NOTES

APPROACHING HARMONIZATION: EXAMINING THE EU'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 policymakers to reassess the European Union's (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 10, 2023, calls for efforts to support a "common EU Space law" to strengthen Europe's position in outer space.

This Note 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, this Note 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, this Note identifies the legal articles from the EU's founding treaties used to justify more expansive efforts in space legalization. Finally, it assesses 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 identified articles continued use to address specific space activity and, in conjunction with a series of non-binding measures, give the EU 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, Russian troops 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 EU has become

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 INST. (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 Global 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 allegedly hacked American satellite company ViaSat, resulting in diminished command and control capabilities for the Ukrainian

increasingly dependent on the outer space sector,[4] and Russia's unlawful aggression exposed deep European vulnerabilities in outer space, which were caused, in part, by a European reliance on Russian space programming.[5] Immediately after the invasion, the European Space Agency (ESA) canceled Soyuz launches by *Roscosmos*, Russia's Space Agency, as well as delayed the ExoMars rover mission.[6] Aside from immediate impacts on European space programs, Russia's aggression has long-term ramifications for the European space sector, like deterioration in trade and "multilateral negotiations on major space issues," including arms control and Space Traffic Management.[7]

As a result of these "wake-up calls,"[8] EU officials have pushed for accelerating European independence and resilience in outer

military, which relies heavily on ViaSat's services. *See* Patrick Howell O'Neill, *Russia Hacked an American Satellite Company One Hour Before the Ukraine Invasion*, MIT TECH. REV. (May 10, 2022), https://www.technologyreview.com/2022/05/10/1051973/russia-hack-viasat-satellite-ukraine-invasion/. For a discussion of Russia's use of space assets against Ukraine generally, see MICHAEL CORNELL, THE ROLE OF SPACE IN RUSSIA'S OPERATIONS IN UKRAINE (2023), https://www.cna.org/reports/2023/11/role-of-space-in-russia-operations-in-ukraine.

4. CLÉMENT EVROUX, EUR. PARLIAMENT RSCH. SERV., PE 698.926, EU SPACE POLICY: BOOSTING EU COMPETITIVENESS AND ACCELERATING THE TWIN ECOLOGICAL AND DIGITAL TRANSITION 4–5 (Feb. 2022), 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 billion 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 ten percent of European GDP).

5. *See* EUR. SPACE POL'Y INST., THE WAR IN UKRAINE AND THE EUROPEAN SPACE SECTOR (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* EVROUX, *supra* note 4, at 5 (emphasizing the economic reliance on space could implicate €1,100 billion in economic activity).

6. *See* EUR. SPACE POL'Y INST., *supra* note 5; *see also*, Joshua Posaner, *Russia's War in Ukraine Upends Europe's Space Plans*, POLITICO (Sept. 23, 2022), https://www.politico.eu/article/russia-war-ukraine-european-space-agency-josef-aschbacher/ (explaining the European Space Agency's reliance on Russia extends beyond Soyuz and also includes "many components, raw materials, and even ion thrusters").

7. EUR. SPACE POL'Y INST., *supra* note 5.

8. 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 EU needed to consider "how space assets and services are crucial" to European action. *European Commission to Present Space Defense Strategic Plan in March*, ALARABIYA (Jan. 24, 2023, 03:35 PM), https://english.alarabiya.net/News/world/2023/01/24/European-Commission-to-present-space-defense-strategic-plan-in-March-.

space.[9] In fact, the most recent EU Space Strategy for Security and Defense specifically proposes "an EU Space Law" (EUSL) as a necessary step to ensure "resilience" and coordination among Member States on European space activities.[10] Moreover, the President of the EU Commission presented the findings of the Commission's "targeted consultation on EU Space Law," on September 13, 2023.[11] The findings propose an initiative for an EUSL, which would envisage "common EU rules addressing the safety, resilience and sustainability of space activities and operations."[12]

A unified EUSL 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.[13] From an economic perspective, an EUSL is preferable as divergent norms among Member States can create unequal conditions for competition, ultimately leading to a race to the bottom in terms of regulatory or quality standards.[14] However, harmonization is not without its drawbacks. National legislation offers greater flexibility for Member States to manage the growing privatization and commercialization of space activities, and allows states to find the "most suitable way [within their jurisdictions]

9. The 2023 European space agenda focuses on "competitiveness, resilience, sovereignty, and security." *See The European Commission Presented its Space Policy Priorities for 2023 at the 15th European Space Conference*, DEF. INDUS. & SPACE: EUR. COMM'N (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; *see also* Posaner, *supra* note 6 (quoting Director General of the European Space Agency, Josef Aschbacher, "We have terminated this cooperation [with Russia] . . . [S]o we need to establish a more resilient, autonomous and strategically independent industry.").

10. *European Union Space Strategy for Security and Defense*, at 4, JOIN (2023) 9 final (Mar. 10, 2023); European Commission Press Release SPEECH/23/341, The Commission, 2023: A Crucial Year to Deliver on our European Space Ambitions (Jan. 24, 2023) (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").

11. *Targeted Consultation on EU Space Law*, DEF. IND. & SPACE: EUR. COMM'N, https://defence-industry-space.ec.europa.eu/newsroom/consultations/targeted-consultation-eu-space-law_en (last visited Jan 8, 2024).

12. *Id.*

13. *European Commission to Present Space Defense Strategic Plan in March, supra* note 8.

14. *See* Dimitri Linden, *The Impact of National Space Legislation on Private Space Undertakings: Regulatory Competition vs. Harmonization*, 8 J. SCI. POL'Y & GOVERNANCE 7 (2016). Other concerns from rampant space nationalization include 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 potential global impact if something went array, greater supervision and higher standards is in the EU's (and the Member States') best interest. *Id.*

to regulate and control private initiatives to ensure compliance with international legal principles."[15] At its core, these competing theoretical perspectives highlight the difficulties in navigating the European outer space environment—one perforated by national and international space organizations, quasi-states and non-governmental organizations, and a complex shared legal competency system.[16]

This Note explores the future of EUSL 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 EUSL is highly advantageous from a policy perspective, 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 outer space landscape. Part III explores the historical development of European space law, showing a trend toward increasing harmonization. Part IV examines the present environment, arguing that the EU 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 an EUSL. Finally, the Note assesses whether the articles identified in Part IV, including Articles 189, 114 and 115, 170–173, 352, and 2(4), are legally sufficient to form a foundation for an EUSL. Ultimately, no article, alone, is appropriate. However, when used to address specific space initiatives and in conjunction with non-binding measures, the EU has powerful tools to encourage harmonization for most activity in the domain until an amendment to the foundational treaties occurs that would support an EUSL.

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

15. *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 like lunar or asteroid mining, where wide-spread regulation might be too stringent and stifle innovation. A national approach can provide the required flexibility unavailable at a European-wide level. *Id.*

16. The main European space actors, the broad legal landscape, and an explanation of EU governance in outer space is provided in Part II.

(OST).[17] The OST entered into force in January 1967, and "provides the basic framework on international space law."[18] 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."[19] Outer space, the moon, and other celestial bodies "[are] not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[20] The U.N. Charter and other principles of international law apply in outer space.[21] And, state parties bear the responsibility for national activities in outer space regardless of whether the actor is the national government or non-governmental agencies.[22] While the EU has not formally recognized the OST,[23] the EU does recognize principles of international space law insofar as they reflect customary international law and hence represent international legal obligations.[24] Because most of the

17. 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 International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 13810 U.N.T.S. 961; Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 15020 U.N.T.S. 1023; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 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 Space Law Treaties and Principles*, UN OFFICE FOR OUTER SPACE AFFS., https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html (last visited Mar. 8, 2024); *see also* STEPHAN HOBE, SPACE LAW 62 (2023) (explaining that the Moon Agreement's sparse 18 ratifications is a product, in part, of its categorization of the Moon and its resources as a "common heritage of mankind").

18. *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, UN OFFICE FOR OUTER SPACE AFFS., https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html (last visited Mar. 8, 2024).

19. Outer Space Treaty, *supra* note 17, art. 1.

20. *Id.* art. 2.

21. *Id.* art. 3.

22. *Id.* art. 6.

23. Frans G. von der Dunk, *The European Union and the Outer Space Treaty: Will the Twain Ever Meet?*, *in* FIFTY YEARS OF THE OUTER SPACE TREATY: TRACING THE JOURNEY 75, 83 (Ajey Lele ed., 2017) (explaining that the European Union has not explicitly stated its obligation to abide by the OST).

24. 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. 1962 (XVIII) (Dec. 13, 1963) (documenting the adoption of the Outer Space Treaty by the General Assembly); *see also* Comm. on the Peaceful Uses of Outer Space, Rep. of Legal Subcomm.

OST's principles reflect customary international law, they are binding on the EU.

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

The Treaty of Lisbon—agreed to by the twenty-seven Member States in December 2007 and entered into force on December 1, 2009[25]—set out to "for the first time clarify[] the powers of the Union" and amend the EU's founding treaties.[26] Particularly, the Treaty of Lisbon distinguished three types of legal competences that define the relationship between EU and Member State activities, or as the Treaty of Lisbon called it, the "allocation of competence."[27] The Treaty of Lisbon created three principal competence categories: exclusive competences, shared competences, and supportive competences.[28] The second category, shared competency, is the most important. The Treaty on the Functioning of the European Union (TFEU), as amended by the Treaty of Lisbon, mentions outer space twice in the treaty document. One of these mentions, Article 4(3), outlines that "in the areas of research, technological development and *space*, the Union shall have

on Its Fifty-Sixth Session, U.N. Doc. A/AC.105/1122 (2017) (explaining that the principles in the Outer Space Treaty are constitutive of customary international law); FRANCIS LYALL & PAUL B. LARSEN, SPACE LAW: A TREATISE 64 (2020) ("We could argue that certain elements of the OST have indeed passed into or now reflect customary international law."); Consolidated Version of the Treaty on European Union art. 3(5), Oct. 26, 2012 O.J. (C 326) 13, 17 [hereinafter TEU] ("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, 21 May 2007 O.J. (C 136) 1 (reflecting the EU's adherence to the principles set out by the United Nations in the Outer Space Treaty).

25. Eeva Pavey, *The Treaty of Lisbon*, EUR. PARL. (2023), https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon.

26. *Id.*

27. CHRISTIAN DADOMO & NOELLE QUÉNIVET, EUROPEAN UNION LAW 35 (2020).

28. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 2, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. 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.* art. 2(1). Conversely, supporting competences are divided into two sub-categories: (1) coordinating competences and (2) complementary competences. Coordinating competences are areas where the EU can issue guidelines or suggest initiatives to "foster further coordination among the Member States in relation to economic, employment, or social policy." While complementary competences as outlined in TFEU Articles 2(5) and 6 allow the EU to "take action to support, coordinate or supplement action of the Member States" in select fields like health and tourism. DADOMO & QUÉNIVET, *supra* note 27, at 36.

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*."[29] This provision situates outer space as a shared competency between the EU and Member States. The next mention of outer space is in Article 189, which states the following:

> 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*.[30]

Hence, these two mentions—in Article 4(3) and Article 189—squarely place lawmaking in outer space as a *shared* competence. Under this legal power-sharing framework, both the EU and the Member States can act. Member States can legislate in certain areas,[31] but only if the EU has "not yet exercised its right to act, or has decided to cease exercising its right to act."[32] 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),[33] which prevents Member States from adopting measures in contradiction with the EU's principles and values.

However, the EU cannot "preempt" a vast swath of competencies in these areas. Several limitations exist, including those called out in Article 4(3), which prohibit the EU from limiting Member States that are "exercising their competences" in cases of research, technological

29. TFEU, *supra* note 28, art. 4(3) (emphasis added).

30. *Id.* art. 189 (emphasis added).

31. *Id.* art. 4 (outlining a non-exclusive list of areas to include technology and consumer protection).

32. DADOMO & QUÉNIVET, *supra* note 27, at 36.

33. TEU, *supra* note 24, 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.").

development, and outer space.[34] Moreover, two additional principles constrain the EU's ability to legislate: subsidiarity and proportionality. Subsidiarity requires the EU to justify any proposal for legislation and explain why "action at the Member States' level is not sufficient."[35] As applied to outer space legislation, the EU 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."[36] 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 Note does not explore national legislation in depth,[37] it is worth noting that ten[38] EU Member States have already enacted domestic legislation on topics ranging from launching activities[39] to national registration.[40] Moreover, because there are several areas in which Member States have already legislated, per TFEU Article 189, the EU cannot harmonize EU and Member State law in those areas. This parallel structure has been a driving factor behind recent harmonizing efforts that will be discussed in greater depth in Parts III through V.[41]

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34. DADOMO & QUÉNIVET, *supra* note 27, at 36; TFEU, *supra* note 28, art. 4(3).

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

36. TEU, *supra* note 24, art. 5 (emphasis added).

37. For a more comprehensive survey, see Irmgard Marboe & F. Hafner, *Brief Overview over National Authorization Mechanisms in Implementation of the UN International Space Treaties*, *in* NATIONAL SPACE LEGISLATION IN EUROPE: ISSUES OF AUTHORIZATION OF PRIVATE SPACE ACTIVITIES IN LIGHT OF DEVELOPMENTS IN EUROPEAN SPACE COORDINATION 29, 30–40 (Frans G. von der Dunk ed., 2011) (surveying national space legislation in light of varying outer space legal topics); *see also* NATIONAL REGULATION OF SPACE ACTIVITIES (Ram S. Jakhu ed., 2010); A collection of national space laws can be found here: *National Space Law*, U.N. OFF. FOR OUTER SPACE AFFAIRS, https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html.

38. *National Space Legislation*, EUR. SPACE AGENCY, https://www.esa.int/About_Us/ECSL_-_European_Centre_for_Space_Law/National_Space_Legislations#EUROPE.

39. *See* Royal Decree of Mar. 15, 2022, Implementing Certain Provisions of the Law of 17 September 2005 on the Activities of Launching, Flight Operations and Guidance of Space Objects (Belg.), art. 1, https://www.belspo.be/belspo/space/doc/beLaw/AR20220315_en.pdf.

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

41. In a speech on January 24, 2023, Commissioner Thierry Breton remarked that the "[F]ourth pillar is about an EU space law to put in place common rules on safety, security and

III. THE PAST: CONSTRAINED HARMONIZATION

The EU has its institutional origins in the European Coal and Steel Community (ECSC) of 1951–52 and the European Economic Community (EEC) of 1957–58.[42] Despite being nearly concomitant with humanity's first forays into outer space (the first artificial Earth satellite, *Sputnik*, was launched in 1957), the EU's early priorities were decidedly Earth-bound. Rather than turning its attention star-ward, the EU focused on integrating European markets by creating customs unions, agricultural policies, and the European Free Trade Association.[43] Space exploration, at that time, was a national governmental affair in the arena of research and development—not economic integration.[44] Nonetheless, there is an appreciable "prehistory"[45] of European space legislation.

While outer space is technically beyond the "jurisdiction" of the EU (space is not a part of any Member States' sovereign territory), the EU (and its predecessors) have exercised noticeable jurisdiction in these areas.[46] By 1986, the EEC imbued European institutions with the power to invest in and finance research and development—a power widely regarded to include outer space activity.[47] And, by 1994, the EU "exercised a fundamental competence to regulate satellite communications" through the 1994 Satellite Directive.[48] The 1994 Satellite Directive, with

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 SPEECH/23/341, *supra* note 10.

42. Wolfram Kaiser et al., *Origins of a European Polity: A New Research Agenda for European Union History*, *in* THE HISTORY OF THE EUROPEAN UNION 1, 1 (Wolfram Kaiser et al. eds., 2009).

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

44. *See* STEVE MIRMINA & CARYN SCHENEWERK, INTERNATIONAL SPACE LAW AND SPACE LAWS OF THE UNITED STATES 4–5 (2022) (explaining the early era in space exploration was dominated by national space agencies).

45. Frans G. von der Dunk, *The EU Space Competence as per the Treaty of Lisbon: Sea Change or Empty Shell?*, *in* PROCEEDINGS OF THE INTERNATIONAL INSTITUTE OF SPACE LAW 382, 383 (2011).

46. *Id.*

47. *Id.*

48. Frans G. von der Dunk, *Europe and Security Issues in Space: The Institutional Setting*, 4 SPACE & DEF. 71, 96 (2010) (offering 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).

its legal basis in Article 90[49] of the Treaty Establishing the European Community (TEC), specifically tied the regulation of satellite communication to the maintenance of a European free market.[50] For example, the regulation called for the "abolition of all exclusive or special nights [sic] in this area" in line with the European Parliament's resolution on creating a common market for satellite communication, even if the Member States had "already opened up certain satellite communications services."[51] In short, by analogizing certain space activity to preexisting economic activity capable of regulation to protect the free market (i.e., radio telecommunications), the then-European Community was able to harmonize satellite telecommunications.

In another instance, the European Community relied on general competition concerns to issue decisions on several concentrations that were either compatible or incompatible with the common market.[52] For example, Decision 96/177/EC outlined the Commission's intent to "use the competition rules to remove all national restrictions within the European Union on access to space segments."[53] And, subsequent communication between the Commission and the European Parliament and Council again stressed regulating the space-telecommunications market via competition controls already used in the Earth-bound telecommunications sector.[54]

These early trends were significant. They show that by the 1990s, as outer space grew in *economic* importance to the EU, 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 a player, albeit a nascent one, in the European free market. For example, the aforementioned 1994 Satellite Directive stemmed

49. TFEU, *supra* note 28, art. 106(2) ("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 the Treaties, in particular to the rules on competition, in so far 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 Union.").

50. von der Dunk, *supra* note 48, at 96 (highlighting that the 1994 Satellite Directive regulated satellite communications "as part of the broader telecommunications sector in the context of the European Internal Market").

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

52. von der Dunk, *supra* note 48, at 96 (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).

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

54. *Id.*

from the precedent set by telecommunications frameworks broadly within the European Internal Market.[55] However, these harmonization efforts, while significant, were still largely constrained. Rather than focusing on a direct EU contribution to outer space governance, "for many years the Community and subsequently the EU invested much political capital" in keeping ESA at the helm of space coordination and governance at the expense of fostering an independent EU presence.[56]

IV. The Present: From the Treaty of Lisbon (2007) to Regulation 2023/588 (2023)

December 13, 2007, was a watershed moment for the EU. In the words of then-Portuguese Prime Minister José Sócrates, "[h]istory will remember this day."[57] For outer space, the Treaty of Lisbon ushered in specific articles that addressed the EU's ability to regulate in the domain as outlined in Part II of this Note. This section now surveys European regulations from 2007 to the present, identifying their legal bases used to justify legislating certain outer space activities.[58] Some preeminent space scholars suggest that the Treaty of Lisbon looks "more like a shell" than substantive change. This Note argues, however, that the EU's activities since 2007 used many of the lessons from the 1990s by regulating space activity using economic articles. While the use of TFEU Article 189 was sparing, the EU deployed a plethora of new articles to justify regulating activity in outer space.[59] Part V then assesses whether these articles could form a sound legal basis for an EUSL.

In the 1990s, ESA controlled most of the European outer space governance; however, that control changed between 2012–14. Then, the EU redefined its relationship with ESA, and by 2014, it entered the stage as a major space player. Through a series of reports, the EU identified shortcomings in its relationship with ESA and prioritized "greater

55. von der Dunk, *supra* note 48, at 96.

56. Jan Wouters & Giulia Pavesi, *The Final Frontier? The European Union and the Governance of Outer Space* 9 (Leuven Ctr. for Glob. Stud. & Inst. for Int'l L., Working Paper No. 234, 2022), https://ghum.kuleuven.be/ggs/publications/working_papers/wp234-wouters-pavesi.pdf.

57. Ian Traynor, *Miliband Plays Stand-in at Lavish EU Relaunch*, Guardian (Dec. 13, 2007, 7:01 PM), https://www.theguardian.com/world/2007/dec/14/uk.eu?CMP=gu_com ("History will remember this day as a day when new paths of hope were opened to the European ideal.").

58. 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."

59. Lesley Jane Smith, *The Legal Personality of the European Union and its Effects on the Development of Space Activities in Europe*, Y.B. on Space Pol'y 2009/2010 199, 202 (2011).

involvement in defining the goals of a European space policy" as well as becoming a major financial contributor to European space activities.[60] These efforts resulted in the first "Space Strategy for Europe" in 2016 where the European 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."[61] The EU's draft code of conduct for outer space,[62] released in 2014, highlights not just the EU's ambitions to become a space regulator, but represents 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 EU as an outer space regulator.

As with the 1994 Satellite Directive, after the Treaty of Lisbon, the EU made ample use of economic articles to justify space regulation, not just TFEU Article 189. For example, TFEU Articles 171 and 172[63] were instrumental in managing European satellite navigation programs.[64] 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).[65] 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

60. Wouters & Pavesi, *supra* note 56.

61. *Id.*

62. EUR. UNION, DRAFT INTERNATIONAL CODE OF CONDUCT FOR OUTER SPACE ACTIVITIES (Mar. 31, 2014), https://www.eeas.europa.eu/sites/default/files/space_code_conduct_draft_vers_31-march-2014_en.pdf.

63. TFEU, *supra* note 28, art. 171(1) (allowing the EU 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 standardisation*") (emphasis added); TFEU, *supra* note 28, art. 172 (allowing the Council and Parliament to adopt necessary guidelines and measures to achieve the aims of Article 171).

64. Parliament and Council Regulation 912/2010, 2010 O.J. (L 276); Parliament and Council Regulation 1285/2013, 2013 O.J. (L 347).

65. Parliament and Council Regulation 912/2010, *supra* note 64; Parliament and Council regulation 1285/2013, *supra* note 64; *see also European Satellite Navigation Programmes: European Commission Adopts Proposal for a Regulation Amending Regulation (EU) 912/2010 Setting up the European GNSS Agency*, THOMSON REUTERS PRACTICAL L. (Feb. 13, 2013), https://us.practicallaw.thomsonreuters.com/0-524-1103.

172 represented the first "proper piece of EU law" on a truly "European" system.[66]

The EU's activity in space (or at least tangential enterprises) continued to expand beyond the strictly economic regulation of the 1990s. For example, the EU used Article 215[67] to impose sanctions on Venezuela, Myanmar, Belarus, and Russia regarding the sale of dual-use items with telecommunications capabilities.[68] A December 16, 2022, 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."[69] However, derogations were allowed for technology that could be used to prevent unintended or uncontrolled reentry or satellite collisions.[70]

Regulations also started to target the dual-use nature of satellites.[71] For example, regulation 428/2009 used TFEU Article 207 (then-TEC Article 133) 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.[72] Moreover, the EU used Article 77 as a basis to create the European Border Surveillance System (EUROSUR) with the European Maritime Safety Agency and the European Union Satellite Centre to support EU border security.[73]

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66. von der Dunk, *supra* note 45, at 384.

67. TFEU, *supra* note 28, 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.").

68. 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).

69. Council Regulation 2022/2474, *supra* note 68, ¶ 14.

70. *Id.*

71. 15 C.F.R. § 730.3 (2024) (defining dual use items as those with "civil applications as well as terrorism and military or weapons of mass destruction (WMD)-related applications").

72. Council Regulation 428/2009, 2009 O.J. (L 134) ¶ 3; *see also* Council Regulation 2021/821, 2021 O.J. (L 206).

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

Perhaps most impactful, the EU 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.[74] Regulation 2021/696 highlights the importance of EU-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."[75] Importantly, Regulation 2021/696 ties the justification for the Space Programme to the Global Strategy for the EU's Foreign and Security Policy from 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."[76] It continues, recognizing the importance of outer space to independence and security and that the EU's "autonomous access to space" is "essential."[77] Finally, the Regulation stresses the limitations that shared competence between the EU and Member States places on outer space governance. It notes that despite Member States' traditions of active national space industries, a EU-wide program and collaboration across all Member States "should be promoted."[78] The establishment of the Union Space Programme, while still recognizing the constraints of Article 189, shows an appreciable preference for centralization.

Echoing the justifications of Regulation 2021/696, a recent space-based regulation, issued on March 15, 2023, established another EU-based program, the Union Secure Connectivity Programme.[79] The justifications for the Programme also recalled the emphasis on governmental satellite communications in the Global Strategy for the EU's Foreign and Security Policy of June 2016, as well as the EU Maritime Security Strategy and the EU Arctic Policy.[80] The Programme specifically highlighted the improvement of connectivity over "geographical areas of strategic interest," including Africa, the Arctic, the Baltic, and the Black Sea.[81] As with the establishment of the Union Space Programme, the EU appears to have broadened its justifications for its

74. Council Regulation 2021/696, 2021 O.J. (L 170) ¶ 1.
75. *Id.*
76. *Id.* ¶ 2.
77. *Id.* ¶ 6.
78. *Id.* ¶ 10.
79. Council Regulation 2023/588, 2023 O.J. (L 79).
80. *Id.* ¶ 1.
81. *Id.* ¶ 18.

space activity, highlighting a potentially wider basis for the use of Article 189, including ties to the general security and defense aims of the EU.

This brief survey shows the expansion of the EU's activities in outer space. Compared to the earlier days of space activity, which were rooted in strictly economic justifications, the EU now relies on a variety of articles to achieve wide-sweeping space regulations. Whether these articles can be used to support an EUSL 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 EU to regulate outer space; however, when used in conjunction with one another, the EU could effectively regulate aspects of space activity using a piecemeal approach—with different regulations relying on 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, this Note turns to consider several of these articles and their potential usefulness as a legal basis for a unified EUSL.

A. *Potential Legal Bases*

This section assesses potential legal bases in order of their specificity to outer space. It begins with Article 189 as the "space article." Following Article 189, the Note considers the articles that address the functioning of European internal markets (Articles 114, 115, and 170–173). It then proceeds with Article 352, which is the EU's "flexibility clause" for harmonization efforts. It concludes with Article 2(4), which unifies activities that support European common security and foreign policy interests.

1. Article 189

Article 189 is the space article and a compelling place to start the legal analysis. A strict reading of the Article coupled with examining its legislative history, makes it an unlikely candidate for a broad, sweeping EUSL. While section (1) of the Article permits the EU to create a "European Space policy"—which the EU has used as a legal basis before[82]—such programs are limited to "promote scientific and technical progress, industrial competitiveness and the implementation of its

82. *See* Council Regulation 2021/696, *supra* note 74.

policies . . . ."[83] The Article allows the EU to "promote joint initiatives, support research and technological development, and coordinate the efforts needed for the exploration and exploitation of space."[84]

At first, these powers appear limited to research and technological development; however, the EU's interpretation of this language signals greater flexibility. For example, the EU Space Programme (established in 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 from June 2016. Article 189(2) signals the intent of the Member States to limit such encroachment even if a broader interpretation allows greater regulation than Article 189(1) explicitly outlines. Article 189(2) limits the EU's ability to regulate by "excluding any harmonisation of the laws and regulations of the Member States."[85] The drafting history of Article 189 shows that this provision was added by the Member States after the initial drafted Article lacked paragraph 2 and any mention of excluding harmonization between Member States.[86] This addition highlights that, at the time, the Member States were unwilling to "give up their sovereignty in the area of space."[87]

Hence, activity justified under Article 189 would likely be viewed as parallel competence or supporting competence in addition to Member State activities. Of course, as outlined in Part II, the principles of subsidiarity (i.e., the EU should only intervene when decentralized authorities—Member States—cannot act satisfactorily) and proportionality (i.e., the action must not go further than absolutely necessary) still constrain EU action.[88] 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.[89] Moreover, Article 189(4) limits the scope to one that "shall be without prejudice to the other provisions of this Title."[90] Such a restriction is important given that Articles 179–188 may also be used to support a coherent space law. Regardless, as currently

83. TFEU, *supra* note 28, art.189(1).

84. *Id.*

85. TFEU, *supra* note 28, art. 189(2).

86. *See* Linden, *supra* note 14, at 8 (noting that the "clear wording in the new space competence" differed from the "first draft of the EU's space competence," which had excluded a prohibition against harmonization); *see also* Draft Treaty Establishing a European Constitution, Article III-254.

87. *See* Linden, *supra* note 14, at 8.

88. *Id.*

89. *Id.*

90. TFEU, *supra* note 28, art.189(4).

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 Article 189(2).

2. Articles 114 and 115

Articles 114[91] and 115[92] 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."[93] Article 114 allows the EU to pass "measures," which includes directives and regulations, and Article 115 authorizes a general power to pass directives.[94] Both can be directly binding on Member States.[95]

Several limitations constrain the applicability of Article 114, particularly as applied in outer space. First, Article 114 only applies to instances "save where otherwise provided in the Treaties, the following provisions shall apply . . . ."[96] By the Treaty's terms, more applicable treaty provisions take precedence. As applied to outer space, this would include regulating satellite telecommunications under Article 170 rather than under Article 114.[97] Moreover, the European Court of Justice (ECJ) confirmed the limitations on Article 114's applicability in *Tobacco Advertising* (2000).[98] There, 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

91. TFEU, *supra* note 28, 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.").

92. TFEU, *supra* note 28, 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.").

93. Linden, *supra* note 14, at 8–9.

94. TFEU, *supra* note 28, arts. 114–15.

95. *Types of Legislation*, EUR. UNION (last visited Mar. 17, 2024), https://european-union.europa.eu/institutions-law-budget/law/types-legislation (explaining that regulations are binding law that must be applied entirely across the EU while directives are also binding legislative acts but that allow implementation by the individual Member States).

96. TFEU, *supra* note 28, art. 114(1).

97. Article 170 explicitly applies to the harmonization of internal frontiers, including "establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures." TFEU, *supra* note 28, art. 170.

98. PAUL CRAIG & GRÁINEE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 651 (2020).

functioning of the internal market."[99] Mere disparities among national rules that only produce an abstract rather than actualized risk are not appropriate to regulate under Article 114.[100] Despite these limitations, more recent precedent suggests a broader interpretation of Article 114.[101] 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.[102] 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 among Member States. Under the International Space Law treaties discussed in Section II.A, registration is the mechanism that bestows responsibility and liability for accidents or damage occurring in space or during launch.[103] For example, Belgium requires licenses for activities principally conducted on Belgian territory or by Belgian nationals outside of Belgium.[104] Conversely, Sweden does not require licensing for certain launches, like sounding rockets.[105] Under the *Tobacco Advertising* (2006) standard, such disparate registration and licensing requirements could affect competition in the launching sector between Belgium and Sweden. As the ECJ 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 [now Article 114 TFEU] authorises the Community legislature to intervene by adopting appropriate measures."[106]

Even though Article 189(2) prohibited the regulation of national registration requirements, it seems that for certain activities, if they sufficiently relate to or are likely to prevent the free movement of trade

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. J.F. Mayence, *Granting Access to Outer Space: Rights and Responsibilities for States and their Citizens*, *in* NATIONAL SPACE LEGISLATION IN EUROPE 73, 101 (Frans G. von der Dunk ed., 2011).

104. Frans G. von der Dunk, *Article VI of the Outer Space Treaty 'in European Context'*, *in* PROCEEDINGS OF THE INTERNATIONAL INSTITUTE OF SPACE LAW 547, 556 (2008).

105. *Selected Examples of National Laws Governing Space Activities: Sweden*, U.N. OFF. FOR OUTER SPACE AFFS., https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/sweden/act_on_space_activities_1982E.html (last visited Mar. 4, 2024).

106. CRAIG & DE BÚRCA, *supra* note 98, at 651.

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 considers the national provision necessary under Article 36.[107] If a Member State makes this determination, it can notify the Commission of the provisions and the grounds for maintaining them.[108] Under Article 114(4), 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 for supporting an EUSL, but it is likely best tailored to address emerging legislation rather than existing legislation.[109]

3. Articles 170–173

To promote "overall harmonious development"[110] and ensure the functioning of the internal market,[111] Article 170 authorizes the EU to create an area "without internal frontiers" and to develop "trans-European networks in the areas of transport, telecommunications and energy infrastructures."[112] To achieve these aims, the EU shall "[promote] the interconnection and interoperability of national networks as well as access to such networks."[113] Article 171 outlines the mechanisms available to the EU 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 . . . ."[114]

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107. TFEU, *supra* note 28, 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.").

108. Christina Ratcliff, et al., *Fact Sheets on the European Union: Free Movement of Goods* (Nov. 2023), https://www.europarl.europa.eu/factsheets/en/sheet/38/free-movement-of-goods#:~:text=Article%2036%20of%20the%20TFEU,trade%20barriers%20between%20Member%20States ("Member States are required to inform the Commission about these exemptions.").

109. 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 & DE BÚRCA, *supra* note 98, at 653.

110. TFEU, *supra* note 28, art. 174.

111. TFEU, *supra* note 28, art. 26.

112. TFEU, *supra* note 28, art. 170(1).

113. TFEU, *supra* note 28, art. 170(2).

114. TFEU, *supra* note 28, art. 171. Article 172 establishes the mechanisms by which any measures proposed pursuant to Article 171 shall be adopted. *See id.* art. 172. While Article 173

Articles 170–173, as shown in Part IV, provide a satisfactory basis for the EU 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 potentially space tourism,[115] 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 EUSL in those specific areas.

4. Article 352

Some literature has recognized Article 352 as a potential source of harmonization;[116] however, Article 352 is not an appropriate legal basis for a common EUSL. Article 352, the successor to Article 308 of the TEC, is the "flexibility clause" of the TFEU and allows that "if 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 EU can act.[117]

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. Article 352(3) notes that "measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation."[118] 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 EUSL is severely constrained, as it cannot be used as a legal

requires Member States to "ensure that the conditions necessary for the competitiveness of the Union's industry exist." *Id.* art. 173(1). Such action can include speeding up adjustment to industry change, encouraging undertakings, encouraging cooperation among undertakings, and encouraging industrial innovation, research, and technological development.

115. *See* Frans G. von der Dunk, *Space Tourism, Private Spaceflight and the Law: Key Aspects,* 27 SPACE POL'Y 146 (2011) ("Space tourism, then, represents a third era, in that now the aforementioned privatization has also reached the area of manned spaceflight.").

116. *See* Linden, *supra* note 14, at 8.

117. CRAIG & DE BÚRCA, *supra* note 98, at 121.

118. TFEU, *supra* note 28, art. 352(3).

basis to justify the harmonization of disparate areas in Member State regulation.

5. Article 2(4)

Given the connection between outer space and common foreign and security policies for the EU, Article 2(4) may be a useful basis for implementing a common EUSL—albeit the mechanisms available for the EU 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."[119] Article 2(4) specifically isolates foreign security and policy as a unique legal competence for European regulation and is distinct from the other legal bases thus far considered.[120]

The Commission has already shown interest in tying its harmonization efforts in outer space to Article 2(4)'s language. For example, in the Commission's Joint 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.[121] The report recognized that STM directly contributes to the "security and defense dimensions of the EU in space."[122] 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.[123] Incentive measures could include adopting an "award criteria" to promote "guidelines and standards" within preexisting EU space programs.[124] Section V.B, below, elaborates on other incentive measures as suggested in the STM Communication; however, the STM Communication importantly recognizes that existing EU legal structures cannot serve as a basis to harmonize European space law, and these incentive measures could be a solution.

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119. *Id.* at art. 2(4).

120. Robert Szhutze, *EU Competences Existence and Exercise, in* THE OXFORD HANDBOOK OF EUROPEAN UNION LAW 75, 84 (Damian Chalmers & Anthony Arnull eds., 2015).

121. *Joint Communication to the European Parliament and the Council An EU Approach for Space Traffic Management*, at 1, JOIN (2022) 4 final (Feb. 15, 2022).

122. *Id.*

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

124. *Joint Communication to the European Parliament and the Council An EU Approach for Space Traffic Management*, *supra* note 121.

The Commission's 2023 Joint Communication to Parliament and the Council on an EU 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 "[s]ome Member States have put national rules in place to regulate space operations, including security aspects."[125] Such national rules could "differ," and such "divergence could affect the competitiveness of the EU space industry and the security of the EU."[126] Then, in a move beyond the STM Communication, the 2023 Joint Communication states that "[t]o ensure a consistent EU-wide approach . . . the Commission will consider proposing *an EU Space law*."[127] As with the STM Communication, the Commission appears to be tying its aims of a common EUSL to security and defense (Article 2(4)) and economic competitiveness (Article 114).

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.[128] Moreover, Article 2(4) and the CFSP are not further elaborated upon in the TFEU, nor do they neatly fall into the competences outlined elsewhere in Article 2.[129] Under the CFSP, the Council can issue decisions that either address an "international situation [that] requires operational action by the Union"[130] or a thematic or geographical issue. Under these categories, the Member States must conform their national guidelines to the decisions proposed by the EU. For example, the STM Communication concluded with a desire to promote an "EU position on STM."[131] 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

125. *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).

126. *Id.*

127. *Id.* (emphasis added).

128. CRAIG & DE BÚRCA, *supra* note 98, at 119.

129. *Id.*

130. AUGUST REINISCH, ESSENTIALS OF EU LAW 258 (2012); *see, e.g.*, Council Decision 2021/904, of the Council of the European Union of 3 June 2021 on the European Union Rule of Law Mission in Kosovo Amending Joint Action 2008/124/CFSP, 2021 O.J. (L 197/114) (authorizing European Union Rule of Law Mission in Kosovo).

131. *Joint Communication to the European Parliament and the Council An EU Approach for Space Traffic Management*, *supra* note 121, at 16.

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.[132] While not a "common EU Law" *per se*, it does partially address the concerns of the 2023 Joint Communication.

6. 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 specific activities in outer space—like telecommunications under Article 171[133] or sanctions under Article 215.[134] 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.[135] Despite the lack of an article that would support a comprehensive EUSL, the next part addresses potential ways ahead to achieve a unified vision albeit through non-binding measures.

B. *The Way Ahead?*

Despite the lack of a legal basis *per se* within which to establish a common EUSL, 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 EU can use its open method for coordination (OMC) mechanisms, which facilitate cooperation by exchanging best practices, targets, and guidelines among Member States.[136] 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 EU.[137] OMCs have

132. *Joint Communication to the European Parliament and the Council: European Union Strategy for Security and Defence*, *supra* note 125, at 9.

133. *See* Parliament and Council Regulation 912/2020, *supra* note 64.

134. *See* Council Regulation 2017/2063, *supra* note 68.

135. *Joint Communication to the European Parliament and the Council An EU Approach for Space Traffic Management*, *supra* note 121, at 11.

136. *See* Linden, *supra* note 14, at 9.

137. MARTINA PRPIC, EUR. PARLIAMENTARY RSCH. SERV., AT A GLANCE: THE OPEN METHOD OF COORDINATION (2014).

been used (with varying levels of success) to address areas including "social protection, social inclusion, pensions and healthcare, innovation, research and development" among other areas.[138] Under OMCs, the EU can still encourage Member States to meet common goals and practices while respecting the autonomy of the States.[139] As one author observes, such mechanisms could be particularly useful in the field of authorization, supervision, or evaluation of space activities, which are outside the regulatory power underneath Article 189 or not within the other Articles mentioned in Section V.A, above.[140]

Second, the EU 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.[141] The Communication also considered an award program and a public list of companies that adopted STM guidelines.[142] 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 EU to facilitate coordination include recommendations and opinions, both of which are non-binding instruments and outlined in Article 288.[143] A recommendation would enable EU institutions to publicly outline their position without legal consequences.[144] The Commission issued such recommendations on subjects including "the rights of suspects in criminal cases, policy guidance on individual EU countries' public finances and promoting zero-energy buildings"[145]—recommendations on outer space can certainly be next. Opinions are also non-binding and address specific situations including, submissions to join the EU or when Member States seek the Commission's views on a proposed measure.[146] Opinions could be highly useful for Member States that are considering additional national space laws. Those Member States could present their proposals

138. *Id.*

139. *Id.*

140. *See* Linden, *supra* note 14, at 8.

141. *Joint Communication to the European Parliament and the Council An EU Approach for Space Traffic Management*, *supra* note 121, at 11.

142. *Id.*

143. TFEU, *supra* note 28, art. 288.

144. *Types of Legislation*, *supra* note 95.

145. *Glossary of Summaries: Recommendation*, EUR-LEX, https://eur-lex.europa.eu/EN/legal-content/glossary/recommendation.html (last visited Mar. 5, 2024).

146. *Summaries of EU Legislation: European Union Opinions*, EUR-LEX, https://eur-lex.europa.eu/EN/legal-content/summary/european-union-opinions.html (last updated Nov. 10, 2021).

to the Commission, which could then consider whether the proposal is compatible with the goals of the EU's outer space policy.[147]

Another option would be to amend the TFEU and remove Article 189(2)'s language "excluding any harmonisation of the laws and regulations of the Member States."[148] 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 EU 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 EU activity (subject to proportionality and subsidiarity constraints). TEU's Article 48 outlines the revision procedure. Any Member State government, the European Parliament, or the Commission may submit a proposal for amendments to the Council.[149] 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.[150] Of course, given this complexity, the Council may decide not to convene unless the proposed changes are "of great importance."[151] At this point, it does not appear that the pursuit of a common EUSL would meet such a threshold.

These articles, coupled with the use of non-binding measures, provide a compelling avenue for approaching an EUSL before necessary amendments or interpretations allow for more sweeping legislation. Such legislation may come as early as the first half of 2024 in the form of proposals for an EUSL.[152]

147. *See* Opinion of the Commission on the measure adopted by the Netherlands prohibiting the use of permanent dermal fillers for aesthetic purposes, 2015 O.J. (C 241/01) ("Given the rationale presented by the Netherlands and the outcome of the consultations, the Commission considers that the risks associated with the use of permanent dermal fillers justify their ban for purely aesthetic purposes.").

148. TFEU, *supra* note 28, art. 189(2).

149. *Summaries of EU Legislation: Revision of EU Treaties*, EUR-LEX, https://eur-lex.europa.eu/EN/legal-content/summary/revision-of-eu-treaties.html (last updated Oct. 14, 2022).

150. *Id.*

151. *Id.*

152. *Targeted Consultation on EU Space Law*, *supra* note 11.

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 an EUSL, the EU has steadily extended its reach further into the final frontier.

This Note 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 an EUSL. 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 EUSL before necessary amendments or interpretations allow for more sweeping legislation. Such legislation may come as early as the first half of 2024 as the EU considers proposals and assesses the viability of an EUSL.[153] The legal basis for such proposals and their justifications will shape European space law for decades to come.

153. *Id.*