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TOWARDS A COHERENT EUROPEAN SPACE PROCUREMENT LAW AND POLICY: A NEW
STEP FORWARD?

Abstract

Since the initiation of the Copernicus and Galileo programmes over a decade ago, the European Space Agency (ESA) and the European Union (EU) have been working more closely together than ever. However, it soon became clear that in order to optimize future cooperation in space programmes and, possibly future closer relations, several obstacles had to be overcome. One of the most pressing is the difference in public procurement rules between both organisations. While EU procurement regulations are subject to non-discrimination and open competition, the ESA has since long used the ‘fair return’ principle. During the last decade, several initiatives were taken to bring both organisations closer together. However, no progress was made on the resolution of the conflict of procurement regulations, and how the future relationship will be governed. A new initiative to resolve the issue was taken in November 2012, when the European Commission issued a communication where it projected the incorporation of the ESA into the EU legal framework. Three possible scenarios were outlined. In the first, the EU-ESA relations would more or less remain as they are now, with minor incremental changes. In the second, the ESA would become an intergovernmental organisation under EU authority such as the European Defence Agency. In the third, the ESA would become a regulatory agency of the EU. This raises the very important question as to what extent the EU and ESA procurement rules can be reconciled when applying the proposed models of cooperation. Therefore, this paper performs a detailed legal analysis of the possible coherence that can be achieved following this communication. In addition, stakeholders and experts are consulted to elaborate on the question and to give their opinion on the legal solution presented. Following this study, it became clear that a consensus on the matter is not within reach for the coming years. While the European Commission projected concrete models for future EU-ESA relations, it didn’t provide sufficient legal answers for reconciling both regimes. Furthermore, different stakeholders with various interests render the solution into a difficult equation with many variables. It is obvious only a negotiated remedy will provide enough common ground to end the stalemate.