

Annegret Engel

The Choice of Legal Basis for Acts of the European Union

Competence Overlaps, Institutional
Preferences, and Legal Basis Litigation

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In loving memory of my dear grandparents.

Preface

This book is a monograph based on my Ph.D. thesis submitted to the Law School at Durham University and successfully defended without corrections (*summa cum laude*) in July 2013. The thesis was recommended for publication by a number of experts in the field: my Ph.D. supervisor Professor Robert Schütze, my internal examiner Dr Andres Delgado-Casteleiro, and my external examiner Professor Takis Tridimas. They have strongly encouraged me to pursue publication of my thesis as it provides a valuable contribution to the academic discussion in the field, since there is only one single academic reference which has discussed legal basis litigation in the European Union in a similar way until this date.¹

For this monograph, I have significantly revised the structure of the original thesis which comprised three chapters representing the former three pillars of the EU, taking a chronological approach within each of them. In contrast, this book is divided into the different aspects of legal bases, only keeping the former second pillar on CFSP matters separately. Rather than taking a chronological approach as I did in my original thesis, the starting point within this book is the *status quo* before looking back at previous cases and/or legislation which may help to inform about future case scenarios and their outcomes. The latter approach seemed more appropriate for a monograph as compared to the thesis style, thus making it more interesting for readers.

This book provides the first comprehensive discussion of conflicts between legal bases in EU law. It will fill an important gap in the existing literature on the choice of legal basis in EU law by analysing the structure of legal bases and the resulting legal basis litigation in the European Union, thus identifying areas of conflicts due to overlapping competences, divergent inter-institutional interests, and inconsistencies in the courts' judgments. While certain cases have been discussed extensively

¹Cullen H and Charlesworth A (1999) Diplomacy by other Means: The use of Legal Basis Litigation as a Political Strategy by the European Parliament and the Member States. CMLR 36(6):1243–1270.

in academic literature (e.g. *Tobacco Advertising*,² *ECOWAS*),³ there is little analysis of the generally underlying criteria and principles governing the choice of the legal basis by the European institutions. Such an analysis has, however, become necessary in order to better understand and possibly predict judicial outcomes, or to identify existing flaws in the current legislative framework.

In addition, this book diverts from the common belief that the determinant factors for the choice of legal basis are to be seen as distinct from its legal effects. Instead, it will propose a ‘reverse’ approach, treating legal effects as a determinant factor for the choice of legal basis rather than a mere consequence. Essentially, this is based on the assumption that there are two or more potential legal bases available for a proposed measure prescribing different legal effects (e.g. different legislative procedures). With the aim to maximising their influence in the legislative process, EU institutions might choose legal bases accordingly, thus reversing the role of legal effects from being a mere consequence to becoming a determinant factor for the choice of legal basis.

Since this book mainly refers to legal basis litigation, thus the actual jurisdiction of the European courts, little attention is drawn on such conflicts which may be solved before they reach the courts. As regards the legislative frameworks, this book does not attempt to provide a thorough overview of the various treaties and their respective changes. Instead, it focuses on selected issues which have already generated or will generate conflicts between legal bases and therefore could contribute to the main discussion. Where possible, reference will be made to the earliest case in which a particular issue was reviewed and/or to the most recent case in order to reflect current developments.

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² Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)*, EU:C:2000:544.

³ Case C-91/05, *Commission of the European Communities v Council of the European Union (ECOWAS or Small Arms and Light Weapons)*, EU:C:2008:288.

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List of Abbreviations

ACP	African, Caribbean and Pacific Group
AFSJ	Area of Freedom, Security and Justice
Art	Article
CETA	Comprehensive Economic and Trade Agreement
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
DHS	Department of Homeland Security
EAEC	European Atomic Energy Community
EEC	European Economic Community
EC	European Community
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ed(s)	Editor(s)
e.g.	exempli gratia (for example)
ERTA	European Agreement concerning the work of crews of vehicles engaged in international road transport
et al.	et alia (and others)
etc.	et cetera (and other things)
EU	European Union
EUI	European University Institute
EUSFTA	EU-Singapore Free Trade Agreement
ECR	European Court Reports
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
i.e.	id est (that is)
ILO	International Labour Organization
JHA	Justice and Home Affairs
NATO	North Atlantic Treaty Organization
No	Number
p(p)	Page(s)

para	Paragraph
PJCC	Police and Judicial Cooperation in Criminal Matters
PNR	Passenger Name Record
SEA	Single European Act
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
US	United States
v	Versus
WEU	Western European Union
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Chapter 1

Introduction



1.1 In General

Legal bases are treaty provisions which confer powers to the legislative organs of the European Union in order to pass legislation. Every legislative/non-legislative act has to be based on at least one legal basis. The choice of the correct legal basis may sometimes create tensions between the different institutions due to their competing interests and the inevitable competence overlaps inherited in the legal bases. Such competence conflicts often reach the European courts in the form of legal basis litigation. The courts have had to develop general principles to solve these kinds of judicial review cases in order to provide guidance for future case law. This section will provide a brief overview of the main aspects to bear in mind as regards legal bases and legal basis litigation before looking at the outline of the book.

1.1.1 The Structure of Legal Bases

The structure of legal bases is an important indicator for the potential for legal basis litigation: The existence of differences between legal bases often causes conflicts between the EU institutions or between the EU and its Member States. In the same legal order, differences can be found in the scope and nature of the competence,¹ which is the determinant factor of whether the Union is competent to act on its own, in parallel with the Member States, or only in a supportive function. Further, there are also differences in the legal instruments and the procedures,² having an impact on the degree of involvement of the different legal actors (for example the European

¹ “[A] competence is the *material field* within which an authority is entitled to exercise power.” Definition in Schütze (2009), p. 65.

² This is called the “supply-side” factor, Jupille (2006), p. 17.

institutions, competent authorities of the Member States, etc.) in the legislative process for the adoption of a measure.

The choice of the correct legal basis for a proposed measure may not always be a straightforward endeavour considering the sheer variety of treaty provisions available conferring different competences on the actors involved in the legislative process. In addition, the broader policy areas are not often as clear-cut and may therefore overlap with other related areas, thus making the choice of legal basis potentially arbitrary based on the institutions' convictions. The different legal effects entailed by potential legal bases may influence institutional choices and create inter-institutional conflicts with the potential for legal basis litigation.³

In general, the different institutional actors aim for a maximum of influence and autonomy by continuously increasing their input during the legislative process and to extend their overall scope of competences.⁴ Another aim is an optimum of legislative freedom, thus having a maximum of discretion and actual regulatory powers conferred by the legal basis. As a result, the legal effects entailed by the legal basis in question may constitute a determinant factor for its choice. The analysis of legal bases under this 'reverse' approach is treating legal effects as a determinant factor for the choice of legal basis rather than a mere consequence.

1.1.2 The Conundrum of Legal Basis Litigation

Differences between legal bases have been the motivation for the courts to develop general criteria which could provide some guidance as regards the determination of the correct legal basis for a measure. Thus, legal basis litigation of the past four decades or so has provided an entire range of general criteria, principles and theories which were aimed at increasing legal certainty in complex areas of overlapping or competing competences, most notably the 'centre of gravity' theory. Ideally, the application of such criteria would lead to one possible solution only, ruling out all other options. Unfortunately, however, this is rather self-deceptive and, as will be demonstrated in the following Chapters, the courts have more than once deviated from their own previous approach, thus creating exceptions or even new criteria which could potentially undermine previous ones.

In general, the so-called 'principle of conferred powers' according to Article 5 TEU requires the Union to derive any action from the powers provided for in the Treaties:

the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

³ See Cullen and Charlesworth (1999).

⁴ This is called the "demand-side" factor, Jupille (2006), pp. 17 and 18.

The reference to a specific legal basis is considered “as a minimum item of information” for a measure to contain.⁵ Further, according to the Court, the choice of the correct legal basis is of “constitutional significance”: The reliance on an incorrect legal basis would render any measure or agreement which was adopted on such basis nugatory.⁶

Notwithstanding the fact that the conferral principle is of a constitutional nature, it has been undermined in the past three decades or so by the courts’ teleological interpretation and by the more and more extensive application of general legal bases, such as Articles 114 and 352 TFEU. The EU has extended its competences within the first pillar in such a way that the principle of enumerated powers has become less and less important. Thus, for the majority of cases, there will almost always be a Union competence available.⁷ In only a few exceptions, the courts have refused to accept that those provisions could serve as a legal basis for a proposed measure.

In general, therefore, the question today is less likely about whether there *is* a legal basis available, but rather the determination of *which* one applies. Legal basis litigation has therefore become a frequently discussed issue before the European courts. This phenomenon is not an invention of the European Union but is quite familiar to some of its Member States, for example Germany.⁸ The quest for the correct legal basis is often complicated *inter alia* by the complexity of the treaties and can mainly be attributed to the fact that there are differences in the structure of legal bases.

1.1.3 *The Pillars of the European Union*

For more than one and a half decades, EU law was shaped by the artificial concept of a three-pillar structure, introduced in 1993 by the Treaty of Maastricht.⁹ The three pillars represented different sets of competences and were decisive in determining *who* was acting *when* and *how*.¹⁰ The former first pillar comprised all supranational

⁵Case C-370/07, *Commission of the European Communities v Council of the European Union*, EU:C:2009:590, para 52. This judgment was criticised on the grounds that the threshold was placed too high for the requirement to indicate a legal basis and that the Court failed to explain under which circumstances an exceptional non-statement of the legal basis in a measure would be allowed; Heliskoski (2011), pp. 566 and 567.

⁶Opinion 2/00, *Cartagena Protocol on Biosafety*, EU:C:2001:664, para 5.

⁷As has been observed, e.g., in Wuemeling (2004) p. 219.

⁸See e.g. BVerfG, 1 BvR 636/02 vom 9.6.2004, concerning shop opening hours on Sundays and public holidays.

⁹For an extensive study on the Maastricht Treaty, see O’Keeffe (1994).

¹⁰It goes without saying that such differences could not only occur between the three pillars but also within the pillars themselves, i.e. *inter-* as well as *intra-*pillar differences.