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Near Space: Legal Aspects of Aerospace Activities (2)

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THE RATIONE LOCI APPLICABILITY OF THE RULES OF THE AIR TO AEROSPACE
ACTIVITIES

Abstract

So-called aerospace activities are spread over both outer space and airspace. Although, legally speaking, there is no agreed boundary between the two spaces (despite the scientific acceptance of the Kármán line as such a boundary), even the so-called functional approach distinguishes between aerospace and space applications and thus, at least implicitly, indicates different spaces for such activities. A good example of aerospace activities are suborbital flights, which are currently still carried out either experimentally or as part of space tourism activities, but which are expected to be used in as many civil or military applications as possible soon.

From a legal point of view, airspace, which constitutes a spatial domain of aeronautical activities, is characterised by the fact that it is regulated in detail by a systematic and comprehensive legal framework created by ICAO after 1945 in order to ensure not only the integrity of air traffic but also to "meet the needs of the peoples of the world for safe, regular, efficient and economical air services" (Art. 44(d) of the 1944 Chicago Convention on International Civil Aviation). To fulfil this fundamental purpose of ICAO, the Annexes to the Chicago Convention contain "international standards", i.e. rules which become mandatory for the Member States of the Organisation if they do not notify a difference within 60 days (Article 38). This mechanism for imposing international rules on States has had a positive effect on air transport, making it the safest means of international - as well as domestic - transport, as experience has shown.

This article elaborates on the position that, to the extent that a space activity - whether common or aeronautical - takes place in airspace, it must, to the extent and for as long as it moves in that space, fully comply with the generally accepted "rules of the air", since there is an established, solid legal framework for the activities of air users, in relation to whom any space activity (e.g. a launch) is, so to speak, an "intruder". This approach has also long been applied in the United States, where the Federal Aviation Administration (FAA) has authority in this area, including space activities.

Furthermore, the article will highlight the most important part of this legal framework for air transport (Annex 2, Annex 11, Annex 16, concept of civil-military coordination), to specify its applicability to space and, in particular, to aerospace activities.