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### Freedoms of The Air & Sovereignty: The Viability of Seventh Freedom Rights for Air Cargo

Fauve Mottart\*

#### Abstract

*In the contemporary world where technology has an utmost role in our daily lives, the technological development also influences the aerospace industry. Consumers have access to the worldwide market and can buy nearly anything from anywhere, with delivery options within a matter of a couple of days, or even less. All of this could not be done without a developed aviation industry, where cargo companies play the principal role. For this, traffic rights need to be granted to the flag State of that carrier, pursuant to the Freedoms of the Air. To establish an easier access to the market, seventh freedom rights are considered to be economically attractive for cargo carriers.*

*This paper provides a comprehensive analysis of the viability of seventh freedom rights granted to cargo services. In doing so, a look will be given to the creation of Freedoms of the Air and how this is intertwined with sovereignty. After that, focus will be placed on the European Union (EU) and United States (US) perspective, followed by an analysis of two main agreements handling with seventh freedom rights for cargo; the EU-US agreements and the Multilateral Agreement on the Liberalization of International Air Transport. Lastly, an answer will be provided to the question whether seventh freedom rights for cargo are still viable in the contemporary world arena.*

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## AVIATION

**Introduction**

Globalization of the world economic system and the requirement of just-in-time deliveries along with countless e-shopping possibilities people have nowadays, are having a significant impact on the logistic transport sector<sup>1</sup>. To support companies to distribute their goods without delay, air transport has become a major player on the market. Air cargo has been, and still is, a fast growing industry over the last decades and a continuous increase is predicted for the coming years<sup>2</sup>. Therefore, the airspace needs to be free to travel through, and regulating this is done by so-called "Freedoms".

Cargo companies may only operate freely if traffic rights are granted to the flag State<sup>3</sup> of the cargo carrier. Economically, it would make sense if seventh freedom rights are included to allow easy access to third States without the requirement of departure from and/ or arrival in the own State. The seventh freedom of the air considers flights from designated air carriers from a third country, being the home country or flag State, transporting passengers and/ or cargo between two countries while having no direct link with its home country of the air carrier operating the flight along the route. This would be, for example, a flight operated by Lufthansa Cargo, having its flag State in Germany, carrying goods between Colombia and Ecuador, without having a connection<sup>4</sup> with or to Germany. When there would be a connection with Germany in the aforementioned example, this flight would become a fifth freedom.

Before considering the viability of the seventh freedom, this paper will address the international, (legal), framework that developed the "Freedoms of the Air" and how it is intertwined with sovereignty. Subsequent sections will provide an overview to major seventh freedom agreements such as EU-US agreements and the Multilateral Agreement on the Liberalization of International Air Transport (MALIAT).

**Freedoms of the Air: A Flight Through Time**

The regulatory framework for international aviation stems from the maritime legal framework, where freedom of the seas (*Mare Liberum*), and therefore freedom of travel to and trade with other nations, was the origin for this framework<sup>5</sup>. The first approach for a legal framework on global aviation is found in 1919 via the Convention Relating to the Regulation of Aerial Navigation ("Paris Convention").

The Paris Convention was a result of the recognized importance of - the evolution of - aviation as seen during World War I<sup>6</sup>. The principles of the Freedoms of the Air are addressed in Article 2 of the Paris Convention, stating that:

*"[E]ach contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to aircraft of other contracting States..." (emphasis added)*<sup>7</sup>.

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Even though this was a response to the military aspect of aviation, the following 20 to 25 years would prove the emergence of aviation on both the military, and the economic field<sup>8</sup>. Therefore, the Freedoms of the Air, as constituted in 1944 complementary to the Convention on International Civil Aviation ("Chicago Convention")<sup>9</sup>, originated as an answer to the limitation of the sovereignty of the States over their airspace<sup>10</sup>, when establishing agreements to open up the airspace of one's territory for market access<sup>11</sup>. Furthermore, this is an answer to the possible issue raised in Article 6 of the Chicago Convention, referring to the need of a special permission or authorisation from the State where *scheduled* international air services are operated in or over its territory, as traffic rights are granted<sup>12</sup>.

"Freedom of the Air" means freedom to fly through airspace. The expression however is often used in a broader sense as including freedom of air commerce - that is, as including not only freedom to fly, but also the freedom of aircraft of one nation to land in the territory of other nations and to take on and discharge traffic there."<sup>13</sup>

Hence, this explains why the terminology *freedom* is used, even though permission needs to be granted to use that freedom of the air. Therefore, the term freedom can be considered in contrast, although very much aligned with sovereignty<sup>14</sup>, as the State has the freedom<sup>15</sup> to rule over its own territory, even for the space above ground<sup>16</sup>. Thus, the system created is a general principle of *non-freedom* where permission for freedom [of the air] needs to be granted<sup>17</sup>.

The first and second freedom<sup>18</sup>, which are the basic traffic rights to be granted<sup>19</sup>, are included in the International Air Services Transit Agreement<sup>20</sup>, focusing on so-called transit rights and are also referred to as technical freedoms. As this Agreement has been ratified by 131 States<sup>21</sup>, the legal value of the concept of these two freedoms cannot be considered to be at stake, although some major players in the aviation industry are not party to this Agreement<sup>22</sup>. This once again reflects the contradiction in the use of the terminology 'freedom'.

To further liberalize the Freedoms of the Air, the International Air Transport Agreement<sup>23</sup> was signed, adding three more freedoms to those in the International Air Services Transit Agreement. These freedoms are key to the operational and commercial aspect of a flight as they provide for a more open market environment. Nevertheless, general consensus could not be reached at the time and only 11 States<sup>24</sup> have acceded to the agreement<sup>25</sup>. For this reason, the international legal value of the agreement is considered to be minimal<sup>26</sup>. Given the evolution in the (non-)acceptance of the International Air Transport Agreement, States still rely almost always on negotiation of (bilateral) Air Services Agreements (ASA's),<sup>27</sup> in which the first five freedoms have a vital role, as it would include, besides the transit rights, outbound (third freedom) and return flights (fourth freedom), as well as connecting flights between two different countries (fifth freedom).

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Since the coming into force of the Chicago Convention, additional Freedoms of the Air have been distinguished<sup>28</sup>, some of them seen as special applications of the fifth freedom<sup>29</sup>. In total, nine freedoms<sup>30</sup> of the air have been established and recognized, even though the International Organization for Civil Aviation (ICAO) only recognizes the first five freedoms as established by an international treaty<sup>31</sup>. The reason for that recognition of the other four freedoms is found within the commercial development of the aviation sector. A necessity was created to complement such development in order for airlines to be able to create new routes that would be more attractive from a commercial perspective. Consequently, these freedoms have not been incorporated within a treaty or another agreement, which emphasises the role of negotiations to include these freedoms in the ASA's. Hence, ICAO rather refers to the last four freedoms (freedoms 6 to 9) as 'so-called'. Despite, these additional freedoms are generally accepted by the international community as these are negotiated and granted under bi- or multilateral agreements, generally through ASA's.<sup>32</sup>

### The EU Perspective on Freedoms of the Air

From a European perspective, all Freedoms of the Air are automatically granted to Community carriers as a result from the unification of the European market, the European Common Aviation Area (ECAA), after the implementation of the so-called three packages<sup>33</sup>.

This considers airlines owned and controlled by EU nationals<sup>34</sup>, which therefore have equal rights on the European market towards each other. Seventh freedom rights are especially exercised by easyJet and Ryanair that are operating from outside, respectively, the United Kingdom and Ireland, between two EU Member States. Even though seventh freedom rights technically do exist within the EU, these rights can be considered as non-existent in the unified market. For example, flights operated by Cargolux, Luxembourg, between Amsterdam, The Netherlands, and Berlin, Germany, are rather considered to be domestic flights, and therefore could qualify as *cabotage* or eighth or ninth freedom rights, under the provision that these flights are operated by an EU carrier<sup>35</sup>. This is what Allan I. Mendelsohn refers to as 'virtual seventh freedom'<sup>36</sup>. Nevertheless, these flights should still be considered as 'full' seventh freedom rights as it constitute air services between two sovereign States<sup>37</sup>, with no link to the sovereign flag State.

The sovereignty of the Member States of the EU has faded due to the aviation policy, resulting from the unification of the market, as the ownership and control by EU nationals can come from different Member States, as well as the place of establishment that can become points of discussion<sup>38</sup>. Thus, the question needs to be raised if this reasoning is viable towards the Member States themselves, and if they are willing to give access to other Community carriers leaving from their airports to a destination somewhere else in the world. Would Germany be willing to have Air France KLM Martinair Cargo as operating carrier from Luxemburg operating a flight to a main destination for cargo distribution in the US, given that this carrier is not part of the Lufthansa (Cargo) alliance? To my opinion this would be rather doubtful, but obviously it is not up to me to answer this question given the many factors that would influence such decision that do not fall within the scope of this paper. Nevertheless, this question leads us to the US, as they are another major player on the aviation market.

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**The US Open Skies Policy**

The US distinguishes itself in its policy making from the EU, which represents, currently, 28 Member States<sup>39</sup>, because flights operated *within* the US are, without questioning, domestic. Although flights between EU Member States have an international connotation, these are considered, from a European law perspective, to be domestic as discussed earlier. This distinction in policy making results in a different perspective on Freedoms of the Air when representing the State(s) in an ASA. The US Open Skies agreement reflects the advocacy for a liberal aviation policy and provides a model of unrestricted market access, as developed as of the 1990's and has vastly expanded since 1992<sup>40</sup>. Of the 120 established agreements with States all over the world, more than 80 agreements (including with EU Member States) grant all cargo seventh freedom rights<sup>41</sup>. Generally, Open Skies agreements include the *option* of seventh freedom for all cargo services. Thus, Open Skies does not mean that all elements falling under economic regulation of international air transport services are liberalized under the agreement<sup>42</sup>, as seventh freedom rights remain an element of further negotiation. This policy approach is found in all the Open Skies agreements that have been established on behalf of the US. However, given the current political developments in the US after the presidential elections in November 2016, it is questioned whether this liberal aviation approach will still be vital for the US.

**Agreements Handling Seventh Freedom Cargo Rights**

There are few agreements that allow unlimited seventh freedom rights, even when it considers cargo. According to the ICAO Working Paper on the Liberalization of Air Cargo Services of 2013 used for the Sixth Meeting of the Worldwide Air Transport Conference, more than 100 of the 400 plus Open Skies agreements grant seventh freedom rights for air cargo or all cargo services. Of this number, a majority stake can be found in the agreements concluded by the US. Even though a growth of air cargo services is predicted, this part of the industry still faces many constraints as air cargo has distinct features from regular transport of passengers<sup>43</sup>. A very important reason for this is the restriction on ownership and control that has been set by many States.

Having looked at the EU and US perspective on Freedoms of the Air, the EU-US Agreement<sup>44</sup> will be discussed first. Afterwards attention will also be given to the MALIAT.

- **The EU-US Agreement**

The EU and the US Open Skies agreement has been set up in two stages. The first stage agreement was signed on 30 April 2007 and the second stage agreement was concluded in 2010, but the latter did not bring major changes considering cargo<sup>45</sup>. The traffic rights granted under these agreements, also included seventh freedom rights for both US carriers as for EU airlines, the Community carriers<sup>46</sup>. The latter received unrestricted cargo traffic rights under the seventh freedom, departing from US airports. The US airlines however, only received the seventh freedom traffic rights on a restricted basis.

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The rendered services needed to have a point in one of the eight agreed upon Member States, in order to be able to operate the seventh freedom rights, often already established under separate bilateral agreements with the specified EU Member States<sup>47</sup>. When we relate this to US cargo carriers as FedEx or UPS, this agreement resulted in the establishment of different hubs of these carriers in Europe, from which they could easily operate their seventh freedom rights, including flights to other EU Member States, under the so-called hub and spoke system<sup>48</sup>. EU carriers, as DHL or Cargolux, however, did not have the possibility to operate within the US, but did gain all rights to operate from the US to any other country. This raises an issue of equal opportunities under this Agreement as discussed by J. Margolis<sup>49</sup>, and it could be questioned whether this is therefore indeed a fully granted Open Skies Agreement for both parties.

- **The MALIAT<sup>50</sup>**

Contrary to the Open Skies Policy that has even been pursued by the US, MALIAT was an initiative to develop a multilateral agreement on air transport open to any State, rather than the continuous bilateral agreements that need to be discussed. The agreement was negotiated by Brunei Darussalam, Chile, New Zealand, Singapore and the US. Its goal is to implement a liberalization process on a multilateral basis, thus promoting Open Skies ASA's, for States that are party to the security conventions. The agreement entered into force on 21 December 2001 and the parties to this agreement are granted seventh freedom rights for cargo<sup>51</sup>. However, it can be said that MALIAT is not very successful up to now, as only nine States have signed the agreement so far. Nevertheless, it is one of the few agreements that grants seventh freedoms cargo rights on an unrestricted basis between a flight from a member to MALIAT and any other State.

This agreement can be considered as being the most liberal policy that can be pursued, however, it does not seem to be a viable agreement. It seems very unlikely that major States in the world will sign this agreement and grant unrestricted seventh freedom rights without reservations. Nonetheless, ICAO considers this agreement as an efficient and effective standardised means of exchanging air rights on an open basis, that also gives the option of joining for all-cargo services only<sup>52</sup>. Therefore it may be considered whether cargo services would be better agreed upon in separate agreements in order to obtain a more liberal framework as MALIAT, as there still seems to be a future for seventh freedom rights.

## Conclusion

It is seen in liberalized ASA's that seventh freedom is, *in se*, often granted to cargo without limitations. However, in practice, there are very few agreements<sup>53</sup> to be found where seventh freedoms are granted on an unrestricted basis. Seventh freedom rights can be considered as a reflection of the liberalization process, however, even the Open Skies policy does not entail a full liberalization when it comes to seventh freedom as it is still a point of negotiation.

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In a constant evolving world arena, where the access to the economic market plays more and more a vital role in our daily lives, this freedom facilitates the easy access for the carriers that serve goods to the industry and the consumer, and an increased competition on the market should result in price reductions. Nevertheless, the granting of seventh freedom rights may result in a feeling of sovereignty interference for States, as flag State carriers can operate freely, under the established agreement, outside their territory to other countries.

Furthermore, this can also bring forward problems when it comes to safety oversight, which is the responsibility of the flag State. However, a way to avoid seventh freedom rights is, (a) either through a code sharing system; or (b) through the establishment of a hub and an air carrier in another State than its normal flag State, by use of the hub and spoke system, intending different establishment criteria. This will result in the possibility to obtain fifth freedom rights, rather than seventh freedom rights, which seems to be more likely to be granted.

Even though ICAO supports the implementation of seventh freedom rights for cargo on an unrestricted basis and sees improved air connectivity as a key element to economic growth and development, they acknowledge in the working papers that there is still a long road ahead. As air cargo services have distinct features compared to passenger flights, ICAO urges its Member States to recognize this when establishing an ASA framework. Taking ICAO's stance on air cargo services into consideration, one could say that seventh freedom rights are still viable towards the future. Nonetheless, it seems that the main factor influencing this, is still the sovereignty of States. When a further liberalization of the international aviation sector is desired, seventh freedom rights seem inevitably necessary to be granted under ASA's to serve further economic growth and development. This also entails the need for a worldwide liberal approach towards the aviation sector for cargo, having MALIAT as an example. The question here remains whether States are willing to take this liberal approach and if it would be viable from a political, or should one say diplomatic, stance.

In this perspective, it can be considered that seventh freedom rights are still viable, yet *only* on the conditions that, first, these traffic rights are granted on a fair and equal basis to the designated carriers, in order to avoid a dominant position on the market, and second, whether the world arena is willing to consider the granting of these rights to foreign carriers, which seems highly unlikely. Furthermore, as Professor Brian Havel correctly referred to, it seems that the liberal orientation of aviation may diminish the liberal process given the political changes that are taking place in the contemporary world arena<sup>54</sup>, i.e. the Brexit referendum of June 2016, the November 2016 US presidential elections and the rising conflict between the Gulf-carriers and the EU considering ownership and control issues. Even though this seems a negative note to end with, the operation on seventh freedom routes is, from an economical point of view, vital for cargo companies and will therefore always be a point of negotiation in ASA's. The current emphasis on sovereignty of States in the world may hinder that these rights will be granted in a multilateral agreement, resembling a general Open Aviation Area.



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<sup>1</sup>This often results in multimodal transport.

<sup>2</sup>See ICAO Working Paper, *Liberalization of Air Cargo Services* (2013).

<sup>3</sup>See Article 17 Convention on International Civil Aviation (Chicago, 7 Dec. 1944).

<sup>4</sup>A connection implies a starting-, intermediate- or endpoint.

<sup>5</sup>See Grotius H and Van Deman Magoffin R (trs), *The Freedoms of the Seas* (1916).

<sup>6</sup>An earlier attempt for a convention on aerial navigation failed in 1910, also held at Paris.

<sup>7</sup>However, the freedom of the air ("l'air est libre") was already earlier addressed by M. Fauchille. See Fauchille M, 'Le domaine aérien et le régime juridique des aérostats', (1901) VIII *Revue Générale de Droit International Public* 482.

<sup>8</sup>See Mendes de Leon PMJ, *Cabotage in Air Transport Regulation* (Martinus Nijhoff Publishers 1992) 18.

<sup>9</sup>Convention on International Civil Aviation (Chicago, 7 Dec. 1944).

<sup>10</sup>See Article 1 of the Paris Convention, as well as Article 1 of the Chicago Convention.

<sup>11</sup>See Diederiks - Verschoor IHPH revised by Mendes de Leon PMJ, *An Introduction to Air Law* (9<sup>th</sup> rev edn, Kluwer Law International 2012) 53.

<sup>12</sup>See also Thaine C, 'The Way Ahead from Memo 2: The Need for More Competition a Better Deal for Europe' (1985) 10(2) *Air and Space Law* 90-98. Non-scheduled air services enjoy a more liberal regime as defined under Article 5 of the Chicago Convention.

<sup>13</sup>See Lissitzyn OJ, *Freedom of the Air: Scheduled and Non-Scheduled Air Services*, in: McWhinney E, Bradley MA, *The Freedom of the Air* (AW Sijthoff 1968) 89-105, at 89.

<sup>14</sup>Brian F. Havel refers to this as 'A Sovereign Irony' in Havel BF, *In Search for Open Skies: Law and Policy for a New Era in International Aviation* (Kluwer Law International 1997) 35.

<sup>15</sup>As defined by Oxford Dictionary: "The power or right to act, speak, or think as one wants"; <<https://en.oxforddictionaries.com/definition/freedom>> (last visited 15 August 2017).

<sup>16</sup>Prof. Peter PC Haanappel also refers to it as 'parlance' as the Freedoms of the Air are not concretely defined in an international legal instrument. See Haanappel PPC, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer Law International 2003) 104.

<sup>17</sup>See Havel BF, *Beyond Open Skies: A New Regime for International Aviation* (Kluwer Law International 2009) 103-105.

<sup>18</sup>Overflight rights and landing rights for non-traffic purposes (technical stops).

<sup>19</sup>See also, Milde M, *International air law and ICAO* (Eleven International Publishing 2008) 104-105

<sup>20</sup>International Air Services Transit Agreement, Chicago, 7 December 1944.

<sup>21</sup>See <[www.icao.int/secretariat/legal/List%20of%20Parties/Transit\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf)> (last visited 15 August 2017) for a full list of the parties to the Agreement.

<sup>22</sup>e.g. Canada, China, Russian Federation, etc.

<sup>23</sup>International Air Transport Agreement, Chicago, 7 December 1944

<sup>24</sup>See <[www.icao.int/secretariat/legal/List%20of%20Parties/Transport\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Transport_EN.pdf)> (last visited 15 August 2017) for a full list of the parties to the Agreement.

<sup>25</sup>Additionally, the United States (US) withdrew from this Agreement in 1947.

<sup>26</sup>See Lissitzyn OJ, *Freedom of the Air: Scheduled and Non-Scheduled Air Services*, in: McWhinney E, Bradley MA, *The Freedom of the Air* (AW Sijthoff 1968) 89-105, at 90.

<sup>27</sup>See Haanappel PPC, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer Law International 2003) 106; 110.

<sup>28</sup>*ibid*, 104.

<sup>29</sup>*ibid*, 106.

<sup>30</sup>For a full overview of the freedoms of the air, please see CSE Aviation, 'Freedoms of the Air'; <<http://www.slideshare.net/CSE-Aviation/freedoms-of-the-air-slideshare>> (last visited 15 August 2017).

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- <sup>31</sup>See ICAO Document 9626, *Manual on the Regulation of International Air Transport* (2004) 4.1-10
- <sup>32</sup>cf. The requirements set in Article 6 of the Chicago Convention.
- <sup>33</sup>The third package has been replaced by EU Regulation (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293.
- <sup>34</sup>See Council Regulation (EEC) 2407/92 of 23 July 1992 on licensing of air carriers OJ L240.
- <sup>35</sup>This as a consequence of the CJEU ruling on the Open Skies Agreement with the US and several EU Member States. See CJEU Ruling of 5 November 2002 in cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, and C-476/98 against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.
- <sup>36</sup>See Mendelsohn AI, 'The USA and the EU - Aviation Relations: An Impasse or an Opportunity?' (2004) 29 (4/5) *Air & Space Law* 268-269.
- <sup>37</sup>See also Article 2 (1) Charter of the United Nations (San Francisco, 26 June 1945), 3 *Bevans* 1153, 59 *Stat.* 1031, T.S. No. 993, entered into force 24 Oct. 1945.
- <sup>38</sup>Ownership and control, as well as pricing and the principle place of business will not be discussed for the purposes of this paper, but it is recognized that these items have a crucial role in the agreements towards freedoms of the air.  
See also van Fenema P, 'Lufthansa Cargo 'Flower Flights' Colombia/Ecuador-Amsterdam: Netherlands Court Judgment on the Applicability of the EU-US Agreement on 'Establishment' (2016) 41(3) *Air & Space Law* 167-192.
- <sup>39</sup>The United Kingdom referendum held in June 2016 considering a possible Brexit, will have a major impact on the policy-making for the ASA's that have been signed. As such, it could also impact the granted seventh freedom rights.
- <sup>40</sup>The first Open Skies agreement was signed with the Netherlands in 1992. Currently, the US has Open Skies agreements with 120 partners. See *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation*; <[www.state.gov/r/pa/pl/262022.htm](http://www.state.gov/r/pa/pl/262022.htm)> (last visited 17 August 2017).
- <sup>41</sup>See Bureau of Economic and Business Affairs, *Open Skies Partners* (18 October 2016); <[www.state.gov/documents/organization/206046.pdf](http://www.state.gov/documents/organization/206046.pdf)> (last visited 17 August 2017).
- <sup>42</sup>See Diederiks - Verschoor IHPH, revised by Mendes de Leon PMJ, *An Introduction to Air Law* (9<sup>th</sup> rev edn, *Kluwer Law International* 2012) 67.
- <sup>43</sup>See ICAO Working Paper, *Liberalization of Air Cargo Services* (2013).
- <sup>44</sup>US-EU Air Transport Agreement of 2007, OJ L 134/4 (2007).
- <sup>45</sup>See *Negotiations on a second stage EU-US "Open Skies" agreement and existing first stage air services agreement - Frequently asked questions* (March 2010); <[http://europa.eu/rapid/press-release\\_MEMO-10-74\\_en.htm](http://europa.eu/rapid/press-release_MEMO-10-74_en.htm)> (last visited 17 August 2017).  
and see *International aviation: United States*; <[https://ec.europa.eu/transport/modes/air/international\\_aviation/country\\_index/united\\_states\\_en](https://ec.europa.eu/transport/modes/air/international_aviation/country_index/united_states_en)> (last visited 17 August 2017).  
See also Hunnicutt CA, 'U.S.-EU Second Stage Air Transport Agreement: Toward an Open Aviation Area' (2011) 39 *Ga. J. Int'l & Comp. L.* 682.
- <sup>46</sup>See Article 3 of the EU-US agreement; <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2007:134:FULL&from=EN>> (last visited 17 August 2017).
- <sup>47</sup>The Czech Republic, France, Germany, Luxembourg, Malta, Poland, Portugal and Slovakia.
- <sup>48</sup>See ICAO Working Paper, *Enhancement of Air Transport Connectivity and Facilitation* (2013) 4.3.  
See also the acquisition of TNT by FedEx; <[www.tnt.com/corporate/en/data/press/2016/05/fedex-acquires-tnt-express.html](http://www.tnt.com/corporate/en/data/press/2016/05/fedex-acquires-tnt-express.html)> (last visited 17 August 2017).
- <sup>49</sup>See also Margolis J, 'When Jumbo Jets Share the Sky: Civil Aviation in the European Union and the United States of America' (2014) 19(1) *European Foreign Affairs Review* at 90-92.
- <sup>50</sup>See Multilateral Agreement on the Liberalization of International Air Transport; <[www.maliat.govt.nz/](http://www.maliat.govt.nz/)> (last visited 17 August 2017).
- <sup>51</sup>A Protocol to the agreement also provides in seventh freedom passenger and cabotage rights, but has not been signed by all members to the agreement.
- <sup>52</sup>See ICAO Working Paper, *on the Multilateral Agreement on the Liberalization of International Air Transportation: A Basis for Future Economic Regulation of Air Services* (2013).
- <sup>53</sup>Lecture by Brian F. Havel on 23 November 2016 at Leiden University for the LL.M Air and Space Law and on 24 November 2016 during the Air Law Workshop at Leiden.

## Passenger 's Contributory Negligence in International Carriage by Air Calling for a modernisation of the exoneration of the air carrier in Warsaw and Montreal regimes

Valentina Vecchio \*

### Abstract

*This article focuses on passenger's contributory negligence in regard to personal injury in the field of international carriage by air. This provision, featuring in international legal frameworks on air transport, seems to have been triggered in few occasions, despite being an important way to exonerate the carrier's liability. The author aims to critically evaluate the provision analysing its rationale and application, with a view to consider its relevance today. Assessing the claimant's contribution to the damage requires both an analysis of the legal concept in its evolution from the Warsaw to the Montreal Convention, as well as an in-depth case law study. In shaping this particular carrier's exoneration, the objective was providing uniformity among various legal regimes; however, a common definition is still lacking. The present discussion elaborates on the concept with a view to bringing the provision to a further development, aligned with the current popularity and increased awareness on air travel.*

### Preliminary remarks

Casting out minds back to the early days of air travel is quite fascinating; however air transportation has been changing, not only because of the impressive developments of technology, but also in the passengers' perception. It does not represent a commodity, but rather the most common way of reaching business and leisure destinations. These changes are not meant to be mere societal considerations, as they have the practical impact of making the carriage by air a modality of transport travellers are accustomed to and familiar with; from a legal perspective this can also entail that, as passengers, the awareness on the potential dangers involved in air travel has increased. The *author* aims to analyse what this may imply in terms of allocation of risks analysing international legal frameworks defining passengers' contributory negligence.

As a starting point, the article will discuss the rationale behind the provision and the evolution of the provision from WC29 to MC99; subsequently, the analysis will situate the exoneration in the general theory of negligence and inspect the concept in its working dimension through relevant case law; lastly, a possible way towards further developments is suggested.

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“The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, dating from 1929”, and the “Convention for the Unification of Certain Rules for International Carriage by Air, dating from 1999”, both include, respectively in Article 21 and 20<sup>1</sup>, contributory negligence of the injured person/claimant - formulation adopted in the recalled provisions - in causing the damage as possible exoneration for the air carrier.

Mindful of the overall relevance of the provision, applicable to all liability cases laid down in the aforementioned regimes, the scope of the current analysis is limited to passenger’s contributory negligence in regard to personal injuries.

This article puts forward a proposal to modernise this particular exoneration of the carrier referring to how respective defaults have been apportioned in the past, and how they should be weighed against each other given the current times, with a view to placing a higher degree of responsibility on the air traveller.

### Shaping contributory negligence from Warsaw to Montreal

A wide range of legal systems includes the plaintiff’s contributory negligence as possible mitigation for the defendant’s liability both in contract and tort law<sup>2</sup>, therefore it is not surprising that it was included by the drafters of 1929: several causes may lead to an accident on board, and taking into account the contributory negligence of the passenger and its effects is a crucial step to assess the carrier’s liability. This section analyses the path from the first formulation in Article 21 of the Warsaw regime to the changes that led to Article 20 MC99, with a view to setting the scene for the discussion on its limits.

Tracing back the legal reasoning behind the examined provision requires a comparison between the original text and the English one, and the main question to be addressed is whether contributory negligence and *faute de la personne lésée* represent the same legal concept.

### Synoptic table - French and English versions of Article 20 WC29

| Convention pour l’Unification de Certain Règles Relatives au Transport Aérien International - Article 21  | Convention for the Unification of Certain Rules Relating to International Carriage by Air - Article 21  |
|---|---|
| Dans le cas où le transporteur fait la preuve que la faute de la personne lésée a causé le dommage ou y a contribué, le tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur. | If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability. |

The discussions around the adoption of this Article show the importance of making a distinction between contributory negligence as such, and contributory negligence as meant in the Warsaw framework.

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It was the British delegate that requested this provision<sup>3</sup>. For continental countries it was unnecessary to state that the defendant's liability needed to be apportioned accordingly if the injured person was partially or completely to blame for the damage occurred. This because they envisaged the liability regime as a whole, and this provision was the way of structuring a rebuttable presumption of fault for the carrier<sup>4</sup>. The British representatives wanted a harsher rule: if the negligent victim's behaviour contributes to the damage, the defendant will be totally exempted notwithstanding its lack of diligence<sup>5</sup>. This would have been aligned with the common law tradition, where the doctrine of contributory negligence does not entail a comparison, and a consequential apportionment, between the respective defaults by the defendant and the plaintiff, but represents a defence barring any recovery of damages<sup>6</sup>. This rule was mitigated through a compromise: on the one hand, it was refused to conceive the injured claimant's behaviour as a total exoneration in a negligent action, on the other it was agreed that how the victim's behaviour diverged from the standard of care was a definition to be found in the law of the court seized of the dispute.

Furthermore, in order to avoid frictions between the forum's own law and the rules laid down in the Convention, Article 23 WC29 prescribes the nullity of provisions not in conformity with the framework, which would have been the case adopting the contributory negligence doctrine in its original form<sup>7</sup>.

Thusly structured, subsequent legal frameworks affected the original wording and relevance of the provision, as analysed in the following section.

### Comparing 21 WC29 and 20 MC99

Article 21 WC29 underwent several changes: for the purpose of the current analysis, the focus will be on the apparent elimination of the *renvoi*, and on the development underlining the role of contributory negligence in the overall system, which can be derived from the combined effects of Articles 20 and 21 MC99<sup>8</sup>.

As for the former change, the reference to the country's own law was eliminated in the Guatemala City Protocol and the Protocol No. 4 of Montreal<sup>9</sup>, respectively under Articles VII and VI.

As seen *supra*, the *renvoi* was the result of a compromise: it served the purpose of avoiding contrasts within the Contracting Parties' national legal systems by setting a rule in the Convention itself; however, different domestic laws may give rise to diverging outcomes in similar situations, thus impairing the uniformity sought by the drafters. In successive wordings of the provision, the mention to the *lex fori* is implicit, so that, pursuant to Article 33 MC99, the Court selected will apply its rules in this regard; however, still no uniform, overarching, and autonomous definition of negligence is provided.

As for the latter development, Article 21 MC99 creates a two-tier compensation system: below 100,000, now 113,100 SDRs, the carrier can be held liable irrespective of fault; above, there is a presumption of fault, unless the carrier proves that itself or its agents were not guilty of negligence, or the occurrence was entirely due to a third party's blameful conduct.

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The last sentence of Article 20 MC99 underlines its applicability to 21 MC99 first paragraph, which means that contributory negligence, if proven, can give a partial or even whole exoneration also below the threshold, thus having greater relevance than in the Warsaw regime. In the latter, the carrier could rely on two defences, respectively Articles 20 and 21 WC29, for complete exoneration, with the adoption of the necessary measures or the impossibility of taking them operating to a wider extent and not only in excess of a certain amount of proven damages<sup>10</sup>.

It is useful to point out another difference from Warsaw to Montreal regimes: while the former left more margin to national Courts to exonerate the carrier wholly or partially, as the verb “may” adopted in the provision underlines, Article 20 MC99 affirms that the carrier *shall be* exonerated from its liability to the claimant to the extent that it proves that the claimant’s negligence caused or contributed to the damage, thus entailing greater cogency.

Despite the relevance of the presented changes, light is not shed on the determination of contributory negligence. The subsequent section attempts a clarification relying both on legal definitions and interpretations by Courts.

### Defining contributory negligence through selected case law

Searching for a definition of contributory negligence in international air transport is a complex endeavour. It is beyond the scope of this article to examine and review the extensive literature on negligence; in this section the *author* will explain the main features of what amounts to a plaintiff’s lack of care that can contribute to a damage focusing on the factual elements derived from case law. In fact, how Courts apportion respective defaults in the field of damages for personal injuries can shed light on contributory negligence as structured in Article 21 WC29, and has a bearing upon the application of Article 20 MC99. Furthermore, the cases outlined below raise crucial points for discussion, namely: the relevance of safety forewarnings by the air carrier, and to what extent a duty of care is attributable to the passenger.

In several lawsuits, contributory negligence arises because passengers/claimants disregard the instructions given by the carrier. In this respect it is recalled *Sue Ellen YaFee v. Continental Airlines* and *Chutter v. KLM*<sup>11</sup>.

In the former, passengers were requested to be seated, the aircraft being on the runway waiting for departure; the claimant was asked to stand up by another traveller to reach the toilet facilities. When taking back her seat, the plaintiff fell and got injured because of the sudden movement of the aircraft. The Warsaw Convention was applied, and the requirements of Article 17 were fulfilled; the airline triggered Articles 20 and 21 WC29. As for the latter, which is relevant for the present discussion, the Court drew a distinction while rejecting the airline’s defence: the Tel Aviv Magistrate Court stated that only the plaintiff’s autonomous decision of standing up would have amounted to contributory negligence, however, in the given case, she was compelled to move by the other passenger.

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*Chutter v. KLM* underlines to a greater extent the importance of the voluntariness of the claimant's act. In a flight New York-Athens, despite the sign of fastening the safety belts being lighted, the victim abandoned her seat to wave goodbye to a relative. She stepped outside the aircraft, sure that the loading steps were still in place, while actually the ramp was already withdrawn as evidence further proved. Consequently, she got injured and claimed for damages. Recovery was barred on two grounds: the action was raised after the required time limit prescribed by the Convention as per Article 29, besides, the Court found solely the claimant at fault<sup>12</sup>.

The relevance of forewarnings and regulations on board the aircraft is further illustrated in *Bradfield v. Trans World Airlines*<sup>13</sup>. On a TWA flight San Francisco-Paris encountering turbulence, a passenger fell off the stairs of the first class area. The claimant, prior to the accident, was suffering from a pain in the neck, however he was not wearing his medical collar at the time of the turbulence. He was also an economy class passenger visiting the first class sector on his own initiative. Moreover, he was wearing socks and not the footwear furnished by the carrier. The airline contended that these elements contributed to the damage. The Court stated that, despite several derelictions by the claimant, the decisive points were that no regulation precludes economy class passengers from visiting the first class, or gives warnings around the risks of not wearing proper shoes during the flight; besides, the turbulence was not forewarned. Furthermore, the medical condition of the claimant was not deemed relevant because there was no evidence around the advisability of wearing a collar at all times.

Another point to raise is whether a duty of care can be attributed to the allegedly negligent passenger. This is explained in *Kwon v. Singapore Airlines*<sup>14</sup> and *Husain v. Olympic Airways*<sup>15</sup>.

Dr. Kwon suffered damages because another traveller lost balance while stowing her luggage and stumbled upon him. The circumstances of the case showed that the claimant was very close to the passenger struggling with her suitcase. The carrier demonstrated that it had put in place all necessary measures to avoid the damage, such as adhering to its regulations for boarding passengers and training the crew members to adequately assist them. As for the defence under Article 21 WC29, the Court could not hold Dr. Kwon negligent for not helping the passenger stowing her luggage, as no such duty is attributable to him. In a similar case, *Maxwell v. Aer Lingus LTD.*<sup>16</sup>, where an incorrectly stored bottle dropped on the claimant, it is clarified that indeed passengers are required to place their personal items in the overhead bins, but the cabin crew has a duty to supervise, and consequently is held accountable, being the cautioning warnings on correct stowage unable to shift the aforementioned duty on travellers.

In *Husain v. Olympic Airways*, the defendant put forward a possible contributory negligence of the plaintiff on two grounds: the deceased Dr. Hanson, suffering from asthma and repeatedly asking to be moved away from the smoking area of the aircraft, unreasonably failed to ask for assistance directly to the flight attendant's supervisor; moreover, he failed to ask for himself to other passengers to change seats like the flight attendant told him to. The Court found only the latter conduct as negligent. As for the former, requiring the passenger to understand the flight crew hierarchy would have been an unreasonable and unrealistic burden.

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While, despite the inconvenience of searching for help from other travellers, the choice not to approach them was deemed unreasonable, because Dr. Hanson was granted permission and, given his medical background and history, he was fully aware of the consequences of his inaction.

Notable proceedings applying Article 20 MC99 in the field of personal injuries have not been retrieved. Whether this provision is dead letter or could be leveraged for a modernisation of the Convention, is the question addressed in the following section.

**Suggesting a way forward**

The examined cases show what kind of factual considerations play a role in assessing contributory negligence. In international air transport, this does not merely include situations of reduced visibility of obstacles that caused the traveller to fall<sup>17</sup>; carrier's safety instructions play a crucial role, and despite the increasing use of air transport, passengers may not always be aware of the consequences of disregarding them. However, the more we, as passengers, fly, the more we could be aware of the risk of our conducts when we act carelessly. The question at stake is whether and to what extent we should be aware and therefore negligent if we lack of care.

This is not an easy evaluation as the aircraft is a controlled environment. While on board, passengers accept to surrender a certain portion of freedom of movement and to abide by the rules of behaviour in exchange for safety and comfort; in the *Husain* case, reference is made to an unwritten compact when entering a commercial flight: "Passengers bestow upon the airline and the flight crew nearly absolute authority to control and manipulate the mobile environment for the benefit of all those aboard. [...] Passengers grant a certain level of power to the airlines, but with that power comes responsibility." Compliance with restrictions on board could mean that potential dangerous behaviours might be the result of a non-voluntary action, therefore not amounting to contributory negligence - as occurred in *Sue Ellen YaFee* case - or could lead to a conduct distant from one's own judgement even when envisioning a risk. In this respect, in the *Husain* case it is explained that Dr. Hanson, by virtue of the aforementioned unwritten compact, authorised the flight crew to protect his safety acting on his behalf, while he agreed on being compliant to their instructions, such as remaining in his assigned seat. Hence, despite being in the best position to know the risks of his inaction, he was not enough empowered to avoid them.

At the same time, it could be useful to question the level of specificity of regulations on board. Is it not an unreasonable burden to require carriers to state how passenger should behave if wandering on their own initiative as in the *Bradfield* case? The recalled judgement was issued in 1979, nowadays a different rule could be shaped, not awarding the damages avoidable by a diligent passenger, and shifting a greater *onus* on the air traveller.

Cases that have barred any recovery seem very extreme, like *Medina v. American Airlines*<sup>18</sup>. On a flight Florida-Colombia, the claimant was served a hot beverage in a cup filled to the brim with no lid. There was no evidence of the flight attendant's fault in placing the container on Medina's folding tray. Despite the ab-



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sence of turbulence and the fact that nothing prevented the injured party from waiting the heat to fade, in the attempt to drink he spilt the beverage on himself and got bodily injuries. The Court found such conduct fitting the requirements of contributory negligence, being the sole proximate cause of the accident, and no damage was awarded. Can only these striking occurrences amount to a negligent behaviour, or could less leniency be granted to air travellers?

The *author* of this analysis points out the need to increase the level of diligence expected from passengers aligning the provision with the current awareness around flight. It is true that air transport is a hazardous activity requiring high safety standards; however, nowadays fliers are more knowledgeable on behaviours that could endanger them. Trying to define standards of conduct is not an easy exercise especially in the context of international frameworks that strive towards harmonisation across legal systems. However, the *author* is of the view that where the hard law of treaties/conventions encounters difficulties, soft law tools can pave the way, in a manner comparable to what international airlines association are pursuing to circumscribe and tackle disruptive behaviours on board<sup>19</sup>, in order to define a yardstick of the diligent and prudent air traveller<sup>20</sup>. It would be difficult, if not impossible, to provide a set of conducts as *numerus clausus*, but without triggering the cumbersome process of renegotiating or amending an international convention, operational guidelines can be a powerful tool to start a modernisation process of a provision far too overlooked.

The drafters of the 1929 included an exoneration based on passenger's contributory negligence but its structuring was object of debate, which led to a lack of a uniform definition. From the Warsaw to the Montreal regime, the provision gained further relevance, however Courts, in the absence of a common guidance, adopted a protective attitude towards passengers, not awarding damages only in extreme circumstances.

Given air travel's forecast growth<sup>21</sup>, the *author* wishes to ask whether the persistence of conservatory attitude in applying this provision should be expected or further developments may be envisaged. The *author's* view is that the exoneration should not be made dead letter, but rather considered a tool to leverage a modernisation of the carrier's liability system. This would have the beneficial outcome of making the Conventions living instruments, capable of constantly adapting to the changes in air transport.

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<sup>1</sup> For the full text See, respectively, *Warsaw Convention 1929* and *The Montreal Convention*. All web sites cited in this article have been accessed and verified on 5 December 2017.

<sup>2</sup> For a detailed overview of the regimes regulating contributory negligence See U. Magnus, M. Martin-Casals, *Unification of Tort Law: Contributory Negligence* (2004).

<sup>3</sup> G. Miller, *Liability in International Air Transport, the Warsaw System in Municipal Courts*, at 70 (1977).

<sup>4</sup> *Ibidem*. Negligence is structured as a negative element: the claimant does not have to prove the presence of the defendant's fault, as it lies with the latter to demonstrate that it was blameless. Requiring the absence, rather than the presence of negligence, avoids imposing on the plaintiff an onerous burden of proof, which, if not fulfilled, may also lead to an exemption of liability tout court. See E. Giamulla, R. Schmid, W. Muller-Rostin, R. Dettling-Ott, R. Margo, *Montreal Convention*, chapter 3, section Article 20, at 2-3 (2006).

<sup>5</sup> G. Miller, *Liability in International Air Transport*, *op. cit.*, at 70.

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<sup>6</sup> In order to mitigate such doctrine, common law Courts developed the comparative negligence concept, which is a way to reduce, rather than ban, the recovery of damages by the injured party, if s/he has failed to meet the expected standard of care. See L. J. Miller, *Comparative Negligence*, 248 (12) JAMA 1443-1444 (1982). See also case law referring to a comparative negligence test when examining the conduct: Husain v. Olympic Airways, US District Court, N.D. California, 3 October 2000; Kwon v. Singapore Airlines, United States District Court, N.D. California, 26 August 2003.

<sup>7</sup> L. B. Goldhirsch, *The Warsaw Convention Annotated: a Legal Handbook*, at 118, 2<sup>nd</sup> ed. (2000).

<sup>8</sup> Beyond the points already examined, attention will be briefly drawn here to the new wording around the injured party. The substitution of the *personne lésée* with the “person claiming damages” clarifies that the concept of contributory negligence does not only come into play in cases of personal injuries, since the person claiming for compensation can more broadly identified as a holder of rights. See Giemulla et al., *Montreal Convention*, op. cit., chapter 3, section Article 20, at 9-10. This interpretation was already implied in the phrasing of WC29, as case law further proves: reference can be made to an action involving damages for delay in *Oberlandesgericht Frankfurt*, 18 February 2004, case no. 21 U 11/03; 2005 *ReiseRecht aktuell* 78, as reported by R. Schmid & G. Guerreri, *Case Law Digest*, 30(4/5) *Air and Space Law* 374-375 (2005).

<sup>9</sup> Respectively: “Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended By The Protocol Done At The Hague on 28 September 1955, Signed at Guatemala City, on 8 March 1971” - Guatemala City Protocol 1971; “Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed At Warsaw on 12 October 1929, As Amended By the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975” - Additional Protocol No. 4 To The Warsaw Convention.

<sup>10</sup> Giemulla et al., *Montreal Convention*, cit., op. cit., chapter 3, section Article 20, at 3, See also G. N. Tompkins, *The Continuing Development of the Montreal Convention 1999 Jurisprudence*, 37(3) *Air and Space Law*, at 262 (2012).

<sup>11</sup> Respectively: Sue Ellen YaFee v. Continental Airlines, Tel Aviv Magistrate Court CF, 27 April 2015, as reported by P. Sharon and K. Marco on 24 June 2015; Chutter v. KLM, US District Court, 27 June 1955, as reported by J. G. Gazdik, *Observation and Comments on Cases Involving Foreign Element*, 23 (2) *Journal of Air Law and Commerce*, at 232 (1956).

<sup>12</sup> It can be drawn the distinction between a claimant voluntary undertaking a risk which a diligent person would not bear, and a victim acting with malice. See the fraud in Olding v. Singapore Airlines Limited, Hong Kong High Court, 18 September 2003, as reported by P. Coles in *Barlow Lyde & Gilbert LLP newsletter*.

<sup>13</sup> Bradfield v. Trans World Airlines, Inc., 152 Cal. Rptr. 172 (Cal. Ct. App. 1979), as reported by G. N. Tompkins, *Liability Rules Applicable to International Air transportation as Developed by the Courts in the United States*, at 289 (2010).

<sup>14</sup> Kwon v. Singapore Airlines, United States District Court, N.D. California, 26 August 2003.

<sup>15</sup> Husain v. Olympic Airways, US District Court, N.D. California, 3 October 2000.

<sup>16</sup> Maxwell v. Aer Lingus LTD., US District Court, D. Massachusetts, 15 November 2000.

<sup>17</sup> Eichler v. Lufthansa German Airlines, US District Court for the Southern District of New York, 7 July 1992. In the case, the claimant tripped over a luggage not clearly visible and therefore not deemed avoidable by a diligent passenger.

<sup>18</sup> Medina v. American Airlines, Inc., 31 Avi. 18,306 (S.D.Fla.2006), as reported by G. N. Tompkins, *Article 17 and the Warsaw Convention - When is an ‘Accident’ not an Article 17 Compensable ‘Accident’?*, 32(3) *Air and Space Law* 228-229 (2007).

<sup>19</sup> See IATA “*Unruly Passenger Prevention and Management*” at 69, 2<sup>nd</sup> ed. (2015). Despite the difference scenario when dealing with unruly passengers, it is interesting to point out that phenomena not addressed via legislative tools are being dealt by operational guidelines - at least ad interim.

<sup>20</sup> It is the author’s belief that soft law instruments, despite their non-binding nature, have a normative value. See B. Conforti, *The Law and Practice of the United Nations* (1996) and D. Thürer, *Soft Law*, in *Max Planck Encyclopedia of Public International Law*, as updated in June 2017.

<sup>21</sup> See Boeing and Airbus Market Outlook.

## Aerial Blockade in the Middle East: The Line That Must Not Be Crossed

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When Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt cut diplomatic ties with Qatar on June 5<sup>th</sup>, 2017, they blocked Qatar from accessing their airspace. Qatar is a peninsular country that is adjacent to Saudi Arabia (by land and sea), Bahrain (by sea) and the UAE (by sea), so losing access to these countries' airspace would effectively ground all Qatar-registered airlines, including Qatar Airways, its flag carrier.

After this unexpected aerial blockade, Bahrain opened up a single flight path in and out of Qatar, so all of Qatar's jets had to fly through this very congested corridor to reach Iranian airspace, from which point they could fly freely. Obviously, the altered routes for Qatari flights led to longer flight times and operational complications.

Three days after the closure, the chairman of the Civil Aviation of Qatar wrote to the president of the Council of the International Civil Aviation Organization (ICAO) requesting its intervention<sup>1</sup>. The ICAO has long played a crucial role in international aviation. Since its creation in 1944 by the Chicago Convention of 1944, an overarching treaty for international aviation law, the ICAO has developed extensive rules for international law related to aviation safety and security as well as technical aspects of air navigation. Furthermore, states have demonstrated their willingness to comply with the rules of international aviation law, largely for two reasons. First is their willingness to engage in issues affecting cross-border air transport<sup>2</sup>, and second is the relative ease of cooperating on (more or less) non-political issues. Understanding the predominantly technical nature of the ICAO's mandate<sup>3</sup> and the member states' general preferences, the ICAO has been cautious about getting involved in political issues.

When an extraordinary session of the ICAO Council was held on July 31<sup>st</sup>, 2017, at Qatar's request, the Council president stressed that the meeting must avoid politics and focus on technical issues<sup>4</sup>. One important result of this session was that Saudi Arabia and its allies agreed to open nine additional air routes to relieve the pressure on the current routes over international waters<sup>5</sup>. Although such operational flexibility certainly helps Qatar, it is not enough for Qatari aircraft to operate with the greatest possible efficiency.

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More freedom of overflight (i.e., the freedom of Qatari aircraft to fly over the territory of Saudi Arabia and its allies) will depend on whether diplomatic relations among these states improve. Until then, Qatar will have to keep relying on detours.

**Freedom of Overflight**

Although freedom of navigation at sea is well established through customary international law and the United Nations Convention on the Law of the Sea (UNCLOS), freedom of overflight is not fully authorized by international law. There is an international convention on freedom of overflight (the International Air Services Transit Agreement of 1944, often called the “Transit Agreement”), but it is not universally accepted. At present, the Transit Agreement has 131 signatories, including the UAE, Bahrain, Egypt and Qatar, but not Saudi Arabia. Although 131 is a substantial number, some of the states that are not parties to the Agreement, such as Russia, China, Canada, Brazil and Indonesia, cover a large amount of territory. Practically speaking, therefore, freedom of overflight is limited on a multilateral level. When freedom of overflight is not covered by the Transit Agreement, it must be negotiated bilaterally<sup>6</sup>.

Although more than seventy years have passed since the Transit Agreement was established, it remains significant. Obviously, freedom of overflight is important to international air transport, since it enables airlines to choose the shortest routes rather than taking detours to avoid blocked airspace. Former ICAO Secretary-General R.C. Costa Pereira noted that freedom of overflight is “a cornerstone of multilateralism” in international air transport<sup>7</sup>. The ICAO Assembly has regularly adopted resolutions urging States to become parties to the Transit Agreement<sup>8</sup>. Indeed, since 2000, 13 new states have become parties to the Transit Agreement.

Because Bahrain, Egypt and the UAE are signatories to the Transit Agreement, Qatar alleged that those states were acting in violation of the Transit Agreement. In its defense, the UAE has referred to United Nations Security Council (UNSC) Resolution 2309, which affirms that a state has sovereignty over its airspace and that states have the responsibility to protect the security of their citizens and nationals against terrorist attacks in a manner consistent with existing obligations under international law<sup>9</sup>.

**Arguments Based on Violating the UN Resolution**

On June 23<sup>rd</sup>, 2017, Kuwait, acting as a mediator, presented Qatar with a 13-point ultimatum on behalf of Saudi Arabia and its allies. The demands on this list mainly concerned geopolitical matters, such as limiting diplomatic ties with Iran, shutting down Al Jazeera and terminating the Turkish military presence in Qatar<sup>10</sup>.

One important legal argument is based on the claim that Qatar has ties with terrorist groups, specifically, the Muslim Brotherhood, the Islamic State, al-Qaida and Lebanon’s Hezbollah.

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The essence of the argument is that because Qatar has adopted a pro-terrorist policy that violates UNSC resolutions, the measures taken by Saudi Arabia and its allies were legal, justified and proportionate<sup>11</sup>.

Ostensibly, Bahrain, the UAE, and Egypt (signatories to the Transit Agreement) based their position on Article 103 of the United Nations (UN) Charter. Article 103 provides that, “[i]n the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Although the primacy of UNSC resolutions under Article 103 is not clearly articulated in the Charter, it has been widely accepted in practice and in doctrine<sup>12</sup>. Hence, obligations under the UN Charter or UNSC resolutions would prevail over the obligations of the Transit Agreement. Whether Qatar actually violated the UN Charter or UNSC resolutions is beyond the scope of this article.

**Threat to Civil Aircraft and the Chicago Convention Article 3bis**

The aerial tension in the Middle East escalated to a new level when Saudi Arabia’s main news outlet released a video showing the potential consequences of a Qatari passenger plane entering Riyadh’s airspace on August 9<sup>th</sup>, 2017<sup>13</sup>. The video started with a statement that “[T]he decision of the anti-terrorism states to boycott Qatar included banning Qatari planes from crossing their airspaces. According to international law, any state that restricts a flight from crossing over it has the right to deal with it in any manner it sees fit<sup>14</sup>.” The video shows two ways that Saudi Arabia could respond to a violation. In the first, a jet fighter scrambles to intercept the passenger plane and force it to land. In the second, a jet fires a missile at the aircraft while the narration says that “international law allows states to shoot down any flight that violates a state’s airspace, classing it as a legitimate target, especially over military areas<sup>15</sup>.”

This disturbing video inevitably reminds one of the tragic shoot-down of Korean Air Lines Flight 007, which resulted in the loss of 279 lives. When KE 007 mistakenly penetrated Soviet airspace on September 1<sup>st</sup>, 1983, it was shot down by a Soviet interceptor. According to the accident investigation report, the interceptor’s pilot saw and reported the plane’s navigational lights and flashing strobe light - evidence that it was a civil aircraft<sup>16</sup>. Regardless, the Soviet command ordered the interceptor’s pilot to “destroy the target<sup>17</sup>.”

The use of armed force against a civil aircraft provoked a sharp reaction from the international community. Although it was generally accepted that the existing international laws already prohibited the use of weapons against civil aircraft, there was a strong feeling that that principle should be clearly formulated in the form of codified international law<sup>18</sup>. As a consequence, the 25<sup>th</sup> Session of the ICAO Assembly adopted an amendment to the Chicago Convention by adding a new Article 3bis in May 1984<sup>19</sup>. Paragraph a) of Article 3bis stipulates that “[T]he contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”

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At present, there are 153 signatories to Article 3bis of the Chicago Convention, including the UAE, Bahrain, Egypt, Qatar and Saudi Arabia.

The two World Wars shaped the basic principles of international aviation law, and the Cold War that followed has continued to affect them. Indeed, the most significant legacy of the Cold War's effect on international aviation law is the Chicago Convention Article 3bis. Even though such an inhumane act could never be justified, the Cold War regime and the deeply rooted obsession with protecting airspace that prevailed during the 1980s were factors in the tragedy, especially the mindset of the Soviet military<sup>20</sup>. The Cold War has come to an end and brought a reduction of East-West tension. Michael Milde, former director of ICAO's Legal Bureau, noted that "the end of the Cold War by 1990 will hopefully mark the end of State-sponsored attacks against civil aircraft<sup>21</sup>."

## Concluding Remarks

At present, there is no sign that the aerial blockade in the Middle East will be lifted anytime soon. The relevant states have expressed starkly different views on a number of issues<sup>22</sup>. One of the few positive developments is that Kuwait is making an effort as a mediator to solve the crisis. The UN Secretary-General has shown his support for the continuation of Kuwaiti mediation efforts while calling on "all sides to resolve their differences through negotiations, in the spirit of good neighborly relations and respect<sup>23</sup>." In the meantime, the tension will continue. In any given situation, however, it is fundamentally important to remember that there is a line that must not be crossed. (end)

<sup>1</sup> Tommy Koh, *Small countries must also be self-reliant*, *THE STRAIT TIMES*, July 4, 2017, <http://www.straitstimes.com/opinion/small-countries-must-be-self-reliant>.

<sup>2</sup> Brian F. Havel & Gabriel S. Sanchez, *THE PRINCIPLES and Practice of INTERNATIONAL AVIATION LAW 20* (2014).

<sup>3</sup> *Convention on International Civil Aviation art.44, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.*

<sup>4</sup> *ICAO rejects Qatar's request to condemn boycotting countries*, *Al Arabiya English.*, Aug. 1, 2017, <http://english.alarabiya.net/en/business/economy/2017/08/01/ICAO-rejects-Qatar-s-request-to-condemn-boycotting-countries.html>.

<sup>5</sup> *Id.*

<sup>6</sup> Peter Haanappel, *The Transformation of Sovereignty in the Air*, in *THE USE OF AIR AND OUTER SPACE COOPERATION AND COMPETITION* 13, 24 (Chia-Jui Cheng ed. 1998).

<sup>7</sup> *Int'l Civil Aviation Org. [ICAO], Consideration of adherence to and implantation of the IASTA (International Air Services Transit Agreement)*, O 1/5-03/77 (July 25, 2003).

<sup>8</sup> *The most recent one is ICAO, Consolidated statement of continuing ICAO policies in the air transport field, Assemb. Res. A39-15 (2016), compiled in Resolutions Adopted by the Assembly III-4, ICAO Doc. 10075 (Oct. 6, 2016).*

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<sup>9</sup> General Civil Aviation Authority bans aviation companies registered in UAE to operate direct and indirect flights to Qatar, *EMIRATE News Agency*, June 13, 2016, <http://wam.ae/en/details/1395302618767>.

<sup>10</sup> Patrick Wintour, Qatar given 10 days to meet 13 sweeping demands by Saudi Arabia, *THE Guardian*, June 23, 2017, <https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade>.

<sup>11</sup> Michelle Nicholas, Qatar seeks options at United Nations to overcome Gulf rift, *Reuters*, July 28, 2017, <https://www.reuters.com/article/us-gulf-qatar-un/qatar-seeks-options-at-united-nations-to-overcome-gulf-rift-idUSKBN1AC396>.

<sup>12</sup> Rep. of the Int'l Comm'n, 58th sess, 1 May-9 June, 3 July-11 August, 2006, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 331, UN Doc A/CN.4/L.682 (2006).

<sup>13</sup> See Saudi state TV justifies shooting down of Qatari airliners, *MIDDLE EAST EYE*, 14 Aug 2017, <http://www.middleeasteye.net/news/saudi-owned-tv-shares-animation-missile-shooting-down-qatari-passenger-jet-392542993>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Michael Milde, *INTERNATIONAL Air Law and ICAO 54* (2<sup>nd</sup> ed. 2012).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* 55

<sup>19</sup> Protocol Relating to an Amendment to the Convention of Civil Aviation (May 10, 1984), ICAO Doc. 9436.

<sup>20</sup> Jae Woon Lee, Revisiting Freedom of Overflight in International Air Law: Minimum Multilateralism in International Air Transport, 38 *Air & Space L.* 351, 364 (2013).

<sup>21</sup> Milde, *supra* note 16 at 58.

<sup>22</sup> George R. A. Doumar, Raj Patel & Michael J. Smith, *Legal Analysis of the Demands Presented to Qatar* (June 26, 2017), [http://arabcenterdc.org/policy\\_analyses/legal-analysis-of-the-demands-presented-to-qatar/](http://arabcenterdc.org/policy_analyses/legal-analysis-of-the-demands-presented-to-qatar/).

<sup>23</sup> U.N. Secretary-General, Note to correspondents on questions raised on Kuwait's mediation efforts (Sep. 30, 2017).

## The European Union's role in law making as owner of space operative systems:

### Legal and factual reflections on a EU's external dimension coherent with its accomplished potential in Space

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#### Introduction

The European Union (EU)'s ownership of the two flagship space programs Galileo and Copernicus, and their on-going operative completion, rises many questions regarding the EU external role within the international institutions and its perception. What is going to be factually conferred to the EU whereby the mentioned ownership is indeed an extraordinary potential without precedents in “*spaces cape*” for a “supranational political and economic institution”. Such potential needs to be addressed in the proper fashion in order to optimize its projections in the field of the international cooperation and in the sphere of EU's concrete weight within all the relevant international *fora*.

Today's social and economic trends highlight a worldwide crisis and somehow a regression of the common perception of values which gave birth to the sentiment of a United Europe. This trend is even more evident in the internal Member States (MS)'s political and social dynamics, whereas orientations of dissolution, intolerance, discrimination and thoughtless political approach are constantly stronger and well represented within the national parliaments, when even definitively they identify the national governments.

An EU's role coherent with its innate nature seems to be axiologically needed, for the future global challenges can't be likely tackled without the contribution of the whole patrimony of values and aspirations that EU represents, in order to address the individual MSs' contingent impulses in a forward looking and righteous design for the humankind.

Space is inescapably related to the afore-mentioned need, namely, for its inherent implications, it is the future extent whereas most of the future international balances will be played, likewise it is the present instrument whereby ascending on the international scene, and determining the social and economic development, thus also the global political trend, taking also into due account the military direct or indirect applications therein.

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The key issue is condensed around the EU's legal prerogatives for its external action with reference to space, especially taking into due account the wider relations' landscape among the MSs, ESA and the self-same EU. From that perspective, the technical-juridical approach needs to be completely overturned with respect to the common current method, deflecting the dialectical construction of the juridical analysis from Article 189 TFEU and tackling it as just a component of the whole normative substrate of reference, having rather an historical and political dimension than a truly juridical effective one.

The fundamental aim resides in providing some juridical and factual considerations in order to support or instil a political approach, or in order to determine the emergence of the need concerned with more detailed juridical in depth analyses apt to be functional for any deemed proper political choice. Indeed, to assess the adequacy of the EU's action with respect to space and the legal and factual hindrances therein, in order to extrapolate the proper legal instruments apt to overcome those obstacles shall constitute exclusively a technical-juridical endeavour, focused solely on the already existing law. Therefore, the present article won't assess the legal implications of the European Space Policy in order to provide a "direction" for the law making, but rather in order to evaluate if a desirable political direction is currently feasible under a legal point of view.

**The adequacy of EU's action with respect to space undertaken in the last decades and the asymmetry emerging from its projection in the field of the EU's representation within the relevant International Institutions.**

As it is well renown, with the entry into force of the Treaty of Lisbon the European Union has been empowered of a labelled "*space competence*" whereby Article 189 TFEU. Since that, several discussions have been engaged among the most accredited experts on the real range of the afore-mentioned clause. Indeed, the interpretation of the quoted norm is controversial, especially if the exegesis' aim is oriented in elevating the said disposition as an indisputable milestone for a shared and effective competence in space assigned to the EU. The self-same European Commission has deployed several efforts in the last few years in order to shape its conception of Article 189 TFEU in its copious communications, probably not reaching the hoped result in terms of an unconditional acknowledgement from the MSs and ESA.

In spite of that, Article 189 TFEU cannot actually be considered as a watershed for the EU's official entrance in "*spaces cape*", because EU has exercised fundamental and incisive interventions if not truly in space, definitely with respect to space, and that since the late '80s of the past century. In parallel with those interventions, the EU has likewise started in projecting its posture with reference to space within the related and competent international institutions, especially in the United Nations System.

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In point of fact, it is undoubtedly evident that already long before the discussion on a Constitutional Treaty had started in earnest in the early 2000's, the European Community, then the Union, had exercised jurisdiction regarding outer space activities, albeit in somewhat indirect or "accidental" fashion. The afore-mentioned indirect jurisdiction has been undertaken in four specific areas and in the following progressive chronological order, namely in research and development, in the satellite communications sector, in remote sensing for commercial applications, and ultimately with the definitive rise of UE as a global space actor with the political conception, the consequent implementation and respective realization of the two flagship programs Galileo and Copernicus.

European Community also started, since that time, in building relationships with ESA.

The satellite communications sector is still nowadays probably the most brilliant example of an adequate, incisive and timing intervention of the EU in a space related field, whereby a pouring adoption of Directives, Regulations and Decisions through which the EU institutions have exercised a large measure of jurisdictional competence exploiting a juridical base truly not related or conceived for the rise and the implementation of the European Space Policy.

Furthermore, the increasing cooperation with ESA in the context of Galileo and Copernicus also gave rise to the well-known Framework Agreement between EU and ESA in 2003.

On the other side, as regards the external projection of the EU's posture with reference to space, namely to the EU representation within the International Organizations (IOs), as afore outlined, EU has progressively consolidated its prerogatives, although still far from a clear, definitive or undisputed fashion. Concerning the UN's system, EU, and previously the European Economic Community has been admitted to the meetings of United Nations General Assembly (UNGA) for almost forty years, and ultimately in 2011 the rules governing its *status* have been formally adopted, whereby the EU enjoys nowadays enhanced participation rights. As regards specifically the EU's representation and participation within the UNCOPUOS, EU doesn't enjoy therein the same upgraded *status* as in the UNGA itself. Nonetheless, the Committee has recognized the EU as an observer at the beginning of each annual session. In this context, there has been likewise a regular and periodic debate of the Code of Conduct project, and a periodic note of its state of negotiations. As for UNCOPUOS' Legal Subcommittee, which would in all likelihood be the *forum* most appropriate for deliberations on a code of conduct-type measure, the picture of the EU's presence is still somewhat vague. Before 2010, indeed, there were no signs of EU activity in this forum. Since 2012, mirroring the evolution in the main Committee, the EU has been invited to attend the meetings of the Legal Subcommittee, and to address them, as appropriate. In spite of such important mark, which is anyway indicative, and highlighting a certain "trend direction", until present, the EU has not made use of its right to address the Legal Subcommittee.

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The above mentioned comparison between EU's action and EU's external representation leads to emerge as in spite of the "growing trend" detectable in both the described environments, there is likewise a clear asymmetry between them in terms of velocity, incisiveness, and probably "audacity".

Indeed, whilst the factual action exercised by the EU has had a bright character, connoted by timing, temperament and enterprise, the road travelled by EU in the field of the external projection of the posture emerged from such a described action within the IOs has been intricate, full of hindrances and tricks, and most of the times connoted by moments of deadlock. It is as well evident how those difficulties are in a directly proportional fashion emphasized as much as the EU's involvement is concerned directly with space, and more specifically with the law making regarding space, whereas from the UNGA, passing through the UNCOPUOS and ultimately to the Legal Subcommittee, the EU's position become increasingly more hesitant.

In this regard, the afore-detected phenomenon could be explained moving from the natural *dyscrasia* existing between the two ontological environments pertaining respectively to the "internal dimension" and the international cooperation characterizing the "external representation", whereas a political posture needs to be metabolized and filtered within the diplomacy mechanisms and balances, therefore which doesn't allow a perfect overlapping or coherent projection of the one on the other.

Nevertheless, the above-described consideration doesn't hit completely the mark. In fact, the real asymmetry seems to be rather detectable in the "intimate approach", considering that an overview of the general attitude proposed by the EU within the afore-mentioned IOs, doesn't show the same strength and lucidity advanced in the fields of Research and Development, Satellite Communications Sector, Remote Sensing's commercial applications and finally achieving the conception and consequent realization of Galileo and Copernicus.

Assessing the whole complex of questions and considerations above examined, they lead however to emerge an unequivocal adequacy of the EU's action and approach undertaken in the last three decades with reference to space activities and their related adjustments, decisions, interventions, and as a last resort the conception, implementation and realization of space operative systems. Accordingly, the EU's posture has been progressively and increasingly more incisive, pervasive, ambitious, and most of all characterized by the strength apt to realize those ambitions.

Already in the previous dissertations it has been highlighted the extreme efficaciousness with which EU has addressed its enterprise regarding space related activities in R&D, remote sensing commercial applications, and especially in the satellite telecommunications sector, exploiting juridical basis, as referred, not at all conceived for the expression of a European Space Policy. Probably, beyond the political will displayed, the reason behind such a timing, influential and successful interposition resides on a psychological - juridical premise. In fact, in all the quoted areas which have been object of the EU's action, the self-same EU has moved with confidence in a field it felt properly intimate, familiar, and recognizable, namely in the normative substrate of reference pertaining to the internal market law, competitive law and intellectual property rights area.

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Nonetheless, the most important achievement is undoubtedly identified in the realization of the two flagship programmes Galileo and Copernicus and their political, social, economic and strategic inescapable corollary. In this respect, the EU's action appears as even more subversive, considering the conception of endeavours totally cut from any usual EU's field of action, thus identifying a real audacious step forward a non-regulated future environment. The enormous efforts deployed in this regard have been remarkable whereas the difficulties and delays which have connoted especially the Galileo's implementation could hopelessly determine a crush of the project.

All the afore-quoted difficulties highlight even more the strength exercised by the EU, whereas before such a complex and obstructing background it displayed a marked and resolute political willpower and determination in order to accomplish the realization of such a strategic project.

### The contemporary EU's action and approach with respect to the potential accomplished

Given the undeniable adequacy of the action undertaken with respect to space by the EU in the historical *excursus* duly discussed *supra*, and identified opportunely its *acme* whereby the realization of Galileo and Copernicus, and the EU's ascent in the space international scene conferred thereon, the first inevitable question concerns with the EU's contemporary action, specifically whether such action is adequate with respect to the potential thereby accomplished.

Indeed, from the afore mentioned discussion, it has clearly emerged the intricate path the EU needed to travel in the field of the projection of its external posture within the international institutions regarding space, in spite of its although incisive interventions in space related activities and areas.

In this regard, pursuant to a *stricto sensu* conceptual point of view, it is as well incontrovertible that the structure of any kind of international institution, namely international *forum*, especially as regards to its decision dynamics, is still inescapably conceived and related to the idea of "State" in all its classical "conjugations" emanating from the theory of the public international law, thus it is scarcely adaptable to an entity like EU, with its hybridism, its commingling of intergovernmental and supranational elements, its interlocking institutions, and last but not least its frame of dissemination of competences and prerogatives with its own MSs, which constitutes an "internal relation" from which the IOs are totally extraneous, nor thus the afore mentioned elements are susceptible to be automatically applicable or claimable therein. The quoted conceptual separation between the internal relation and its external applicability inevitably affects in prejudice of the EU rather than its MSs, for the last quoted entities operate in their natural environment, from which they are fully recognized and empowered to exercise all the prerogatives pertaining to a "State Entity". The asymmetry between the EU contemporary external representation and its ownership of Galileo and Copernicus is just the natural evolution of the afore-detected asymmetry between the EU's action and its external projection within IOs in the historical review discussed *supra*.

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Nonetheless what above given, such phenomenon could likely acquire alarming proportions, and amount to a general deadlock condition characterized by a total ownership of space operative systems potentially apt to contribute in founding the future global international policies, notwithstanding an obstructed condition within the appropriate seats apt to conceive, develop and implement those policies.

If indeed an asymmetry is totally acceptable and manageable, an inertial attitude in the field of the contemplation of its tendential annulment, thus the shortage of relevant mechanisms apt to mitigate such asymmetry, will inescapably lead to the immoderation of its effects, therefore from an inequality to a blown dichotomy.

### The legal and factual hindrances for the European Union's ascent.

Accomplished a sort of awareness afferent to the evident asymmetry above exposed, and to its implications in terms of a harmful blown dichotomy, the next question which rises to the attention is inevitably oriented in discerning what are the hindrances for the European Union's complete ascent, and those hindrances have both factual and legal sources. In this regard, the main issues heightened as a restriction trait may be identified in four controversial areas, namely the "Article 189 TFEU"; the "Unclear Structure of the European Space Governance (ESG)"; the "Uncertain Borders among EU and its MSs' prerogatives"; and the "Lack of a Conceptual and Systematic Hermeneutical Elaboration of the whole Normative Substrate of reference".

To focus on Article 189 TFEU in order to endow an undisputed legal basis for EU oriented towards an although outlined leadership in the environment concerned with the European Space Governance (ESG), is a very harmful endeavour, which is susceptible to amount to a probable defeat, and to a certain loss of authority. The calling upon Article 189 TFEU shall be undertaken in a very attentive and accurate fashion, and most of all cut off from outbursts generated by a belief of being empowered of "something new" or "something more", which instead is not truly new, nor more. Indeed, as mentioned *supra*, EU's space competence and its acknowledgement whereby Article 189 introduced by the Treaty of Lisbon constitutes merely a formal result with respect to a competence and jurisdiction factually exercised by EU since more than two decades before that recognition. In this regard, nor is feasible a different conclusion for the benefit of EU pursuant to a strictly political key of interpretation, for the *verbatim* data emerging thereon is bivalent, therefore it doesn't allow to define whether its length is more identifiable in a EU strengthened position, or rather in a "safeguard clause" for the benefit of MSs. The space competence established whereby Article 189 TFEU is atypical within the EU's catalogue of competences in a number of ways. First, Article 4, paragraph 3 TFEU ranks space among the EU's shared competences, yet adds the provision that "the exercise - by the EU - of that competence shall not result in Member States being prevented from exercising theirs." This installs a third type of EU competences, distinct from exclusive and 'ordinary' shared competences, as in the latter case, a Member State can no longer legislate once the EU has done so and has "occupied the field".

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This third type has been called a “parallel” competence. Second, and on a somewhat related note, Article 189, paragraph 2 TFEU specifically excludes the harmonization of national laws and regulations from the measures the EU may take when acting on its space competence. It is therefore evident, pursuant to the considerations afore formulated, how Article 189 TFEU is nowadays more susceptible to be a hindrance than a true opening breach apt to consolidate EU’s position within the general environment related to the European Space Governance, and therefore the EU’s consolidation as the leading vector in the external international dimension thereon.

The above detected criticalities derived from Article 189, paragraph 2 TFEU reverberate their effects also on the structure affecting the European Space Governance (ESG). It is a matter of common knowledge how the ESG is conceived, characterized, and realized by means of the so called “triangle” composed by EU, MSs, and ESA. It is nonetheless as well noticeable how that “triangle” - keeping the metaphor - has no specific features, with unidentified clear distances, barycentre, area, and vertexes. The relations among EU, MSs and ESA are indeed deprived of any even outlined or reasonable hierarchical logic, and most of all they are characterized by the lack of any mechanism apt to mitigate their inherent conflictual connotation.

At the present time, indeed, the so called renown “three scenarios” pertaining to the evolution of the relations between EU and ESA - 1) improved cooperation under the *status quo*; 2) making EU to become a member of ESA; 3) turning ESA into a EU’s space agency: 3) - are substantially reduced to only one, probably the most ambiguous and bleak, namely the “improved cooperation under the *status quo*. Apart from further considerations about the adequacy of the afore mentioned solution, to which the present article is not predestined, it seems nonetheless worth to stress how, under a conceptual point of view, the term “scenarios” it is not likely appropriate in order to tackle the shortcomings resulting from the *status quo*, and detected officially in several occasions by the EU Commission, for the legitimate term shall probably be “solutions”, and solutions rather than scenarios are in fact needed. To improve the cooperation under the *status quo* is truly a scenario, but probably not a solution. Governance assimilates by definition the cooperation, but such cooperation needs to be channelled in a definite frame. Consequently, the syllogism seems inescapable: to improve cooperation in a cloudy frame, improves the ambiguity of that frame. In accordance with such assumption, the inference is as well inevitable: unclear internal governance arrangements may make for unclear external representation mandates.

The issue afferent to the precise borders amongst EU and MSs ‘prerogatives is as well pertaining to the topic just discussed, namely to the European Space Governance, nevertheless it needs to be treated with a separated dialectical key. The reason behind that resides in its more intimate nature, and in its deeper connotation. In fact, in spite of whatever is supposed to be emanated from Article 189 TFEU, States still retain sovereign discretion and, as a result, the competence could not be regarded as a shared one but a “parallel” or “supporting” competence. Therefore, any future institutional and programmatic balance remains then heavily reliant on the choices and policies of MSs and, particularly of the most prominent among them. After all, “governments decide on national space activities, which are fundamental elements of the European space panorama.

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They decide ESA's direction, by sitting on the Council, and they influence the EU's position and priorities through the Competitiveness Council or as budgetary authority". It is thus evident how even the problematic dynamics *supra* exposed about the relations between EU and ESA, actually are just a projection of the more profound and rooted obstacle concerned with the relations between EU and MSs. The so called "space clause" contained in Article 189 TFEU cannot be the key apt to overcome that obstacle, for all the reasons broadly above duly discussed. On the opposite, the afore quoted clause contributes in emphasizing the uncertainty amongst the borders related to the EU and MSs 'prerogatives. The just now examined hindrance is probably further accentuated by the common approach undertaken since the entry into force of the Treaty of Lisbon, completely reliant on Article 189 as sculpted and introduced by the quoted treaty, together with an undefined clear global policy apt to serve as a lever in order to liberate EU from a mere economic dimension, thus involving a shortage of a political and strategic willpower.

As it has been duly pointed out in several passages, to pretend to anchor the EU's space competence only in Article 189 TFEU is susceptible to constitute a counter-productive endeavour. Ultimately, under a purely juridical angle, the mentioned assumption constitutes a misleading operation. In fact, a conceptual research of the legal sources whereby to ground the EU's competence in space related activities cannot be undertaken regardless of a systematic and hermeneutical methodological approach. The laws which constitute a normative system are indeed susceptible to fill themselves of their most intimate *ratio* only if assessed pursuant to the whole system whose they are just a propagation. A juridical system has an alive and dynamic connotation, it finds its nourishment both in the ongoing social and political impulses, and it is likewise susceptible of an "*objectification*" from those social and political impulses which gave birth to it. To ask for a juridical response in a single norm is equivalent to a removal of that norm from the "body" whereby it moistens itself of sense. The single laws constitute just an organ, or rather veins, which are just capable of confused spasms if taken away from the system they belong. Accordingly, in order to resolve a juridical dilemma, it is never actually the pertinent norm which responds, but always the whole system. Moreover, taking into due account the system's "*objectification*" mentioned *supra*, its reading needs to be characterized not only by a *sic et simpliciter* exegetic approach, rather equally by a hermeneutical methodology.

Indeed, contrary to their common association as synonyms, exegesis and hermeneutics have truly different ontological prerequisites, for the exegesis cares about providing an explanation of the author's message in the self-same author's contemporary context, whilst hermeneutics overlooks the contingent historical context in order to catch a deeper and more objective significance. A hermeneutical analysis of the whole normative substrate of reference concerned with the EU's competence is thus feasible, necessary, and inescapable in order to extrapolate adequate legal basis apt to ground the EU's competence in space related activities beyond the cage resulting from Article 189 TFEU.



### Legal instruments for avoiding the afore-mentioned hindrances:

- **Trends on Foreign and Security Policy related to GNSS and Earth Observation**

Security policy is deeply intertwined with the themes here examined - most of all with EU's external representation, considering therein included foreign policy and defence policy -, and it is as well intensely in relation with its purposes, in a strengthening meaning. Consequently, it offers remarkable opportunities in order to project some legal concepts therein in the field of space related initiatives, taking as well into due account the EU's ownership of Galileo and Copernicus and its projection in the field of EU's external action and representation within IOs.

The Treaty of Lisbon has led to a simplification of the EU's structure, the explicit provision on the EU's legal personality and institutional amendments related to the European foreign policy, namely, the new position of the President of the European Council, the revised position of the High Representative and a new institution, the European External Action Service. These substantive and institutional innovations affect European external relations, particularly from the principle of coherence's standpoint. Coherence is a necessary precondition for the efficacy of foreign policy not only of the EU but of all international actors. Coherence can be defined as a principle that guides foreign policy. In the case of the EU, coherence indicates, on the one hand, the degree of congruence between the external policies of the MSs and that of the EU - vertical direction - while, on the other hand, it refers to the level of internal coordination of EU policies - horizontal direction -. Since the establishment of the EU with the Treaty of Maastricht, the principle of coherence in the external relations of the EU has been codified in the TEU. The objective of achieving coherence in the external activities of the EU is, therefore, to ensure that the Union can "assert its identity on the international scene". Member States are also obliged to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity", and to "work together to enhance and develop their mutual political solidarity". Furthermore, Member States are required to "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations".

The above mentioned provisions of Article 11(2) of the TEU(N) apply to the Common Foreign and Security Policy - CFSP - and can be understood as a principle of vertical coherence. The Council is charged with the responsibility to ensure compliance with this principle of loyalty.

The Lisbon Treaty maintains the principles of both horizontal and vertical coherence. The legal effect of the obligations to cooperate and to coordinate is nonetheless still relativized by the fact that neither the principle of horizontal coherence of Article 21(3) nor the principle of vertical coherence of Article 24(3) of the TEU(L) are justiciable, because these Articles do not fall under the jurisdiction of the Court of Justice of the European Union (ECJ), which was the case concerning articles 3 and 11(2) of the TEU(N).



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Despite the afore detected shortage, it is evident the emergence of FASP as a fertile field whereby to develop EU's external action and representation even for space related initiatives, especially after the innovation given by the Lisbon Treaty, since, as afore mentioned, the former purely intergovernmental connotation of FASP has been mitigated by means of the new features given to the High Representative. By such implemented role, indeed, FASP may be susceptible to have also a genuine supranational dimension, allowing thus such sector to be affected by purely European policies and visions, with a view of an escape dynamic from the main MSs' influence which has characterized such environment. Furthermore, Galileo and Copernicus are susceptible to be the main prodrome of the aforesaid dynamic, whereby the complex of facilities they provide in matters of security and defence. On the opposite angle of view, FASP can be likewise a prodrome for the EU's external length development in space related activities, whereas, as afore outlined, its structure - even with the ambivalent connotation of some passages of the Treaties above remarked - grants to EU to postulate its identity on the international scene and charges the MSs in order to facilitate such process, in the general aim identified in the coherence of EU external policy as a unitary entity towards which such described system is supposed to tend. From that perspective, there are some environments in which FASP is susceptible to be inflected in space related activities having an external latitude on a purely "supranational" connotation, namely the implementation plan for GE-OSS (Global Earth Observation System of Systems, EU Commission DGs engaged in matters related to internal security; The High Representative FASP's competence in the management of Galileo in urgent contingencies; and the potential projection mainly of Galileo in military areas).

**Theoretical and legal conception of Outer Space regarding the competence's issues concerned with EU:**

- **Space as an Aim or Space as a Means?**

In order to assess the EU's legal frame pertaining to the competence's distribution afferent to space related activities, a conceptual analysis of the real dimension concerned with the definition of "space" is preliminarily needed. In fact, the assessment of the legal frame requires a previous proper identification and demarcation of such frame. The conception of "space" is an ineluctable prerequisite in order to accomplish properly the afore-mentioned identification. The above entitled conceptual distinction whereby the term "Space" is susceptible to be inflected - Aim or Means - translates itself in the core of the issue just now introduced.

From a purely EU law's perspective the term "space" cannot be interpreted as end in itself, for such a length might bear misleading effects in the field of the EU-MSs distinction of competences. Such unconscious conceptual approach is the principal cause of several difficulties detected in the preceding dissertations regarding the deceitful outcome given by a construction of EU's space competence essentially anchored on Article 189 TFEU.

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The introduction of Article 189 TFEU, establishing an explicit EU's space competence, has likewise inherently deflected the attention of the interpreters with regard to the terminological extent of the term "space", reducing its sense in a *stricto sensu* denotation, namely manipulating its dimension by implying a EU's competence exclusively grounded to space intended as an aim. Consequently, the whole setting of discussions and debates raised thereon have been focused on extrapolating the EU's space competence arguing by such conception, and so did the self-same EU Commission whereby its efforts apt to shape the length of its related prerogatives given thereon.

The afore described distortion raises the conceptual distinction between the two connotations which are linked to space as regards particularly to EU Law's setting of competences, namely "Space as an Aim" and "Space as a Means". Article 189 TFEU undoubtedly bears the former intent. Accordingly, a juridical in depth-analysis apt to ground the EU's space competence with such sense, will always inescapably amount to the self-same Article 189, with the corollary of hindrances broadly already detected and discussed. Nevertheless, from a EU law's perspective, space should likewise be inherently intended as a means and with its economic, commercial and social implications, for its capability to satisfy and realize a set of policies which are deeply connected with EU's institutional competences, aspirations, and general purposes. Such a distinction is not a mere exercise in style, for it reverberates concrete effects in the field pertaining to the identification of the law applicable and claimable regarding EU's competences. Indeed, once the space is intended as a means, the EU space competence's anchoring may be deflected from Article 189 TFEU, and it could find its juridical ground in several other EU Law's dispositions which provide a wide range of exclusive and shared competences reserved to EU in areas whose space is increasingly raising as a crucial instrument. Once again, the above outlined inference is confirmed by the historical *excursus* referenced in the previous passages. The EU's action and jurisdiction undertaken with respect to space in the last three decades was not at all a speculation, rather EU moved itself perfectly among concrete legal basis, namely with a juridical legitimacy. Such historical reference is thus a testament showing how the space intended as an aim, and consequently the space competence sculpted in Article 189 TFEU, is just a component, namely a residual segment among the whole set of connotations and related competences with which space may be translated or inflected with respect to the total landscape of EU's policies.

### The "Indirect Space Competence

Arguing from the assumption of Space intended as a means, the EU's exclusive or shared competence owned in several extents of policies whereby the EU Treaties, may be surreptitiously extended to Space in so far as Space serves as an ineluctable instrument for the realization of the afore mentioned policies, or in so far as space activities affect to those areas of EU's competence.

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In any case, on any acceptance afore exposed, the above mentioned dynamic stresses the inescapable connection between Space and EU's rightful areas of interventions.

Consequently, if the clause sculpted whereby Article 189 TFEU could be defined as the "EU direct space competence", it may be likewise configurable a "EU indirect space competence" given by the inevitable denotation of space as an instrument for the fulfilment and implementation of those policies whose EU owns a truthful shared competence, when even an exclusive one.

Exclusive Indirect Space Competence may be recovered and identified in the following EU's areas of relevance: EU's Competition Law; The conservation of marine biological resources under the common fisheries policy; and The EU's exclusive competence in the conclusion of international agreements.

**Competition Policy**

The competition policy is the first area apt to ground EU's exclusive competence in space related activities, and it is grounded in the normative reference given by th Article 3, paragraph 1, let. B TFEU.

From that perspective, EU's competition law is in particular related to space in the angle of a set of issues pertaining to the Liability Convention and its corresponding corollary, especially in the context of "national authorizations and licensing" thereon, in order to stress how several legal and economic dynamics emanating from such environment are susceptible to touch EU's competition frame, and consequently they may be susceptible to be touched in turn.

Specifically, in the context of national authorization, the issue of liability is sculpted by the general framework developed at the international level by means, principally, of Article VII of the Outer Space Treaty and the Liability Convention.

In addition to the well renown general principles emanating from the afore mentioned treaties in matter of liability, as a further consequence of the above, under domestic implementation mechanisms usually appropriate insurance or financial guarantees are required from the private operator.

The mechanism most often chosen by states to deal with any international space law issues in the context of their domestic legal systems is to draft a framework law, laying down the ground rules for the licensing process whilst merely indicating the substantive obligations to be included in specific licenses, or at best outlining them. As for the liability and insurance issues, this amounts usually to insertion in the national space law or act of a principled obligation to indemnify the state comprehensively if the latter would have to pay an international liability claimed under the Liability Convention, most of the times by providing as well a compulsory insurance provision, but also allowing for case-by-case deviations from that general rule without much detailed guidance on when such partial exemptions should be admissible allowing likewise a *de facto* cap to the insurance coverage whereby disparate instruments.

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While the flexibility noted above in determining the substantive obligations regarding liability and insurance on the part of national authorities may perhaps be reasonable, these “case-by-case” solutions from a legal perspective raise some serious questions. Indeed, they may well turn out to be disputable under EU’s competition rules and State aid rules.

The tendential unenforceability of EU’s competence in such highlighted matters, given by the distinguished opinion of some experts - substantially anchored in Article 189 TFEU and in the theorized exemption from application of state aid principles grounded on a presumed infancy of the space sector, deserving some protection - may be somewhat debatable.

Under the point of view *supra* exposed, it may be likewise possible to achieve a different conclusion, namely the tendential applicability of EU’s competence and, as a result, the possibility to advocate the potential legitimacy of EU’s interventions in the afore described areas.

Such different conclusion is truly allowed by the overturned conceptual approach duly exposed as regards the acceptance of space as a means, and consequently to the theoretical qualification of a EU’s indirect space competence given by a hermeneutical juridical elaboration aimed at deflecting the discernment of EU space competence merely from Article 189 TFEU. There is indeed no doubt that the aforementioned national regulations are susceptible to conflict on the EU’s competition set of rules, as well as no doubt can be raised on the EU’s exclusive competence on such area pursuant to Article 3, lett. B TFEU.

Regarding the outlined exemption of potential state aid pertaining to space related sectors of interest with respect to the EU’s corresponding discipline, the argument set out above, expressed by some distinguished doctrine, might not hit completely the mark.

In fact, preliminarily, on the one hand, the term “space sector” shouldn’t probably be used in an all-encompassing intent. Within “Article 189” several compartments are detectable, with totally different economic dynamics and as much distinctive *status* of development. Accordingly, saying that the space sector is still in its infancy doesn’t provide an overlapping representation of the factual reality and its related complexity noticeable therein. Considerable areas concerned with space activities and space industry bear a background developed in more than 40 years, with consolidated players, practices, and know-how.

On the other hand, the reference to Article 107, paragraph 3 TFEU is operated in a partial fashion, not catching all the implications emanating thereon.

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It is undoubtedly true that the space sector - *rectius*: some space sector compartments - could be tantamount to “*certain economic activities or certain economic areas as recipient of the aid, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*” in order to facilitate their development. Nevertheless, such observation omits to consider that the afore quoted activities or areas, don’t enjoy the “legal compatibility” established by the paragraph 2 of the norm in question whereby the locution “*shall be considered compatible*”, rather they relapse in the provisions of the paragraph 3, pursuant to which such aids “*may*” be considered to be compatible with the internal market. Such detection is anything but negligible. In fact, under such legal regime, the EU Commission owns several prerogatives of intervention, when even of truly coercive interference with respect to MSs’ appanages, being likewise empowered to invoke the intervention of the Court of Justice of the European Union, pursuant to the subsequent Article 108, paragraphs 1 and 2.

Moreover, with a view to the deflection from Article 189 TFEU and the set of difficulties detected thereon, the legal system *supra* exposed, duly shaped whereby the interpretation key as well provided, may allow to bypass both the EU space competence’s issue, and the foreclosure of harmonization concerned with MSs legislations and regulations on space matters, since the exclusive competence and the set of instruments provided by Article 108 TFEU are surreptitiously functional to such aim, in order to exercise a gradual harmonization pressure.

Finally, a last cue which deserves duly attention in matter of liability, is identified by the EU’s ownership of Galileo, and it is concerned with the possible perspectives emanating from cases of malfunctions of the quoted system, and consequently the potential damages resulted thereon in the environment pertaining to particularly significant civil activities, as for instance the civil aviation.

The matter above described is susceptible to constitute as well a fertile field in order to feed EU’s prerogatives in the law making with respect to several space activities which are lacking of a juridical coverage, as well as to enhance EU’s perspectives of harmonization regarding its own MSs’ set of rules on the matter, both in case those set of rules have been already established, that in case they haven’t yet, thus stressing such lack and pushing for relevant national legislations therein.

Indeed, the hypothesis *supra* outlined is not susceptible to relapse on the Liability Convention, and not simply because EU doesn’t fall within the signatory States of such international agreement. When even EU adhered the Liability Convention, the latter would not likely be as well applicable in view of the conceptual length of the term “space object”, which as interpreted, is not inclined to cover cases given by a Galileo’s malfunction apart from damages generated by “*component parts thereof including any fragment after (partial) disintegration in outer space*”.

In such quoted frame, the only normative source raising to the attention is identified in Article 340 TFEU, which sculpts EU’s liability both in its contractual that non-contractual dimension.

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Consequently, the liability configurable in relation to damages affecting civil activities emanating from Galileo's malfunctions constitutes a totally new frontier, relapsing specifically in the field which may go by the name of "The liability for damages created by space systems aimed to civil use", namely a virgin and unknown juridical field which requires to be filled. EU is empowered to legislate in this regard already pursuant to Article 189 TFEU. The exclusion of any prerogative of harmonization contained therein shall not be a deterrent apt to inhibit EU's initiative, as to why the first leverage for harmonization is a previous legislation in fields not yet touched by national interventions, displaying a political will apt to claim a leading role in certain environments, and creating conditions apt to make politically not convenient and factually difficult a subsequent national legislation susceptible to jeopardize the European extent on the matter in question, last but not least pursuant to the general clause of "Sincere Cooperation".

Equally, the potential applicability of the Liability Convention in cases concerned with damages generated by space objects resulting from Galileo's constellation may rise even more pregnant scenarios for EU's range of action. In such cases, indeed, since EU is not a signatory part of the quoted Convention, the latter would be applicable to the "launching state (s)" case by case identified. Nevertheless, considering the EU ownership of the referenced space system, EU would be inescapably involved in the "chain" apt to release the MS(s) which will be obligated pursuant to the Liability Convention. Consequently, the existence of national authorization and licensing systems, or even their non-existence, in so far as they are susceptible to create inconsistencies with the EU's frame which will be in turn adopted on the matter, may jeopardize the architecture of EU's common market, and may as well relapse in the sphere of EU exclusive competence afore duly argued.

**Article 3, Paragraph 1, lett. D TFUE**

The conservation of marine biological resources under the common fisheries policy, as an area where EU enjoys an exclusive competence in accordance to the entitled normative disposition, is decisively intertwined with Copernicus ownership and the consequent space related activities and policies emanating thereon.

**Article 3, Paragraph 2 TFUE**

As regards to the EU's external length in space related policies, and pursuant to as above inferred, the entitled disposition in question is emblematic. The wording of the norm explicitly brings the following reference: "*The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*".

**The Shared Indirect Competence - Internal Market; Economic, social and territorial cohesion; Agriculture and fisheries; Environment; Transport; Trans- European networks.**

As for the exclusive competence, there are a set of areas directly and indirectly related to space activities as well as to EU's ownership of Galileo and Copernicus, where EU enjoys a shared competence in relation with its MSs. Such areas are sculpted by Article 4, paragraph 2 TFEU, which are identified in the following EU's policy sectors: Internal Market; Economic, social and territorial cohesion; Agriculture and fisheries; Environment; Transport; Trans- European networks.

The connection between such areas and EU's ownership of Galileo and Copernicus is intuitive.

As regards specifically the internal market, it has been already outlined how such environment is capable to attract a set of space activity's implications, and consequently the relevant EU's exclusive or shared competence. Indeed, each contemporary space programme is susceptible, when even conceived, in order to be functional for civil users, namely in order to reverberate its effects on the worldwide market. From that perspective, it is evident how the implications emanating from a space programme for the EU's internal market are potentially unlimited. The sector pertaining to the social and territorial cohesion rests on the same roots.

All the afore mentioned areas ground a EU truthful shared competence, in spite of the "parallel competence" sculpted by Article 189 TFEU. Such detection bears several implications in so far as EU may legislate in such sectors in advance of its MSs, thus preventing MSs in exercising their self-same competence.

**Case Law perspectives of the European Court of Justice**

The Court of Justice of the European Union (CJEU) has jurisdiction in principle over all disputes pertaining to the interpretation, application, and implementation of EU law across the European Union pursuant to the artt. 258, 259, 263, 265 267 TFEU.

The potential case law posed by the CJEU on the matter concerned with EU's space competence, both in its direct that indirect connotation as afore argued, rises the Court as a tremendous political instrument, as well as the Court itself represents - more than a purely jurisdictional one - a truthful political subject in the EU's landscape.

The jurisdiction frame established by the EU's treaties as regards the CJEU comprises a range of instruments and matters, as well as a range of "subjects" who are empowered, case by case, to appeal to the Court. From that perspective, such instruments are extremely functional in order to allow EU to consolidate its prerogatives in space regarding its internal dimension towards MSs, and consequently the external projection thereon towards IOs, as well as those instruments are susceptible to result as a means for a gradual process of harmonization towards respective national legislations, overcoming thus indirectly the foreclosure given by Article 189 TFEU on the matter.

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Such instruments are well renowned, duly listed by the treaties, and identified in: the “Action for Failure”; the “Action for Annulment and for Failure to Act”; the “CJEU Competence on Preliminary Rulings”; and the “CJEU Consultative Competence”.

The picture emerging from an overview concerned with the norms governing the *supra* outlined instruments, as well as the subjects and the cases involved thereon, rises the possibility to channel whereby the CJEU the EU’s political will apt to claim its own competences and prerogatives in the space related areas and matters, thus provoking the law production emanating from such principal legal source whereas the controversial interpretation of Article 189 TFEU may be overcome whereby the normative references and cues disseminated along the treaties. Such path, may translate the hermeneutical endeavor hereby undertaken in blown coercive law endorsed by the Court.

Consequently, the solution hereby envisaged, is condensed in the potential EU’s quarrelsome posture towards its own MSs whereas the latter undermine EU’s prerogatives pursuant to the set of competences indirectly related to space - even calling upon Article 189 TFEU - in order to contain EU’s action and its external representation availing themselves of the foreclosure given thereon.

To this end, EU enjoys a wide range of options whereby to translate its political will into the jurisdictional machinery, whilst some other instruments given therein, as for instance the CJEU’s preliminary rulings, are not directly related to EU’s will, rather representing a source of juridical production from which EU may benefit by extension, especially with respect to the process of harmonization of national laws and regulations.

Consequently, the potential disputes regarding EU’s space competence may be raised to the Court by EU whereby the Action for Failure. A hypothetical behaviour put in place by a Member State in order to hinder EU’s actions, prerogatives and/or competences deemed rightful in space related activities, pursuant to the hermeneutical elaboration of the whole normative substrate of reference provided by EU Law, could be ascribable to a “*failure to fulfil an obligation under the treaties*”, thus susceptible to fall under the procedure provided for in Article 258 TFEU. It is also worth mentioning that the principal MSs’ obligation emanating from the treaties, considering the aseptic and controversial length of Article 189 TFEU, is provided for in the general clause of “Sincere Cooperation”, pursuant to which: “*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives*”.

Equally, as regards for instance to the national legislations and regulations in space related activities which may affect the European internal market being potentially in contrast with EU competition and state aid law, as it has been duly referred *supra*, pursuant to Article 108 TFEU, the Commission may refer the matter directly to the CJEU in derogation of the specific procedure outlined by Article 258 and 259 TFEU.



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As regards Action for Annulment and for Failure to Act, such instruments provide a strategic leverage for EU in order to exercise a speculative action - when even a speculative inertial behaviour - in space related activities apt to provoke an appeal to the CJEU viable by MSs, or even by natural or juridical subjects which may deem their juridical sphere affected thereon. Indeed, with regard to the latter case, again, the issues pertaining to the national authorization and licensing systems needed by virtue of the potential applicability of the Liability Convention to the corresponding states, thus their possible being in contrast with EU competition and state aid rules, are claiming to be a dormant *humus* apt to germinate disputes. In this regard, the most latent scenarios are identified in controversies which could be raised to the Court by the MSs in response to a concrete action of interference exercised by EU, or which could be likewise raised by natural or juridical subjects - most of all private companies - which could claim for a EU's intervention in areas regulated at national level which are censored to be in contrast with the internal market's principles, in response to an inertial posture perpetrated by EU.

Moreover, the advocated EU's intervention by virtue of the potential prerogatives hereby duly outlined, does not end only in a mere option for EU, rather it is susceptible to identify itself as a true obligation. In fact, it should not be neglected that EU is liable for damages caused by its institutions or by its servants in the performance of their duties, pursuant to Article 268 in conjunction with Article 340, paragraph 2 TFEU. Accordingly, a private company operating in space activities - or space related activities - which felt itself damaged by the inertial posture of EU institutions in case an obligation of intervention was inclined to be extrapolated from the treaties, in a general context given by a national legislation which was retained to be in contrast with EU prevalent principles, could concretely claim a compensation towards EU in response to its neglectful behaviour.

Regarding the CJEU's competence in preliminary rulings, it has been duly mentioned *supra* its connotation as a source of juridical production from which EU may benefit by extension, especially with respect to the process of harmonization of national laws and regulations. Indeed, the obstacle given by Article 189 TFEU in term of harmonization of national legislations and regulations in space, could be easily undermined by the national courts or tribunals. Once a national law was censored as in contrast with EU Law or with a previous EU's legislation in accordance with the treaties by a private subject, and once such matter was referred to the aforementioned national jurisdiction, such question should be likely devolved to the CJEU. In case the latter will find the national law contrary to the EU Law or in contrast with a previous EU legislation even formulated in accordance with Article 189 TFEU, the national judge would be obliged in providing a disapplication of the national law.

The attitude of such dynamic in order to provide a gradual harmonization in spite of the foreclosure posed by Article 189 TFEU is intuitive, and it shows as well how the aforementioned foreclosure should not inhibit EU in formulating promptly its own legislation in space, especially in the several fields where such intervention is intimately required.

*SPACE*

Finally, as it has been already mentioned, the CJEU's consultative competences given whereby Article 218, paragraph 11, constitute a massive instrument whereby EU's political will - in ITS external dimension, within the IOs and towards third states - may be channeled, thus grounding the EU's envisaged actions within the international scene pertaining to space - whereas such actions were frustrated by MSs' posture therein - on the binding opinion provided by CJEU. Such instrument is in point of fact inclined to consolidate EU's international dimension in space, whereby the instigation of the "juridical source" represented by the Court.

**Conclusions**

Moving from the substantial intent expressed in the introduction afferent the present study, the questions hereby treated are oriented in order to stress a lack, a shortage, and consequently with a view to foist the emergence of a latent need of fulfilment in all its blown acuteness.

The residence of such a need in the "inner hole" of EU's institutions, especially those with a supranational vocation, at least in its axiological inflection, shall constitute a firm conviction.

In spite the pretended pure technical-juridical approach, and in the light of the legal instruments here provided, it is as well clear which one is the hoped political direction hereby advocated.

Nevertheless, such political direction is latent throughout EU's law, as well as in the actions undertaken by EU duly exposed, last but not least the self-same ownership of Galileo and Copernicus. Consequently, the lack to be filled doesn't identify itself in the desirable EU's political orientation herein paraded, rather in the discernment of the way apt to reach, to keep and to implement such political orientation given as an inescapable assumption. Therefore, the "political answer" quoted in the introduction from which the present dissertation has been distanced, doesn't concern the aim, rather the itinerary apt to achieve such aim. Such itinerary belongs to the discretionary contemporary EU's ruling class, whilst the present discussion's appanages are technical and functional.

From that perspective, notwithstanding, the law is the quintessential instrument, for it is not only functional in order to provide gears to a political will, but it is likewise inclined with a view to shape that self-same political will, or recurrently it tends to remind the political orientations anchored on its inception, basically translating itself as a compass for any deemed proper direction. Moreover, the juridical mechanisms afore outlined are likewise susceptible to determine the intersection between the top-down solutions hereby presented and the bottom-up dynamics as well highlighted. In this regard, it is worth to be further stressed the particular connotation of EU's law which constitutes the only one blown example of "international law" directly applicable and claimable by natural and juridical subjects. Consequently, the legal instruments hereby provided display a potential concatenation of effects and results.

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In point of fact, each one of the issues *supra* outlined bears its own critical and controversial aspects which thus require a specific in depth elaboration in order to overcome any potential difficulty and to identify the most proper fashion apt to achieve the corresponding most aware and accurate application of such juridical mechanisms.

Whereby the questions herewith posed it has been possible to stress some critical issues concerned with EU's political weight in space related policies, both in its internal and external inflection, compared with EU's ownership of space operative systems inescapably apt to conceive and implement those policies. If EU's political posture, and its subsequent choices are nearly unquestionable under the adopted methodological approach afferent the present analysis, it is no less true that the critical points hereby highlighted are nearly undisputable. Accordingly, a EU's prompt decision apt to identify its own defined and resolute path shall be at the present time a sudden urge.

In this regard, the present elaboration provides just a sample of all the juridical instruments duly examined, nevertheless, as a downside, the initial in depth approach hereby undertaken is doubtless susceptible to parade instead entirely the foreseeable scenarios in case such instruments were not used, thus granting a full consciousness in terms of paths towards some achievements as well as in terms of crossing time apt to reach them.

The counterfactual scenarios pertaining to the non-utilization of the instruments hereby discussed relies totally in the *status quo* affected and ruled by Article 189 TFEU. Such legal frame, in spite of its statement of principle, doesn't provide a truthful relational competence for EU, conversely it explicitly excludes it, whereby the foreclosure of any prerogative of harmonization of national legislations and regulations therein. The mentioned juridical cage translates itself in a factual dimension bearing a range of pernicious effects in the extent of European Space Governance, in the field of the implementation of a European Common Position, and consequently in the sphere of EU's proportion within the relevant IOs. Furthermore, the just quoted condition reverberates its ineluctable effects towards another factor which is generally fundamental in policy, and most of all in space policies related to Galileo and Copernicus's ownership, namely the time. The contemporary international scene pertaining to space is indeed increasingly characterized by both consolidated and emerging nations which are EU's competitors as owners as well of such same type of space systems. Those nations move themselves both in their internal that external dimension with well oiled mechanisms, as well as their posture is marked by speed of thought and prompt related actions. The potential overtaking in the global market operated by other space actors to the detriment of EU may frustrate the potential political weight currently exploitable by EU whereby its state-of-the-art space operative systems, making them "politically obsolete" even in the medium term. Consequently, the whole range of Union's efforts may be potentially undermined, and the political ambitions behind their inception may be hopelessly lost.

Moreover, it would be truly specious to conceive such counterfactual scenario as limited only to the "space extent".

## *SPACE*

Indeed, at the present time, space translates itself as an exceptional opportunity for the worldwide global policy. As already mentioned, space represents, for its inherent implications, the future extent whereas most of the future international balances will be played, being likewise the present instrument whereby ascending on the international scene, and determining the social and economic development, thus also the global political trend, taking also into due account the military direct or indirect applications thereon. From that perspective, the contemporary EU's ownership of tremendous cutting-edge space operative systems produces a "one-time juncture" in order to acquire a political length as a unitary entity in a comprehensive dimension. To lose a full exploitation of such contingency, would mean to relegate EU's development in an indefinite suspension. In layman's terms, it would represent a watershed, implying a EU missed reconciliation with its history.



## Entry into force of the European Common Aviation Area (ECAA) Agreement

Pietro Nisi \* and Daniele D' Antonio\*\*

On 1<sup>st</sup> of December 2017, the European Common Aviation Area (ECAA) Agreement between the EU, its Member States, the Kingdom of Norway, Iceland and the Western Balkan partners (encompassing *The Republic of Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, the Republic of Serbia, Montenegro and the United Nations Interim Administration Mission in Kosovo*) came into force.

This agreement seeks to establish a European Common Aviation Area (hereafter ECAA) which is contingent on the principles of free access with the market, freedom of establishment, equal conditions of competition, as well as standardized rules encompassing areas related to security, air traffic management and also social and environmental aspects. Once in force, this agreement aims to incorporate the Western Balkan partners into the internal aviation market of the European Union.

The incorporation of the Western Balkan partners into the ECAA is divided into two provisional stages and is subject to valuation by the EU. In respect of the amalgamation of the Western Balkan partners into the EASA, the Agreement specifically refers to a Joint Committee being established at the end of the second phase of the transitional period. This specifies that the Committee is to determine the exact status and conditions for collaboration in the EASA.

The Agreement results from indications by the EU which were communicated as far back as 2005 when the importance of establishing a common air space with oriental and southern countries was underlined. The purpose of the 2005 Communication "Developing the Agenda for the EU's foreign aviation policy" was to create a more open and wider framework of common rules within the aviation industry. These indications were accepted and subsequently adopted by the EU Council, aiming to adapt bilateral agreements within the sector and focusing on expanding and improving such agreements in the aviation market.

The provisions of Article 6 are of particular relevance in this context because these provisions implement the principle of non-discrimination on the basis of nationality as well as the principles set out in Articles 7 to 10 which prohibit any restriction on the freedom of establishment of Member State citizens or of ECAA partners in the individual territories.

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## MISCELLANEOUS MATERIAL OF INTEREST

This results in access to self-employment, potential setting up of and running businesses and companies under the conditions established, in line with the legislation of the individual country concerned. Quantitative restrictions in respect of transfers of equipment, spare parts and other devices are also abolished where it is necessary for the ECAA air carrier to continue its business in line with the conditions established within the agreement.

In relation to aviation security, the Parties must ensure that the aircraft of any Party landing the another territory complies with the international safety standards as well as being subject to any required inspections of crews and equipment.

Parties to the agreement must mutually undertake to protect civil aviation from any potential act of piracy which intends to threaten the safety of passengers, crews, airports and air navigation facilities. Furthermore, a mutual obligation of cooperation is bestowed on Parties in the event of any potential security risk.

In order to facilitate the application of the "Single European Sky" legislation in the ECAA, the Parties undertake to organise specific structures for air traffic management which involve setting up specific national control bodies which, in accordance with Community legislation, must be separated from the subjects providing air navigation management services.

With regard to the protection of competition, the Agreement establishes a process of approximation of the existing legislative provisions on State aid and competition between the parties associated with those of the European Union.

Specifically, Annex III states that commercial practices which are incompatible with the proper functioning of the agreement are represented by: (i) all agreements between companies that have, as their object or effect the prevention, restriction or distortion of competition; ii) the abuse by one or more undertakings of a dominant position in the territories of all the Contracting Parties or in large part of them; (iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or productions. Each associated party designates or establishes a functionally independent authority able to monitor compliance with the rules protecting competition.

It is therefore an important development considering the fact that the issue of protection of competition is rarely the subject of evaluation and an in-depth analysis in the context of bilateral agreements between States.



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