



Σχολή Διεθνών Σπουδών, Επικοινωνίας και Πολιτισμού

,

Department of International, European and Area Studies

. . .

: «

»

The choice of the Legal Basis and the Legal Services
of the institutions in the EU law-making process

. . . : 01791221 079

ό 2022

1. , ()
2. ,
3. - ,



Copyright © , 2022

All rights reserved,

«

».

, 20/12/2022

-

-

-

-

-

-

COREPER

-

-Comité des représentants permanents

-

-

-

-

-

-

iv
vii
Abstract	9
.....	11
•	12
1.	12
2.	19
3.	20
4.	23
5.	26
•	28
1. :	28
i.	29
ii.	30
iii.	31
2. :	33
3.	36
4.	38
5.	39
6.	41
7.	43
•	47
1.	50
2.	54
3.	60
4.	63
5.	66
IV.	67
V.	73
VI.	77
.....	77
.....	80
.....	86
.....	87
.....	92

«

»

,

,

.

. Ø

,

,

.

,

,

.

,

,

,

.

«

»

.

,

,

.

,

,

,

.

,

,

•
,
, << >>
•
,
,
,
,
- ,
,
•
,
,
•
,
•
,
•
,
•
- :

The choice of the Legal Basis and the Legal Services of the institutions in the EU law-making process

Eleni Sgantzou

Abstract

The legislative functions of the European Union are exercised in accordance with the principle of "attributed competence", requiring the EU legislator to explicitly state in the preamble of each legal act the authorizing provision from which the competence of the Union derives for the adoption of the measure to be adopted, i.e. its legal basis, otherwise it risks being annulled. At the same time, the legal basis specifies the procedure to be followed by the institutions for the approval of the relevant legislative acts. By definition, therefore, the legal basis is twofold, on the one hand legal, on the other political.

The choice of legal basis straddles the dichotomy between formal rules enshrined in the Treaties and informal governance characterized by closed-door inter-institutional agreements on the legislative process, the voting system or the legislative instrument. The legal basis, therefore, is instrumentalized in order to serve political interests and enhance the influence of institutional actors during the negotiation of trilogues. This "legal basis game" inevitably leads to conflicts due to the unclear jurisdiction of the Union's competences and the conflicting motivations of the institutions during the law-making process.

The Legal Services of the three EU institutions check the legal basis of the proposed measure, the Legal Service of the Commission during the drafting of the proposal and the Legal Services of the European Parliament and the Council after its submission. The role of the Legal Services in the choice of the legal basis is certainly pivotal, since their opinions are almost unquestionably accepted by the institutions, but it remains procedurally and essentially uncharted, due to the confidentiality of the legal opinions and the non-disclosure of the proceedings of the trilogues.

The Court, although initially in favor of the practice of not making public the opinions of the Legal Services of the Union, after the signing of the Lisbon Treaty shifted its jurisprudence suggesting that the publication of an institution's legal opinions on legal issues arising in the context of consultation on legislative initiatives increases transparency and

strengthens the European citizen's democratic right to control the information that formed the basis of a legislative act.

The Court has been called on several times to rule on the appropriateness of the legal basis of a measure, relying on two main tools when examining such disputes, the "center of gravity" theory and the principle that the special provision prevails over the general one.

As regards the legal bases of the Area of Freedom, Security and Justice, which after the Treaty of Lisbon became a concurrent competence between the member states and the Union, these retained certain intergovernmental elements, as traditionally the competences of the former third pillar were part of the heart of sovereign state.

The choice of the legal basis is a key point in the establishment of rules of law and must be controlled both by the National Parliaments, which act as guarantors of the democratic quality of the Union, and by the citizens as custodians of the Treaties. The other side of the coin, however, concerns the change of philosophy of the Institutional bodies themselves, with their further democratization, the strengthening of transparency and the unrestricted access of citizens to the documents concerning the law-making process.

Key words: Legal base, Legal Services, Legal opinion

1951

2007.

23.4.1986

Les Verts

‡

18

13

294/83

«

»

ultra vires

(Jupille, 2007: 303).

1.

« í ».

(5 .1 & 2)

() . 2017/1939 12.10.2017

(EPPO) : «
86».

. 86 «
,

Eurojust.

».

EPPO

, 9
, 22

(86) (

) ()

2014/41/

3.4.2014

82

1

)

.

82

(

)

,

,

.

(,

)

. 883/2013

11.9.2013

(OLAF)

: «

325

106 ».

325

,

.

,

,

OLAF,

,

317

,

325

.

106

352

.

,

88

. 2

Europol

114

(1987)

26.3.1987

«

(1991).

11

».

10

11.6.1991

«

».

(2012)

43

«

».

Ø

15

(1991),

100

130

100

(Engel,2018:141)

(2012)

1390(2002)

75

215 . 1 ,

· ,
· ,

« 215, . 2,
».

Sophie inø Veld (2014)

29, « ,
· ,
· ,
· ,

».

ultra vires.

«
» (Cuyvers,2017:122)

2018: 38)

, (Leino,

. (Leino, 2018: 38)

(1993)

26

«[]

».

(6

.1),

Planet AE

(2015)

()

).
(OLAF)

48, . 1,
OLAF

∅

ultra vires

(Leino, 2018: 31-32)

2.

5

‡

«

»,

« ».

».

296 «[]

í [] », (1987)

5 «[] 190 ,

7 1981, Rew , 158/80),

».

3.

,

.

,

,

,

,

(. 3).

,

.

.

,

.

()

.

,

,

,

.

,

, «

»,

().

,

,

,

.

,

,

,

,

,

,

,

(. 4).

,

,

.

(.5 6).

. (Engel, 2018:11)

352

« »,

352

» (Cuyvers, 2017: 129-130).

(.5 .3).

· ,
,
,
·
,
,
,
,
,
(5
.4)

4.

,
·
(.289)

(, ,).

« ,
,
,
294.
,
,
,
».

, « » † « »
·

27

8

4

)

« » (

24

(Cuyvers, 2017:136).

. (Cuyvers, 2017:136).

» (, 2012: 34)

5.

» (Jupille, 2006: 10)

Lenaerts, , «

». (Jupille, 2006: 9)

(, 2012: 35). , ,

«

. *Jean-Paul Jacqu *,

, :

,

,

». (Leino, 2018: 33)

(2000)

98/43

100

(114)

.

100

.

,

32

,

129 .4

(168 .5)

54 55

,

.

«

»

,

2021:13)

1.

:

group)

(expert

(, 2012:66).

. (Leino,2018:50)

()

(/Coreper)

(). (, 2012:66)

i.

.17 , . 244-250

27

32.000

36

(Leino,2018:49).

(expert groups)

expert groups

.(, 2012:37)

groups

expert

fora

. (, 2012:48)

ii.

.14 , . 223-234

705

27

1/3

« »,

« »

(Leino,2018:54).

iii.

16

237-243

27

10

()
(Coreper)

(working groups),

Coreper working groups

(, 2012:103).

, . (55%
65%),

working group,

. ,
.

,
.
. (Leino,2018:56)

, ,
, ,
, ,
, . (,2012:101)

Coreper «
», «
» « » (,2012:103).
Coreper
win-win

working groups

. (Leino,2018:58)

« »

(,2012:136).

2. :

，
.(,2021:164)

·
， 2007 « »
.(,2012:126)

fast track

2012:141)

1049/2001: «

...

« »-í . , ,
, ,
« »
,

». (Leino, 2018:63)

Emilio De

Capitani

(2018)

70

«[]

í «

» ,

, «
»

, 73,

,

, 74,

27

28

2016

«

, ,

».

, , 81,

82,

,

,

, 83,

84,

(Leino, 2018:64),

3.

Ø

33

(2013).

, (Leino:2018,44)

« », Koen Lenaerts,

» (Lenaerts, 2013:1304)‡

Ø ,

(, ,)
. (Leino, 2018: 47)

4.

.

veto

,

,

,

,

,

,

» o Joseph Jupille « []
» (Jupille,

2006: 10)

,

,

(Soriano, 2007:

332)‡

« Cullen Charlesworth , ,
,

,
.

». (Leino, 2018: 40)

.

5.

Jupille (2007)

,

,

.

«[]

» (Jupille,

2007:306),

.

24

27

,

,

«

»,

(Jupille, 2006:17).

« » .
,
« » (Jupille, 2004:21). «
» , ,
,

(Jupille, 2007: 304).

Jupille, « » ,
,
,
.
,

« »
(Jupille, 2006: 17).

,
()
,
(, 2012:30).

« » « » ,

« » . (Jupille, 2006: 18)

, « », , ,
« ». (Jupille, 2007: 304)

6.

,
,
.
,

(Soriano, 2007:323)

.
, . . .
,
.
,
.

(Engel, 2018: 76)

,
.
.
, « »
,
.
« »

. (Soriano, 2007: 324)

. (Soriano, 2007: 324)

(Pernice,2014:6)

. (- ,2012:169)

ultra vires

(Soriano, 2007: 331).

(Soriano, 2007:327),

7.

288

«
,
Steinebach, 2021:280)

» (Hurka

296

. A , ,

. (Hurka Steinebach,
2021:278)

Joint Practical Guide of the European Parliament, the Council and the
Commission for persons involved in the drafting of European Union legislation

()

10.8 «[]

. (Hurka Steinebach, 2021: 279)

, « » ,

, «

» 18.6 «[] ,

». H ,
.
,
. (Hurka Steinebach, 2021:
281)

,
.
,
(Hurka
Steinebach, 2021: 282-283).

,
.
,
,
,
(Hurka Steinebach, 2021: 283).

.
Von Bogdandy et al. (2004)
31%
,
9% .(Engel, 2018: 55)

.

,

.

, ,

,

. (Leino-Sandberg, 2022:231)

,

,

,

. (Jacqué, 2013:

44)

.

.

. (Jacqué, 2013: 45)

,

ad hoc

.

,

working groups

.

,

(Jacqué, 2013: 46).

Coreper

,

.

(Jacqué, 2013: 46).

. (Jacqué, 2013: 47)

(Jacqué, 2013:47-49).

50)

, (Jacqué, 2013:

. (Jacqué, 2013: 51)

(Jacqué, 2013:52).

. (Jacqué, 2013:54).

of Legislation . . . Quality

(, 2019:5)

1960.

1963 1964 Van Gend en Loos Costa ENEL,

» 1952 « 1963-1964

Gaudet Michael . (Bailleux, 2013:

361) Gaudet

. (Bailleux, 2013: 365)

. (Bailleux, 2013: 363)

Gaudet

Van Gend en Loos 12 . Gaudet
12

. (Rasmussen, 2012: 386-387).

Gaudet

. (Rasmussen, 2012: 387-388)

(1963) Van Gend en Loos Netherlands Inland Revenue Administration

. 12

Gaudet,

(Rasmussen,2012:396)

15/7/1964

1964
ENEL (1964:1213)

Maurice Lagrange

Costa

«

».

Van Gend en Loos Netherlands Inland Revenue
Administration (1963) Costa ENEL (1964)

«

»

. (Bailleux, 2013:

108)

10/7/1964

FIDE

(Bailleux, 2013: 112),

Costa ENEL.

«

»

(Hartlapp M. et al., 2014:23)

«

»

Hartlapp, Metz

Rauh

«

», «

»

«

». (2014: 25)

2.

22

(<https://www.consilium.europa.eu/el/general-secretariat/>,26-10-2022)

150

« »,
« »,

. (Bishop Naert, 2017:101)

. (Bishop Naert, 2017:103-104)

« ».

. (Bishop Naert, 2017:109)

. (Bishop Naert, 2017:104)

11 . 4 .

Joseph Jupille «[]

1997,

6%

11%»

Golub

28

(

)

1960663, 145

1964667, 55

1968

1972, 110

1973677

185

1982 (Jupille,

2006:14).

Golub «
» (Jupille, 2006:19).

2 Jupille (2006:34)

EUR-Lex

COM(1992)33

113

149

. (EUR-Lex, 1993)

113

44, «[]

113

». (EUR-Lex, 1993)

« » 7 «

» 93/98/ 29 1993

113

, ÷ ∅
149
29.10.1993,
1 1993,
COM(1991)444
100
(EUR-Lex,
1994)
1991,
30.6.1994
(1992)
100 (
) 100
() 189
94/36/
30 1994

. (EUR-Lex, 1994)

Carlsen 3 1998,

(1998),

46

«

».

. (Jupille, 2006: 15).

36

« »,

«

» , , «

».

,
, 52,

.

,

,

,
. (Leino,

2018:60)

,

.

Turco

(2008),

63 66

,

.

«

» ,

,

«

»,

. ø

, ,

,

64, «

í ,

,

,

».

,

,

68, « ' ,

».

1049/2001

, 67, «

».

() Turco

,

3.

,

.

(<https://the-secretary-general.europarl.europa.eu/en/organisation/legal-service>, 12-11-2022):

- (

,

,

,

,

,

)

-

-

, . Ø
 , 5
 ,
 , .
 , , Ø .
 , () ,
 , .
 61, Ø

VI

,
 , ,
 , .
 , Ø
 ,
 .
 ,
 .

Jacqué (2013:45)

«

»

. (Jacqué,

2013: 45).

4.

2008

Turco (2008),

45-46

«

í

í

í

í

».

Turco

(2008)

37

44

63

59,

Maurizio Turco

Sophie in ø Veld (2014)

86

[] « »

104

Samuli Miettinen (2015)

67

()

69 70,

64

Laurent Pech

(2021)

80 81

,

[]

,

,

.

,

,

,

,

.

.

40

«

,

,

,

».

,

,

,

,

,

.

,

65

Turco

(2008)

46

«

».

. (Leino, 2018:67)

(Leino, 2018:68).

5.

13.4.2016

295

8 «[]

25

«[]

»

Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation

9

9

(, 294)

IV.

. (Leino, 2018: 41)

,
,
,
.
.
« » ,
,
.
(1991),
,
« »
« » « ». H
« »,
(Engel,2018:14)
,
,
,
, 130 100
,
,
,
100 , 130
100 ,
,
.

，
(2009)

« »

2006/24/ ，
95 (114)， ， 28，

« ，

， ， »

30, 31 .1 34

.2 . ， ， 36，

95

«

». ， 91，

，

，

，

«

»

. (Engel,2018:16)

， (2012)

« »

« »，

70

· ， 72, «

»

，

，

215 .2 .

, ,
, .
,
, Ø
,
.

« »

(Soriano,2007:329)

(2015)

36 «

»

37 « 31

í

í í ,
»,

192, .1,
31 .

(*Lex Specialis Derogat Legi Generali,*

),

(Engel,2018:18)

, 114 352

114

« »

352 (308)

Lex Specialis Derogat Legi Generali,

Legi Generali

Lex Specialis Derogat

». (Engel,2018:19)

114

÷passepartoutø

114

(1988)

16 «

43

»

100

22

43

« »

(2006)

«

» (PNR),

95 (114)

PNR

57 63

«

»

95

«

».

,

67 69,

PNR

352

,

,

«

» «

»,

«

»

,

.

,

,

352

(Engel,2018:28)

, « [352]

». (Engel,2018:28)

«

», ø

352

352

,

2/94 28.3.1996

235

(352)

«

,

,

.

,

,

'

,

».

352

,

∴

∅

,

. (Engel,2018:31)

,

,

-

,

,

.

V.

,

,

,

.

,

4 .2

,

∅

,

V

) (.

82 . 2

82 « »

. (Engel,2018:34)

76

1/4
by pass

« »,

69

.276

«

74

».

«

»

82 . 3 83 .3

. (Engel,2018:36)

«

»

∅

(Engel,2018:45)

/

∅

25.5.2022

2

82

2,

83

1

2

75

87 2 ().

:

83 1 ,

.

, « »

83 1 . ,

87 2 . ,

82

2 .

,

-

- / .

8-3-2022

82 2 83 1 (

).

83 1

. «

» 83 1

í

2

11-5-2022

114

()

114

VI.

(Coreper working group)

Päivi Leino-Sandberg
Money 17-11-2021

Peter Teffer

site Follow The

Leino-Sandberg

, Leino-Sandberg

. (Teffer, 2021)

Leino-Sandberg

2017 Leino-Sandberg

(2015)4931

Emilio De Capitani

Sandberg

(2022)

Päivi Leino-

53, «

» , 54, «

4, 2,

1049/2001 ,

».

. (Teffer, 2021)

(Leino, 2018: 41)

« »

. (Jupille, 2006: 24)

. (

, 2001:23)

«

»,

,

,

«

»

.

,

12

1

2

.

27

ultra vires

.

,

,

. (, 2012:160)

, 2021: 161)

4 .2

.(- ,2012:166)

∅

ultra vires

expert groups.

(2001)

2001:20)

Pernice

. (Pernice,2014:22)

. (Pernice,2014:14)

forum

ultra vires

() . 2017/1939

12.10.2017

(EPPO)

(,) . 883/2013

11.9.2013

(OLAF)

2014/41/

3.4.2014

93/98/

29

1993

94/36/

30

1994

:

<https://www.consilium.europa.eu/el/general-secretariat/> (26-10-2022).

26-10-

:

[https://the-secretary-](https://the-secretary-general.europarl.europa.eu/en/organisation/legal-service)

[general.europarl.europa.eu/en/organisation/legal-service](https://the-secretary-general.europarl.europa.eu/en/organisation/legal-service) (12-11-2022).

12-11-

,

C

115

C 115

,

Bailleux, J. (2013) 'Michel Gaudet, A Law Entrepreneur: The role of the legal service of the European executives in the invention of EC Law and the birth of the Common Market Law Review', *Common Market Law Review*, **50:2**, . 359-368.

Bailleux, J. (2013) 'L'Europe et ses légistes: Le Service juridique des Exécutifs européens et la promotion d'un droit communautaire autonome (1957-1964)', *Politique Européenne*, **41**, . 88-117.

Bishop, M. Naert, F., (2017) 'The Role of the Council Legal Service in Ensuring Respect for the Law', Czuczai, J. Naert, F. (eds) *The EU as a Global Actor ó Bridging Legal Theory and Practice*, Leiden, Koninklijke Brill NV.

Cuyvers, A. (2017) 'The Legal Framework of the EU', Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. Cuyvers A. (eds) *East African Community Law -Institutional, Substantive and Comparative EU Aspects*, Brill.

Engel, A. (2018) *The Choice of Legal Basis for Acts of the European Union*, Switzerland, Springer.

EUR-Lex, (1993) *1992/0395/SYN, COM (1992) 33:*
,
https://eur-lex.europa.eu/procedure/EL/1992_395?qid=1669483075026&rid=1, 27-11-2022.

EUR-Lex, (1994) *1991/0368/COD, COM (1991) 444:*
,
https://eur-lex.europa.eu/procedure/EL/1991_368?rid=1&qid=1669481843314, 27-11-2022.

, (2016) 13.4.2016

L 123.

European Union, (2015) *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, <https://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>

, (2018) 2018

, Ref. Ares(2019)2262950 - 29/03/2019,

https://ec.europa.eu/info/sites/default/files/sj_aar_2018_final.pdf

, (2019) 2019 , Ref.

Ares(2018)6537718 - 18/12/2018,

https://ec.europa.eu/info/sites/default/files/management-plan-sj-2019_en.pdf

, (2022)

, COM(2022) 209 final,

https://eur-lex.europa.eu/resource.html?uri=cellar:13e33abf-d209-11ec-a95f-01aa75ed71a1.0014.02/DOC_1&format=PDF

, (2022)

, COM(2022) 105 final, [https://eur-](https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52022PC0105&from=EN)

[lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52022PC0105&from=EN](https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52022PC0105&from=EN)

, (2022)

COM(2022) 245 final, [https://eur-lex.europa.eu/legal-](https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52022PC0245&from=EN)

[content/EL/TXT/PDF/?uri=CELEX:52022PC0245&from=EN](https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52022PC0245&from=EN)

, (2001)

<https://www.consilium.europa.eu/media/20943/68835.pdf>

, (2021) Mission Statement of the Legal Service

https://ec.europa.eu/info/sites/default/files/mission-statement-legal-service_en.pdf

Hartlapp, M., Metz, J., Rauh, C. (2014) *Which Policy for Europe? Power and Conflict inside the European Commission*, Oxford University Press.

Hurka, S. Steinebach, Y. (2021) 'Legal Instrument Choice in the European Union' *Journal of Common Market Studies*, **59:2**, . 278-296.

Jacqué, J. P. (2013) 'The Role of Legal Services in the Elaboration of European Legislation' Vauchez, A. Witte, B. (eds) *Lawyering Europe: European Law as a Transnational Social Field*, London, Hart Publishing.

Jupille, J. (2004) *Procedural Politics*, Cambridge University Press.

Jupille, J. (2006) *The Legal Basis Game and European Governance*, Stockholm, Swedish Institute for European Policy Studies.

Jupille, J. (2007) 'Contested Procedures: Ambiguities, Interstices and EU Institutional Change' *West European Politics*, **30:2**, . 301-320.

- , . (2012) ÷ :
(4 .2)ø , . (ed)
: 1981-2011, ,

Leino, P., (2018) 'The Politics of Efficient Compromise in the Adoption of the EU Legal Acts' Cremona, M. Kilpatrick, C. (eds) *EU Legal Acts: Challenges and Transformations*, Oxford University Press.

Leino-Sandberg, P. (2022) 'Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?' *European Law Open*, **1:2**, . 231-256.

Lenaets, K. (2013) 'How the ECJ Thinks: A Study on Judicial Legitimacy' *Fordham International Law Journal*, **36:5**, . 1303-1371.

, . (2012)

, . (2021) ÷

ø , ..
, . (eds) -
« » 1981-2001, , .

Pernice, I. (2014)

, , ,
<https://www.constitutionalism.gr/pernice-polyepipedos-syntagmatismos/>, 3-12-2022.

Rasmussen, M. (2012) 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-665' *Contemporary European History*, **21:3**, . 375-397.

Soriano, L. M. (2007) 'Vertical Juridical Disputes over Legal Bases' *West European Politics*, **30:2**, . 321-337.

Teffer, P. (2021) 'European Council's legal service more powerful than most member states' *Follow the money*, <https://www.ftm.eu/articles/ec-legal-council-more-powerful-than-most-member-states>, 24-10-2022.

, B. (2021)

«

»

&

&

.

			(2013),
16.4.2013		C-274/11	C-295/11
		(1993),	16.6.1993
		C-325/91	
	2/94	28.3.1996	
Carlsen		(1998),	3.3.1998
		-610/97	
Costa	ENEL (1964),	15.7.1964	
	C-6/64		
Emilio De Capitani		(2018),	22.3.2018
		-540/15	
		(1987),	26.3.1987
	C-45/86		
		(1991),	11.6.1991
	C-300/89		
			(2006),
30.5.2006		C-317/04	C-318/04
		(2012),	19.7.2012
		C-130/10	
		(2015),	12.2.2015
		C-48/14	
		(1988),	23.2.1988
		C-68/86	

		(2009),	
10.2.2009		C-301/06	
Laurent Pech	,	21.4.2021	
	T-252/19		
Les Verts		(1986),	23.4.1986
		C-294/83	
(2000),	5.10.2000		C-376/98
Päivi Leino-Sandberg		(2022),	
28.9.2022		T-421/17	
Planet AE		(2015),	22.4.2015
		T-320/09	
		Maurice Lagrange	25.6.1964
Costa	ENEL	C-6/64	
Samuli Miettinen		(2015),	18.9.2015
		T-395/13	
Turco		(2008),	1.7.2008
	C-39/05	C-52/05	
	Sophie in't Veld (2014),	3.7.2014	
	C-350/12		
Van Gend & Loos	Netherlands Inland Revenue Administration (1963),		
5.2.1963		C-26/62	

List of legal bases providing for the ordinary legislative procedure in the Treaty of Lisbon

https://www.europarl.europa.eu/cmsdata/198025/List_of_legal_bases.pdf