

THE FRAMEWORK AGREEMENT BETWEEN THE EUROPEAN SPACE AGENCY AND THE EUROPEAN COMMUNITY

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Abstract

This paper analyses the framework agreement between the European Space Agency (ESA) and the European Community (EC), concluded November 25th, 2003, which entered into force May 28th, 2004.

The institutional landscape for European activities in outer space provided for in the agreement is compared to the prior institutional setting. This comparison shows that the framework agreement (FA) has not revolutionised the relationship between ESA and EC. It rather contains models for cooperation projects that could already have been employed outside the framework the agreement provides for.

Nevertheless, the political importance of the framework agreement should not be underestimated. For the first time, the agreement commits ESA and EC to working together and to combining their efforts to achieve a coherent European space policy.

Therefore, the application of the framework agreement will play an important role in determining in which direction the cooperation between ESA and EC and thus the European commitment in outer space will develop.

Introduction

The conclusion of a Framework Agreement (FA) between the European Space Agency and the European Community on November 25th 2003¹ was the latest step in a continuous rapprochement between the two organisations. Founded in 1975 as a replacement of the European Launcher Development Organisation (ELDO) and the European Space Research Organisation (ESRO), ESA was designed to serve as the institutional framework for European collaboration in space.²

But since the early 1980's, the EC, originally focussed on economic questions like the common customs area, became more and more involved in space matters due to an increasing interconnection

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between space applications and the implementation of the EC's policies.³

This increasing involvement of the EC in space matters evoked the question of the relationship between ESA and EC. A closer cooperation between the two organisations seemed to be the logical consequence, since ESA possesses the technical know-how to implement specific space programmes, while the EC could provide for a stronger institutional demand for space applications. In order to bring together the supply-focussed approach of ESA and the demand-focussed approach of the EC, the two organisations agreed to cooperate in specific space related projects like Galileo (the European navigation system)⁴ and GMES (Global monitoring for environment and security)⁵. But it became clear that this only project-oriented approach could not answer the need for a coherent overall European space policy.⁶

This need was particularly stressed by the "Wise Men Report", an independent expert opinion on the future role of ESA, which was published November 9th 2000⁷. The authors of this report called for a restructuring of the European space sector, with the EC (resp. the European Union, EU⁸) becoming the overall policy maker and ESA the *de facto* implementing agency⁹. Stimulated by this report, the EC Commission initiated a so called "Green Paper Process" to discuss the question of an EC space policy with all the stakeholders.¹⁰ This process led to the presentation of a "White Paper on Space", elaborated in close cooperation with ESA, which contains concrete propositions for a multi-annual European space programme.¹¹

At the same time, the deliberations in the European Convention on the future of Europe led to the inclusion of an explicit EU competence for outer space in the draft EU constitution.¹² This constitution for Europe has in the meantime been accepted by the

Heads of State or Government without amendment to the articles regarding outer space.¹³

It is against this background that the framework agreement was concluded and is meant as the necessary means to implement the European space programme laid down in the "White Paper on Space".¹⁴

The framework agreement and the other above mentioned major changes in the institutional setting of the European space sector are subject of the current research project "Legal Framework for a coherent future structure of European space activities" carried out by the Institute of Air and Space Law at the University of Cologne under the supervision of Prof. *Stephan Hobe*, supported by the German Federal Ministry for Education and Research (BMBF) and the German Aerospace Centre (DLR).¹⁵ The results of this research project will be published mid 2005.

General remarks

The framework agreement has been subject to long-lasting negotiations between the two parties. Controversial issues included *inter alia* the responsibility for the elaboration of the overall European Space Policy and the application of ESA's principle of geographical return.

Pursuant to this principle, ESA awards contracts to the industry of its member states according to the member state's respective financial contributions to the ESA-programmes.¹⁶ The compliance of this principle with EC-competition and single market rules is controversial.¹⁷ The EC-Commission, for its part, was not willing to accept the application of the principle of geographical return to EC-contributions. In its art. 5.3., the framework agreement thus states explicitly that the EC shall "under no circumstances (...) be bound to apply the

rule of geographical distribution contained in the ESA Convention.”

A further issue at stake in the course of the negotiations was the inclusion of the European Union’s Common Foreign and Security Policy (CFSP) into the framework of the agreement. Originally, the negotiation mandate for the ESA Director General covered the EU as a whole, including the CFSP, the EU’s second, intergovernmental pillar. However, the framework agreement was finally concluded between ESA and EC, excluding the security related CFSP-issues from the scope of the agreement.

Legal basis for the framework agreement in the ESA-Convention is art. XIV ESA-C.¹⁸ It provides for the cooperation of ESA with other international organisations. The EC-Council decision to adopt the agreement was based upon “the Treaty establishing the European Community and in particular Article 170 ... in conjunction with ... Article 300(2)” thereof. Art. 170 EC in conjunction with art. 300(2) EC provides for the conclusion of agreements “implementing the multiannual framework programme” in the areas of “research, technological development and demonstration”.

The scope of the framework agreement is not limited to joint research projects, though. According to its art. 1, the framework agreement rather aims to link the European Space Policy to other general policies pursued by the European Communities¹⁹. Thus, it would have been preferable to base the framework agreement also on respective provisions concerning these other EC-policies.

Aims of the Framework Agreement

The preamble and art. 1 FA contain the aims and purposes of the framework agreement. According to the preamble, the framework agreement is meant to “strengthen the peaceful use of outer space as an important

tool to contribute to European cohesion and economic growth and will allow space-related activities to be brought to a wider political, scientific, environmental and social framework more directly at the service of European citizens”. ESA and EC acknowledge that they have “specific complementary and mutually reinforcing strengths” and commit themselves to cooperate in an “efficient and mutually beneficial manner” and to avoid “any unnecessary duplication of effort”.²⁰

According to Art. 1 FA, the purposes of the cooperation are twofold: On the one hand, ESA and EC are to develop a coherent overall European space policy, linking the demand for services and applications using space systems in support of EC policies with the supply of space systems and infrastructure necessary to meet this demand. On the other hand, the FA will also provide for the necessary rules to jointly implement this policy.

The envisaged fields of cooperation are listed in art. 3 FA. This non-exhaustive list embraces science, technology, earth observation, navigation, communication by satellite, human space flight and micro-gravity, launchers and spectrum policy related to space.

It is noteworthy that, due to the diverging positions of the two parties, security and industrial policy, two important policy fields connected to outer space, are not explicitly mentioned as fields of cooperation.

Space Policy

Although the development of a coherent European space policy is one of the main objectives of the framework agreement²¹, the agreement does not include provisions on responsibilities or procedures to determine such a space policy.

In practice, the two organisations will thus have to develop their respective space

policies, according to their internal procedures and responsibilities. These space policies will need to be harmonised to the greatest possible extent. With the EC's "White Paper on Space"²² and ESA's "Agenda 2007"²³, two such concerted policy documents have already been elaborated. The next step will be the joint elaboration of a European Space Programme based on these documents.²⁴

Implementation

Concerning the implementation of the European space policy, the concept of the framework agreement is based on the joint carrying out of specific space related projects by ESA and EC. The Galileo- and GMES-initiatives can serve as examples for such joint projects. The framework agreement itself does not provide for legal bases for the conclusion of respective cooperation agreements. These will have to be based on internal provisions of the ESA-Convention and the EC-Treaty, respectively, and be concluded pursuant to the procedures and responsibilities laid down therein.

In order to facilitate the conclusion of the cooperation agreements for each project, the framework agreement provides in its art. 5 five cooperation models for such joint initiatives. These cooperation models are meant to supply orientations for the decision-makers and thus facilitate and harmonise the negotiations concerning each cooperation agreement.

One of the disputed questions in the course of the negotiations of the framework agreement was how detailed the cooperation models should be laid down.²⁵ A highly detailed specification would have provided for narrow guidelines, facilitating the negotiations for every joint initiative. Due to the fear that the cooperation models could become too prescriptive and thus too inflexible, the framework agreement

however only lists the five cooperation models without any detailed provisions on their respective implementation. The elaboration of respective guiding principles is left, according to art. 5.2 FA, to be undertaken by the contracting parties "as soon as possible".

Below, the different cooperation models will be examined. In order to demonstrate the differences between them, the example of a joint ESA/EC effort to launch a small satellite for environmental monitoring as part of the EC's environmental policy (art. 174 - 176 EC) will be examined for each model.

Model 1

The first cooperation model proposes the management by ESA of EC space-related activities in accordance with the rules of the EC. According to this model, ESA acts as the implementing agency of the EC. Any specific project will be exclusively financed by the EC, and thus, as art. 5.3 FA states explicitly, the principle of geographical return will not be applicable.

In our example, the funding of the small environmental satellite would be warranted by the budget for environmental measures of the EC. In order to provide for the required means, the EC would have to launch a respective internal programme according to art. 175 EC. In this case, upon proposal by the Commission of the EC, the Council of the EC, acting by qualified majority, and the European Parliament would have to agree upon the environmental satellite programme. ESA would implement the programme pursuant to the directives given by the EC, awarding contracts without any application of the principle of geographical return. The respective cooperation agreement between ESA and EC would be concluded pursuant to art. 300 EC on the side of the EC (qualified majority in the Council upon

Commission proposal) and pursuant to art. XIV ESA-C (unanimous decision of the ESA Council) on the side of ESA. The cooperation agreement would have to include provisions on the exact responsibilities of the parties, in particular concerning eventual controlling rights of the EC, the distribution of risks in case of an unpredicted increase of the project costs etc. Cooperation between ESA and EC pursuant to this model was already possible before the coming into force of the framework agreement. The Galileo project portrays a good example: In an agreement between ESA and the Galileo Joint Undertaking, ESA was charged to carry out the EC-funded part of the programme.²⁶

Model 2

The second model proposes the participation of the EC in optional programmes of ESA, in accordance with art. V.I.b of the ESA-Convention. According to this model, the EC contributes to an optional ESA programme like any ESA member state.

In our example, the environmental satellite project would first have to be accepted as an optional ESA programme by a decision (simple majority) of the ESA Council.²⁷ The ESA member states interested in participating in the project would then have to adopt a programme declaration (unanimous decision), determining *inter alia* their respective financial contributions.²⁸ Subsequently, negotiations with the EC would follow, defining the investment of the EC and its exact role in the implementation of the programme, in particular concerning the voting rights in the ESA programme council. The respective cooperation agreement would have to be based on the same provisions as in Model 1. Pursuant to art. 175, 300 EC, the EC-Council, acting with qualified majority, and the European Parliament would have to agree upon the

cooperation as well as the ESA-Council, acting unanimously, according to art. XIV.1 ESA-C. The detailed arrangements of the EC's participation in the optional programme would though be defined by a two-thirds majority of the ESA-member states participating in the respective programme.²⁹

The application of Model two raises complex questions concerning the principle of geographical return. While this principle would apply to the individual contributions of the ESA member states, it would, according to art. 5.3 FA, not be applicable to the EC's contribution. Specific provisions would have to be agreed upon to make the application of the geographical return to only parts of the contributions to a programme manageable.

Like Model one, the application of this second model was also already possible before the entry into force of the framework agreement. Art. XIV ESA-Convention has always explicitly provided for the participation of international organisations in optional ESA programmes.³⁰

Model 3

Model three is only vaguely shaped, proposing the joint "carrying out of activities which are coordinated, implemented and funded by both parties". This model allows for any institutional setting to implement a joint programme. An example could be the GMES project, which is based on a number of specific programmes implemented separately by ESA and EC. The coordination within the GMES framework is warranted by a supervisory board composed of representatives of the two organisations.³¹ Another example could be the Galileo Joint Undertaking, a largely autonomous administrative body founded by the two organisations to implement the joint Galileo

programme.³² While model three thus provides for much flexibility, a multitude of arrangements concerning the decision-making procedure, the respective roles of the parties, the funding and the application of the geographical return will have to be made within the respective cooperation agreements.

Supplementary measures

Models four and five of the framework agreement do not concern the implementation of large-scale space programmes. They rather deal with supplementary measures to strengthen the foundations of the cooperation.

Model four proposes the “creation by the parties of bodies charged with pursuing initiatives complementary to research and developing activities, such as the provision of services, the promotion of operators formation and the management of infrastructures.” The scope of this model being limited to initiatives “complementary to research and development”, it should help to limit unnecessary duplications of effort in the allocation of services and infrastructure for research and developing activities.

Model five finally provides for the “carrying out of studies, the organisation of scientific seminars, conferences, symposia and workshops, the training of scientists and technical experts, the exchange or sharing of equipment and material, the access to facilities and the support of visits and exchanges of scientists, engineers or other specialists”. This last model thus deals with a self-evident cooperation that will help to establish a veritably trustful partnership.

Institutional Setting

Regarding the institutional setting, art. 8 of the framework agreement provides for the establishment of a so called Space Council.

This Space Council shall convene through regular joint and concomitant meetings of the EC Council and the ESA Council at ministerial level.³³ The Space Council shall provide orientations to identify the required actions, make recommendations, advise the parties to enhance cooperation and review the effective and efficient functioning of the framework agreement. There will be no transfer of decision-making powers to the Space Council, every cooperation project between ESA and EC will have to be agreed upon by the two organisations according to their respective internal rules and procedures.

According to the current plans, the first Space Council shall convene in November 2004.³⁴

To support the work of the Space Council, the framework agreement provides for the establishment of a Secretariat to be composed of officials from the Commission of the EC and the ESA Executive.³⁵ The Secretariat shall elaborate the initiatives deriving from the implementation of the framework agreement and implement the guidelines provided by the Space Council. However, like the Space Council itself, the Secretariat can not adopt decisions binding either of the two organisations. The Secretariat has taken up its work in June 2004.³⁶

The Space Council, as informal as it is designed to be, will serve as an important forum for the establishment and implementation of a veritable European Space Policy.

The idea of a Space Council is not new, though. The first joint meeting of the councils of ESA and EC was originally planned for 2002³⁷, before the conclusion of the framework agreement, but was postponed several times.

The installation of the Secretariat is not completely new, either. To establish a continuous dialogue between ESA and EC,

to supervise the implementation of joint projects and to make propositions regarding the future cooperation, ESA and EC set up a Joint Task Force (JTF) in 2000.³⁸ The functions and composition of this JTF remarkably resemble the functions and composition of the framework agreement's Secretariat.

Conclusion

At a first sight, the framework agreement concluded between ESA and EC does not provide for much new. Neither a procedure for the establishment of a coherent overall European Space Policy, nor provisions for a simplified decision-making process have been laid down. The five models of cooperation mentioned in art. 5 FA could all have been implemented without the framework agreement. The delicate outstanding questions, particularly concerning the application of the principle of geographical return, are left to be answered within the negotiations on each concrete cooperation project.

But in spite of all these deficiencies, it has to be welcomed that the framework agreement for the first time commits ESA and EC to working together closely by establishing a formal basis for the cooperation.

Thus, the framework agreement is an important step towards an efficient institutional setting for European cooperation in outer space. But further steps will have to follow. The direction of these further steps will depend on the experiences gained during the application of the framework agreement.

References:

¹ Entered into force on May 28th 2004, for the text of the framework agreement cf. ZLW 2004, p. 89 ff.

² Cf. for the history of ESA *Madders*, A New Force at a New Frontier, p. 39 et seq.

³ Cf. *Wouters*, The EU and Space Policy: Constitutional and Institutional Aspects, in: *Hobe, Schmidt-Tedd, Schrogl*, Legal Aspects of the Future Institutional Relationship between the European Union and the European Space Agency, Proceedings of the Project 2001 Plus Workshop, Dec. 5th/6th in Brussels, p. 17 et seq.

⁴ Cf. for a detailed description of the Galileo project *Andries*, The European initiative Galileo, AASL Vol. XXV (2000), p. 43 et seq.; *Ashkenazi*, The challenges facing Galileo, Space Policy Vol. 16 (2000), p. 185 et seq.; cf. for the problems regarding the funding of ESA's GalileoSat programme *Hobe, Cloppenburg*, Financial Contributions of Participating States to Optional Programmes of the European Space Agency (ESA), ZLW 2003, p. 297 et seq.

⁵ Cf. the Action Plan of the Commission of the EC for GMES, COM (2004) 65 final; *Brachet*, From initial ideas to a European plan: GMES as an exemplar of a European space strategy, Space Policy Vol. 20 (2004), p. 7.

⁶ Cf. the European Commission's Communication *Europe and Space: Turning to a new chapter*, COM (2000), 597.

⁷ *Bildt, Peyrelevalde, Späth*, Towards a Space Agency for the European Union, Paris 2000. The report was commissioned by the ESA Director General.

⁸ As of today, the European Union consists of three so called pillars: The European Community and Euratom as the supranational first pillar and the Common Foreign and Security Policy as well as the Police and Judicial Cooperation in Criminal Matters as the intergovernmental second and third pillars.

⁹ *Bildt, Peyrelevalde, Späth*, Towards a Space Agency for the European Union, p. 11.

¹⁰ Cf. for the Green Paper process and the outcomes of the consultation events the homepage of the Commission, http://www.europa.eu.int/comm/space/whitepaper/index_en.html (July 13th, 2004).

¹¹ Commission of the EC, White Paper, Space: a new European frontier for an expanding Union, COM (2003) 673; *Schmidt-Tedd*, Das Weißbuch zur Raumfahrt, ein kritischer Meilenstein auf dem Weg zu einer kohärenten europäischen Raumfahrtpolitik, ZLW 2004 p. 169 et seq.

¹² Draft Treaty establishing a Constitution for Europe, Doc. CONV 850/03, Art. I-13 and III-155.

¹³ Provisional consolidated version of the draft Treaty establishing a Constitution for Europe, CIG 86/04, <http://ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf>.

¹⁴ ESA-Press release, esa bulletin 116 – november 2003, p. 90.

¹⁵ An introduction to the research project can be found on the homepage of the Institute of Air and

Space Law, <http://www.uni-koeln.de/jur-fak/institluft/index-e.html>; cf. *Hobe*, Prospects for a European Space Administration, *Space Policy Vol. 20* (2004), p. 25; *Kunzmann, Reuter*, Crafting a legal framework for a coherent future structure for European space activities, *Space Policy Vol. 20* (2004), p. 59; cf. also *Reuter*, The Framework Agreement between the European Space Agency and the European Community: A significant step forward?, *ZLW 2004*, p. 56 (61).

¹⁶ Cf. *Morel de Westgaver/Imbert*, le 'juste retour' : contrainte ou instrument d'intégration européenne ?, *esa bulletin 59* (1989), p. 62.

¹⁷ Cf. *Grillo*, Die Vereinbarkeit der ESA-Konvention mit europäischem Gemeinschaftsrecht am Beispiel des juste retour, Beiheft 10, Rechtsfragen der Forschung der Zeitschrift für Recht und Verwaltung der wissenschaftlichen Hochschulen und der wissenschaftsplegenden und -fördernden Organisationen und Stiftungen, p. 63; with another perception *Micklitz/Reich*, Legal Aspects of European Space Activities, 1989.

¹⁸ Cf. *Baudin*, Cooperation and International Agreements, Article XIV of the ESA Convention, *Air & Space Law 1998*, p. 8.

¹⁹ E.g. within the area of transport, environment, traffic, transeuropean networks.

²⁰ Preamble of the Framework Agreement.

²¹ Cf. Art. 1(1) FA.

²² European Commission, White Paper, Space: a new European frontier for an expanding Union, COM (2003) 673.

²³ Policy Document presented by the ESA Director General, October 2003.

²⁴ Press release of the EC Commission, http://www.europa.eu.int/comm/space/articles/news/news123_en.htm.

²⁵ The German Ministry of Education and Research for example favoured a more detailed agreement, speech held by *H. Diehl* at the Closing conference of the greenpaper process, June 23-24, 2003, in Paris, http://europa.eu.int/comm/space/doc_pdf/paris_diehl_en.pdf. The UK on the other hand opposed a too detailed agreement, 35th report of the Select Committee on European Scrutiny of the House of Commons, <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmeuleg/63-xxxv.6315.htm>.

²⁶ The agreement was concluded between ESA and the GJU according to art. 2.2 of the statutes of the GJU (OJ L 138/4, 28 May 2002).

²⁷ Art. XI.5.(c).(i) ESA-C.

²⁸ *Spude*, in: *Böckstiegel* (ed.), *Handbuch des Weltraumrechts*, p. 667 (718).

²⁹ Cf. art. XIV.2 ESA-C.

³⁰ Cf. *Baudin*, Cooperation and International Agreements, Article XIV of the ESA Convention, *Air & Space Law 1998*, p. 8.

³¹ Cf. the information on the GMES homepage, <http://www.gmes.info>.

³² Cf. the Statutes of the Galileo Joint Undertaking, OJ L 138/4 of 28.5.2002.

³³ Art. 8.1 FA.

³⁴ Press release of the EC Commission, http://www.europa.eu.int/comm/space/articles/news/news123_en.htm.

³⁵ Art. 8.3 FA.

³⁶ Press release of the EC Commission, http://www.europa.eu.int/comm/space/articles/news/news123_en.htm.

³⁷ Cf. 2417th meeting of the EC Research Council, March 11, 2002, Doc. 6833/02 (Presse 61), p. 7.

³⁸ European Commission, Europe and space: Turning to a new chapter, COM (2000) 597, p. 6; cf. concerning the establishment of the Joint Task Force *Schmidt-Tedd*, *Rechtliche Implikationen der gemeinsamen ESA/EU-Raumfahrtstrategie*, *ZLW 2001*, p. 202 (204); *Suzuki*, Policy Logics and Institutions of European Space Collaboration, p. 199.