

The relationship between EU and ESA

Prof. Chiara Cellerino

Lecturer in EU Law, University of Genoa

Ph.D., LL.M. (Columbia University)

What is in common?

- Intergovernmental organizations
- Established by a Treaty
- Regional dimension



What is different?



- Different origins (EC-EU 1957, ESA 1975)
- Different nature and competences
- Different goals
- Different membership (28 EU vs. 22 ESA)
- Different budget (about 157 billions EU vs. 5 billions ESA)
- Different financial rules (infra)

EU vs. ESA

Art. 2 ESA Convention:

“provide for and promote, for exclusively peaceful purposes, cooperation among European States in space research and technology and their space application”

Art 1 and 3 TEU:

“creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen...”

“The Union's aim is to promote peace, its values and the well-being of its peoples”



Cooperation in spaceflight: historical perspective

Costly and complex undertaking (e.g. risks of venturing into outer space, keeping humans alive in hostile environment, advanced technologies)

Space as a common province of mankind

Calls for international cooperation for peaceful purposes in a long term vision

But

historically, reluctance to cooperate: “struggle for supremacy”, superpowers needed to show supremacy at technological, political, military and economic level, and retain a minimum level of control the adversary

human desire to dominate, or at least influence, others

More recently

In times of peaceful international relations between countries, dominance is achieved through economic power instead of military power

Space is full of economic implications (technological development, new services and products, improvement of several economic sectors)

However, budgetary issues increase the need for cooperation + global challenges and common responsibilities (e.g. environment and border control)

ESA model of European space governance

- mandatory programs funded according to GDP
- optional programs funded “à la carte”, according to “fair return” rule: the percentage of funds invested by a country in a given programme is then redistributed in contracts to its industries
- flexible tool of industrial policy: steady public investments in space over the past two decades in Europe + excellence in technical capabilities
- Each programme is an end in itself, regardless of further economic or societal benefits

Is ESA capable to conduct a comprehensive space policy? Does it have necessary political drive?

EU involvement in space (i)

- Space was not a primary concern of EC/EU, left to MS
- After the European Act (1986), EC/EU started to be involved in space sector, mainly as a “regulator”:
 - a) space became part of the R&D agenda and funds
 - b) satellite telecommunication services to be subject to internal market rules (e.g. satellite directive, separation between regulatory and operationsl functions, prohibition of anti-competitive practices) + export control rules on dual use
 - c) EU as a data customer: protect investments in remote sensing, through *sui generis* copyright protection of database of space generated images (e.g. database directive) > impact on success of activities in outer space
- Commission recognized the technical superiority of ESA and need to cooperate

Eu involvement in space (ii)

Space is an area of increasing technological development and research, with high geopolitical implications

Cooperation between ESA and Commission was not sufficient any-longer

1993: space advisory group attempted to institutionalize the cooperation

2000: meeting among ESA Council and EU Council gave rise to the **European Space strategy**: EU would ensure benefits for society and markets, ESA would deal with R&D and scientific projects and launch capabilities

2003: Commission calls for space infrastructure and applications to serve EU needs, need for more powers to drive, coordinate and fund EU space policy.

art. 189 TFEU

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

[...]

The Union shall establish any appropriate relations with the European Space Agency”.

2003 ESA-EC framework Agreement

2004-2008 with automatic renewal every 4 years

Space Council: Joint concomitant meeting of EU competitiveness Council and ESA council + Commission + Secretariat assisting the meetings

Fields of cooperation: science, technology, earth observation, navigation, communication by satellite, human space flight and microgravity, launchers, spectrum policies related to space

Forms of cooperation: management by ESA of EU space-related activities (delegation agreements), participation of EU in ESA optional programmes, joint initiatives.

Specific arrangements for each initiative, defining inter alia industrial policy scheme





Problems

1) Membership asymmetry:

22 MS, 20 EU Members (Norway and CH out). As cooperation grows, unanimity vote gives leverage to non EU members over EU matters + difficult to impose loyalty duties upon them (e.g. sensitive technologies being sold to third countries)

2) Asymmetry in security and defence matters:

worse when security and defence matter of the EU are at stake, such as management of classified EU data (ESDP requires to combine civil and defence dimension of space)

3) Absence of mechanisms of policy coordination:

no formal mechanism ensuring that ESA initiatives are consistent with EU policies (ESA industrial policy vs. EU service provision objectives, case by case approach to be negotiated)

4) Lack of ESA parliamentary accountability:

No link of actions undertaken within ESA to EU citizens. EU delegates around 75% of its space budget to ESA (EU is largest ESA contributor, > member states individual contributions)

A clash of legal orders

5) Mismatch of financial rules:

However, industrial policy is an area of intense disagreement: “fair return” principle vs. EU market rules, i.e. free competition among economic operators (free competitive bidding based on best value for money) and prohibition of State aids

+ financial regulation on public procurement rules must apply to expenditure of EU funds

ESA was designed also as a tool for shaping European space industrial policy (see art. VII ESA Convention)

Justification and solution

- 1) specificity of space as a market sector: barriers to entry: highly technical, highly risky, highly cost-intensive, long term strategic return, one-shot operations. Big companies and institutional actors are better equipped. Is there a real competition?
 - + risk of weakening European industry vs. other countries (e.g. Japan and US consortia) - strategic implications and overriding EU general interest in derogating to competition rules
- 2) Art. 5.3 of ESA-EU Framework agreement: in case of joint initiatives

“Under no circumstances shall the European Community be bound to apply the rule of 'geographical distribution' contained in the ESA convention”.

Possible future models of cooperation

COM(2014)56

- 1) **no change:** specific agreements on case by case basis
- 2) **improved co-operation under the status quo:**
amendments to EU-ESA framework agreement, adopted with the consent of EP, coordination mechanisms and progressive alignment of ESA accounting and audit
- 3) **EU pillar in ESA:** establishing a programmatic structure dedicated to management of EU programmes working in a “EU like” environment, without affecting other departments work
- 4) **ESA as an agency of the EU:** ESA would cease to exist as an intergovernmental organization, however optional programmes would continue to be funded by third countries

Conclusion

- All actions could be based on art. 189.3 TFEU: some more workable than others
 - EU is the largest institutional customer of ESA and needs to maintain its autonomous access to space
 - Cyber threats need to be addressed and responsible behaviour in outer space is to be supported and promoted at all levels
 - Space activities are increasingly open to private investments in satellite communications, earth observation, even launchers
- > A strong EU-ESA partnership is needed now more than ever, if Europe wants to keep a leading role in shaping the use of outer space for future generations, in compliance with international law and EU general principles and values*