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REGULATING THE SAFETY OF SUBORBITAL FLIGHTS IN EUROPE: NAVIGATING THROUGH THE LABYRINTH OF COMPETENCES OF THE EU, ITS MEMBER STATES AND EASA

Abstract

In the last years, there has been a discussion on safety regulations for suborbital flights. In Europe, EASA appeared interested in certifying suborbital vehicles as aircraft. However, EASA is a specialized EU agency for aviation, while suborbital flights are partly spaceflights. At the same time, Art. 189 TFEU prohibits any harmonization in the space laws and regulations of EU Member States. This paper examines the problems of establishing safety regulations, from the view of competencies between the EU and the Member States. Since EASA is competent only for aviation, it could regulate safety only for a part of the flight and only for suborbital vehicles of a certain design, i.e. as long as these fulfill the definition of aircraft. To the rest, i.e. regarding vehicles that do not fulfill such definition and vehicles flying in outer space, regulatory competency belongs to the MS. This regulatory fragmentation causes a serious of problems. First, it seriously distorts competition, because, depending on the technical characteristics of their vehicles, some operators would have to bear the costs of both certification by EASA and licensing by MS, whereas others would need to deal only with national authorities. In turn, this would hamper innovation, as regulation would be an important factor to consider in designing suborbital vehicles. Third, if operators claim that their vehicles have been certified as safe, without clarifying that such certification relates only to the aircraft-like part of the flight, they would risk liability for a misleading commercial practice according to Directive 2005/29/EC, notwithstanding potential liability for fraud. Fourth, it is unclear where and when the space part of the flight begins and ends, which makes competences between national authorities and EASA hard to delineate. The solution is to attribute competency for all vehicles and for the entire flight only to either national authorities or to EASA. We could either deem the entire flight as spaceflight and all suborbital vehicles as space objects, which would deprive EASA of its competency, or consider all suborbital vehicles as suborbital aircraft, which would give EASA the exclusive competency to regulate. In the latter case, the portion of the flight in outer space could be justified through the implied-powers theory combined with a definition of space policy under Art. 189 TFEU as relating only to orbital spaceflight.