

FEBRUARY 2024



**AN EU SPACE LAW ON THE HORIZON:
DECODING LEGAL FOUNDATIONS AND NAVIGATING POLICY FRONTIERS**

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I. Introduction

In recent years and through the dissemination of documents, strategic initiatives, and legislative measures, the European Union recognised the need for a substantial space regulation framework that would ensure responsible and sustainable activities in outer space. Member States [MSs] have begun drafting national laws to meet space-related challenges such as satellite proliferation, risks of congestion and collision, and security threats against space assets (European Commission, 2023a). To mitigate fragmentation, the EU is ready to establish a dedicated legal framework that aligns within international space law within its legal system. As a matter of fact, in the EU Space Strategy for Security and Defence of March 2023, the Commission announced that it is working on the proposal for an EU Space Law. This legal instrument will be available in early 2024 and will allegedly envisage common EU rules for the safety, resilience and sustainability of space activities and operations. The risk of fragmentation in the absence of a regulatory framework can impact the competitiveness, security, and worldwide influence of EU industries in international for a (European Commission, 2023a). This mesmerising topic has attracted interest from academia, industry, and the private and public sectors which expressed their views through a targeted consultation.

However, tangible concerns surrounding the legal basis as well as the legitimacy of the legal framework manifestly emerge, casting ambiguities over the discourse. Although the creation of a harmonised European Space Law is extremely useful from a political perspective, full harmonisation in the field of outer space is specifically forbidden by the founding treaties of the EU, as revised by the Lisbon Treaty in 2007 (Potter, 2023). The second section of this paper will delve into this thorny topic, which has also been deconstructed thanks to informal talks with EU law experts. Section three discusses the likely content and policy options that the Commission could implement. The Commission could use several main policy standards with a certain level of grip on the MSs, such as non-binding standards, a binding framework or a binding framework with non-binding measures. These are all suitable as long as they comply with the three proposed pillars, namely security, resilience, and sustainability. In the final section, further remarks highlight the paper's fundamental points and conclusions are drawn.

II. The Legal Conundrum: A Foundation for the New Framework

In the realm of international legal obligations, the EU has always recognised only an array of customary international law principles, omitting to consistently consider all the different international space law treaties setting the foundation of this legal domain (Bertasini & Yáñez, 2023; von Der Dunk, 2017). However, most of these principles are exclusively conveyed in a singular primary source, the Outer Space Treaty of 1967, binding on the EU because of its customary nature. Substantiating this, the EU also asserted that “the 1967 Outer Space Treaty and the principles developed in the United Nations framework are the cornerstone of the global governance of outer space[...]” (European Commission, 2023b).

At the Union stage, the Treaty on the Functioning of the European Union [TFEU] plays a significant role in allocating legal competencies, i.e. effective powers on law-making, to the Union, the MSs or both jointly. Within the TFEU, outer space is defined as a shared competence between the Union and the MSs, a point underscored in two Articles. Firstly, Article 4(3) specifies that "...in areas of research, technological development and space, the Union shall have the 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". According to this provision, the MSs can legislate if the Union has not yet exercised its right to do so and, following the principle of sincere cooperation, they are restrained from adopting measures that could potentially contradict existing EU norms or values. The second mention occurs in Article 189 which propels the promotion of scientific and technical progress, industrial competitiveness, and the implementation of a European space policy. Notwithstanding Article 189's thrust towards common policies and regulations in the area, paragraph 2 of the Article expressly precludes the possibility of harmonising MSs' laws and regulations, establishing this as a shared competence with significant restrictions (Wouters & Hansen, 2013).

The conundrum concerning the legal basis for the new framework presents an enduring uncertainty even among experts and officials for various reasons. Indeed, the introduction of a new EU legislation mandates reliance on at least one existing provision, making it pivotal to determine the most suitable article, or combination of articles, to serve as the legal basis of the upcoming EU Space Law. Inevitably, the subsequent question arises as to whether the amendment of the treaties is a *de minimis* condition to bridge the gap and promote a harmonised regime. To address these questions, this research refrains from championing either the interests of the MSs or the EU and adopts a neutral stance instead.

On a first note, the amendment of the treaties does not seem mandatory at this stage considering the Commission's objectives. Nevertheless, to maintain geopolitical competitiveness, it proves beneficial to establish a treaty provision that accommodates future law-making endeavours. In the meantime, an alternative approach has to be determined; the most plausible scenario to reconcile all the interests at stake involves dividing the upcoming space law into several segments, each supported by a distinct legal basis. Whether this constitutes the ultimate approach is yet to be ascertained, especially as this fragmentation is not devoid of complications. However, such an approach would help consolidate and streamline regulatory barriers for both companies and public and private enterprises. Several scholars, having examined the TFEU, recommended a patchwork approach, arguing that no single article could satisfactorily justify a comprehensive EU legal strategy for space.

Nonetheless, several primary law articles, coupled with non-binding measures, could serve as means to control certain space activities; the following elucidates the key examples. Firstly, as highlighted earlier, paragraph 1 of Article 189 TFEU allows for the formulation of a common European space policy to advance scientific and technical progress, industrial competitiveness, and the execution of EU policies. Although paragraph 2 strictly excludes harmonisation policies, it requires the Parliament and Council to establish necessary measures to achieve the objectives outlined in paragraph 1, implying the feasibility of alternative initiatives.

These could encompass decisions, best practices, codes of conduct, and non-binding standards (Potter, 2023).

Secondly, Article 114 TFEU could serve as an appropriate legal basis when disparities among MSs' legislations hinder fundamental freedoms and directly impact the functioning of the internal market, eventually allowing for the implementation of anti-competitive regulation restrictions. Yet, this Article is applicable except where otherwise provided in the Treaty and, as a consequence, other inherently applicable treaty provisions are considered to take precedence (Potter, 2023). Thirdly, Articles 170 and 171 TFEU address the EU's capacity to develop and execute "trans-European networks in the areas of transport, telecommunications, and energy infrastructures." They also outline the available mechanisms for their promotion, including the establishment of objectives, guidelines, and "any measures that may prove necessary to ensure interoperability." When contemplating telecommunications and potential space exploration, Articles 170 and 171 are deemed appropriate provisions to rely on (Potter, 2023). Fourthly, Article 352 TFEU, the so-called flexibility clause, is acknowledged as a potential source of harmonisation, but it is not recognised as a suitable legal basis for a common EU Space Law. Paragraph 3 states that "measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation" and, as seen above, Article 189(2) specifically prevents any harmonisation policies (Potter, 2023). Finally, relying on Article 2(4) TFEU as the basis to justify a space legal framework seems insufficient. Even though this Article bestows upon the Union the power to define and implement a Common Foreign and Security Policy [CFSP], it remains silent on the type of competence applicable to CFSP measures (Potter, 2023).

Since outer space assets serve both civilian and military purposes, the defence domain emerges as another pivotal area to be taken into consideration in light of the upcoming legislation. This sector, highly sensitive and firmly protected by the MSs, is intricately linked to the space field. With internet infrastructure installed in space to maximise broadband and secure connectivity, and satellites having both peaceful and non-peaceful applications, the EU would welcome a legal basis that can progressively circumvent restrictions. It is clear that the CFSP, being essentially an intergovernmental action, lacks the authority to pass legislation on this matter (Bennett, 2023). Therefore, the Union might attempt to adopt all the provisions discussed earlier as general laws, hoping that in the current political environment, the MSs either accept them, allowing the EU to legislate, or at least abstain from challenging them legally.

III. Policy Options and Policy Frameworks for the New EU Space Law

The upcoming EU Space Law is designed to address challenges in the space domain. This section investigates the potential policy standards and viable policy options, aiming to grasp their implications. Certain options may find more appreciation and favour with specific stakeholders, such as the space industry or the MSs. With multiple interests at stake, assessing likely options to identify the preferable ones would necessitate adopting a specific perspective, potentially involving taking sides. The analysis hereby avoids taking this approach, choosing instead to step back and give a general perspective on the range of options available to the Commission regarding the framework and the policy proposals already put forward.

The precise scope of the legislation is yet to be clearly defined. It may include national and EU programmes, missions conducted by European actors or operators, and services provided within the Union's territory (Galland, 2023). The primary focus of its application revolves around competition, which could be adversely influenced by unregulated international entities operating in the EU market alongside regulated European entities (Galland, 2023).

III.i Policy frameworks

The Commission could employ three main policy standards, each involving a certain degree of control over the MSs: non-binding standards, a binding framework, or a binding framework with non-binding measures (European Commission, 2023c). The main concept behind this approach is to face issues by setting scopes of action, requirements to be met, and concrete measures that can effectively fulfil the requirements. To elucidate this process, the Commission has provided examples for each standard, one of which is applied to the standards below, offering a comparative view of the approaches.

Non-binding standards would encompass a collection of best practices, standards, and guidelines intended to tackle key risks related to space safety, resilience, and sustainability in space activities (European Commission, 2023c). As an illustration, concerning the risks associated with satellite collisions, the set requirements would include satellite tracking; a concrete measure to mitigate clash risks could involve satellite operators registering with a Collision Avoidance Service Provider while also providing their name to an EU registry (European Commission, 2023c). The aim of this approach is to engage all companies that have previously participated in similar initiatives and help governments establish mechanisms for certifying companies. This strategy is envisioned to ultimately reduce deceptive advertising by corporations and encourage a positive shift in their behaviour (European Commission, 2023c).

A binding framework would involve the proposal of an EU regulation with key provisions linked to the three pillars of safety, resilience, and sustainability. Building upon the previous example with the same scope and requirement, in addition to registering with providers and providing their name to an EU registry, satellite operators could be required to report changes to manoeuvres (European Commission, 2023c). Like any regulation, this framework would evolve into a set of rules and requirements binding on every Member State at the national level. Such an approach would ensure the development of an EU single market for goods and services related to space activities, achieved through the introduction of harmonised rules aimed at fulfilling the above mentioned objectives (European Commission, 2023c).

A binding framework with non-binding measures would be a refined version of a binding framework. Apart from the previously mentioned regulation, this approach would introduce a proposal for a Directive with measures directly targeting the space industry (European Commission, 2023c). Said measures would bolster the established objectives by offering economic incentives for space companies, ultimately motivating them to surpass the requirements and setting the stage for excellence. This third option opens the door to further policy action in the form of bilateral agreements.

By engaging in bilateral agreements at the international level, the EU would seize the opportunity to shape the global landscape of outer space legislation through policy initiatives (European Commission, 2023c).

III.ii Policy options

Three pillars have been proposed to encompass the full spectrum of space activities: safety, resilience, and sustainability (European Commission, 2023c). While safety and resilience are crucial for the viability of the European space sector in the long run, the sustainability pillar aims to guarantee compliance with environmental standards and promote responsible behaviour (Galland, 2023). The focus of the new framework is initially on establishing safety requirements to ensure the security of private and public parties, as well as individuals. Moreover, it is anticipated to organise security measures, particularly in terms of cybersecurity and risk management strategies. Also, it is foreseen to safeguard space infrastructure from potential threats and improve its resilience (Galland, 2023). At the same time, with sustainability being a recent focus for the EU, reaching environmental objectives even in space activities, such as reducing space debris, would reaffirm its leadership in this field (Galland, 2023). Concurrently, the Commission is prepared to face practical challenges in the space domain, including satellite proliferation and risks of congestion and collision (European Commission, 2023a). Considering the widespread proliferation of satellites and space activities, Space Traffic Management emerges as an urgent topic to be addressed and an EU Space Law has the potential to regulate this policy area by establishing standards for coordination, monitoring, and tracking of space entities, which hold international value as well (Galland, 2023). Managing this matter effectively could safeguard space assets and reduce the risk of damage caused by orbital debris (Galland, 2023).

IV. Conclusions

Space policy has entered the spotlight worldwide by virtue of its potential for secure, safe, and resilient infrastructure. Recognising this, the European Union has embarked on the development of a new space programme (Sintorn&Verduci, 2023). This choice has called for a harmonised legal framework, preventing future discrepancies in MSs' approaches and facilitating a unified regulation of the space sector. Thus, the Commission has announced the drafting of an EU Space Law, possibly coming in early 2024. However, the initial challenge in issuing this new law lies in determining the framework's legal basis. Currently, there is no single Article in the Treaties that can, by itself, provide such a legal basis. Nevertheless, the TFEU offers ample material to regulate outer space activities through a mosaic approach, tailoring specific articles to address specific activities. Several articles will likely be used to regulate specific activities, justifying various provisions and policies. While solving the legal basis issue constitutes the preliminary step for legislative action, additional concerns arise upon investigating EU Space Law. The third section has scrutinised the most likely policy frameworks and options for adoptions showing their potential outcomes. Overall, a non-binding-only framework does not appear to be the most advantageous choice, considering the EU's imperative to compete with other more advanced international space powers and keep up with their advancements. On the contrary, a binding framework or a combination of both options seems to be the most desirable scenario, providing a common ground in a timely and effective manner. The proposed three-pillar structure aligns directly with the chosen framework, serving as a generic outline for policy options.

Even though the decisions regarding the legal basis, the precise array of proposals, and the type of policy framework remain uncertain, the scope of this paper was to highlight the relevant elements at stake, as raised by both public and private stakeholders. The significant strides in the space field in recent years have been essential for the EU to withhold its role as a key player in the international arena. However, the Union has gone even further by creating what is meant to be a new system unmatched by other countries worldwide. Lastly, the expected legal framework holds the potential to make a positive contribution to International Law, benefitting the international community as a whole. The set of space laws outlined by the Commission strikes as ground-breaking, but a final assessment is yet to be made and awaits publication.

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