

Impact of International Code of Conduct for Outer Space Activities and EU Contribution to Collaborative Projects

Devising a New Approach for Space Law in Europe

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Abstract

Art 189 (3) of Treaty on the Functioning of the European Union (TFEU) provides that the European Union (EU) has no competence to harmonise existing member state space legislation. Nevertheless, some alignment is needed; an alignment of European space law has developed consistently over the last decade, though rather through the backdoor. The Draft of the European Code of Conduct for Outer Space Activities – renamed in 2014 as the International Code of Conduct despite its status as soft law – is a possible instrument for developing harmonised European standards in space debris mitigation, space traffic management and the sustainable use of outer space. Much has already been done at the level of ‘soft law’ space standardisation by the European Space Agency in developing the European Cooperation for Space Standardization (ECSS). Nevertheless it seems that the EU is paving the way for a common European space law, at least for special sectors, such as the use and dissemination of space data. This can be seen in the Proposal for a Directive of the European Parliament and the Council on the dissemination of Earth observation satellite data for commercial purposes, [Brussels, 17.6.2014]. The proposal emphasises the demand for free circulation of satellite data within Europe, but in practice there is little evidence of such a need in the single market for spatial imagery. This paper takes as its starting point the fact that the EU has no competence-competence to regulate general space activities for its Member States. It discusses what the new approach towards a European space law might indicate for the “shared competence” laid down in Art 4 TFEU. In outlining the potential competence in moving towards a European Space Law, it outlines the by-product of creating added value and solutions for a common European space law strategy.

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I. Introduction

The European Union (EU) is a supranational player in space.¹ The term “supranational” indicates that the interests of the EU in space basically can go beyond national interests. These interests are laid down in a European space policy. “Supranational” in a legal sense means that the law enacted by the EU has primacy over national law and can bind not only member states but also individuals of a member state.² EU directives are right applicable to member states and individuals.

The EU was fitted with competences by the member states. One competence is to enact laws or to harmonise existing legislation.³ As far as space matters are concerned, Art 189 (3) Treaty on the Functioning of the European Union (TFEU) provides that the European Union (EU) has *no* competence to harmonise existing member state space legislation. According to Art 4 TFEU space is a so called “shared competence” between the European Union and the member states. However, it is laid down that the EU is only allowed to develop a space policy and own space programmes of its own but they must not hinder national space policies and programmes. Thus the EU is a supranational player as far as policies are concerned but not a supranational player in space law making.

The EU is aware of the fact that outer space is a limited national resource and thus needs to be protected. This view is also one of self-interest. The EU is carrying out the biggest collaborative projects in Europe together with the European Space Agency (ESA): Galileo and Copernicus.⁴ These projects cost billions of Euros and depend on the availability of the natural resource in outer space. Space debris, space traffic and frequency interference may harm the valuable satellites for navigation, remote sensing and weather forecast. Thus the EU has an increasing interest in a common code of conduct in outer space activities. Due to the lack of competences to harmonise existing (binding) space legislation, the EU seeks to enact soft law regulations to “harmonise” existing law through the back door. “Soft law” is not binding and is thus not law in a legal sense, which would be clearly forbidden under Art 189 (3) TFEU.⁵ Nevertheless,

1 See Leopold Mantl, *The European Union in Christian Brünner, Alexander Soucek, Outer Space in Society, Politics and Law*, SpringerWienNewYork, 2011 p. 406 ff.

2 For a definition of the term “supranational” See www.investopedia.com/terms/s/supranational.asp (last accessed 21.9.2015).

3 For basic information on European law See Rudolf Streinz, *Europarecht*, Vol. 9, Müller CF, Germany, 2012.

4 See http://europa.eu/pol/space/index_en.htm (last accessed 21.9.2015).

5 For a description of “soft law” See Steven Freeland, *The role of Soft Law in Public International Law and its Relevance to International Legal Regulations of Outer Space in: Irmgard Marboe, Soft Law in Outer Space, The Function of non-binding Norms in International Space Law, studien zu Politik und Verwaltung*, Brünner Ch., Mantl W., Welan M. (Hrsg.) Wien-Böhlau-Graz, 2011, p. 9 ff.

soft law can have a steering function if member states start to bind themselves though there is no legal obligation. To harmonise existing space law through this legal back door can be a new approach for space law in Europe.

II. A New Approach for Space Law in Europe – Chances and Challenges

II.1. Chances

First of all, it has to be highlighted that a “European Space Act” in a classic sense, which is binding and enforceable to all member states, cannot be enacted under the existing European legal framework. One should never believe that the existing competences cannot be changed but at the moment there is no political will visible to change space competences at the European level. It would be a long lasting political and legal process to change competences. Perhaps because of the fact that it would last too long the EU seeks to use the back door which is called “soft law” to harmonise existing space law. This back door can be a new approach for space law in Europe. But what is the perspective of various players when it comes to a common space law for Europe?

As mentioned above, valuable satellites and technology is threatened by the increasing number of space debris. A common strategy to mitigate space debris and ensure a sustainable use of outer space is clearly for the benefit and in the interest of the space industry. Different national space laws can also hinder capacity building. Furthermore, different national space policies and laws concerning a sustainable use of outer space can hinder technology transfer and would have negative economic effect on the export of technology. Thus, a common European approach for devising space law in Europe may be in the interest of various players.

II.2. Challenges

Even non-binding European standards can be fast become binding if member states transform non-binding guidelines into national binding space acts. A prime example is the Austrian Outer Space Act. Paragraph 4 (1) lit 4 in conjunction with paragraph 5 of the Austrian Outer Space Act state that space activities should be carried out “due to consideration” of the internationally recognised guidelines concerning space debris mitigation.⁶ Hence, the non-binding space debris mitigation guidelines became binding for Austria. A space activity carried out by Austria is bound by the space debris mitigation guidelines which are intended to be fulfilled voluntarily.⁷

6 Federal Law Gazette I No. 132/2011 of 27 December 2011 available under www.oosa.unvienna.org/pdf/spacelaw/national/austria/austrian-outer-space-actE.pdf (last accessed 22.09. 2015).

7 Inter-Agency Space debris Coordination Committee (IADC), Space Debris Mitigation Guidelines, 2002 (revised 2007), IADC-02-01, www.iadc-online.org/index.cgi?item=docs_pub (last accessed 23.09.2015).

But what if national laws are going beyond the “code of conduct” and start to “overregulate” space debris, frequency allocation and space traffic management? “Overregulation” is the enemy of economic wealth. The issue of the current status on negotiation on the Draft of an International Code of Conduct for Space Activities⁸ (hereinafter called “the Code of Conduct”) is that the up-stream sector perspective might not be sufficiently heard in the negotiations process. On the one hand, a wide acceptance of the concept of a sustainable use of outer space can save highly valuable communication and remote sensing satellites from collisions and loss of signals due to space debris. On the other hand, it is not yet clear what kind of economic effects restrictions in the field of space debris and space traffic management would have. Thus both the up- and the downstream sector perspective is a very important issue in negotiating even non-binding rules.

III. The International Code of Conduct for Outer Space Activities

III.1. The History of Negotiating an International Code of Conduct for Outer Space Activities

The idea of a Code of Conduct for Outer Space Activities was initially not a sustainable use aspect. The intentions were security aspects and confidence building measures in space.⁹ The idea behind the Code of Conduct was originally to positively contribute to disarmament in space. The discussions started in 2007 under the Portuguese presidency of the EU. In the same year the UNCOPUOS started its discussion on the Long Term Sustainability of Space Activities. Further ESA started its discussions on Space Situational Awareness in 2008. In 2009 China shot its own satellite in space, which caused millions of pieces of space debris in orbit.¹⁰ This and other events that harmed outer space environment in the last decade led the discussion from the original security and defence aspect to a more sustainable discussion of the Code of Conduct.¹¹

Over the last decades the number of space actors has rapidly increased. Space activities need the spectrum of frequencies for communication, the orbits for transportation and placement of space objects. Space activities leave a tremendous amount of space debris after the end of a mission. Governmental and increasingly non-governmental and individual space actors are “conquering”

8 Draft International Code of Conduct for Outer Space Activities (version 2014).

9 For the history of the International Code of Conduct See Jean Francois Mayence, *The European Unions initiative for a Code of Conduct on Space Activities: A Model of Soft Law for Outer Space?* in: Irmgard Marboe, *Soft Law in Outer Space, The Function of non-binding Norms in International Space Law*, Studien zu Politik und Verwaltung, Brünner Ch., Mantl W., Welan M. (Hrsg.) Wien-Böhlau-Graz, 2011, p. 343 ff.

10 Ibid.

11 Ibid.

outer space. This development can also be called a “democratisation of space”.¹² The democratisation of space, in particular the civilian use of space, is valuable for the space industries. The need for navigation, remote sensing data and the billion dollar market for communication has a huge potential for space industries.¹³ However, the dark side of this development is the fact that the increasing number of space activities limits the natural resources of space. The frequency spectrum is not unlimited and thus there is an inherent danger of (harmful) interference. Furthermore, the orbits are getting crowded, which leads to the inherent danger of collisions between space objects. Moreover, (uncontrolled) space debris becomes one of the most important challenges.¹⁴ Even tiny fragments that hit a space object can damage important parts of satellites. Due to the fact that the EU, ESA and also the space industry invest billions of dollars in the development of space capacities the limitation of space debris as well as space traffic management is some of the biggest challenges. All over the world a few national space legislations exist.¹⁵ The existing laws are diverse and do not regulate space activities in the same way. Most laws are regulating the question of liability but do not focus on the sustainable use of outer space. The EU recognizes this lack of national harmonised regulation and thus wants to impose a non-binding code of conduct for outer space activities to promote a sustainable use of space. The current version of the Draft of the International Code of Conduct for Outer Space Activities has the intention to give further input to tackle the issue of security, safety and sustainability. The code of conduct intends to promote the sustainable use of outer space, such as space debris mitigation, space traffic and frequency management.

The idea for a European and later International Code of Conduct was raised in 2006 when the UN General Assembly Resolution 61/75 on Transparency and Confidence Building Measures was endorsed. A preliminary draft of a EU Code of Conduct was then released in 2008. The draft was revised in 2014 and renamed in International Code of Conduct. The renaming happened against the background of an increasing international interest in the EU initiative. The Code of Conduct was positively mentioned in the Resolution 65/68 2013 concerning Outer Space transparency and confidence building measures

12 See Anita Rinner, *A new Approach towards Outer Space Democratisation? Legal, Political and Economic Issues concerning Small Satellite Missions*, Diploma Thesis, University of Graz, 2013.

13 *Ibid.*

14 See *Contant-Jorgenson, Corinne/ Låla, Petr/ Schrogl, Kai-Uwe* (eds.): *Cosmic Study on Space Traffic Management*, published by the International Academy of Astronautics, printed by the German Aerospace Centre (DLR), France, 2006.

15 Currently only 23 space laws respectively space acts does exist. For further information See www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html (last accessed 22.9.2015).

in outer space. The three rounds of multilateral open-ended consultations in Kiew (2013), Bangkok (2013) and Luxembourg (2014) and ended up with a broad interest to promote the development of the draft status. The UN Institute for Disarmament Research has also promoted the views and goals of the Code of Conduct.¹⁶

In July 2015 the UN hosted the first multilateral negotiations on the Draft Code of Conduct. Currently over 95 (!) countries are involved in the discussion. This leads to the fact that if the International Code of Conduct will become released it will have broad international acceptance.

III.2. The International Code of Conduct in Brief

Although no harmonised rules on public national law exist so far, the EU released a Draft Code of Conduct for outer space activities (revised draft 2014 and further formal negotiations in July 2015).

contribute on a voluntary basis, which is to strengthen transparency and confidence-building measures (Preamble). Notably, all states, not only European Union member states, are invited to subscribe to the Code of Conduct when adopted (item 1.2 in conjunction with the preamble).

Chapter 1 of the Code of Conduct lays down the purposes. These are “security, safety and sustainability of space activities”. Chapter 2 contains “General Measures” *inter alia* common measures on space debris control and mitigation. It further highlights the right of self-defence according to Art 51 of the UN Charter. The incorporation of the right of self-defence in the Code of Conduct is ambiguous and contested. The US welcomes the reference to the right of self-defence in particular if it comes to attacks in space. However, if the Code of Conduct should positively contribute to disarmament of space, the reference to the right of self-defence is not needed.¹⁷

Chapter 3 tries to strengthen international cooperation mechanisms, put the focuses on outer space activities, registration of space objects and consultation mechanisms.

IV. Conclusions

The International Code of Conduct for Outer Space Activities, is an initiative by the EU and has still draft status. If this document is in place it is not law (not binding and not enforceable) in the legal sense. It has a “soft law” character and can be voluntarily fulfilled by every state in the world. Hence, the Code of Conduct is not a European Law.

National Space Legislations can incorporate the Code of Conduct in their national laws. Through incorporation of the Code of Conduct into national law the code would turn from non-binding to binding regulations.

¹⁶ See Jean Francois Mayence *supra* fn 9.

¹⁷ Ibid.

Soft law can be a new tool to harmonise European space legislation through the back door. Thus the International Code of Conduct for Outer Space Activities is a prime example for devising a new approach for (harmonised) space law in Europe.

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