

THE SPACE LAW
REVIEW

THIRD EDITION

Editor
Joanne Wheeler MBE

THE LAWREVIEWS

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REVIEW

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PREFACE

Over the past year, we have increasingly looked upwards – to consider the ‘mega-constellations’ being launched to bring us internet broadband in the remotest places; to reflect on the increasing issue of space debris; and to opine on news reports describing new space technology observing Earth, climate change and human activities, down to a couple of centimetres. Perhaps we are also seeking to track the International Space Station and other objects in space as more humans explore this final frontier. Whatever the reason, outer space is increasingly on our minds and in our conversations and news stories, and is used by us on Earth in more sophisticated ways – usually without us even realising.

During the continuing covid-19 pandemic, and stimulated by the growing concerns related to climate change on Earth, we have relied on satellite technology for communications, healthcare (including assistance for first responders), education, information and simple social interaction. The relevance of the space and satellite industry to our lives has rarely been greater.

The importance of *The Space Law Review* and its content written by experts across the world is growing each year as the value of the space domain and applications from space activities are understood to an enhanced level. New applications of satellite technology are brought into use and the commercial revenues from the industry are more widely recognised.

New and innovative technologies increasingly derive from private commercial activities rather than more traditional government-funded missions. States are liable and responsible for national activities in outer space and, therefore, seek to supervise and authorise such activities through national legislation and licensing mechanisms, which we see more of across the globe. New and more diverse space players are entering the market, including more state players.

New technology – such as constellations of several thousands of satellites (even hundreds of thousands), very high-resolution Earth observation data and new small-launcher technology – is testing regulatory and insurance frameworks. This, combined with greater risks from debris, in-orbit servicing, active debris removal and robotic missions, presents challenges to regulators that must work closely with industry to govern such activities, ideally by using anticipatory and outcome-focused regulation.

The dynamics of space are also changing with aspiring space nations joining the international space community, along with new categories of non-state actors, such as large industrial players, start-ups and universities. Space is mainstream now and part of everyone’s lives.

Lawyers, such as the excellent contributors to this book, are not only required to understand the international treaties and how they are enforced and applied in national law,

but are also being asked to look at the application of such laws, regulations and policies in innovative and challenging ways and at new applications, technologies (civil and military) and new business models.

Space law is not simply one practice area – it consists of layers of interrelated disciplines and dimensions that lawyers must apply and be alert to, such as: telecommunications; Earth observation; navigation; security and defence; data management; international relations; radio frequency spectrum; technology; national, regional and international laws and regulations; export controls; environmental laws; and corporate, finance and taxation. It requires bright, flexible, problem-solving and solutions-driven minds.

This year I am very pleased to say that *The Space Law Review* has expanded to include contributions from Lichtenberger Partner Attorneys-at-Law in Austria, Fasken Martineau DuMoulin LLP in Canada, Bird & Bird in France, the International Institute of Air and Space Law in the Netherlands and Formichella & Sritawat Attorneys at Law in Thailand. It has been a pleasure to engage with these new contributors, who have all shared their expertise and knowledge in this book.

My thanks go to all the authors, who have contributed their time, expertise and enthusiasm to this edition. Their practical knowledge of the legal and regulatory frameworks, and the related challenges and solutions, makes this book unique.

The contributors' expertise will grow in importance as the economic benefits from the space sector are increasingly recognised by states. The global space economy is expected to be worth £40 billion by 2030.

Effective national regulation, enabling innovation and investment, is an increasingly important source of competitive advantage globally. We are witnessing increasing regulatory forum shopping in the space industry. The importance of effective national regulation as an enabler for new and innovative satellite technology and the ability to raise finance is increasingly recognised. This is especially the case when such national regulation embraces sustainability goals in relation to the mitigation of space debris and the protection of the outer space environment.

Thank you again to the contributors of *The Space Law Review*. I wish them success in the year ahead. I hope that readers find this edition valuable and recognise the benefit that the international space industry can bring us, especially during challenging times.

Joanne Wheeler MBE

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AUSTRIA

*Ewald Lichtenberger, Maurits Haas and Fabian Saxl*¹

I INTRODUCTION TO THE NATIONAL LEGAL, REGULATORY AND POLICY FRAMEWORK

Austria is rarely considered a nation with a close connection to space research and space law. However, the first Austrian scientists were exploring theoretical concepts of space travel at the beginning of the twentieth century, though they initially failed due to technical restraints.² Today, Austria contributes a considerable amount to the work of the European Space Agency (ESA), both qualitatively and quantitatively, which is significant given the relatively small size of its population.³ Currently, numerous Austrian research institutions and small and medium-sized companies are active in the space sector.⁴

Austria's contribution to the United Nations (UN) Committee on the Peaceful Uses of Outer Space (COPUOS) is helpful for understanding Austria's attitude to outer space. During the Cold War, the West and the East agreed to Austria chairing COPUOS, which it did with a high degree of diplomacy to ensure the smooth running of the Committee's activities.⁵ Between 1962 and 1996, COPUOS was chaired by an Austrian diplomat,⁶ and in this same period all five UN space treaties were signed. Austria's status of permanent neutrality made it a trustworthy chair for all parties involved.

In this context, it is unsurprising that Austria is one of the few⁷ nations that has ratified all five UN space treaties. The President – on the proposal of the federal government – concludes and executes international treaties. Political treaties, as well as treaties amending or

1 Ewald Lichtenberger is a partner and Maurits Haas is an associate at Lichtenberger Partner Attorneys-at-Law. Fabian Saxl is a research assistant at the University of Innsbruck.

2 Christian Brünner and Edith Walter, 'Raumfahrt und Recht', edited by Christian Brünner, Alexander Soucek and Edith Walter, in *Raumfahrt und Recht. Faszination Weltraum - Regeln zwischen Himmel und Erde*. Vol. 89, Studien zu Politik und Verwaltung (Vienna: Böhlau, 2007), pp. 9–20, p. 12.

3 *ibid.*

4 Federal Ministry for Transport, Innovation and Technology, Ö-SPACE: Austrian Space Industry and Research: Database of Market Participants, https://www.bmk.gv.at/dam/jcr:8bb63dee-a69f-4611-9477-47e078828e4f/oespace_final_report.pdf, accessed 26 August 2021.

5 Peter Jankowitsch, 'International Relations during the Days of Cold War and Today: The Situation within COPUOS', edited by Christian Brünner, Alexander Soucek and Edith Walter, in *Raumfahrt und Recht. Faszination Weltraum - Regeln zwischen Himmel und Erde*. Vol. 89, Studien zu Politik und Verwaltung (Vienna: Böhlau, 2007), pp. 21–34, p. 25.

6 <https://austria-in-space.at/en/space-law/aboutNPOCAustria.php>, accessed 26 August 2021.

7 As at 1 January 2021, only 15 nations have ratified all five UN space treaties: COPUOS Legal Subcommittee, 60th Sess., Status of International Agreements relating to activities in outer space as of 1 January 2021, A/AC.105/C.2/2021/CRP.10, pp. 5–10.

supplementing existing laws, additionally require the approval of the National Council (the lower house of the Austrian Parliament) with the participation of the Federal Council (the upper house).⁸

An international treaty is self-executing if the National Council has not reserved the right to implement the treaty by a special law⁹ and the regulations of the treaty are sufficiently specific.¹⁰ In the case of the Convention on Registration of Objects Launched into Outer Space 1975 (the Registration Convention), in particular, considerable doubts arose as to the requirement of sufficient determination.¹¹

Austria had no need to become a launching state in the sense of the Registration Convention until the intended launch of two small satellites in 2011,¹² which prompted the enactment of a new legal framework for space activities. As a result of this process,¹³ the Outer Space Act (OSA) was adopted,¹⁴ which identified the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology (BMK) as the national space agency.¹⁵

While the BMK is responsible for regulatory aspects, such as the authorisation of space activities, the Aeronautics and Space Agency (ALR) represents Austria within ESA. The ALR is also responsible for the Austrian Space Applications Programme, a comprehensive research funding programme targeted at space science, technology and applications.¹⁶ This financial commitment is in line with the national space strategy from 2012,¹⁷ which recognises advantages for the domestic business and science sector in support of space activities.

Based on Section 12 of the OSA, the BMK issued the Outer Space Regulation (OSR) in 2015,¹⁸ which provides further details on the OSA.

8 Art. 50 Para. 1 in conjunction with Art. 65 Para. 1 in conjunction with Art. 67 Para. 1 of the Federal Constitutional Law.

9 Art. 50 Para. 2 Subpara. 4 of the Federal Constitutional Law.

10 Theo Öhlinger and Andreas Th. Müller, 'Art. 50 B-VG', edited by Karl Korinek, Michael Holoubek, Christoph Bezemek et al., in *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Vienna: Verlag Österreich; C. F. Müller; Springer, 1999), margin No. 101.

11 This conclusion was already reached in 1979 in the explanatory notes to the government bill to obtain parliamentary approval for the Registration Convention No. 79 in the Supplements to the Proceedings of the National Council, 15th Legislative Period, p. 8.

12 Franz Koppensteiner, 'Das österreichische Weltraumgesetz', *ZVR*, No. 05 (2012): pp. 148–153, p. 148.

13 For further details on this process, see Irmgard Marboe, 'The New Austrian Outer Space Act', *ZLW* 61, No. 1 (2012): pp. 26–61, pp. 26–32.

14 Federal Law Gazette I No. 132/2011 as amended by Federal Law Gazette I No. 37/2018. A translated version of the OSA is available in the Federal Legal Information System (<https://www.ris.bka.gv.at/defaultEn.aspx>).

15 The OSA cites the Federal Ministry for Transport, Innovation and Technology as the national space agency. Following a government reorganisation, this became the BMK.

16 <https://www.ffg.at/en/program/austrian-space-applications-programme-0>, accessed 27 August 2021.

17 Federal Ministry for Transport, Innovation and Technology, Austria in Space: Strategy of the bmvit for Austrian Space Activities, <https://austria-in-space.at/resources/pdf/austria-in-space-bmvit-space-strategy.pdf>, accessed 27 August 2021.

18 Federal Law Gazette II No. 36/2015 as amended by Federal Law Gazette II No. 90/2018. A translated version of the OSR is available online, see <https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html>, accessed 27 August 2021.

II REGULATION IN PRACTICE

i Types of licences required

According to Section 3 of the OSA, space activities require the authorisation of the BMK. The OSA applies to space activities carried out on Austrian territory, on ships or aircraft registered in Austria, or by operators who are Austrian citizens or Austrian legal entities.¹⁹ Whether civil law entitlements (e.g., liability claims regarding damages) are subject to the OSA is determined by the rules of private international law.²⁰ According to the legal definition under Section 2(1) of the OSA, a space activity includes the launch, operation or control of a space object as well as the operation of a launch facility. The mere control of satellite data content, for example the content of television programmes or websites, does not constitute a space activity and, therefore, does not require a licence under the OSA.²¹

In addition to the initial approval of a space activity, a change of operator must be approved under the same conditions according to Section 8 of the OSA. In this event, it is very likely that the BMK will impose such conditions to compensate Austria for liability risks under international law.²²

ii Obtaining an authorisation

To obtain an authorisation for space activities, the operator must submit an application to the BMK containing appropriate documentation to validate the authorisation requirements. A large number of the prerequisites can be deduced from Articles II to XII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967.²³

According to Section 4(1)(1) of the OSA, the operator must have the necessary reliability, capability and expertise to carry out space activities. Specific evidence for this requirement is regulated in Section 2(1) of the OSR. These include, inter alia, safety clearance, certification of professional qualifications, information on the operator's financial capacity, and the technical and organisational plans for the space activity.

To obtain a licence, the space activity must not pose an immediate threat to public order, public safety or public health. This proof shall be provided by compliance with the scientific state of the art and by the existence of emergency plans. It must also be stated whether the space activity includes Earth observation and what data is obtained in the process.²⁴ This obligation must be considered in the context of strict European data protection requirements.

Furthermore, the space activity must not impede Austria's obligations under international law or foreign policy interests.²⁵ In assessing the issue, the BMK must consult with the Federal Minister of Foreign Affairs and the Federal Minister of Defence.²⁶ Such impairment could exist, for example, in the case of Earth observation.²⁷

19 Section 1 Para. 1 of the OSA.

20 Section 1 Para. 2 of the OSA.

21 Explanatory Notes on the Government's Draft of the OSA, No. 1466 in the Supplements to the Proceedings of the National Council, 24th Legislative Period, p. 5.

22 *ibid.*, p. 9.

23 Koppensteiner, 'Das österreichische Weltraumgesetz' (*supra* n. 14), p. 150.

24 Section 4(1)(2) of the OSA; Section 2(2) of the OSR.

25 Section 4(1)(3) of the OSA.

26 Explanatory Notes (*supra*, n. 21), p. 6.

27 Section 2(3) of the OSR.

Pursuant to Section 4(1)(4) in conjunction with Section 5 of the OSA, the operator must make provisions for the mitigation of space debris in accordance with the state of the art and due consideration of internationally recognised guidelines on this matter. The operator must also take precautions for end-of-life activities, at the conclusion of the space activity.²⁸ This requires consideration of technical, legal and economic factors.²⁹ In addition, the space activity must not cause any contamination of space or any harmful change to the environment.³⁰

Finally, the operator must comply with the requirements of the International Telecommunication Union (ITU) with regard to orbital positions and frequency allocation, and have sufficient liability insurance (see Section II.iii).

The BMK must decide on the application for authorisation within six months. It may stipulate conditions and requirements for the approval.³¹ Where the OSA does not contain any specific procedural law provisions, general administrative procedural law provisions apply.

The applicant has to cover the costs of necessary expert reviews and security clearance, and pay a procedural fee of €6,500.³²

iii Liability and insurance

In the case of liability for damage caused by a space object, a distinction must be made between recourse by the federal government and the direct liability of the operator.

If Austria has compensated an injured party for damage caused by a space activity based on its obligations under international law, the federal government has a right of recourse against the operator under Section 11(1) of the OSA. For damage occurring on the surface of the Earth or to an aircraft in flight, recourse is limited to the amount of the sum insured. This privilege does not apply if the operator or its agents are at fault or in the case of unauthorised space activities.³³ Insurance coverage of a minimum sum of €60 million³⁴ must be obtained for every space activity. The BMK may allow a reduction of the insurance sum if it is in the public interest, in particular if the space activity is useful for science, research or education.³⁵

The operator itself is directly liable according to the rules of civil law. According to Section 1295, Paragraph 1 of the Austrian Civil Code, any person can claim compensation for damage culpably caused to them by another person. However, jurisprudence and case law have evolved specific legal provisions on strict liability for certain dangerous activities into general strict liability for particularly hazardous activities. It is generally accepted that principles of strict liability applying to motor vehicles, railways, aircraft, nuclear power plants or pipelines, for example, apply by analogy to other dangerous activities.³⁶ Space activities are

28 Section 2(1)(8) of the OSA. This aspect was particularly important to the responsible ministry drafting the space law. See Marboe, 'The New Austrian Outer Space Act' (*supra*, n. 12), pp. 35–36.

29 Explanatory Notes (*supra*, n. 21), p. 7.

30 Section 2(1)(5) of the OSA.

31 Section 4(3) of the OSA.

32 Sections 7 and 8 of the OSR.

33 Section 11(2) of the OSA.

34 For the considerations behind this sum, see Marboe, 'The New Austrian Outer Space Act' (*supra*, n. 12), pp. 34–35.

35 Section 4(4) of the OSA.

36 Herbert Hausmaninger, *The Austrian Legal System*, 3rd ed. (Vienna: Manz, 2003), pp. 278–279.

considered hazardous activities. The strict liability established in the existing statutes is limited to certain amounts in each case. As these liability limits are always based on the legally required minimum insurance sum,³⁷ the space operator's strict liability is limited to €60 million.

iv Registration

All space objects for which Austria is considered the launching state in the terms of the Registration Convention must be entered in the Austrian Registry for Space Objects, which is administered by the BMK. If other states are also considered launching states, it must be determined by agreement which state will perform the registration.³⁸ The information to be entered is determined by Section 10 of the OSA and Section 6 of the OSR. The Space Registry can be found on the BMK's website.³⁹

v Monitoring

Even after permission has been granted and the space object has been launched, the space activity is subject to continued monitoring by the BMK in accordance with Section 13 of the OSA. For this supervision right to be exercised efficiently, the operator must grant the BMK access to all facilities and allow inspection of all documents.

If the authorisation requirements are no longer met or if defined conditions are not complied with, the BMK must revoke the authorisation in accordance with Section 7 of the OSA. In the event of such withdrawal, the operator may be required to take measures for the temporary continuation or safe completion of the space activity. If these measures are not met, the BMK may transfer control of the space object to any other operator.

Violations of the OSA are sanctioned with a fine of up to €100,000. If a space activity is carried out entirely without authorisation, the minimum fine is €20,000.⁴⁰

vi Dispute resolution mechanisms

Approval of space activities or fines imposed under the OSA are legally qualified as administrative decisions. According to Article 130, Paragraph 1, No. 1 of the Federal Constitutional Law, such decisions can be challenged by appeal to one of the regional administrative courts⁴¹ on the grounds of unlawfulness. Under certain prerequisites, the decision of the regional administrative court may still be appealed to the Constitutional Court or the Supreme Administrative Court.

If the BMK has not reached a decision within six months of filing the application, an appeal on the grounds of delay may be filed before the regional administrative court in

37 For motor vehicles and railways, this is regulated, for example, in Sections 15 and 16 of the Railway and Motor Vehicle Liability Act in conjunction with Section 9 of the Motor Vehicle Liability Insurance Act (1994). For aircraft, this is regulated in Section 164 in conjunction with Section 151 of the Aviation Act.

38 Section 9 of the OSA.

39 https://www.bmk.gv.at/en/topics/innovation/registry_for_space_objects.html, accessed 2 September 2021.

40 Section 14 of the OSA.

41 The question of the jurisdiction of the regional administrative courts instead of the Federal Administrative Court has been clarified by the Supreme Administrative Court in similar cases (e.g., in the decision of 27 February 2019, case Ro 2016/04/0048).

accordance with Article 130, Paragraph 1, No. 3 of the Federal Constitution Law. If the BMK has not made a decision within three months of the submission of the appeal, the regional administrative court will be competent to decide on the application.⁴²

III DISTINCTIVE CHARACTERISTICS OF THE NATIONAL FRAMEWORK

The Austrian Telecommunications Act (TKG 2021) provides for the licensing of satellite radio systems and communications services using satellite radio systems. The key provisions are summarised in the following paragraphs.⁴³

i Provision of communications networks and services

The intended provision of public communications networks and services must be reported to the Regulatory Authority for Broadcasting and Telecommunications (RTR).⁴⁴ General authorisations are issued by the RTR.

ii Licences for satellite radio equipment

In principle, importing, distributing and possessing satellite radio equipment does not require a licence. However, there are cases where individual licences are required, as outlined below.

Individual licence

An individual licence is required to install and operate satellite radiocommunications equipment if it operates in certain frequency ranges and the technical or operational characteristics for a general licence that may apply in the frequency range in question are not fulfilled. The technical and operational characteristics of satellite radio equipment are defined in the respective radio interface descriptions, which are published on the website of the Telecommunications Authority.⁴⁵

All applications for installation and operating licences must be submitted to the Telecommunications Authority, preferably using the forms provided by it.⁴⁶

General licence

A general licence is required for certain types of satellite radio equipment. As mentioned above, the radio interface descriptions are published on the website of the Telecommunications Authority.⁴⁷

The status of the general authorisation is published in the Regulation of the Federal Minister for Transport, Innovation and Technology on the Granting of General Authorisations.⁴⁸

42 However, if it is determined in this proceeding that the delay is not attributable to the BMK, jurisdiction remains with the BMK.

43 The authors express their gratitude to the Telecommunications Division of the Federal Ministry of Agriculture, Regions and Tourism for its contributions to Section III of this chapter.

44 Art. 6 of the TKG 2021.

45 In German, Fernmeldebüro. <https://www.fb.gv.at/Markt/markt-funk-schnittstellenbeschreibung.html>.

46 *ibid.*

47 *ibid.*

48 <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008809>.

iii Placing satellite radio equipment on the market

The placing of satellite radio equipment on the market is subject to the provisions of the Federal Act on Market Surveillance of Radio Equipment,⁴⁹ which is based on Directive 2014/53/EU.⁵⁰ Further information on placing satellite radio equipment on the market can be requested from the Telecommunications Authority.

iv Frequency coordination

In the case of individually licensed satellite radiocommunications systems (except in the 406–406.1 MHz frequency range), a check is carried out prior to granting the licence on the basis of the information provided in the application (technical data sheet, descriptions, circuit diagrams, horizon profile) to determine whether the system at the planned location, with the specific transmission frequency applied for, may cause interference with other licensed systems when accessing the planned satellite. A licence for the operation of such satellite radio systems will only be granted if interference is not expected.

International coordination and notification of an individually authorised satellite radio system in accordance with the relevant provisions of the ITU will be carried out in any case where the satellite radio system may cause interference with radiocommunications services abroad. In other cases, international coordination will be carried out upon request.

Regarding satellite reception, the Telecommunications Authority cannot guarantee protection against interference from terrestrial radio services.

In the case of generally approved satellite radio systems, no frequency compatibility analysis will be carried out.

IV CURRENT DEVELOPMENTS

The OSA and the OSR have remained unchanged since their enactment, with the exception of an adjustment to the application of the EU General Data Protection Regulation. There are no amendments to the OSA or the OSR currently envisaged.

The TKG 2021 was enacted with effect from 1 November 2021 and replaced the provisions of the previously applicable TKG 2003. It appears that there are no significant changes in the area of satellite frequencies.

On 1 October 2021, Austria presented its ‘Space Strategy 2030+’.⁵¹ The envisaged goals of this strategy include sustainable development on Earth and in space, a competitive space sector in Austria, and scientific excellence in space and Earth exploration. Satellite technology made in Austria is used to provide information on the state of the Earth, and data from space will support the green and digital transformation of society and the economy. In this respect,

49 Federal Law Gazette I No. 57/2017. Current version available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009860>.

50 Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC.

51 Österreichische Weltraumstrategie 2030+ Mensch, Klima, Wirtschaft: Weltraum ist für alle da. Available at https://www.parlament.gv.at/PAKT/VHG/XXVII/III/III_00389/index.shtml.

the Federal Minister of Climate Action, Environment, Energy, Mobility, Innovation and Technology, Leonore Gewessler, stated that the strategy is also intended to make a significant contribution to the implementation of Austria's goal of climate neutrality by 2040.⁵²

V OUTLOOK AND CONCLUSIONS

Austria has a long tradition of space activities. It has promoted and contributed to the development of space technology, space industry and space research for a number of years. It has also chosen to cooperate internationally and to participate in and contribute to international bodies, such as ESA.

With regard to its own legal framework, Austria has enacted the OSA and the OSR, which provide clear guidance for space activities within their scope of application. It aims to continue to make important contributions to space exploration in the future, as highlighted by the goals of its Space Strategy 2030+.

52 <https://austria-in-space.at/de/news/2021/weltraumstrategie-gewessler-austromir.php>.

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