representation of applications programmes for its policies.¹⁹⁷

The Programme is coordinated and managed by the European Commission and is supported by EU-owned Sentinels operated by ESA, EUMETSAT, EU Member States and other third countries and commercial providers. The data collected *in situ* by these satellites is transformed into valuable information for policy-makers in the fields of atmosphere, marine and land monitoring and climate change, emergency management and security. The Commission together with the Parliament and Council are responsible for the long-term financing.

¹⁹⁴ COM (2000) 597 final, *supra* note 17, p. 12.

¹⁹⁵ Commission (EC), Communication ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’, COM (2001) 264 final, 15 May 2001, p. 6.

¹⁹⁶ COM (2005) 208 final, *supra* note 63, p.8.

¹⁹⁷ COM (2007) 212, *supra* note 64, p. 12.

In 2012 the programme was renamed COPERNICUS, as an homage to the European scientist. Two years later, a joint resolution from the Council and the Parliament established the programme as ‘...a civil, user driven programme under civil control, building on the existing national and European capacities, as well as ensuring continuity with the activities achieved under the Global Monitoring for Environment and Security.’¹⁹⁸

The same resolution describes the three components of COPERNICUS: space (that ensures sustainable space borne observations), *in situ* (that ensures access to ground based installations) and service (that ensures delivery of the information).¹⁹⁹ Like GALILEO, the EU is the owner of COPERNICUS.²⁰⁰ Finally, in the 2016 European Strategy, the Commission renewed its commitment to improve access and dissemination of EO data.²⁰¹

4. CHAPTER IV: THE EU AS A GLOBAL ACTOR IN SPACE MATTERS

4.1. The Lisbon Treaty and the European diplomatic service:

As already explained, the Lisbon Treaty introduced many provisions of particular relevance for space matters. Notably, Art. 189 TFEU is one of the core ones. Besides, the Lisbon Treaty made important changes to endow the EU with a diplomatic service, something that contributes to the development of Europe as player in the international relations regarding space affairs.

However, it is important to recall that before the Lisbon Treaty the EU made its voice known in international fora through the Commission, that performed functions in matters of external relations on behalf of the EC and the EU with the assistance of the Directorate General on External Relations.

¹⁹⁸ Regulation (EU) No 377/2014 of the European Parliament and of the Council establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010, OJ L 122, 3 April 2014, Art. 2(1).

¹⁹⁹ Ibid., Art. 2(2).

²⁰⁰ Ibid., Art. 28.

²⁰¹ COM (2016) 705 final, *supra* note 128, p. 4.

With the inclusion of CFSP in the Maastricht Treaty, the need for a European Minister of Foreign Affairs became more and more desirable. Indeed, the appointment of a Union Minister for Foreign Affairs was envisaged in Art. I-28 of the Constitutional Treaty. He/she would be assisted by the European External Action Service pursuant to Art. III-296(3) of the same instrument. The rejection of the Constitutional Treaty set in motion new efforts to reform the EU but this time without resorting to the appointment of a Union Minister for Foreign Affairs but a High Representative of the Union for Foreign Affairs and Security Policy (HR).²⁰²

The external relations of the EU are nowadays in the hands of many actors: the European Commission is responsible for non-CSFP matters (Art. 17(1) TEU), the President of the European Council and the HR are in charge of CSFP issues (Art. 15(6) TEU and Art. 27(2) TEU respectively), and EU Delegations intervene in both CFSP and non-CFSP issues (Art. 221(1) TEU).

It is worth recalling that the post of the HR already existed in the Amsterdam Treaty (Art. J.8, third paragraph) and was fulfilled by the Secretary-General of the Council (this function was exercised by Javier Solana from 1999 until 2009). The Lisbon Treaty attempted to bring consistency, effectiveness and overall political coordination to the EU's external action and, therefore, expanded the functions of the HR, who became also the Vice-President of the Commission (Art. 18.4 TEU).

The coordination of the EU policies in the previous system could not always be warranted because of the rotating character of the Presidency of the Council. Therefore, the new role of the HR as the President of one of the configurations of the Council, the Foreign Affairs Council (Art. 18.3 TEU), was supposed to ensure more consistency in the external relations of the EU. In addition, the fact that the HR expresses the EU's position in international organisations and at international conferences pursuant to Art. 27(2) TEU serves the purposes of making the EU speak with one voice.

Another novelty brought about by the Lisbon Treaty is the modified text of Art. 27(3) TEU that provides that the HR would be assisted by the European External Action Service (EEAS), which should work in cooperation with the diplomatic services of the Member States and should comprise

²⁰² Council (EC), Presidency Conclusions, 11177/1/07 REV 1, 20 July 2007. ANNEX I. Draft Intergovernmental Mandate, para. 3.

officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of Member States.

Pursuant to the already mentioned Art. 27(3) TEU, the organisation and functioning of the EEAS was going to be established by a decision of the Council. It was Council Decision 2010/427/EU²⁰³ which determined that the EEAS would support the HR in fulfilling his/her mandates as outlined in Art. 18 and 27 TEU, namely, to conduct CFSP, to preside over the Foreign Affairs Council and to exercise the Vice-Presidency of the Commission (the diversity of roles has been branded ‘double’²⁰⁴ or ‘triple hatted’²⁰⁵ functions). The EEAS is staffed with national experts following the rules adopted by the Decision of the HR of 23 March 2011.²⁰⁶

4.2. The participation of the EU at the UN and UNGA Resolution 65/276

The constituent treaties of the EU have many references to the United Nations (UN), but one of particular relevance is Art. 21(1) TEU (second paragraph) that establishes that ‘[the EU] shall promote multilateral solutions to common problems, in particular in the framework of the United Nations’. Furthermore, Art. 220(1) TFEU provides that ‘[t]he Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies’.

As already described, the Lisbon Treaty brought about important changes in the field of the external representation: firstly, pursuant to Art. 1(3) TEU, the EU replaced and succeeded the EC and secondly, the representation of the CFSP was entrusted to the HR and to the permanent President of the European Council ‘at his level’ (Art. 27(2) TEU and Art. 15 TEU, respectively). Finally, EU Delegations in third countries and at international organisations would represent the EU (Art. 221(1) TFEU).

²⁰³ Council Decision (EU) 2010/427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201/30, pp 30 – 40.

²⁰⁴ A. Frontini and P. Ivan, ‘EEAS 2014: How to Make EU Foreign Policy Work Better?’ in Doris Dialer, Heiriche Neisser, Anja Opitz (eds.), *The EU’s External Action Service: Potentials for a one voice Foreign Policy* (Innsbruck University Press, 2014). Available online at: https://www.uibk.ac.at/iup/buch_pdfs/eeas_bd3.pdf (last accessed 12 August 2017).

²⁰⁵ Piris quoted in M. Schmid, ‘The HR/VP and the Organisation of the EEAS’ Senior Management’ in Doris Dialer, Heiriche Neisser, Anja Opitz (eds.), *The EU’s External Action Service: Potentials for a one voice Foreign Policy* (Innsbruck University Press, 2014).

²⁰⁶ Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 23 March 2011. Available at http://www.esteri.it/mae/opportunita/Nella_UE/Nelle_istituzioni/Esperti_Nazionali_Distaccati/20110419_EEAS_Decision_governing_SNEs.pdf; 11 09 2013 (last accessed on 12 August 2017)

Before those institutional changes, the Commission represented the EC in international organisations generally as an observer²⁰⁷ and the country holding the rotating Presidency of the Council represented the EU in the field of CFSP, with the full powers of a Member State. The representation of the EU by the rotating Presidency allowed it to speak with the rest of Member States speakers.

The replacement of this form of representation with a delegate from the EU was detrimental to its participation because the EU would then only be able to participate with the rights of an observer, namely very limited ones.²⁰⁸ This proved to be an important reason to start negotiations on a better deal to ensure the effective participation of the EU at the UN. The result of these negotiations paved the way to General Assembly Resolution 65/276 (hereinafter ‘UNGA Resolution 65/276’),²⁰⁹ adopted by 180 votes in favour and 2 abstentions (Syria and Zimbabwe). Two precedents were relevant for UNGA Resolution 65/276: the UNGA Resolution on the ‘Participation of Palestine in the Work of the United Nations’²¹⁰ and a similar one for the Holy See.²¹¹

UNGA Resolution 65/276 sets out the modalities for the participation of the representatives of the EU in its capacity as an observer. Indeed, the important note about this resolution is that it did not create any new rights but simply set out the ‘modalities’ for participation in the work of the UNGA and its committees and working groups, in international meetings and conferences convened under the auspices of the UNGA and in UN conferences. Moreover, the UN Secretary General issued a note contained in document A/65/856 (dated 1 June 2011) that constitutes the basis for the analysis of the modalities.

The resolution allows the EU to be inscribed on the list of speakers among representatives of major groups,²¹² to reply, to present proposals and amendments orally as agreed by the EU Member States. Furthermore, it makes clear that the EU is an observer and accordingly it is ensured sitting among the

²⁰⁷ The EU may be a full member in the International Organisations that allow membership of other international organisations, such as the case of the World Trade Organisation.

²⁰⁸ Observers may not cast a vote, propose candidates or co-sponsor draft resolutions. In addition, they speak after Member States and they sit at the back of the room.

²⁰⁹ UNGA Res 65/276 (10 May 2011) UN Doc A/RES/65/276.

²¹⁰ UNGA Res 52/250 (7 July 1998) UN Doc A/ RES/52/250.

²¹¹ UNGA Res 58/314 (1 July 2004) UN Doc A/RES/58/314.

²¹² This has a practical reason, which is to enable States pertaining to those groups to align themselves with the group positions

observers and that it shall not have the right to vote, to co-sponsor draft resolutions or decisions, or to put forward candidates.

4.3. The EU participation at COPUOS:

The 2007 ESP provides that ‘Europe supports the on-going efforts of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) on the mitigation and prevention of space debris’, and introduced a commitment to respect the principles enshrined in the Outer Space Treaty, as already pointed out.²¹³

Furthermore, the working document elaborated by the Commission in September 2008 included an annex entitled ‘Elements for a European Strategy for International Relations in Space’, which provides that prior to COPUOS meetings, ESA and the European Commission will organise a coordination session with participation of the EU Member States and ESA to decide on common positions.²¹⁴

COPUOS was established by the UNGA Resolution 1348 (XIII) in an *ad hoc* basis²¹⁵ and by UNGA Resolution 1472 (XIV)²¹⁶ as a permanent body with the competence, *inter alia*, to ‘study the nature of the legal problems which may arise from the exploration of outer space’. This section will give an insight into the participation of the EU in this body.

The EU participates at COPUOS as an observer with the particular modalities established in UNGA Resolution 65/276, as explained above. Its interventions are governed by the arrangements for the EU statements in multilateral organisations,²¹⁷ a document that provides that the EU and its Member States representatives will coordinate their action in international organisations to the fullest extent possible as set out in the Treaties.

²¹³ ‘Resolution on the European Space Policy’, *supra* note 65.

²¹⁴ Commission (EC), ‘European Space Policy Progress Report’ COM 2008 (561) final, 11 September 2008, p. 17.

²¹⁵ UNGA Res 1348 (XIII) (13 December 1958).

²¹⁶ UNGA RES 1472 (XIV) (12 December 1959).

²¹⁷ Council (EU), EU Statements in multilateral Organizations: General Arrangements, 15901/11, 24 October 2011.

In 2003, the Commission presented within the forty-sixth session of COPUOS the Green Paper²¹⁸ and introduced the ESP in the sixty-third session of COPUOS on 13 June 2008.²¹⁹ The presentation of the ESP was made by Ms. Hélène-Diane Dage, from the Space Policy and Coordination Unit, who mentioned four main reasons for the development of a ESP: the importance of space systems for critical to key areas of economy, the benefit that satellite communications would bring for every citizen, the contribution of space to the knowledge-society and the valuable support of space to the European external policies.²²⁰

At the fifty-first session of COPUOS France (holding the rotating Presidency of the Council in 2008) made a statement *on behalf of the States Members of the United Nations that are Members of the European Union* related to the European initiative of a Code of Conduct for Outer Space Activities (hereinafter, ‘European Code of Conduct’).²²¹

A year thereafter, the Czech Delegation made a statement again *on behalf of the States Members of the United Nations that are Members of the European Union* also relating to the European Code of Conduct.

After the entry in force of the Lisbon Treaty, the intervention in the fifty-third session (2010) was made by the representative of Spain but this time directly *on behalf of the EU*. In 2011, after UNGA Resolution 65/276, the Committee decided to invite, at its request, the observer for the EU to attend its fifty-fourth session,²²² however, it was not until 2016 that COPUOS expressly made reference to UNGA Resolution 65/276 in its report.²²³

A slight change in the practice of participation of the EU began in 2016, when Ambassador Lenoir delivered a statement *on behalf of the EU and its Member States* and indicated that Albania and Ukraine aligned themselves with his statement.²²⁴ Similarly, in 2017 the representative of the EU

²¹⁸ A/58/20, para. 63.

²¹⁹ A/63/20, para. 23.

²²⁰ The presentation is available online at: <http://www.unoosa.org/pdf/pres/copuos2008/tech-03E.pdf> (last accessed on 12 August 2017).

²²¹ A/63/20, para. 296.

²²² A/66/20, para. 11.

²²³ A/71/20, para. 11.

²²⁴ Committee on the Peaceful Uses of Outer Space, Fifty-ninth session, Digital Recordings of 706th Meeting, 8 June 2016, 10 a.m.

delivered a statement *on behalf of the EU and its twenty eight Members* and also expressed that the following ten States aligned themselves with the European statement: Turkey, Former Republic of Macedonia, Montenegro, Iceland, Serbia, Bosnia Herzegovina, Ukraine, Moldova and Armenia.²²⁵ The new practice of including an expanding list of States that align themselves with the statement of the EU may be read as a sign to increase the weight of the European interventions.

An additional comment deserves the variations in addressing the Committee that deviate from the language suggested in the Council decision on the statements of the EU. In effect, the formulas recommended by the Council were ‘*on behalf of the EU*’ for CFSP matters and the phrase ‘*on behalf of the EU and its Member States*’, for common positions.²²⁶

There are no traces in the digital recordings of statements made by the EU in the Legal Subcommittee of COPUOS until 2017, although it participated as an observer. In the fifty-sixth session, Ambassador Lenoir (on behalf of the EU) made reference to the four strategic goals of the European Space Strategy 2016 (see II.2.3.1). With regard to the fourth goal relating to the role of the EU as a global actor, he conveyed the European support to the initiatives within COPUOS such as UNISPACE+50 (the most important event of COPUOS since UNISPACE III that will take place in 2018) and the work on a compendium of guidelines on the long-term sustainability of outer space activities.²²⁷

4.3.1. *The European Code of Conduct:*

The European Code of Conduct was an initiative of the EU regarding security, safety and sustainability of outer space activities which was conceived and developed outside the framework of the UN multilateral system although updates on that initiative were brought into COPUOS for information of delegations (See 4.3.2 below). Mutschler and Venet considered that this initiative made

²²⁵ Committee on the Peaceful Uses of Outer Space, Sixty-session, Digital Recordings of the 7 June 2017, 10 a.m.

²²⁶ Council (EU), EU Statements in multilateral Organizations: General Arrangements, 15901/11, 24 October 2011, para. 4.

²²⁷ Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, Fifty-sixth session, Digital Recordings of 27 March 2017, 10 a.m.

the EU establish a clear presence in the debate on space security but they concluded that it is doubtful whether it was a manifestation of the European actorness in the field.²²⁸

The origins of this initiative may be traced back to UNGA Resolution 61/75 (2006), where the UN Member States were invited to submit concrete proposals on international outer space transparency and confidence-building measures in the interest of maintaining international peace and security and promoting international cooperation and the prevention of an arms race in outer space.²²⁹ In march 2007 Italy prepared a paper entitled ‘Food for thought for a Comprehensive Code of Conduct for Outer Space Activities’²³⁰ and in September 2007, Portugal (on behalf of the EU) replied to UNGA Resolution 61/75 with the proposal of a draft code of conduct on space objects and space activities.²³¹

Short thereafter, the UNGA renewed the call on UN Member States in its Resolution 62/43 (2007)²³² and requested the Secretary General to submit to it a final report with an annex containing concrete proposals from Member States on international outer space transparency and confidence-building measures.²³³ The EU proposed the European Code of Conduct as its own contribution to space safety that would be presented to the relevant international fora on space matters.²³⁴ The draft was then approved by the Council on 17 December 2008.²³⁵

The Group of Governmental Experts on Transparency and Confidence Building Measures in Outer Space Activities (GGE) was set up by UNGA Resolution 65/68 (2011) and delivered its report in 2013.²³⁶ In the conclusions and recommendations of that report, the GGE ‘endorse[d] efforts to pursue political commitments, for example, in the form of unilateral declarations, bilateral commitments or

²²⁸ Max Mutschler and Christophe Venet, ‘The European Union as an emerging actor in space security?’, (2012) 28 Space Policy 118, 122.

²²⁹ UNGA Res 61/75 (6 December 2006) UN Doc A/RES/61/75, para. 1

²³⁰ Statement by the deputy permanent representative of Italy and charge’ d’affaires, a.i. to the United Nations, Ambassador Inigo Lambertini, at the multilateral negotiations on “an international code of conduct for outer space activities” (27 July 2015). Available online at: http://www.italyun.esteri.it/rappresentanza_onu/en/comunicazione/archivio-news/2015/07/2015-07-27-lambertini-spazio.html (last accessed on 12 August 2017).

²³¹ A/62/114/Add.1, pp. 5-8.

²³² UNGA RES 62/43 (5 December 2007) UN Doc A/RES/62/43, para. 2

²³³ UNGA Res 64/49 (2 December 2009) UN Doc A/RES/64/49, para. 3

²³⁴ Views of Member States (A/65/123). See the EU proposal on p. 62-63.

²³⁵ Council (EC), ‘Conclusions on the draft Code of Conduct for outer space activities as approved by the Council on 8-9 December 2008, 17175/08, 17 December 2008.

²³⁶ A/68/189

a multilateral code of conduct, to encourage responsible actions in, and the peaceful use of, outer space'.²³⁷

4.3.2. *The European Code of Conduct and COPUOS:*

Although the European Code of Conduct was not an initiative negotiated within COPUOS, France (holding the rotating Presidency of the Council in 2008) made a statement relating to it at the fifty-first session of COPUOS.²³⁸ Already at that opportunity, some delegations required an in-depth analysis to be carried out within the framework of the UN body.²³⁹ One year later, the text of the European Code of Conduct (already approved by the Council) was presented to COPUOS by the Czech Delegation on behalf of the EU. In that opportunity, the Committee further noted that, following the conclusion of those consultations, an *ad hoc* conference would be organized for States to subscribe the instrument.²⁴⁰

A second stage in the development of this initiative started after the Council gave a mandate to the HR to carry out further and wider consultations with interested third States with the aim of establishing a text that is acceptable to the greatest number of countries with a view to adopting the European Code of Conduct at an *ad-hoc* diplomatic conference.²⁴¹

On 6 June 2012, the Ambassador and Permanent Representative of Hungary to the International Organizations in Vienna, Ms. Györgyi Martin Zanathy, made a statement on behalf of the European Union at the fifty-fifth session of COPUOS. In that intervention, she explained that the aim of the European Code of Conduct was to submit it formally for signature at the *ad hoc* international diplomatic conference, open to participation by all States on a voluntary basis, to be convened in 2013.²⁴²

²³⁷ Ibid., para. 69.

²³⁸ A/63/20, para. 296.

²³⁹ Ibid., para. 301.

²⁴⁰ A/64/20, para. 45.

²⁴¹ Council (EU), 'Conclusions of 27 September 2010 on the revised draft Code of Conduct for Outer Space Activities', 14455/10, 11 October 2010.

²⁴² Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 644th Meeting, Wednesday, 6 June 2012, 10 a.m., p. 11.

At that session, some States informed to have been involved in the kick-off meeting organised by the United Nations Institute for Disarmament Research (UNIDIR) on 5 June 2012 such as Canada²⁴³ and Japan.²⁴⁴ The Russian Federation expressed concerns about the departure from the principle of jurisdiction when applying measures against others' spacecrafts²⁴⁵ and about the relationship between the European Code of Conduct and the ongoing work on the long-term sustainability within COPUOS.²⁴⁶

The reflection in the final report of the exchange of views on the European Code of Conduct was discussed as usual on the last day of that session and became conflictive. While some delegations expected to have their positive views captured in the report, other delegations wanted to have their strong concerns reflected. The discussion then turned into whether it was appropriate to have any views reflected when the European Code of Conduct was an initiative outside COPUOS. The compromise solution found for the final report reflects that some delegations expressed support to the initiative,²⁴⁷ and that some expressed concerns.²⁴⁸

At the fifty-sixth session of COPUOS in 2013, the EU expressed its commitment to develop the European Code of Conduct in an open, transparent and inclusive manner; made reference to the first round of consultations held in Kyiv on 16-17 May that year and announced the second round of consultations that would take place later that year.²⁴⁹ The second round was convened from 20-22 November 2013 in Bangkok and, the third one was on 27-28 May 2014 in Luxembourg.

The year 2015 seemed to be the highest point reached by the European initiative. The Council passed a decision supporting the European Code of Conduct.²⁵⁰ Luxembourg, on behalf of the EU, made a

²⁴³ Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 651st Meeting, Monday, 11 June 2012, 15 p.m., p. 5.

²⁴⁴ Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 644th Meeting, Wednesday, 6 June 2012, 10 a.m., p. 12.

²⁴⁵ Committee on the Peaceful Uses of Outer Space, *supra* note 242, p. 15.

²⁴⁶ Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 648th Meeting, Friday, 8 June 2012, 3 p.m., p. 8.

²⁴⁷ A/67/20, para. 48

²⁴⁸ *Ibid.*, paras. 51, 53.

²⁴⁹ Committee on the Peaceful Uses of Outer Space, Fifty-sixth session, Digital Recordings of the 661st Meeting, Wednesday 12 June 2013, 10 a.m.

²⁵⁰ Council Decision (CFSP) 2015/203 of 9 February 2015 in support of the Union proposal for an international Code of Conduct for outer-space activities as a contribution to transparency and confidence-building measures in outer-space activities [2015] OJ L 33/38.

statement at the fifty-eight session of COPUOS and announced that it was time to bring the draft code of conduct from a consultative to a negotiating phase. For that purpose, a meeting on 27-31 July 2015 would be organized in New York by the EU with the assistance of the Office for Disarmament Affairs (UNODA).²⁵¹

At that session, the Russian Federation submitted a working document expressing concerns about ‘legitimizing unauthorized coercive measures in respect of foreign space objects’.²⁵² One year later another working document was submitted again by the Russian Federation considering the European Code of Conduct a proposal that was interfering with the work on long term sustainability within the Scientific and Technical Subcommittee of COPUOS.²⁵³

The statements made by the EU in 2016 and 2017 mentioned four priorities for the EU, the fourth being sustainability of the activities in outer space. With the discouraging results of the meeting in New York, it was clear to the EU in 2016 that the European initiative needed to be channelled through the UN system, something that was expressly acknowledged by Ambassador Lenoir at the fifty-ninth session of COPUOS.²⁵⁴

During 2017 no statement was made by the EU regarding the European Code of Conduct. To the contrary, the EU expressed its support to the progress made within the Working Group on the Long-Term Sustainability of Outer Space Activities that had concluded a first set of guidelines in 2016 and continues to work on a second set that will form part of a compendium of a non-legally binding nature that is expected to be adopted in the sixty-first session of COPUOS for referral to the GA in 2018.

CONCLUSIONS:

Space emerged as a tool of power in the struggle for geopolitical superiority. The need to break the US-USSR bipolarity and the desire to gain independence from the two space powers led the European

²⁵¹ Committee on the Peaceful Uses of Outer Space, Fifty-eight session, Digital Recordings of 10 June 2015, 10 a.m.

²⁵² A/AC.105/L.296, paras. 4-5.

²⁵³ A/AC.105/L.304, para. 8.

²⁵⁴ Committee on the Peaceful Uses of Outer Space, *supra* note 224.

States to pull together their national capabilities first in the ESRO/ELDO and then in the ESA structures.

The first sign of the strategic importance of space activities was the need to build an own European launcher and gain access to space. However, it was the first and not the last one. The constant progress in the space field became the driving force for enlarging European capabilities and for seeking cooperation from the experienced space-faring nations.

The external situation was not the only relevant factor. Europe evolved institutionally and with that evolution, its ambitions expanded at an accelerating rate, probably faster than the institutional framework. European policies multiplied and the potential of space as a tool for their implementation became unquestionable. The lack of a specific legal framework was not a barrier for the EC/EU to promote space activities. Research and development provisions brought a solution for the gap that the Commission and the Parliament did not hesitate to resort to.

ESA's long standing experience in scientific and operational programmes was the cornerstone in the construction of the EU/ESA cooperative relations. Their complementary and mutual need led to the negotiation of the 2004 Framework Agreement, and the confirmation of their synergies became the reason for the agreement's extension every four years until nowadays. However, it was even then apparent that this instrument was not going to solve the shortcoming derived from the governance issues. A further step was required to consolidate Europe as a space player.

The Lisbon Treaty introduced the space clause and with that, it provided a specific legal basis for space activities in Europe. It did not bridge many of the gaps open until then: no solution to the governance problems and no clarity as to the scope of the EU competences in this field was provided. A vague language makes the provision unclear on the one hand, but flexible on the other. Until now, national space policies remain untouched from supranational efforts, but bound by the wider umbrella of the European law. Political will bears the burden to decide on the scope of Art. 189 TFEU, taking into consideration the new political realities, such as the Brexit.

Security and defence was implied in the space clause only in a subliminal way. This area of particular importance at the national level became with the space clause one of the community policies that space should contribute to implement. The European Union Satellite Centre and the future GovSatcom

demonstrate that space may be to the service of security and defence goals. The unresolved problems of governance remain a challenge to be addressed in order to ensure an efficient implementation of the CFSP.

The two flagship programmes GALILEO and COPERNICUS are a clear evidence of the need of both independence of and cooperation from third countries. Strategic importance for economical, industrial and security policies complement the ambitions Europe has in the technological and scientific field. The role of the EU as the owner and funding provider is a step towards ensuring continuity and progress of both programmes.

Europe as world player in the space field became a reality not only due to the scientific and technological progress but also due to the institutional changes in the European law that enhanced Europe's participation in international fora. Europe attempted to lead the discussions on space security, however, the failure to conduct negotiations of the European Code of Conduct outside the UN will require a revision of the strategy to do away with the obstacles that the discussion on the right to self-defence in space poses. Europe still has the opportunity to show the international community its commitment to transparency and confidence building measures in the negotiation of the compendium of guidelines within COPUOS. For that purpose, Europe should make efforts to develop a consensus formula to overcome the different views mainly between the United States and the Russian Federation.

In sum, Art. 189 TFEU only enhanced the space competences that the EU already exercised under research and development. It expressly gave space a specific legal framework but it did not create a new regime for it. It implied the use of space technology for defence and security purposes, but it did not address governance issues of incidence in this field. It confirmed the need for cooperation with ESA but it did not change the *status quo*, thus, the 2004 Framework Agreement still remains the main instrument that regulates their relations. Nonetheless, introducing space in the European law is a clear evidence of its strategic value for Europe and, hence, its explicit legal support may pave the way to a greater role for the EU on the world stage.

BIBLIOGRAPHY:

EUROPEAN COMMISSION DOCUMENTS:

Commission (EC), Communication ‘The Community and Space: a Coherent Approach’, COM (88) 417 final, 26 July 1988.

Commission (EC), Communication to the Council and the European Parliament ‘The European Community and Space: challenges, opportunities and new actions’, COM (1992) 360 final, 23 September 1992.

Commission (EC), Communication to the Council and the European Parliament ‘The European Union and Space: fostering applications, markets and industrial competitiveness’, COM (96) 617 final, 4 December 1996.

Commission (EC), Communication to the European Parliament and the Council ‘Towards a Trans-European Positioning and Navigation Network’, COM (1998) 29 final, 21 January 1998.

Communication from the Commission of 10 February 1999 - "Galileo - Involving Europe in a new generation of satellite navigation services", COM(1999) 54 final, 10 February 1999.

Commission (EC), Working Document ‘Towards a coherent European approach for space’, SEC (1999) 789 final, 7 June 1999.

Commission (EC), Communication to the Council and European Parliament ‘Europe and Space: Turning to a new chapter’, COM (2000) 597 final, 27 September 2000.

Commission (EC), Communication to the European Parliament and the Council on Galileo, COM (2000) 750, 22 November 2000.

Commission (EC), Communication ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’, COM (2001) 264 final, 15 May 2001.

Commission (EC), ‘European Governance: a White Paper’, COM (2001) 428, Brussels, 25 July 2001.

Commission (EC), Communication to the Council and the European Parliament ‘Global Monitoring for Environment and Security (GMES) Outline GMES EC Action Plan (Initial Period: 2001 – 2003)’, COM (2001) 609 final, 23 October 2001.

Commission (EC), Progress report on the GALILEO programme, SEC (2001) 1960, 5 December 2001.

Commission (EC), Communication to the Council and the European Parliament 'Towards a European space policy', COM (2001) 718, 7 December 2001.

Commission (EC), Communication to the European Parliament and the Council, 'State of progress of the Galileo programme', COM (2002) 518 final, 24 September 2002.

Commission (EC), 'European space policy', COM (2003)17, 21 January 2003.

Commission (EC), Communication to the European Parliament and the Council, 'Integration of the EGNOS programme in the Galileo programme Brussels', COM (2003) 123 final, 19 March 2003.

Commission (EC), 'A new European frontier for an expanding Union – An action plan for implementing the European Space Policy' (White Paper), COM (2003) 673 final, 11 November 2003.

Commission (EC), Communication to the European Parliament and the Council, Global Monitoring for Environment and Security (GMES): Establishing a GMES capacity by 2008 - (Action Plan (2004-2008)), COM (2004) 65 final, 3 February 2004.

Commission (EC), Communication to the Council and the European Parliament 'European Space Policy - Preliminary Elements', COM (2005) 208 final, Brussels, 23 May 2005.

Commission (EC), Communication to the Council and the European Parliament, Global Monitoring for Environment and Security (GMES): From Concept to Reality, COM (2005) 565 final, 10 November 2005.

Commission (EC), Communication to the Council and the European Parliament 'European space policy', COM (2007) 212, 26 April 2007.

Commission (EC), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'GALILEO at a cross-road: the implementation of the European GNSS programmes, COM (2007) 261 final, 16 May 2007.

Commission (EC), Communication to the European Parliament and to the Council 'Progressing GALILEO: Re-Profiling the European GNSS Programmes', COM (2007) 534 final, 19 September 2007.

Commission (EC), Working Document 'European space policy progress report', COM (2008) 561, 11 September 2008.

Commission (EU), Information Note 'Article 189 of the Treaty on the Functioning of the EU', High Level Space Policy Group, HSPG/22-2009, 1 December 2009.

Commission (EU), Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘Action Plan on Global Navigation Satellite System (GNSS) Applications’, COM (2010) 308 final, 14 June 2010.

Commission (EU), Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions ‘Towards a Space Strategy for the European Union that Benefits its Citizens’ COM (2011) 152, 4 April 2011.

Commission (EU), Communication to the Council and the European Parliament ‘Establishing appropriate relations between the EU and the European Space Agency’, COM (2012) 671, 14 November 2012.

Commission (EU), Report ‘Progress report on establishing appropriate relations between the European Union and the European Space Agency (ESA)’, COM (2014) 56 final, 6 December 2014.

Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Commission Work Programme 2016’, COM (2015) 610 final, 27 October 2015.

Commission (EU), ‘Roadmap for the Space strategy for Europe, December 2015.

Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Commission (EU), Inception Impact Assessment, 18 October 2016.

Programme 2017 ‘Delivering a Europe that protects, empowers and defends, COM (2016) 710 final, 25 October 2016.

Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, Space Strategy for Europe, COM (2016) 705 final, 26 October 2016.

EUROPEAN PARLIAMENT DOCUMENTS:

European Parliament (EC), ‘Resolution on Community participation in space research’, OJ C 127, 21 May 1979.

European Parliament (EC), Resolution on Community participation in space research, OJ C 102. 12 October 1981.

European Parliament (EC), ‘Resolution on Community participation in space research’, OJ C 190, 20 July 1987.

European Parliament (EC), ‘Resolution on the European Community and space’, OJ C 205, 25 July 1994.

European Parliament (EC), Resolution on the Community and Space, OJ C 205, 6 May 1994.

European Parliament (EC), ‘Resolution on the European Union and space’, OJ C 34, 2 February 1998.

European Parliament (EC), Report on the Commission working document ‘Towards a coherent approach for space’, Final A5-0119/200, 19 April 2000.

European Parliament (EC), Report on the Commission communication to the Council and the European Parliament on Europe and Space: Turning to a new chapter (COM (2000)597 - C5-0146/2001 - 2001/2072(COS)), 6 December 2001.

European Parliament (EC), ‘Resolution on Space and security’ (2008/2030 (INI)), 10 July 2008.

European Parliament (EC), ‘Resolution on the European space policy: how to bring space down to earth’, P6_TA (2008)0564, 20 November 2008.

European Parliament (EU), Resolution on a space strategy for the European Union that benefits its citizens, P7_TA (2012) 0013, 19 January 2012.

European Parliament (EU), ‘Resolution on EU space industrial policy, releasing the potential for growth in the space sector’, P7_TA-PROV (2013) 0534, 10 December 2013.

COUNCIL DOCUMENTS:

Council Resolution (EC) on the European contribution to the development of a Global Navigation Satellite System (GNSS) – OJ C 379, 19 December 1994.

Council (EC), ‘Resolution on the reinforcement of the synergy between the European Space Agency and the European Community’. OJ C 224, 22 June 1998.

Council Decision (EC) 98/434 of 18 June 1998 concerning the Agreement between the European Community, the European Space Agency and the European Organisation for the Safety of Air Navigation on a European contribution to the development of a global navigation satellite system (GNSS), OJ L 194/15.

Council (EC), ‘Resolution on a European Space Policy’, OJ C 371, 16 November 2000.

Council (EC), ‘Resolution on a European space strategy’, OJ C 371, 14 December 2000.

Council Resolution (EC) on the launch of the initial period of global monitoring for environment and security (GMES), OJ C 350, 13 November 2001.

Council (EC) No 876/2002, 'Resolution setting up the Galileo Joint Undertaking', OJ L 138, 21 May 2002.

Council (EC), Decision on the Signing of the Framework Agreement between the European Community and the European Space Agency', 12858/03, 7 October 2003.

Council Regulation (EC) No 1321/2004 on the establishment of structures for the management of the European satellite radio-navigation programmes, OJ L 246, 12 July 2004.

Council Decision (EC) 2004/578 on the conclusion of the Framework Agreement between the European Community and the European space agency', OJ L261, 6 August 2004.

Council (EC), Press Release of the 2665th Council meeting, 9501/05, 6-7 June 2005.

Council Regulation (EC) No 1943/2006, amending Regulation (EC) No 876/2002 setting up the Galileo Joint Undertaking, OJ L 367, 12 December 2006.

Council (EC), 'Resolution on the European Space Policy', 10037/07, Brussels 25 May 2007.

Council (EC), Presidency Conclusions, 11177/1/07 REV 1, 20 July 2007. ANNEX I. Draft Intergovernmental Mandate.

Regulation of the European Parliament and of the Council (EC) Regulation No 683/2008 on the further implementation of the European satellite navigation programmes (EGNOS and Galileo), OJ L 196, 9 July 2008.

Council (EC), 'Conclusions on the draft Code of Conduct for outer space activities as approved by the Council on 8-9 December 2008, 17175/08, 17 December 2008.

Council Decision (EU) 2010/427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201/30.

Council (EU), 'Conclusions of 27 September 2010 on the revised draft Code of Conduct for Outer Space Activities', 14455/10, 11 October 2010.

Council (EU), Resolution 'Global challenges: taking full benefit of European space systems', 16864/10, 26 November 2010.

Council Decision 2011/297/CFSP, OJ L 136, 24 May 2011.

Council (EU), Conclusions on 'Towards a space strategy for the European Union that benefits its citizens', 10901/11, 31 May 2011.

Council (EU), EU Statements in multilateral Organizations: General Arrangements, 15901/11, 24 October 2011.

Council (EU), ‘Conclusions on Establishing appropriate relations between the EU and the European Space Agency (ESA)’, 6571/2013, 19 February 2013.

Council (EU) Press, ‘Conclusions towards a shared EU-ESA vision for space fostering competitiveness’, 26 May 2014.

Council (EU) Press, ‘Underpinning the European space renaissance: orientations and future challenges Competitiveness Council meeting’, 5 December 2014.

Council Decision (CFSP) 2015/203 of 9 February 2015 in support of the Union proposal for an international Code of Conduct for outer-space activities as a contribution to transparency and confidence-building measures in outer-space activities [2015] OJ L 33/38.

Council (EU), Authorization to the Commission to sign the "Joint Statement on Shared Vision and Goals for the Future of Europe in Space by the European Union and the European Space Agency, 12808/1/16 REV 1, Brussels, 11 October 2016.

Council (EU), Conclusions on ‘A Space Strategy for Europe’, 9817/17, 30 May 2017.

ARTICLES:

Alain Gaubert and André Lebeau, ‘Reforming European space governance’, (2009) 25 Space Policy 37-44.

Chritophe Venet, ‘European Space Governance: the outlook’, (2012) 28 Space Policy 59- 60.

Emmanuel Sigalas, ‘The role of the European Parliament in the development of a European Union space policy’ (2012) 28 Space Policy 110-117.

Florent Mazurelle, Jan Wouters and Walter Thiebaut, ‘The evolution of European Space Governance: Policy, Legal and institutional implications’, (2009) Working Paper No 25 of the Leuven Centre for Global Governance Studies.

Frans Von der Dunk, ‘Towards one captain on the European spaceship -why the EU should join ESA?’, (2003) 19 Space Policy 83-86.

Frans G. von der Dunk, ‘The EU Space Competence as per the Treaty of Lisbon: Sea of Change or Empty Shell?’, *Proceedings of the International Institute of Space Law* (2011).

Gérat Brachet, 'From initial ideas to a European plan: GMES as an exemplar of European Space strategy', (2004) 20 Space Policy 7-15.

Julien Béclard, 'The Lisbon Treaty and the Evolution of European Space Governance', The Europe & Space Series, N°12, July 2013.

Lucia Marta, 'National visions of European space governance: Elements for a new institutional architecture', (2013) 29 Space Policy 20-27.

Lucia Marta, 'National visions of European space governance: Elements for a new institutional architecture', (2013) 29 Space Policy 20-27.

Max Mutschler and Christophe Venet, 'The European Union as an emerging actor in space security?', (2012) 28 Space Policy 118-124.

Stephan Hobe, 'Prospects for a European space administration', (2004) 20 Space Policy 25-29.

Thomas Hoerber, 'ESA+EU: Ideology or pragmatic task sharing?', (2009) 25 Space Policy 206-208.

Wulf von Kries, 'Which future for Europe's space agencies?' (2003) 19 Space Policy 157-161.

BOOKS:

A. Reinisch, *Essentials of EU Law*, (Second Edition, CUP, Cambridge 2012).

D. Dialer, H. Neisser, A. Opitz (Eds.), *The EU's External Action Service: Potentials for a one voice Foreign Policy*, (First Edition, Innsbruck University Press, Innsbruck 2014).

Doris Dialer, Heiriche Neisser, Anja Opitz (eds.), *The EU's External Action Service: Potentials for a one voice Foreign Policy* (Innsbruck University Press, 2014).

J. Krige and A. Russo, *A History of the European Space Agency 1958 – 1987 (Vol. 1 - ESRO and ELDO, 1958 - 1973)*, (ESA Publications Division, The Netherlands, 2000).

J. Krige, A. Russo and L. Sebesta, *A History of the European Space Agency 1958 – 1987 (Volume II The story of ESA, 1973 to 1987)*, (ESA Publications Division, The Netherlands, 2000).

Office for Disarmament Affairs, *Transparency and Confidence Building Measures in Outer Space Activities*, Study Series No 34, United Nations, New York 2013.

UNGA RESOLUTIONS:

UNGA Res 1348 (XIII) (13 December 1958)

UNGA RES 1472 (XIV) (12 December 1959)

UNGA Res 52/250 (7 July 1998) UN Doc A/ RES/52/250
UNGA Res 58/314 (1 July 2004) UN Doc A/RES/58/314
UNGA Res 61/75 (6 December 2006) UN Doc A/RES/61/75
UNGA RES 62/43 (5 December 2007) UN Doc A/RES/62/43
UNGA Res 64/49 (2 December 2009) UN Doc A/RES/64/49.
UNGA Res 65/276 (10 May 2011) UN Doc A/RES/65/276.
UNGA Res 68/75 (11 December 2013) UN Doc A/RES/68/75
UNGA Res 69/85 (5 December 2014) UN Doc A/RES/69/85
UNGA Res 70/82 (9 December 2015) UN Doc A/RES/70/82
UNGA Res 71/90 (6 December 2016) UN Doc A/RES/71/90

TREATIES:

Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.
Single European Act, 1987 O.J. L 169/1, (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.
Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1.
Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.
Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.
Protocol No 25 on the exercise of shared competence, OJ 2008/C 115/307.
Convention for the Establishment of a European Space Agency.
Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified).

OTHER SOURCES:

ESA Council resolution on immediate measures and preparatory steps towards the Council meeting at ministerial level related to the agency's new programmes and its evolution, ESA/C/CXXXVI/Res.1, 24 June 1998.
Council joint action of 20 July 2001 on the establishment of a European Union Satellite Centre amended by Joint Action 2006/998/CFSP, Joint Action 2009/834/CFSP.

GMES Vision and targets 2008 and Work progress of the Initial Period of the GMES Action Plan (2002-2003) Information document for the participants of the 3rd GMES Forum, May 2003.

Position Paper of the GMES Working Group on Security, The security dimension of GMES, 29 September 2003.

European Space Policy Institute, 'A new paradigm for European Space Policy: a proposal', Report 1, November 2005.

Simon Duke, 'The Commission and the CFSP', Working Paper 2006/W/01, European Institute of Public Administration, Maastricht 2006.

European Economic and Social Committee, 'Opinion on the Communication from the Presidency of the Council (EC), 'Conclusions of the Brussels European Council (21-22 June 2007)', 11177/07 REV.1, 23 June 2007.

European Economic and Social Committee, Opinion on the Communication from the Commission to the Council and the European Parliament: 'European Space Policy', COM (2007) 212 final, 13 February 2008.

European Space Agency Council, Information Document 'Space in the Lisbon Treaty', ESA/C (2008) 19 Paris, 6 March 2008.

President of the Commission, Speech by José Manuel Durão Barroso, SPEECH/09/476, 15 October 2009.

United Nations/Thailand Workshop on Space Law, 'Member States of the European Space Agency', 16-19 November 2010, Bangkok, Thailand.

Regulation (EC, Euratom) No 1605/2002, as amended by Regulation (EC, Euratom) No 1081/2010. Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 23 March 2011.

Jean-Pierre Darnis and Anna Veclani, 'Space and Security: The Use Of Space in the context of the CSDP', Directorate-General for External Policies of The Union, European Parliament, November 2011.

European Space Policy Institute, 'The EU dual approach to Security and Space', Report 45, August 2013.

European Council Conclusions EUCO 217/13, 20 December 2013.

Regulation (EU) No 377/2014 of the European Parliament and of the Council establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010, OJ L 122, 3 April 2014.

Statement by the deputy permanent representative of Italy and charge' d'affaires, a.i. to the United Nations, Ambassador Inigo Lambertini, at the multilateral negotiations on “an international code of conduct for outer space activities” (27 July 2015).

Shared vision, Common Action: A stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy, June 2016.

Joint Statement on shared vision and goals for the future of Europe in space by the EU and ESA, 26 October 2016.

High Representative, Speech given on occasion of the 9th Annual Conference on European Space Policy, 'Space strategy for Europe: the road ahead', Brussels, 24-25 January 2017.

Political go-ahead for GALILEO, 3 December 2017.

Vincent Reillon, European Space Policy, Historical perspective, specific aspects and key challenges, European Parliamentary Research Service, January 2017.

Pedro Antonio Serrano de Haro, Participation of the EU in the work of the UN: General Assembly Resolution 65/276, CLEER WORKING PAPERS 2012/4.

COPUOS:

A/58/20.

A/63/20.

A/63/20.

A/66/20.

A/71/20.

A/62/114/Add.1.

A/68/189

A/63/20.

A/64/20.

A/67/20.

A/AC.105/L.296.

A/AC.105/L.304.

Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 644th Meeting, Wednesday, 6 June 2012, 10 a.m.

Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 644th Meeting, Wednesday, 6 June 2012, 10 a.m.

Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 648th Meeting, Friday, 8 June 2012, 3 p.m.

Committee on the Peaceful Uses of Outer Space, Fifty-fifth session, Script of the 651st Meeting, Monday, 11 June 2012, 15 p.m.

Committee on the Peaceful Uses of Outer Space, Fifty-sixth session, Digital Recordings of the 661st Meeting, Wednesday 12 June 2013, 10 a.m.

Committee on the Peaceful Uses of Outer Space, Fifty-eight session, Digital Recordings of 10 June 2015, 10 a.m.

Committee on the Peaceful Uses of Outer Space, Fifty-ninth session, Digital Recordings of 706th Meeting, 8 June 2016, 10 a.m.

Committee on the Peaceful Uses of Outer Space, Sixty-session, Digital Recordings of the 7 June 2017, 10 a.m.

Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, Fifty-sixth session, Digital Recordings of 27 March 2017, 10 a.m.

ABSTRACT:

Europe has a long-standing history of involvement in space activities although Art. 189 TFEU was a novelty introduced by the Lisbon Treaty. This thesis endeavours to give an insight in the current legal basis for the European space activities, namely, Art. 189 TFEU. For that purpose, the author first introduces the geopolitical context in which the space race emerged and then explores the initial European efforts to institutionalise space activities outside the European Community/European Union framework.

The reader is then ushered into the institutional framework governing European space efforts before the entry in force of the Lisbon Treaty. An overview of the provisions under ‘Research and Development’ of the European treaties that paved the way to the involvement of the European Community/European Union in space matters and the roles played by the Commission and the Parliament as the driving force in shaping Europe as space player will be further examined.

Against this background, an assessment of the space clause requires taking stock of the progress achieved before and after the Lisbon Treaty. For that purpose, an overview of the 2004 Framework Agreement and the derived relations between the European Union and the European Space Agency precedes an interpretative exercise of Art. 172a of the Lisbon Treaty and its comparison with Art. III-254 of the Constitutional Treaty.

It is not possible to address the European space efforts without making reference to the two European flagship programmes -GALILEO and COPERNICUS- and to the participation of the European Union in the Committee on the Peaceful Uses of Outer Space (COPUOS). Strategic objectives and a leadership ambition in the international realm combine together and become the engine for space activities in Europe.

In conclusion, the author attempted to merge context, past, present and future perspectives in a brief introduction to the European Space Policy.

ZUSAMMENFASSUNG:

Europa ist seit vielen Jahren an Raumfahrtaktivitäten beteiligt, obgleich es sich bei Artikel 189 AEUV um ein durch den Vertrag von Lissabon eingeführtes Novum handelt. Diese Arbeit bietet einen Einblick in die aktuelle Rechtsgrundlage für europäische Raumfahrtaktivitäten, nämlich Artikel 189 AEUV. Zu diesem Zweck wird zuerst der geopolitische Kontext beschrieben, in welchem der Wettlauf um das Weltall entstand, ehe auf die anfänglichen Anstrengungen Europas zur Institutionalisierung der Raumfahrtaktivitäten außerhalb der europäischen Gemeinschaft/des Rahmens der Europäischen Union eingegangen wird.

Es folgt eine Einführung zum institutionellen Rahmen, nach dem sich die europäischen Raumfahrtsanstrengungen richteten, bevor der Vertrag von Lissabon in Kraft trat. Ein Überblick zu den Bedingungen unter ‚Forschung und Entwicklung‘ der europäischen Verträge, die den Weg für die Beteiligung der Europäischen Gemeinschaft/Europäischen Union an Raumfahrtangelegenheiten bereitete, wird gegeben, und die Rollen, welche die Kommission und das Parlament als treibende Kräfte der Positionierung Europas als Weltraumplayer einnahmen, werden genauer untersucht.

Vor diesem Hintergrund ist es für eine Beurteilung der Raumfahrtsklausel notwendig, Bilanz über den Fortschritt vor und nach dem Vertrag von Lissabon zu ziehen. Zu diesem Zweck geht ein Überblick über die Rahmenvereinbarung von 2004 und den abgeleiteten Beziehungen zwischen der Europäischen Union und der Europäischen Weltraumorganisation einer Interpretation von Artikel 172a des Vertrags von Lissabon und dessen Vergleich mit Artikel III-254 des Verfassungsvertrags voraus.

Es ist nicht möglich, die europäischen Raumfahrtsbemühungen zu behandeln, ohne die beiden europäischen Vorzeigeprogramme GALILEO und COPERNICUS sowie die Teilnahme der Europäischen Union am Ausschuss für die friedliche Nutzung des Weltraums zu erwähnen. Strategische Ziele und die Ambition, auf internationaler Ebene eine führende Rolle einzunehmen, fließen hier zusammen und bilden den Motor für Raumfahrtaktivitäten in Europa.

Abschließend werden der Kontext sowie vergangene, gegenwärtige und zukünftige Perspektiven im Rahmen einer kurzen Einführung in die europäische Raumfahrtpolitik zusammengeführt.