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The Lisbon treaty's dual-use conundrum: a barrier to EU space endeavour?

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An [asset with a 'dual-use' nature](#) is relatively simple in theory – it is an asset that inherently has the potential for both civilian *and* military applications simultaneously. Nowhere is this a more prominent feature than in the space industry, within which the vast majority of assets could be said to [possess such a 'dual-use' nature](#).

In the context of the [EU's quest to better regulate and stimulate](#) the European space industry in the face of pressing [external](#) (and [internal](#)) concerns and [competition](#), however, this may result in many legal difficulties. The Lisbon Treaty is relatively unaccommodating for the supranational governance of such sensitive dual-use assets, because it features a fundamental divide between civilian competences (governed predominantly supranationally) and defence/security competences (governed predominantly intergovernmentally).

This blogpost will thus briefly explore why the dual-use nature of space assets, combined with the Lisbon Treaty's particular legal architecture, may complicate or hinder the [EU's plans](#) for broadened and deepened space governance. It may render certain (in context, necessary) actions entirely infeasible, slow down the legislative process, or require the dilution of legislative initiatives, and thus diminished effectiveness, so as to ensure they are able to be passed into law.

Dual-use assets in (more) depth

We must first consider what a dual-use system is in a little more detail. It is, at its most basic, an asset that has the potential for either civilian or military applications – but [there are degrees of nuance](#) regarding the relative weight assigned for both types of application.

For example, assets may be *specifically designed* for military application, but have properties that make them suitable for civilian use as a secondary application (and vice versa). They may constitute critical *civilian* infrastructure, but nonetheless have some *military* applications in very specific circumstances (e.g. the utilisation of SpaceX's [Starlink system by the Ukrainian military](#)). A difference should also be made between dual-use assets themselves, and the services or other assets that may be reliant upon them. Take for example the US GPS system (in fact, originally a US military system). Though its satellites remain dual-use systems, safeguards are in place to ensure that the chips that use the satellites' signal do not become dual-use systems; any device that uses a GPS chip will refuse to work if over a [certain altitude and/or over a certain speed, preventing their use in ranged weapons](#). The GPS satellites have not lost their dual-use nature; the end-user device has been prevented from becoming one.

Despite these nuances, [which are more fleshed-out in international law](#), there is sometimes little difference in treatment between them in legal terms directly. The point of these observations is to highlight that the categorisation of assets of both military and civilian nature is inextricably entangled, and difficult to separate. Accordingly, regardless of the fact that specific assets are predominantly used for *civilian* purposes, they may nonetheless be caught by the term 'dual use' in the same way that more innately (and specifically designed) militaristic assets are.

Difficulties of accommodating 'dual-use' assets within the Lisbon Treaty

Such dual-use assets do not fit particularly comfortably with the framework of the Lisbon Treaty. Although it has abolished the pillar structure of previous Treaties, the Lisbon Treaty retains a clear divide between 'civilian' and 'defence/security' competences and functions.

Civilian competences, which constitute the vast majority of competences conferred in any way upon the Union, are predominantly governed supranationally. Non-civilian ([including military, defence and security](#)) capacities, however, are governed predominantly intergovernmentally (the nature of which is not diminished even if this

occurs within the 'supranational' structure of the Union). Crucially, the [Common Foreign and Security Policy](#) (CFSP), the centrepiece of EU security and defence action, is overwhelmingly intergovernmental in its decision-making.

This is not surprising, of course; the defence and security of a state, realised through military and foreign policy mediums, lies at the very core of its sovereignty. The fact that space systems straddle both sides of this divide at once, however, means the capacity of the Union to act is thus inherently unclear, especially without further separation between different 'degrees' of the defence/security nature of space assets in a meaningful way. Competences conferred for 'civilian' areas are far more extensive than those for security/defence.

The above observations are reflected in jurisprudence of the Court of Justice of the EU (CJEU). The Court has interpreted the competences of the Union broadly. Accordingly, it essentially stated in the [*Insinööri- ja InsTiimi Oy* case](#) that products or assets of a dual-use nature are to be treated as 'military' (for the purposes of the application of, in this case, Article 346 TFEU which allows for exceptions to EU obligations *vis-à-vis* 'essential security apparatus') only if such 'dual-use' assets are *specifically designed* to be for military application (paras 39 and 41). The actual objective of the use has little bearing upon this determination. The Court's wording plainly ascribes Union law to have competence over everything that is not built from the ground up as military apparatus, with the original intention to be used as such.

This [absolutist approach](#) almost voids the designation of a 'dual-use' asset entirely, given that it is only specifically military apparatus that can fall under the Article 346 exception (at least within the context of the *Insinööri- ja InsTiimi Oy* case). But leaving that concern aside, the more salient point is that since, as explained, there is little means of legally differentiating between different 'degrees' of dual-use assets (and since the Court treats anything not specifically military as falling within Union jurisdiction), there are a plethora of space assets that may be caught by this. The apparatus at stake in the [*Insinööri- ja InsTiimi Oy* case](#) was merely turntable equipment used in electromagnetic testing. Such items are, though useful, orders of magnitude less important to Member State militaries than space-based infrastructure; upon which modern militaries heavily rely upon, and a huge amount of which is considered dual-use by the EU's own [Regulation 2021/821](#) (The dual-use export control regulation).

If the court were to treat dual-use space assets in the same way it did the turntable equipment (or the Commission treat them the same on that basis when introducing

legislation) in other contexts, it may assume such dual-use assets, since they may not be entirely 'military', therefore entirely fall within Union competences. It stands to reason that the member states would push back vehemently against what could be described as the creeping of EU competence over their essential military assets by lumping them in with civilian assets. Of course, It will not be as plain as this – but nonetheless, the overall issue remains unsolved, and may entice disputes between the Union and Member States regarding who has jurisdiction to regulate.

The consequences for European space endeavour

The potential result of the above is that supranational regulation of even civilian space efforts, entangled with military interests, may be kept out of the reach of a higher level of (supranational) decision-making, thus preventing sector harmonisation/defragmentation. Even if the Union wanted (as is evident) to regulate aspects of the civilian [space industry and industrial policy](#), it would thus potentially have to regulate indirectly essential parts of the Member States' defence infrastructure too, according to current jurisprudence. Member States, [highly protective of their sovereign \(and thus also military functions\)](#), [do not want to give the Union competence](#) or control over their military infrastructure (or its production), and may invoke grave reservations to such a move. This may thus render some far-reaching (but, arguably, needed) provisions out of bounds. An alternative is that the Union does introduce regulation, but of a nature that is in(or less)-consequential to the Member States' overall control of such infrastructure; dilute the regulation to appease their sovereign security concerns.

Either aspect means that the EU is hindered to act in the way it needs to when considering the aforementioned [global pressures](#) and [its own strategic autonomy](#). Given that de-fragmentation of the European space sector is increasingly considered essential for its long-term [strategic autonomy](#) and [competitiveness](#), this constitutes a potentially serious hinderance for the future of European space endeavour. Indeed, the EU is already [extremely limited](#) in its space-specific competences under Article 189(2) [TFEU](#) (qualified also by Article 4(3) [TFEU](#)), and faces [other constitutional issues](#). But the aforementioned guarding of Member State sovereign security functions means finding an 'indirect competence' (such as Article 114 or 207 [TFEU](#)) may also be difficult. This is something the Union has grown very accustomed to doing, often invoking accusations of '[competence creep](#)' – but such instances have never been over such sensitive (fundamentally military-natured) apparatus as is with space assets. Reliance upon such

indirect competences may be very difficult – [and a cohesive regulatory framework out of reach](#). Indeed, it is the dual-use nature of space assets that goes a long way in explaining why the Union’s conferred direct competences regarding space activities are so limited in the first place.

Conclusion

The Lisbon Treaty clearly limits military or defence/security apparatus to intergovernmental regulation only. Space assets, with a fundamental dual-use and thus both civilian and military nature, are caught by this distinction. This is even if the direct and most common use and purpose of such apparatus is civilian in nature. The required (supranational) regulation of space affairs is thus made far more difficult even if necessary. European space industry may suffer as a result. The dual-use conundrum thus represents a difficult legal problem for European space endeavour, and it is not clear how it could be solved. [More specific categorisation](#) in the jurisprudence of dual-use systems would certainly go some way to achieving this, however.

The first test of how the EU institutions may cope with this dilemma may come next year – when the new [EU Space Law](#) and [Space Traffic Management](#) regulations are planned to be released. The approach the EU chooses in this regard may have consequences far further than merely the space sector, and may significantly influence the development of defence policy across the continent if, though unlikely, the Member States grant more legislative leeway to the Union than previously expected.

This piece is based upon research done at the Space Court Foundation and refined following its presentation at the German Ministry of Defence, to an audience of EU member state and EU institution defence officials, in November 2023.