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**Approaching Harmonization: Examining the
European Union's Efforts to Create a
Common EU Space Law and Assessing its
Potential Legal Foundations**

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Abstract

Russia's invasion of Ukraine shattered conceptions of European peace and stability. The invasion forced European policy makers to reassess the EU's independence and resilience in all domains, including outer space. One proposal, the European Union Space Strategy for Security and Defense, released on March 10th, 2023, calls for efforts to support a "common EU Space law" to strengthen Europe's position in outer space. This paper examines the viability of such a proposal. It argues that while pursuing a harmonious EU space law has numerous policy benefits, from a legal perspective, a fully unified legal framework is currently unsupported. First, the paper examines the European space law landscape. It then explores the historical evolution of European space law, showing a trend toward increased activity and harmonization over time. Then, the paper identifies the common articles used to justify the expansive efforts in legalization before turning to assess the suitability of each identified article as a legal basis for a common EU space law. Ultimately, no legal article alone is sufficient to form a foundation for a fully harmonious European space law. However, the continued use of the articles to address specific activity and, in conjunction with a series of non-binding measures, give the European Union powerful tools to encourage harmonization of outer space activities until an amendment to the founding treaties occurs.

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I. INTRODUCTION

On February 24, 2022, Russia invaded Ukraine and “shattered” decades of European peace and stability.¹ Russia’s aggression not only reverberated across Europe and around the globe,² but reached beyond our planet—into outer space.³ The European Union has become increasingly dependent on the outer space sector,⁴ and Russia’s unlawful aggression exposed deep European vulnerabilities in outer space caused, in part, by a European reliance on Russian space programming.⁵ As a result of these “wake-up calls,”⁶ European Union officials have

¹ Matthew Chance, et al., *Peace in Europe ‘shattered’ as Russia invades Ukraine*, CNN (Feb. 24, 2022, 7:01 PM), <https://www.cnn.com/2022/02/24/europe/ukraine-russia-invasion-thursday-intl/index.html> (speaking in Brussels, NATO Secretary-General Jens Stoltenberg remarked that “peace on our continent has been shattered. We now have war in Europe, on the scale and of the type we thought belonged to history”).

² See e.g., Scott R. Anderson, et al., *The World Reacts to Russia’s Invasion of Ukraine*, LAWFARE (Feb. 24, 2022, 4:57 PM), <https://www.lawfareblog.com/world-reacts-russias-invasion-ukraine> (describing the reactions of international and multilateral institutions as well as European countries and major regional responses); Ryan Hass, et al., *How Asian countries are reacting to the Russian Invasion of Ukraine*, BROOKINGS (Mar. 21, 2022), <https://www.brookings.edu/on-the-record/how-asian-countries-are-reacting-to-the-russian-invasion-of-ukraine/> (describing Asian countries’ reactions to the Russian invasion of Ukraine); Christina Lu, *Putin Faces Glob. Criticism Over Ukraine War*, FOREIGN POL’Y (Feb. 24, 2022, 12:45 PM), <https://foreignpolicy.com/2022/02/24/russia-ukraine-war-invasion-global-reaction/> (highlighting the global condemnation of Putin’s invasion).

³ One hour prior to the Ukraine invasion, Russia hacked American satellite company Viasat, resulting in diminished command and control capabilities for the Ukrainian military, which relies heavily on Viasat’s services. Patrick Howell O’Neill, *Russia Hacked an American satellite Co. one hour before the Ukraine invasion*, MIT TECHN. REVIEW (May 10, 2022), <https://www.technologyreview.com/2022/05/10/1051973/russia-hack-viasat-satellite-ukraine-invasion/>

⁴ *EU space policy, Boosting EU competitiveness and accelerating the twin ecological and digital transition*, at 4–5 (Feb. 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698926/EPRS_BRI\(2022\)698926_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698926/EPRS_BRI(2022)698926_EN.pdf) (explaining that in 2020 the EU space economy generated €7.7 billion of sales and employed more than 50,000 people. And, from 2011–2020, the EU space sector represented €20.15 in upstream revenue, representing a “net contribut[ion] to the EU trade balance.” The European economy and society are increasingly reliant on these services, including radio communication, timing and positioning signals, and GPS navigation, which support 10% of European GDP).

⁵ *The War in Ukraine and the European Space Sector*, EUR. SPACE POL’Y INST. (May 5, 2022), <https://www.espi.or.at/briefs/the-war-in-ukraine-and-the-european-space-sector/> (“First, the situation [the war in Ukraine] highlights the vulnerabilities caused by Europe’s reliance on Russia”). Given the immense wealth and economic productivity tied to satellites directly or through indirect reliance, the financial impact of disruption to the space sector would be massive. See *EU space policy*, *supra* note 4, at 5 (emphasizing the economic reliance on space could implicate € 1,100 billion in economic activity).

⁶ The High Representative of the European Union for Foreign Affairs and Security Policy, Joseph Borrell, called the Russian invasion of Ukraine a “wake-up call,” and that the European Union needed to consider “how space assets and services are crucial” to European action. *European Comm’n to present space defense strategic plan in March*, Alarabiya (Jan. 24, 2023, 03:35PM), <https://english.alarabiya.net/News/world/2023/01/24/European-Commission-to-present-space-defense-strategic-plan-in-March->

pushed for accelerating European independence and resilience in outer space.⁷ In fact, the most recent European Union Space Strategy for Security and Defense specifically proposes “an EU Space Law” as a necessary step to ensure “resilience” and coordination between Member States on European space activities.⁸

A common EU space law would streamline responses to European threats, like Russia’s actions in Ukraine, and create “common rules of safety, security, and sustainability” for European space assets.⁹ From an economic perspective, a common EU space law is preferable as divergent norms between Member States can create unequal conditions for competition, ultimately leading to a race to the bottom in terms of regulatory or quality standards.¹⁰ However, harmonization is not without its drawbacks. National legislation can offer greater flexibility for Member States to manage the growing privatization and commercialization of space activities, and allow States to find the “most suitable way [within their jurisdictions] to regulate and control private initiatives to ensure compliance with international legal principles.”¹¹ At its core, these

⁷ The 2023 European space agenda focuses on competitiveness, resilience, sovereignty, and security. European Commission News Report, The Commission, the European Commission Presented its space policy priorities for 2023 at the 15th European Space Conference (Jan. 25, 2023), https://defence-industry-space.ec.europa.eu/european-commission-presented-its-space-policy-priorities-2023-15th-european-space-conference-2023-01-25_en

⁸ Joint Communication to the European Parliament and Council, the Commission, European Union Space Strategy for Security and Defense, (Mar. 10, 2023); European Commission Press Release, the Commission, 2023; a crucial year to deliver on our European Space ambitions, (Jan. 24, 2023), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_341 (A speech by Commissioner Thierry Breton where he noted that the 2023 Space Agenda’s “Fourth Pillar” is rooted in an “EU space law to put in place common rules on safety, security, and sustainability of our space operations”).

⁹ *European Comm’n*, *supra* note 6.

¹⁰ Dimitri Linden, *The Impact of National Space Legislation on Private Space Undertakings: Regulatory Competition vs. Harmonization*. 8 J. OF SCI. POL’Y & GOVERNANCE 1, 7 (2016), https://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/linden_nationalspacelegislation.pdf. Other concerns from rampant space nationalization includes propping up “flags of convenience” or forum shopping phenomena where space actors could take advantage of more lenient regulatory schemes in one Member State to avoid stricter regulations in another State. Considering the inherent dangerousness of space activity, and the global impact if something went array, greater supervision and higher standards is in the Union’s (and the Member States’) best interest.

¹¹ *Id.* at 1. There are other benefits to national space regulation. As Linden outlines, outer space activities are often highly specific, particularly in emerging fields (think lunar or asteroid mining), where wide-spread regulation might be too stringent, stifling innovation. A national approach can provide the required flexibility unavailable at a European-wide level.

competing theoretical perspectives highlight the difficulties in navigating the European outer space environment—one perforated by national and international space organizations, quasi-states and NGOs, and a complex shared legal competency system.¹²

This paper explores the future of EU space law within the context of the heightened urgency caused by the Russian invasion of Ukraine. Specifically, it examines whether politicians’ claims for a “common EU Space Law” are possible in the current European legal framework. It argues that while pursuing a harmonious European space law is, from a policy perspective, highly advantageous, from a legal perspective, the confines of the EU’s founding treaties, as amended by the Treaty of Lisbon in 2007, expressly preclude complete harmonization in outer space affairs.

Part II sets the stage, explaining the current European legal space landscape. Part III explores the historical development of European space law, showing a trend toward increasing harmonization. Part IV explores the present environment, arguing that the Union has become increasingly active in outer space activities, particularly in the Joint Communications announced after the Russian invasion of Ukraine. It also surveys selected regulations to identify potential legal bases for a common EU space law. Finally, the paper ends with an assessment of the identified articles in Part IV and whether they are legally sufficient to form a foundation for European space law. Ultimately, no article, alone, is appropriate. But, when combined to tailored projects and in conjunction with non-binding measures, the European Union has powerful tools to encourage harmonization for most activity in the domain.

¹² The main European space actors, the broad legal landscape, and an explanation of European Union governance in outer space is explained in Part II.

II. THE CURRENT EUROPEAN SPACE LAW LANDSCAPE

A. International Legal Obligations

Five major international space law treaties form the basis of international space law, the principal of which is the Outer Space Treaty (OST).¹³ The OST entered into force in January 1967 and provides the basic framework for international space law.¹⁴ Its defining principles recognize that the exploration of outer space shall be done for the “benefit and in the interests of all countries and shall be the province of all mankind.”¹⁵ That outer space and the moon and other celestial bodies are not subject to national appropriation or other sovereignty claims.¹⁶ That the UN Charter and other principles of international law apply in Outer Space.¹⁷ And, that state parties bear responsibility for national activities in outer space regardless of whether the actor is the national government or non-governmental agencies.¹⁸ While the European Union has not formally recognized the OST,¹⁹ the EU does recognize principles of international space law insofar as they reflect customary international law and hence have international legal

¹³ Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 1, Dec. 19, 1966, 8842 U.N.T.S. 610 [hereinafter Outer Space Treaty]. The other four treaties are: Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space, Apr. 22, 1968, 9574 U.N.T.S. 672; Convention on the International Liability for Damage caused by Space Objects, Mar. 20, 1975, 13810 U.N.T.S. 961; The Convention on Registration of objects launched into outer space, Dec. 11, 1974, 15020 U.N.T.S. 1023; Agreement governing the Activities of States on the Moon and Other Celestial Bodies, May 12, 1979, 23002 U.N.T.S. 1363 [hereinafter The Moon Agreement]. However, The Moon Agreement is the only treaty with limited ratification and international acceptance. See United Nations Office for Outer Space Affairs, *Space Treaties and Principles*, UNOOSA, <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html>.

¹⁴ United Nations Office for Outer Space Affairs, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, UNOOSA, <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html>

¹⁵ Outer Space Treaty, *supra* note 13, at art. 1.

¹⁶ *Id.* at art. 2.

¹⁷ *Id.* at art. 3.

¹⁸ *Id.* at art. 6.

¹⁹ Frans G. von der Dunk, *The European Union and the Outer Space Treaty: Will the Twain Ever Meet?*, U. NEB. SPACE, CYBER, AND TELECOMM. L. PROGRAM FAC. PUBL'NS, 75, 83 (2017), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1089&context=spacelaw> (explaining that the European Union has not explicitly stated its obligation to abide by the OST).

obligations.²⁰ Since most of OST’s principles reflect customary international law, they are then binding on the European Union.

B. The Treaty of Lisbon: Space as a Shared Competency

The Treaty of Lisbon—agreed to by the 27 Member States in December of 2007 and entered into force on 1 December 2009²¹— set out to “for the first time clarify[] the powers of the Union” and amend the Union’s founding treaties.²² Particularly, the Treaty of Lisbon distinguished three types of legal competences that define the relationship between Union and Member State activities, or as the Treaty of Lisbon called it, the “allocation of competence.”²³ The treaty created three principal competence categories: exclusive competences, shared competences, and supportive competences.²⁴ The second category, shared competency, is the most important here. The Treaty on the Functioning of the European Union (TFEU), as amended

²⁰ The main principles of the Outer Space Treaty have become customary international law from their unanimous adoption and wide-spread use by all the major space-faring nations, which conduct their operations in accordance with the principles of the Outer Space Treaty. *See* G.A. Res. A/RES/1962 (XVIII) (Dec. 13, 1963) (documenting the adoption of the Outer Space Treaty by the General Assembly); Comm. On the Peaceful Uses of Outer Space, Rep. of Legal Subcomm. On Its Fifty-Sixth Session, U.N. Doc. A/AC.105 (2017) (explaining that the principles in the Outer Space Treaty are constitutive of customary international law); Consolidated Version of the Treaty on the Functioning of the European Union art. 3(5), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (In its relations with the wider world, the Union shall uphold and promote . . . [] **the strict observance and the development of international law, including respect for the principles of the United Nations Charter**”); *See also* Council Resolution on the European Space Policy No. 2007/C 136/01 of 21 May 2007 preamble para. 5 (reflecting the EU’s adherence to the principles set out by the United Nations in the Outer Space Treaty).

²¹ European Parliament Fact Sheets on the European Union, the European Parliament, The Treaty of Lisbon, (May 2022), <https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>.

²² *Id.*

²³ NOELLE QUÉNIVET AND CHRISTIAN DADOMO, EUROPEAN UNION LAW 35 (2020).

²⁴ *See* TFEU, *supra* note 20, at art. 2. Given that shared competence is the most important competence for the argument here, exclusive and supporting competencies are discussed briefly in this note. Exclusive competence pertains to specific areas in which “only the Union may legislate and adopt legally binding acts” where Member States are only allowed to do so themselves “when empowered by the Union or for the implementation of Union acts.” *Id.* at art. 2(1). Conversely, supporting competences are distinguished into two sub-categories: (1) coordinating competences and (2) complementary competences. Coordinating competences are areas where the European Union can issue guidelines or suggest initiatives to “foster further coordination among economic, employment, or social policy.” While complementary competences as outlined in TFEU Articles 2(5) and 6 allow the European Union to “take action to support, coordinate or supplement action of the Member States” in select fields like health and tourism. Dadomo and Quenivet, *supra* note 23, at 36.

by the Treaty of Lisbon, mentions outer space twice in the treaty document. Once in Article 4(3), outlining that “in areas of research, technological development and *space*, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, *the exercise of that competence shall not result in Member States being prevented from exercising theirs.*”²⁵ This provision situates outer space as a shared competency between the Union and Member States. The next mention is in article 189, which is worth quoting in full:

1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, *the Union shall draw up a European space policy*. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.
2. To contribute to attaining the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space programme, *excluding any harmonisation of the laws and regulations of the Member States.*²⁶

Hence, these two mentions—in article 4(3) and in article 189—squarely place lawmaking in outer space as a *shared* competence. Under this legal power-sharing framework, both the Union and the Member States can act. Member States can legislate in certain areas²⁷ but only if the Union has “not yet exercised its right to act, or has decided to cease exercising its right to act.”²⁸ If Member States can, and do, legislate in these areas, their freedom is still constrained by the principle of cooperation established by TFEU article 4(3),²⁹ which prevents Member States from adopting measures in contradiction with the EU’s principles and values. However, it is not the case that the EU can “pre-empt” a vast swath of competencies in these areas. Several

²⁵ *Id.* at art. 4(3) (emphasis added).

²⁶ *Id.* at art. 189 (emphasis added).

²⁷ TFEU articles 3 and 6 outline a non-exclusive list of areas to include technology and consumer protection. *Id.* at arts 2 and 6.

²⁸ Dadomo and Quenivet, *supra* note 23, at 36.

²⁹ TFEU, *supra* note 20, at art. 4(3) (“Pursuant to the principle of sincere cooperation, the Union and Member States shall, in full mutual respect assist each other in carrying out tasks which flow from the Treaties”).

limitations exist, including those called out in article 4(3), which prohibit the Union from limiting Member States which are “exercising their competences” in cases of research, technological development, and outer space.³⁰ Moreover, two additional principles constrain the Union’s ability to legislate: subsidiarity and proportionality. Subsidiarity requires the Union to justify any proposal for legislation and explain why “action at the Member States’ level is not sufficient.”³¹ As applied to outer space legislation, the Union must justify why Union-level legislation is required and why legislation at the Member State level is ill suited. Next, proportionality requires that the “content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”³² In essence, proportionality limits the bounds of EU action to when it is suitable, necessary, and balanced to the goals sought.

C. Member States Legislation

National legislation in outer space activities further complicates the European outer space legal landscape. While this paper does not explore national legislation in depth,³³ it is worth noting that ten³⁴ EU member states have already enacted domestic legislation on topics ranging from launching activities³⁵ to national registration.³⁶ Moreover, recognizing that there are several

³⁰ *Id.*; See also Dadomo and Quenivet, *supra* note 23, at 36.

³¹ JACQUES ZILLER, *ADVANCED INTRODUCTION TO EUROPEAN UNION LAW* 20 (2020).

³² Treaty on the European Union, art. 5, Sept. 5, 2008, O.J. 115 [hereinafter TEU] (emphasis added).

³³ For a more comprehensive survey, please see: FRANS G. VON DER DUNK, *NATIONAL SPACE LEGISLATION IN EUROPE: ISSUES OF AUTHORIZATION OF PRIVATE SPACE ACTIVITIES IN LIGHT OF DEVELOPMENTS IN EUROPEAN SPACE COORDINATION* 30–40 (Frans G. von der Dunk, ed., 2011) (surveying national space legislation in light of varying outer space legal topics); A collection of national space laws can be found here: United Nations Office for Outer Space Affairs, *National Space Law*. <https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html>.

³⁴ The European Space Agency, *National Space Legislation*, https://www.esa.int/About_Us/ECSL_-_European_Centre_for_Space_Law/National_Space_Legislations#EUROPE.

³⁵ See Royal Decree implementing certain provisions of the Law of 17 September 2005 on the activities of launching, flight operations and guidance of space objects, art. 1, (Belg.).

³⁶ See Royal Decree No. 278/1995 of 24 February 1995 on Establishment in Spain of the Registry of Objects Launched into Outer Space, art. 1, (Spain).

areas in which Member States have already legislated means that according to TFEU article 189, the Union cannot legislate to harmonize Union and Member State law in those areas. However, this parallel structure has been a driving factor behind recent harmonizing efforts that will be discussed in greater depth in Parts III–V.³⁷

III. THE PAST: CONSTRAINED HARMONIZATION

The European Union has its institutional origins in the European Coal and Steel Community (ECSC) of 1951–1952 and the European Economic Community (EEC) of 1957–1958.³⁸ Despite being nearly concomitant with humanity’s first forays into outer space (the first artificial Earth satellite, *Sputnik*, was launched in 1957), the European Union’s early priorities were decidedly Earth-bound. Rather than turning its attention star-ward, the Union focused on integrating European markets through creating customs unions, agricultural policies, and the European Free Trade Association.³⁹ Space exploration, at that time, was a national governmental affair in the arena of research and development—not economic integration. Nonetheless, there is an appreciable “prehistory”⁴⁰ of European space legislation.

While Outer Space is technically beyond the “jurisdiction” of the European Union (it’s not a part of any Member States’ sovereign territory), the Union (and its predecessors) did exercise noticeable jurisdiction in these areas.⁴¹ By 1986, the EEC imbued European institutions

³⁷ In a speech on January 24, 2023, Commissioner Thierry Breton remarked that the “Fourth pillar is about an EU space law to put in place common rules on safety, security and sustainability of our space operations. **Ten Member States have already started to regulate space operations.** We face the risk of diverging national rules with a negative impact on the competitiveness of our industry, as well as on our security. We need for instance, common rules on collision avoidance, safety and mitigation measures, threat assessments, resilience requirement and a zero-debris approach.” European Commission Press Release, *supra* note 8.

³⁸ WOLFRAM KAISER ET AL., *THE HISTORY OF THE EUROPEAN UNION 1* (Wolfram Kaiser et al., eds., 2009).

³⁹ The European Union, *History of the European Union 1960–69*, https://european-union.europa.eu/principles-countries-history/history-eu/1960-69_en.

⁴⁰ Frans G. von der Dunk, *The EU Space Competence as per the Treaty of Lisbon: Sea Change or Empty Shell?*, U. NEB. SPACE, CYBER, AND TELECOMM. L. PROGRAM FAC. PUBL’NS, 382, 383 (2011).

⁴¹ *Id.*

with the power to invest and finance in research and development—a power widely regarded to include outer space activity.⁴² And, by 1994, the Union had “exercised a fundamental competence to regulate satellite communications” through the 1994 Satellite Directive.⁴³ The 1994 Satellite Directive, with its legal basis in article 90⁴⁴ of the Treaty establishing the European Community, specifically tied the regulation of Satellite communication to the maintenance of a European free market. For example, the regulation called for the “abolition of all exclusive or special rights [sic] in this area” in line with the European Parliament’s resolution on creating a common market for satellite communication, even if Member States had “already opened up certain satellite communications services.”⁴⁵ In short, by analogizing certain space activity to pre-existing economic activity capable of regulation to protect the free market (radio telecommunications), the then European Community was able to harmonize satellite telecommunications. In another instance, the European Community relied on ties rooted in general competition concerns to issue decisions on several concentrations that were either compatible or incompatible with the common market.⁴⁶ For example, Decision 96/177/EC outlined that it was the Commission’s intention to “use the competition rules to remove all

⁴² *Id.*

⁴³ Frans G. von der Dunk, *Europe and Security Issues in Space: The Institutional Setting*, U. NEB. SPACE, CYBER, AND TELECOMM. L. PROGRAM FAC. PUBL’NS, 71, 96 n.135 (2010). Offers a list of relevant examples including Directive 90/397/EEC regarding personal and mobile communications and Directive 90/388/EEC, which addressed the implementation of full competition rules in the telecommunications realm.

⁴⁴ Treaty Establishing the European Community, art. 86 (now TFEU art. 106) (“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community”).

⁴⁵ Commission Directive 94/46/EC, 1994 O.J. (L 268).

⁴⁶ von der Dunk, *supra* note 43, at 96 n.136 (providing a comprehensive overview of decisions regarding satellite telecommunications that were either deemed appropriate or inappropriate with free market principles. All the decisions highlight that the Union was regulating this area of the space sector—without explicit authority—based on free market authority).

national restrictions within the European Union on access to space segments.”⁴⁷ And, subsequent communication between the Commission and the European Parliament and Counsel again stressed regulating the space-telecommunications market via competition controls already used in the earth-bound telecommunications sector.⁴⁸

These trends were significant. They show that as outer space grew in *economic* importance to the Union, it required increasing harmonization in policies as had been done in other (economic) domains. Outer space was no longer strictly the realm of science and research but an (albeit nascent) player in the European free market. For example, the aforementioned 1994 Satellite Directive stemmed from precedent set by telecommunications frameworks broadly within the European Internal Market.⁴⁹ However, these harmonization efforts, while significant, were still largely constrained. Rather than focusing on a direct European Union contribution to outer space governance, “for many years the Community and subsequently the EU invested much political capital” in keeping the European Space Agency at the helm of space coordination and governance.⁵⁰

IV. THE PRESENT: FROM THE TREATY OF LISBON (2007) TO REGULATION 2023/588 (2023)

December 2007 was a watershed moment for the European Union, and in the words of then-Portuguese Prime Minister Mr. José Sócrates, “[h]istory will remember this day.”⁵¹ For outer space, the Treaty of Lisbon ushered in specific articles that addressed the Union’s ability to regulate in the domain as outlined in Part II of this work. This section of the paper now turns to

⁴⁷ Commission Decision 96/177/EC, para. 107, 1995 O.J. (L 53).

⁴⁸ *Id.*

⁴⁹ von der Dunk, *supra* note 43, at 96.

⁵⁰ Jan Wouters and Giulia Pavesi, *The Final Frontier? The European Union and the Governance of Outer Space* 9 (Leuven Centre for Global Studies and the Institute for International Law Working Paper, Paper No. 234, Dec. 2022), https://ghum.kuleuven.be/ggs/publications/working_papers/wp234-wouters-pavesi.pdf.

⁵¹ Kaiser, *supra* note 38, at 1.

surveying European regulations issued from 2007 to present day and what legal basis they used to justify legislating certain outer space activities.⁵² Some preeminent space scholars hint that the Treaty of Lisbon looks “more like a shell” than substantive change; however, I argue that the Union’s activities from 2007 used many of the lessons from the 1990s—regulating space activity using economic articles—and while the use of TFEU article 189 was sparing, the Union deployed a plethora of new articles to justify regulating activity in outer space.⁵³ This next part surveys major movements in European outer space governance, focusing on a brief survey of selected regulations and identifying their respective legal bases. Part V then offers an assessment of whether these articles could form a sound legal basis for common EU space law.

In the 1990s, the European Union constrained much of its focus on outer space governance to the European Space Agency (ESA), but that changed in 2012–2014. Then, the Union redefined its relationship with ESA, and by 2014, entered the stage as a major space player. Through a series of reports, the Union identified shortcomings in its relationship with ESA and began to prioritize “greater involvement in defining the goals of a European space policy” as well as becoming a major financial contributor to European space activities.⁵⁴ These efforts resulted in the first “Space Strategy for Europe” in 2016 where the Commission made “explicit” the EU’s desire to “play a role in the reform of space governance, including building global governance and appropriate legal frameworks for space.”⁵⁵ The EU’s draft code of

⁵² Given the space and time constraints, the methodology prioritized regulations rather than other communications. I examined 256 regulations from 2007–2023 with various search queries including “outer space,” “space,” and “satellite.”

⁵³ LESLEY JANE SMITH, *LEGAL PERSONALITY OF THE EUROPEAN UNION AND ITS EFFECTS ON THE DEVELOPMENT OF SPACE ACTIVITIES IN EUROPE 202* (Schrogl et al., eds, 2011).

⁵⁴ Wouters and Pavesi, *supra* note 50, at 9.

⁵⁵ *Id.*

conduct for outer space,⁵⁶ released in 2014, highlights not just the EU’s ambitions to become a space regulator, but a marked shift from viewing outer space as simply another domain for economic regulation to a global common under threat and intertwined with security and defense. The selected regulations below further advance the broadening view of the Union as an outer space regulator.

As with the 1994 Satellite Directive, after the Treaty of Lisbon, the Union made ample use of economic articles to justify space regulation, not just TFEU article 189. For example, TFEU article 171 and 172⁵⁷ were instrumental in managing European satellite navigation programs.⁵⁸ Regulations 912/2010 and 1285/2013 relied on articles 171 and 172 to support European space efforts, including Galileo and the European Geostationary Navigation Overlay Service (EGNOS). While still decidedly tied to economic justifications and comfortably within the telecommunications realm, the European-wide space satellite programs coupled with their subsequent regulations rooted in articles 171 and 172 represented the first “proper piece of EU law” on a truly “European” system.⁵⁹

The Union’s activity in space (or at least tangential enterprises) continued to expand beyond the strictly economic regulation of the 1990s. For example, the Union used article 215⁶⁰

⁵⁶ The European Union, *Draft International Code of Conduct for Outer Space Activities*, https://www.eeas.europa.eu/sites/default/files/space_code_conduct_draft_vers_31-march-2014_en.pdf.

⁵⁷ TFEU, *supra* note 20, at art. 171(1) (allowing the Union to “establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest . . . [the Union] shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardization”) (emphasis added); TFEU, *supra* note 20, at art. 172 (allowing the Council and Parliament to adopt necessary guidelines and measures to achieve the aims of Article 171).

⁵⁸ Parliament and Council Regulation 912/2010, 2010 O.J. (L276); Parliament and Council Regulation 1285/2013, 2013 O.J. (L 347).

⁵⁹ von der Dunk, *supra* note 40, at 384.

⁶⁰ TFEU, *supra* note 20, at art. 215(1) (“Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof”).

to impose sanctions on Venezuela, Myanmar, Belarus, and Russia regarding the sale of dual-use items with telecommunications capabilities.⁶¹ A December 16th regulation against Russia specifically recognized the strategic importance of the outer space domain, noting that “it is appropriate to expand the export ban covering goods and technology suited for use in aviation and the space industry.”⁶² However, derogations were allowed for technology that could be used to prevent satellite collisions or unintended/uncontrolled re-entry.⁶³

Regulations also started to target the dual-use nature of satellites. For example, regulation 428/2009 used TFEU article 207 as a legal basis to regulate certain satellite and telecommunication equipment that could have dual-use capabilities as necessary to “ensure that international commitments and responsibilities of the Member States, especially regarding non-proliferation” were met.⁶⁴ Moreover, the Union used article 77 as a basis to create the European Border Surveillance System (EURSUR) with the European Maritime Safety Agency and European Union Satellite Centre to support Union border security.⁶⁵

Perhaps, most impactful, the Union used article 189 as a basis to create new space programs with significant legal and policy impacts. For example, regulation 2021/696 established the Union Space Programme, which brought together the existing flagship European space programs: Galileo and EGNOS.⁶⁶ Regulation 2021/696 highlights the importance of

⁶¹ Council Regulation, 2017/2063, 2017 O.J. (L 295) (Venezuela); Council Regulation, 2018/647, 2018 O.J. (L 108) (Myanmar); Council Regulation, 2021/1030, 2021 O.J. (L 224I) (Belarus); Council Regulation, 2022/328, 2022 O.J. (L 49) (Russia, Feb. 25, 2022); Council Regulation, 2022/350, 2022 O.J. (L 65) (Russia, Mar. 1, 2022); Council Regulation, 2022/2474, 2022 O.J. (L 322I) (Russia, Dec. 16, 2022).

⁶² Council Regulation, 2022/2474, para. 14, 2022 O.J. (L 322I).

⁶³ *Id.*

⁶⁴ Council Regulation, 428/2009, para. 3, 2009 O.J. (L 134); *See also* Council Regulation, 2021/821, 2021 O.J. (L 206).

⁶⁵ Council Regulation, 1052/2013, 2013 O.J. (L 295) (no longer in force, date of end of validity: 01/05/2021).

⁶⁶ European Commission Performance Review, EU Space Programme—Performance, The Commission (Jun. 7, 2022), https://commission.europa.eu/strategy-and-policy/eu-budget/performance-and-reporting/programme-performance-overview/eu-space-programme-performance_en.

Union-based harmonization, outlining that space has become “indispensable in the daily lives of Europeans and play[s] an essential role in preserving many strategic interests.”⁶⁷ Importantly, the regulation specifically ties the justification for the Space Programme to the Global Strategy for the European Union’s Foreign and Security Policy of June 2016. Notably, it observes that “historically, the space sector’s development has been linked to security. . . in many cases, the equipment components and instruments used in the space sector, as well as space data and services, are dual use.”⁶⁸ It continues, recognizing the importance of outer space to independence and security and that the Union’s “autonomous access to space” is “essential.”⁶⁹ Finally, the regulation stresses the limitations of shared competence for European action given that, despite Member States’ traditions of active space-related industries, a Union-wide program and collaboration across all Member States “should be promoted.”⁷⁰ The establishment of the European Space Programme, while still recognizing the constraints of article 189, shows an appreciable preference for centralization.

Echoing the justifications of Regulation 2021/696, the most recent space-based regulation, issued on 15 March 2023, established another Union-based program, the Union Secure Connectivity Programme.⁷¹ The justifications for the program also recalled the emphasis on governmental satellite communications in the Global Strategy for the European Union’s Foreign and Security Policy of June 2016, as well as the EU Maritime Security Strategy and the EU Arctic Policy.⁷² The Programme specifically called out the improvement of connectivity over “geographic areas of strategic interest,” including Africa, the Arctic, the Baltic, and the Black

⁶⁷ Council Regulation, 2021/696, para. 1, 2021 O.J (L 170).

⁶⁸ *Id.* at para. 2.

⁶⁹ *Id.* at para. 6.

⁷⁰ *Id.* at para. 10.

⁷¹ Council Regulation, 2023/588, 2023 O.J. (L 79).

⁷² *Id.* at para. 1.

Sea.⁷³ As with the establishment of the Union Space Programme, the Union appears to have broadened its justifications for its space activity, highlighting a potentially wider basis for the use of article 189, including ties to the general security and defense aims of the Union.

This brief survey shows the expansion of the Union’s activities in outer space. Compared to the earlier days of space activity, which were rooted in strictly economic justifications, the Union now relies on various articles from border security to article 189 itself to achieve wide-sweeping space regulations. Whether these articles can be used to support a common European space law will be addressed next.

V. THE FUTURE: ASSESSING POTENTIAL LEGAL BASES FOR A COMMON EU SPACE LAW

No single article provides the legal basis for the Union to regulate outer space; however, when used in conjunction with one another, the Union could effectively regulate aspects of space activity via a piecemeal approach—with different regulations using different articles (depending on the item regulated). The survey in Part IV showed the plethora of articles available to regulate different parts of European space behavior, and now I turn to consider several of these articles and their potential usefulness as a legal basis for a unified European space law.

A. *Potential Legal Bases*

Article 189

Article 189 is the space article, and a compelling place to start in our legal analysis. However, a strict reading of the article coupled with examining its legislative history, make it an unlikely candidate for broad, sweeping, “fourth pillar” EU space law legislation. Firstly, while section (1) of the article permits the Union to create a “European Space policy”—which the

⁷³ *Id.* at para. 18.

Union has used as a legal basis before⁷⁴—such programs are limited to “promote scientific and technical progress, industrial competitiveness and the implementation of its policies.”⁷⁵ The article allows the Union to promote joint initiatives, support research and technological development, and “coordinate” efforts needed for space exploration and exploitation.⁷⁶ These powers appear limited to research and technological development; however, the EU’s interpretation of this language signals a greater flexibility. For example, the EU Space Programme (2021) specifically ties its goals to the security and defense aims outlined in other EU policies like the Arctic Policy and the Foreign and Security Policy of June 2016. The article’s section (2) signals the intent of the Member States to limit such encroachment even if a broader interpretation allows greater regulation than section (1) explicitly outlines. Section (2) clearly limits the Union’s ability to regulate by “excluding any harmonization of the laws and regulations of the Member States.”⁷⁷ The drafting history of article 189 shows that this provision was added by the Member States after the initial drafted article only had subsection (1). This addition highlights that, at the time, the Member States were “unwilling to give up their sovereignty” entirely in the space arena.⁷⁸

Hence, activity justified under article 189 would likely be viewed as a parallel competence or supporting competence in addition to Member State activities. Of course, as outlined in Part II, any EU action still is constrained by the principles of subsidiarity (e.g., the EU should only intervene when decentralized authorities—Member States — cannot act satisfactorily) and proportionality (the action must not go further than absolutely necessary).⁷⁹

⁷⁴ See Regulation 2021/696, *supra* note 67.

⁷⁵ TFEU, *supra* note 20, at art. 189.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Linden, *supra* note 10, at 8.

⁷⁹ *Id.*

However, despite these limitations, the wording “establish the necessary measures” indicates that other initiatives might still be possible, like decisions, best practices, codes of conduct, and non-binding standards.⁸⁰ Moreover, subsection (4) of the article does limit its scope to one that “shall be without prejudice to the other provisions of this Title.” Such a restriction is important given that articles 179–188 may also be used to support a coherent space law. Regardless, as currently written and used, article 189 is limited and cannot act as a mechanism for complete harmonization given the explicit protection of Member State action in subsection (2).

Articles 114 and 115

Articles 114⁸¹ and 115⁸² can be used as an appropriate legal basis where differences in Member State legislation obstruct “fundamental freedoms” and have a “direct effect on the functioning of the internal market.”⁸³ Article 115 authorizes a general power to pass directives whereas article 114 allows the Union to pass “measures,” which includes directives and regulations, and hence can be directly binding on Member States.⁸⁴ However, there are several limitations that constrain the applicability of article 114, particularly as applied in outer space. First, article 114 only applies to instances “save where otherwise provided in this Treaty [the TFEU].” Hence, more applicable treaty provisions are deemed to take precedence. As applied to outer space, this would include regulating satellite telecommunications under article 170 as more

⁸⁰ *Id.*

⁸¹ TFEU, *supra* note 20, at art. 114(1) (“Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”).

⁸² *Id.* at art. 115 (“Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market”).

⁸³ Linden, *supra* note 10, at 9.

⁸⁴ PAUL CRAIG & GRÁINEE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 650 (7th ed. 2020).

appropriate than under article 114. Moreover, the European Court of Justice (ECJ) confirmed the limitations on article 114's applicability in *Tobacco Advertising* (2000),⁸⁵ where the ECJ struck down a directive because the activities subject to regulation must “genuinely have as [their] object the improvement of the conditions for the establishment and functioning of the internal market.”⁸⁶ Mere disparities between national rules that only produce an abstract rather than actualized risk are not appropriate to regulate under article 114. Yet, despite these limitations, more recent precedent suggests a broader interpretation of article 114.⁸⁷ In *Tobacco Advertising* (2006), so long as national laws affecting the advertising of tobacco products “could affect competition and inter-state trade,” the use of article 114 was appropriate. As applied to the outer space domain, article 114 could be used to address disparate national legal regimes so long as those regimes “could” affect competition and interstate trade, under the *Tobacco Advertising* (2006) standard.

One area that could be targeted is the disparate registration requirements between Member States. In International Space Law, registration is the mechanism that bestows responsibility and liability for accidents or damage occurring in space or during launch.⁸⁸ For example, Belgium requires licenses for activities principally conducted on Belgian territory or by Belgian nationals outside of Belgium.⁸⁹ Conversely, Sweden does not require licensing for certain launches (like sounding rockets).⁹⁰ Under the *Tobacco Advertising* (2006) standard, such

⁸⁵ Craig & Búrca, *supra* note 84, at 651.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ J.F. MAYENCE, NATIONAL SPACE LEGISLATION IN EUROPE 101 (Frans G. von der Dunk, ed. 2011).

⁸⁹ Frans G. von der Dunk, *Article IV of the Outer Space Treaty 'in European Context'*, U. NEB. SPACE, CYBER, AND TELECOMM. L. PROGRAM FAC. PUBL'NS, 547, 556 (2008), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1022&context=spacelaw>.

⁹⁰ United Nations Office for Outer Space Affairs, *Selected Examples of National Laws Governing Space Activities: Sweden*, UNOOSA, [https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/sweden/act_on_space_activities_1982E.html#:~:text=Space%20activities%20may%20not%20be.anywhere%20else%20without%](https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/sweden/act_on_space_activities_1982E.html#:~:text=Space%20activities%20may%20not%20be.anywhere%20else%20without%20)

disparate registration and licensing requirements could affect competition in the launching sector between Belgium and Sweden. As the Court concluded in *Tobacco Advertising* (2006), “it follows . . . that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future . . . Article 95 EC authorizes the Community Legislature to intervene by adopting appropriate measures.”⁹¹ Furthermore, the regulation of national registration requirements would be impossible under article 189(2). Hence, it seems that for certain activities, if they sufficiently relate to or are likely to prevent the free movement of trade within the internal market, article 114 could support such regulation when it would otherwise be impossible under article 189.

Importantly, article 114(4) does provide a critical exception to such regulation if the Member State deems the national provision necessary pursuant to article 36.⁹² If this is the case, the Member State can notify the Commission of the provisions and the grounds for maintaining them. Under this subsection, for example, if either Sweden or Belgium deemed it critical to keep their national legislation pursuant to a category outlined in article 36, it could be possible for them to retain such a provision. In sum, article 114 does seem more fruitful than article 189 but is likely best tailored to address emerging legislation rather than existing legislation.⁹³

Articles 170–173

In order to promote an “overall harmonious development”⁹⁴ and to ensure the functioning of the internal market,⁹⁵ article 170 gives the Union the ability to create an area “without internal

[20a%20licence.&text=A%20licence%20to%20carry%20on%20space%20activities%20is%20granted%20by%20the%20Government.](#)

⁹¹ Craig & Búrca, *supra* note 84, at 651.

⁹² TFEU, *supra* note 20, at art. 36 (noting that the provisions of articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property).

⁹³ Legal commentary suggests that article 114 has been interpreted to justify the *retention* of existing provisions rather than the justification of *new* provisions. See Craig & Búrca, *supra* note 84, at 653.

⁹⁴ *Id.*, *supra* note 20, at art. 174.

⁹⁵ *Id.* at art. 26.

frontiers” and to develop “trans-European networks in the areas of transport, telecommunications and energy infrastructures.”⁹⁶ Moreover, to achieve these aims, the Union shall “promote the interconnection and interoperability of national networks as well as access to such networks.”⁹⁷ Article 171 outlines the mechanisms available to the Union to promote the common operation of trans-European areas of transport, telecommunications, and energy, including issuing objectives, guidelines, as well as “any measures that may prove necessary to ensure interoperability.”⁹⁸

These articles, as we have seen from the survey of previous regulations in Part IV, provide a satisfactory basis for the Union to regulate telecommunications and satellite activity and even serve as the basis for one of the EU’s flagship space programs—Galileo. In this way, articles 170–173 are already serving as a basis for telecommunication regulation, and as European space travel becomes more accessible (including space tourism),⁹⁹ perhaps regulation under the travel prong of article 170 will be appropriate. It appears that articles 170–173, at least in terms of telecommunication and future space travel, seem more appropriate as a legal basis than article 189, and could form the legal basis for part of a cohesive EU space law in those areas.

Article 352

Some literature has recognized article 352 as a source of harmonization;¹⁰⁰ however, article 352 is not an appropriate legal basis for a common EU space law. Article 352, the successor to article 308 of the EC, is the “flexibility clause” of the TFEU, and allows that “if

⁹⁶ *Id.* at art. 170(1).

⁹⁷ *Id.* at art. 170(2).

⁹⁸ *Id.* at art. 171.

⁹⁹ See Frans G. von der Dunk, *Space Tourism, private spaceflight and the law: key aspects*, 27 SPACE POL’Y 146 (2011) (outlining the legal basis and barriers for space tourism).

¹⁰⁰ Linden, *supra* note 10, at 8.

action by the Union should prove necessary, within the framework of the policies defined in the Treaties, and the Treaties have not provided the necessary powers. . .” then the Union can act.¹⁰¹

At first glance, article 352 seems promising and is not restricted to the internal market like article 114. However, article 352(3) severely limits its applicability to outer space harmonization. Subsection (3) notes that “measures based on this Article shall not entail harmonization of Member States’ laws or regulations in cases where the Treaties exclude such harmonization.”¹⁰² As outlined above, article 189(2) explicitly limits the harmonization of Member States’ outer space activities. Even for outer space activities related to European foreign security policies, article 352 cannot form a legal basis for regulation pursuant to article 352(4). Hence, the applicability of article 352 to a common EU space law is severely constrained as it cannot be used as a legal basis to justify harmonization of disparate areas in Member State regulation.

Article 2(4)

Given the connection between outer space and common foreign and security policies for the Union, Article 2(4) may also be a useful basis for implementing a common EU space law—albeit the mechanisms available for the Union will likely hinge on incentivizing action of Member States rather than mandating harmonization. Article 2(4) notes that “the Union shall have competence, in accordance with the provision of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defense policy.”¹⁰³ The Commission has already been keen to root its harmonization efforts in outer space in Article 2(4)’s language. For example, in the Commission’s Joint

¹⁰¹ Craig & Búrca, *supra* note 84, at 121.

¹⁰² TFEU, *supra* note 20, at art. 352(3).

¹⁰³ *Id.* at art. 2(4).

Communication to Parliament and the Council addressing Space Traffic Management (STM), the Commission highlighted the “direct threat to safety and security” posed by space debris and uncontrolled outer space travel.¹⁰⁴ The report recognizes that STM directly contributes to the “security and defense dimensions of the EU in space.”¹⁰⁵ However, the report itself recognizes the limitations of the EU to fully regulate in this area and calls for “incentive measures” to be put in place.¹⁰⁶

The Commission’s 2023 Joint Communication to Parliament and the Council on a European Union Space Strategy for Security and Defense goes even further than the STM Communication. The 2023 Joint Communication calls for an “EU-wide security framework for the protection of space systems” and notes that “some Member States have put national rules in place to regulate space operations, including security aspects.”¹⁰⁷ Such national rules could “differ” and such divergence “could affect the competitiveness of the EU space industry and the security of the EU.”¹⁰⁸ Then, in a move beyond the STM Communication, the 2023 Joint Communication states that “to ensure a consistent EU-wide approach . . . the Commission will consider proposing *an EU Space law*.”¹⁰⁹ As with the STM Communication, the Commission appears to be tying its aims of a common EU space law to security and defense (article 2(4)) and economic competitiveness (article 114).

¹⁰⁴ *Joint Communication to the European Parliament and the Council: An EU Approach for Space Traffic Management*, at 1, JOIN (2022) 4 final (Feb. 2, 2022).

¹⁰⁵ *Id.*

¹⁰⁶ Recall that incentive measures are a function of supporting measures and reflect areas where the EU cannot directly regulate.

¹⁰⁷ *Joint Communication to the European Parliament and the Council: European Union Strategy for Security and Defence*, at 3, JOIN (2023) 9 final (Mar. 10, 2023).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

Given these Communications’ reliance on article 2(4) language as an apparent legal basis for common space activities, could reliance on this article be sufficient? Article 2(4) “does not specify which type of competence applies” to Common Foreign and Security Policy (CFSP) measures.¹¹⁰ Moreover, article 2(4) and the CFSP are not further elaborated upon in the Treaty nor do they neatly fall into the competences outlined elsewhere in article 2.¹¹¹ Under the CFSP, the European Council can issue decisions that either address an “international situation [that] requires operational action by the Union”¹¹² or a thematic or geographical issue. Under these categories, the Member States must conform their national guidelines to the decisions proposed by the Union. For example, the STM Communication concluded with a desire to promote an “EU position on STM.”¹¹³ At this point, there has yet to be a Council decision on outer space. However, at least in areas of security and defense, such decisions, particularly those targeting outer space as a geographic and thematic frame, could be useful to ensure that Member State national policies at least conform to the common position outlined by the EU. In fact, the 2023 Joint Communication recommends just this action—amending the Council Decision (CFSP) 2021/698 to include threats in the space domain that “may affect the security of the EU and its Member States.”¹¹⁴ While not a “common EU Law” *per se*, it does partially address the concerns of the 2023 Joint Communication.

Summary

No article, alone, currently offers satisfactory legal support for a comprehensive EU legal approach to outer space. However, many of the articles could be (and have been) used to regulate

¹¹⁰ Craig & Búrca, *supra* note 84, at 119.

¹¹¹ *Id.*

¹¹² AUGUST REINISCH, ESSENTIALS OF EU LAW 258 (2012); *See, e.g.*, Council Decision (CFSP), 2021/904, 2021 O.J. (L 197) (authorizing European Union Rule of Law Mission in Kosovo).

¹¹³ *Joint Communication, supra* note 104, at 16.

¹¹⁴ *Id.* at 9.

specific activities in outer space—like telecommunications under article 170 or anti-competitive regulation restrictions under article 114. The TFEU offers ample material to regulate outer space activity through a mosaic approach and by tailoring specific articles to target precise outer space activities. While article 2(4) appears to offer a fruitful possibility in terms of a thematic decision from the Council on outer space, it has yet to do so. Despite the lack of an article that would support a comprehensive EU space law, the next part addresses potential ways ahead to achieve a unified vision albeit through non-binding measures.

B. Way Ahead?

Despite the lack of a legal basis *per se* within which to establish a common EU space law, there are several compelling non-binding measures that could streamline Member State activity until the necessary changes or decisions are implemented to offer a binding, legal basis. This section addresses such alternatives.

First, the Union can make use of its open method for coordination (OMC) mechanisms, which facilitate cooperation by exchanging best practices, targets, and guidelines between Member States.¹¹⁵ As a method of “soft law” governance, OMCs foster convergence toward EU goals in areas that are outside the partial or full competence of the Union. OMCs have been used (with varying levels of success) to address areas including social protection, social inclusion, pensions, healthcare, innovation, and research.¹¹⁶ Under OMCs, the EU can still encourage Member States to meet common goals and practices while respecting the autonomy of the States. As one author observes, such mechanisms could be particularly useful in the field of

¹¹⁵ Linden, *supra* note 10, at 9.

¹¹⁶ At a Glance: The Open Method of Coordination, EUR. PARL. DOC. PE 542.12 (2014).

authorization, supervision, or evaluation of space activities, which are outside the regulatory power underneath article 189 or not within the other articles mentioned in subpart (a).¹¹⁷

Second, the Union can pursue incentive measures as proposed in the STM Communication. Such measures include a “safe space” label that shows consumers and clients that the activities met a certain standard for safe and sustainable space operations.¹¹⁸ The Communication also considered an award program and a public list of companies that adopted STM guidelines.¹¹⁹ Such incentives could be worthwhile to promote Member State and company activities in line with the STM guidelines without infringing on current Member State competence.

Other options available to the Union to facilitate coordination include recommendations and opinions, both of which are non-binding instruments and outlined in article 288.¹²⁰ A recommendation would enable EU institutions to publicly outline their position without legal consequences.¹²¹ The Commission issued such recommendations on subjects including rights of suspects in criminal proceedings, public finance, and zero-energy buildings—recommendations on outer space can certainly be next. Opinions are also non-binding and are used to address certain situations including, submissions to join the EU and when Member States seek the Commission’s views on a proposed measure.¹²² Opinions could be highly useful for Member States that are considering additional national space laws. Those Member States could present

¹¹⁷ Linden, *supra* note 10, at 9.

¹¹⁸ *Joint Communication*, *supra* note 104, at 11.

¹¹⁹ *Id.*

¹²⁰ TFEU, *supra* note 20, at art. 288.

¹²¹ Types of Legislation, The European Union, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en

¹²² European Union Opinions, Eur-Lex, (Oct. 11, 2021), <https://eur-lex.europa.eu/EN/legal-content/summary/european-union-opinions.html>

their proposals to the Commission, which could then consider whether the proposal agreed with the goals of the Union's outer space policy.¹²³

Finally, another option would be to amend the TFEU and remove article 189(2)'s language "excluding any harmonization of the laws and regulations of the Member States." Moreover, an amendment to remove outer space as a shared competence and establish it as an exclusive competence could also be pursued. While article 189 is still largely constrained to scientific and technical progress, given the continued expansion of Union activity in the outer space realm, it seems likely that the interpretation of article 189, with the excluded language, would expand to meet the legal needs of Union activity (subject to proportionality and subsidiarity constraints). Article 48 of the Treaty on European Union outlines the revision procedure, and any Member State government, the European Parliament, or the Commission may submit a proposal for amendments to the Council. Given that the removal of the language in article 189 and moving outer space from a shared competence to an exclusive competence would increase the legal authority of the EU, a proposed amendment is appropriate. Only after a conference of Member State governments is convened and the changes have been ratified by all the Member States do they go into effect. Of course, given this complexity, the Council may decide not to convene unless the proposed changes are "of great importance."¹²⁴ At this point, it does not appear that the pursuit of a common EU space law would meet such a threshold.

¹²³ *Id.* (The Commission issued such an opinion in response to a request by the Netherlands and their proposed legislation that banned a specific cosmetic medical device).

¹²⁴ Revision of EU Treaties, Eur-Lex, (Oct. 14, 2022), <https://eur-lex.europa.eu/EN/legal-content/summary/revision-of-eu-treaties.html>.

VI. CONCLUSION

The Russian invasion of Ukraine highlighted the growing significance of outer space to European security and industry. The invasion and its subsequent impact on space activities, while alarming, merely reflects the expanding importance of the outer space domain. From the 1994 Satellite Directive, to proposed policies for a “common EU space law,” the European Union has steadily extended its reach further into the final frontier. This paper explored the historical evolution of European engagement with the outer space domain and considered the potential legal bases and their likelihood of success for the creation of a common EU space law. While no single article seems appropriate, a mosaic of articles tailored to specific space activity offers a fruitful solution to approximate a unified, European approach to outer space. These articles coupled with the use of non-binding measures provide a compelling avenue for approaching an EU space law. Only time will tell when (and if) the Commission considers proposing an EU space law and what legal basis the Commission will use as its justification.