

Report on the 2010 ECSL Practitioners' Forum

After an interlude of a year and a half, due to a switch back from the fall season to the spring season, the ECSL Practitioners' Forum was again organised in 2010, on 19 March at ESA Headquarters in Paris. The organisation was taken care of by the new ECSL Executive Secretary, **Mr. R. Milchberg**, in close cooperation with the ECSL Chairman, **Prof. Dr. S. Marchisio**, of the University of Rome 'La Sapienza', and the Coordinator of the Practitioners' Forum, **Prof. Dr. F.G. von der Dunk**, of the University of Nebraska-Lincoln. Seven years after a previous Practitioners' Forum had addressed legal issues of Galileo, it was time for this theme to be revisited: hence, the title of the forum was "Galileo: Current Legal Issues". The forum was attended by some 60 participants from various institutional, commercial and academic professions across Europe.

After some welcoming words on behalf of ECSL by **Prof. Marchisio** he also introduced ECSL to those uninitiated as of yet and handed the floor to the Chairman of the morning session on *Selected Legal Issues*, **Prof. Ir. R. Oosterlinck**, Director of the Galileo programme and navigation related activities at ESA.

Prof. Von der Dunk then introduced the forum's topic by "Setting the Stage for Galileo", following the change of direction from the PPP approach to the refinancing arrangements through the EU budget. He outlined the added value Galileo would bring to the existing GNSS environment, by both adding to the value of GPS and EGNOS and in itself raising the standards of a number of potential GNSS services, such as through globally available integrity and service guarantees. With the legal framework for Galileo currently dominated by Regulation 683/2008, ESA had become the procurement agency for the EU. The test satellites GIOVE-A and -B had been launched in 2005 and 2008 respectively, and with the first major contract for the procurement of 14 satellites signed early January, Galileo now was definitely on track. Whilst the stage is thus set for Galileo in technical, operational, institutional and governance terms – at least broadly speaking – there were still some major issues to be dealt with in the legal context, such as the procurement- and liability-related ones. Solving those in an appropriate manner would be key to the trust in Galileo the private sector would have to develop in order to make Galileo a success.

The second speaker was **Prof. Oosterlinck**, on "Institutional issues: ESA rules in the context of Galileo". He pointed out that those discussing liability should be aware of the technical issues behind it and the way the system (is supposed to) operate(s). He defended the erstwhile choice of a PPP as the institutional model for Galileo as at the time, in view of the political environment, the right thing to do, even if operationally speaking it was not the optimum solution as it led to 'competing' in terms of work within ESA (through the Galileo Sat project) and the EU (through the GALA project).

Professor Oosterlinck judged Regulation 683/2008 to be a bit strange legally, implying that ESA was under an obligation to act in a certain manner in accordance with an EU Regulation though formally not subject to jurisdiction of the EU, but as ESA had accepted this *de facto* arrangement he agreed that the Agency had thereby formally endorsed being made subject to relevant rights and obligations in accordance with general public international law principles. Consequently, the Commission now acts as programme manager, where a delegation agreement with ESA spells out the latter's

responsibilities, and with a *de facto* delegation of certain other competencies to the GSA. He then discussed the work packages under the procurement regime and their status: WP 1 (system support), WP 4 (space segment) and WP 5 (launcher) had been signed as of January 2010, whereas WP 2 (ground mission segment), WP 3 (ground control segment) and WP 6 (operations) would probably be signed later in 2010. In addition a few smaller *de facto* work packages exist which would be dealt with soon, such as those pertaining to site hosting, time services, geodetic services and SAR initial services.

The third speaker was **Mr. P. Seité**, of the European Commission's unit responsible for legal and financial aspects of EU satellite navigation programmes, on "New legal developments in terms of Galileo: the point of view of the EU Commission". Speaker started out by stating EU ownership of the 'programmes' of EGNOS and Galileo as leading to the questions regarding what liabilities would be faced, noting there are also operators, service providers and other stakeholders involved. He pointed at the underlying work done on liability, in particular within ICAO (in the area of aviation; whilst efforts to arrive at a convention have failed, Eurocontrol and ECAC are now developing a contractual framework – but that is not yet binding) and UNIDROIT, which has also taken an initiative in this respect.

He concluded that the EU Court is addressable for liability of the Union itself and its organs under EU law, which is a fault-based liability regime; the issue remaining is thus of contractual allocation of third-party liability risks. It looks like the next step in this context might be a particular legislative proposal for handling third-party liability. It is important, however, to wait there until the status of the operator is defined. At the same time, of course the right balance between the interests of the players and the interests of the victims has to be struck. So-called 'soft law' therefore would not seem to be much of an option; perhaps an international convention would be, or perhaps one or the other version of an EU legislative proposal would at least for the first phase be the only realistic and effective method.

Mr. I. Petrou then added to the presentation of his colleague from the European Commission by highlighting that the applicable law to Galileo procurement issued from the EU Treaty, Article 17 of Regulation 683/2008 and the Financial Regulations and implementing rules. He explained the new procedure which was a competitive dialogue not only pertaining to technical issues but also to financial, legal and other issues, allowing the awarding authorities to find out how to obtain best value for money and take that into due consideration into the bidding process.

Also, Galileo is covered by the WTO Government Procurement Agreement (GPA), as it was not excluded by the relevant documents; so normal requirements on procedures continue to be applicable. This has resulted in a more transparent tendering process for Galileo, but also in more administrative burdens, more time and money being spent, supposedly being more than compensated in the long run by a better end-result of the process.

The fourth and last presentation before the lunch break was that of **Dr. O. Heinrich**, of BHO Legal, on "The Procurement Law Background". He went further into the EU framework for procurement law, discussing Directives 2004/18 and 2004/17 as applicable to EU member states and the EU Financial Regulations and implementation rules applicable to EU bodies, as well as finally Regulations 1605/2002 and 2342/2002, as last amended by Regulation 478/2007.

He summarised that public procurement in the EU is subject to key principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency, where various procedures might be used to achieve those: the competitive dialogue procedure (at least three candidates have to be admitted to tendering process), the open procedure (open to any company interested in tendering), the restricted procedure (in case of a somewhat limiting field of participants, but required to construct requirements to allow at least five candidates to tender) and the negotiated procedure (allowing to directly approach at least three candidates to tender).

Finally, he discussed the ESA procurement rules *versus* the EU procurement rules. The geographic return principle is the main differentiator of the former with EU principles. The EU however is a party to the WTO GPA, so under EU rules competition is often opened up to companies from other GPA parties, although there are often national exceptions (e.g. on launching; which was the reason there was only one tender here). The EU consequently applies a very strict and formalised system of procurement rules with only limited room for change, and – in principle – no negotiation after the contract award.

After the lunch, under the Chairmanship of **Dr. P. Hulsroj**, Director of Legal Affairs and External Relations at ESA, the afternoon session on *Liability for Satellite Navigation Signals and Services* was opened by **Prof. Dr. M. Couston**, of the University of Lyon's Faculty of Law, speaking on "Galileo and the Work of the '*Groupe Responsabilité ANAE*'". She explained how and why the *Société Française de Droit Aérien et Spatial*, the French Society for Air and Space Law, had become involved in the issue and had initiated, and organised together with others, a working group on responsibility and liability in the context of GNSS and navigation signals and services. She agreed with the Chairman that it was very important to address those issues *inter alia* by focusing on where a 'signal' ends and a 'service' begins, which were also very important questions from a commercial perspective. Questions would have to be addressed consequently in this context as to whether either or both of them would have to be considered inherently dangerous activities, requiring strict liability, or whether the respective character of 'signals' and 'services' would more likely warrant development of a fault liability regime for GNSS specifically.

The second speaker after lunch was **Prof. Dr. L.J. Smith**, of Leuphana University in Germany, who dealt with "Liability for Satellite Navigation Signals and Services". As the speaker indicated, in view of the absence of a dedicated international regime for GNSS, the discussion now focuses on navigational services. Liability can only arise if some legal wrong has been committed, based on one liability regime or another – many liability cases have no liability regime applicable!

Here, whilst the applicability of the space treaties to the EU as such is not an issue (the EU still constitutes an IGO for the purposes of those treaties), the main issue would then be the measure of application of the Liability Convention: is Article III, providing for fault liability applicable, or Article II, providing for strict liability? Is a signal an integral function of a space object, so as to make liability for damage caused 'by' space objects applicable? Another issue which is unsolved as of yet concerns that of state immunity for (commercial) satellite services, in view of the switch to a public financing system: does the provision of satellite signals and/or services qualify as *acta iure gestionis*?

Speaker then addressed the issue of contractual *versus* tort liability, where the existence of a contract is key: such a contract in principle would exist for SOL, CS, PRS, and SAR, in one way or another, but not for OS, EGNOS and GPS. She further detailed that, with the confidence in Galileo being quite high, this may lead to so-called 'reliance expectation' in turn possibly resulting in liability!

The preliminary conclusions on the issue thus were that the principles of domestic law were quite clear, and operating under comparative denominators, whilst the main divergences would essentially arise in the field of outcomes, largely in terms and level of damages. This, however, left the issue of mass accidents not dealt with as of yet, with innocent bystanders and beneficiaries not specifically covered.

The third afternoon speaker was **Prof. Dr. A. Roma**, of Studio associato AS&T, on "Liability for Galileo Services: towards an EU Legal Act". He discussed several relevant efforts undertaken in 2007 and 2009 to arrive at EU regulation of the issue. The main background was the fact that most states do not directly provide GNSS signals and/or services, so they would (have to) authorise other state(s) to do so. This then, in case of accidents caused by malfunctioning GNSS signals or services, raised the interesting potential analogy with the Überlingen accident. In that case, it turned out that also air navigation services were regulated by domestic law, following the Chicago Convention (notably Article 28). The result was that, even if delegated, states remain responsible for such services, since this concerns a public service of a public nature.

Similarly, the Single European Sky regime will require the delegation of air navigation service tasks to other states in many cases, and in case of a catastrophic event we need a regulation of third-party liability issues. Speaker then briefly discussed various existing liability conventions, such as those on oil pollution damage and on the transport of hazardous and obnoxious goods – all channelling liability to a single liable party. In working towards an EU Regulation finally, OS, CS, SOL and PRS, in each case as based upon their relative operational characteristics, contractual involvement and applicable possibilities for waivers and disclaimers, should be dealt with.

The final speaker was **Dr. H.G. Bollweg**, Ministerial Counsellor of the Federal Ministry of Justice of Germany, who discussed "Is an international instrument to cover liability for damage caused by malfunctioning in global satellite systems feasible?"

He noted, first of all, that the transition towards an environment for successful Galileo operations will be severely handicapped if the liability issues have not been spelled out and, as necessary, further addressed in some details, in particular to the extent private stakeholders otherwise would not know their liabilities. In this regard, he addressed the various ICAO, ECAC, UNIDROIT and EU discussions and efforts to arrive at international legal instruments dealing with liability for the malfunctioning of satellite signals, noting furthermore that so far it seemed difficult to envisage that the United States and Russia will accept any international liability regime for their primary system operations and the resulting signals from space.

Therefore, in speaker's view an EU Regulation could (and indeed should) point the way, and could be extended later on to non-EU countries firstly by means of bilateral extension. The substance of such a Regulation should cover non-contractual liability vis-à-vis non-users (third parties), should maybe cover non-contractual liability vis-à-vis users not bound by contract (such as under OS) but as to lower limits, should maybe cover non-contractual liability vis-à-vis contractually-bound users as a 'gap-filler' where

contractual liability fails to address the issue – but should not cover contractual liability vis-à-vis users.

An interesting and extended **discussion** followed, which was summarised by the Coordinator, **Prof. Von der Dunk**. He concluded that firstly the situation has changed from one where the EU and ESA were more or less acting as parents for Galileo, quarrelling over applicability of respective procurement regimes, to one where the EU was the owner and ESA its procurement agency, to the satisfaction of both resulting in considerable convergence in terms of handling the project. Thus, procurement was now replaced as the major legal obstacle by liability issues, as presentations and discussions at the forum had amply made clear.

The handling of liability in a proper fashion, in turn, would require due analysis of a number of existing yet not tailor-made regimes *lex lata* and their potential applicability, as well as experience with the IOV phase and the ongoing development of the institutional and governance structures. The case for an EU regulation of in particular third-party liability turned out to be a strong one, in the absence for example of the likelihood of arriving at global solutions *ab initio*. In that sense, he finished by concluding that the forum had clearly contributed to setting the stage for Galileo also in the legal sense.

Finally, on behalf also of Prof. Marchisio he thanked ESA for usage of the main Room at ESA Headquarters, ECSL for organising the Forum, especially Mr. Milchberg, Executive Secretary of ECSL, as well as all speakers and the audience, and wished everyone safe travels.

Frans G. von der Dunk