

REPORT

**LEGAL ANALYSIS ON THE COMPETENCES OF THE EUROPEAN UNION FOR
LEGISLATION ON WHISTLEBLOWER PROTECTION**

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ABOUT THIS REPORT

This report provides a legal analysis of the competences of the European Union for legislation on whistleblower protection by explaining the relevant notions and provisions pertaining to the EU's legislative prerogatives more broadly and especially with regard to whistleblower protection. The report provides a broader overview regarding powers for legislation in the EU and explains the notion of 'implicit powers' specifically reflecting on the relevance of this doctrine for whistleblower protection. The report also identifies the different legal bases that enable the EU to enact legislation in this field. Furthermore, the report clarifies the criteria established by the Court of Justice of the European Union regarding the use of multiple legal bases for the enactment of EU legislation and discusses the interconnection of different legal bases for whistleblower protection. The report includes four different Annexes with data on competences, legal acts and case law relevant for whistleblower protection.

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1. INTRODUCTION

A series of different initiatives have taken place in the European Union in the past year with regard to possibly enacting a dedicated EU law for the protection of whistleblowers. In May 2016, the Greens/EFA group of the European Parliament presented a draft Directive on whistleblower protection that relied on Article 153 TFEU with the aim to encompass protection for workers both in the public and private sector.¹ In June 2016, the EU Trade Secrets Directive entered into force that foresees whistleblowing as an exception to the legal regime on the protection of trade secrets.² Importantly, in its Working Programme 2017,³ the European Commission indicated that a legislative act on whistleblower protection would possibly be proposed after examining the legal issues with regard to the EU's competences in this field. Since March 2017, the Commission has opened a public consultation process for a possible legislative act on whistleblower protection.⁴

Against the background of these developments, this report provides a legal understanding of EU powers for legislation on whistleblower protection. The report focuses on the competences of the EU for legislation on whistleblower protection by explaining the relevant notions and provisions in EU law pertaining to EU's legislative prerogatives. Firstly, the report provides a broader overview regarding powers for legislation in the EU and explains the notion of 'implicit powers' specifically reflecting on the relevance of this doctrine for whistleblower protection. Secondly, the report identifies the different legal bases that enable the EU to enact legislation in this field. Thirdly, the report clarifies the criteria established by the Court of Justice of the European Union regarding the use of multiple legal bases for the enactment of EU legislation and discusses the interconnection of different legal

¹ https://www.greens-efa.eu/legacy/fileadmin/dam/Images/Transparency_campaign/WB_directive_draft_for_consultation_launch_May_2016.pdf

² See Art 5 of EU Directive on Trade Secrets, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0943>

³ Page 12; https://ec.europa.eu/info/sites/info/files/cwp_2017_en.pdf

⁴ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254

bases for whistleblower protection. The report also includes four different Annexes with data on competences, legal acts and case law relevant for whistleblower protection.

2. EU LEGISLATIVE POWERS AND THE DOCTRINE OF IMPLIED POWERS: FEASIBILITY OF IMPLICIT COMPETENCES FOR LEGISLATION ON WHISTLEBLOWER PROTECTION

The EU has only those powers as assigned to it by the Treaties.⁵ All residual powers belong to the Member States. EU legislative powers result not from a general proposition but rather from different Treaty provisions vesting prerogatives for each of the areas of EU law.⁶ The legal base matters both for the vertical divisions of powers between the EU and the MS, but also at the EU level due to differences in legal procedures for certain EU policies and as a result the different position of EU institutions therein.⁷ EU measures can be based on one or more Treaty provisions. Importantly, where a measure can be validly based on one (or more) specific provision(s) of the Treaty, it may not be based on a nonspecific power.⁸

The EU may rely on the doctrine of implied powers in order to legislate when that is necessary for the EU to exercise an explicit power effectively. The doctrine of implied powers emerged and is still predominantly applicable in the context of EU foreign relations.⁹ This doctrine was established in EU case law, first set out by the Court of Justice of the European Union in the Case 22/70 *Commission vs. Council* (also known as the ERTA ruling).¹⁰ The ERTA ruling is followed by a series of cases where the Court provides more elaboration on the notion of implied powers, when the EU can act externally, and whether these powers are shared with the Member States.

⁵ Article 5 TEU.

⁶ Joined Cases 188-190/80 *France, Italy and United Kingdom v. Commission* [1982] E.C.R. 2545.

⁷ E.g. whether qualified majority voting or unanimity is required at the Council, whether the EP is a co-legislator or has merely powers of consent.

⁸ Case 68/86, *United Kingdom v. Council (Re Agricultural Hormones)* [1988] E.C.R. 855; Case 45/86, *Commission v. Council (Re Generalized Tariff Preferences)* [1987] E.C.R. 1493. See also, Nicholas Emiliou “Opening Pandora’s Box: the legal basis of Community measures before the Court of Justice” *E.L. Rev.* 1994, 19(5), 488-507.

⁹ See Theodore Konstadinides, “EU foreign policy under the doctrine of implied powers: codification drawbacks and constitutional limitations” 39 *European Law Review* 4 (2014), 511-530.

¹⁰ Case 22/70 *Commission vs. Council* ECLI:EU:C:1971:32.

In the post-Lisbon context, the doctrine of implied powers as far as external relations are concerned is codified in Articles 3(2) TFEU and 216(1) TFEU.¹¹

In addition to applying the doctrine of implied powers to EU external relations, the Court extended its applicability in criminal law particularly regarding environmental protection in the C-176/03 *Commission v. Council* case.¹² This ground-breaking judgment established that the EU has the competence to criminalise acts in the absence of an explicit competence in the Treaties when EU action is necessary to guarantee the effectiveness of an existing EU policy, specifically in this case, in environmental policy.¹³ The Court recognized that the EU has an implied power when it is linked to a specific legal basis and therefore may adopt measures when there is a need to combat failure of Member States to implement EU objectives. Hence, the EU does not have a broad or unbound implied power to legislate, but rather the EU can only act on such basis when it seeks to ensure the effectiveness of an existing competence.

The rationale of effectiveness with regard to implied powers is based on the understanding that when the Treaties grant the EU certain prerogatives in order for those competences not to be ‘rendered wholly ineffective’ the EU institutions have the competences to carry out the necessary tasks.¹⁴ The Court has upheld this approach, focused on the effectiveness of existing competences, in order to apply the implied powers doctrine to other cases, such as in the *Ship Source Pollution* case regarding transport policy.¹⁵ More recently, scholars have argued that the implied powers doctrine entails that the EU may use implied powers with supranational effect in all fields except where the member states have explicitly limited the power of the EU,¹⁶ such as for example in national security.¹⁷ Lastly, even in instances when the

¹¹ See Inge Govaere, “‘Setting the International Scene’: EU External Competence and Procedures Post-Lisbon Revisited in the Light of ECJ Opinion 1/13”, 52 *Common Market Law Review* (2015), 1277-1308.

¹² C-176/03 *Commission v. Council* ECLI:EU:C:2005:542

¹³ C-176/03 *Commission v. Council*, paragraph 48, 52.

¹⁴ Joined cases 281, 283-285 and 287/85 *Germany, France, Netherlands, Denmark and UK v. Commission* [1987] ECR 3203.

¹⁵ C-440/05 *Commission v Council (Ship Source Pollution)* [2007] ECR I-9097.

¹⁶ Carl Lebeck, ‘Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties’, 17 *Journal of Transnational Law & Policy* 2 (2008), 303-358. See further arguments of application of implied powers beyond environmental law: Jason B Gott, ‘Addressing the Debt Crisis in the European Union: The Validity of Mandatory Collective Action Clauses and Extended Maturities’, 12 *Chicago Journal of International Law* (2011), 201-228.

¹⁷ See Article 4 (2) TEU.

EU would have the legal basis or rely on implied powers to legislate, the EU must fulfil the criteria of the principles of proportionality and subsidiarity.¹⁸

With regard to whistleblower protection, many existing EU powers would be effectively realised if the EU offered protection through a legislative act. The specific areas of competence are elaborated in Section 3 (below), but it is worthwhile to note that the instrumental role of whistleblowing, understood as reporting or disclosure of information that is in the public interest, is already evident in many currently applicable EU acts, as provided in the following table.

Table 1. Existing EU rules that offer some form of protection or requirement of disclosure covering a variety of EU competences and policies

No.	EU Legal Act	Treaty Legal Basis
1	Regulation 537/2014 ¹⁹ on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC	Article 114 TFEU
2	Directive 2014/56/EU ²⁰ amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts	Article 50 TFEU
3	Directive 2015/849 ²¹ on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC	Article 114 TFEU
4	Directive 2016/943 ²² on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure	Article 114 TFEU
5	Regulation 596/2014 ²³ on market abuse (market abuse)	Article 114

¹⁸ Art Article 5(3-4) TEU.

¹⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014R0537>

²⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0056>

²¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>

²² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0943>

	regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC	TFEU
6	Commission Implementing Directive on Regulation (EU) No 596/2014²⁴ of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation	This Directive is based on Regulation 596/2014 (Article 114 TFEU)
7	Directive 2009/65²⁵ on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)	Article 53 TFEU
8	Regulation 575/2013²⁶ on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012	Article 114 TFEU
10	Directive 2013/36²⁷ on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC	Article 53(1) TFEU
11	Directive 2013/30/EU²⁸ on safety of offshore oil and gas operations and amending Directive 2004/35/EC	Article 192(1) TFEU
12	Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation	Article 100(2) TFEU

3. EU COMPETENCES RELEVANT FOR WHISTLEBLOWER PROTECTION

²³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>

²⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2392>

²⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>

²⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0575>

²⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:EN:PDF>

²⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:178:0066:0106:en:PDF>

A significant number of EU competences are either directly or indirectly related to the reporting or disclosure of information that is valuable in safeguarding the public interest. Whistleblowing is not limited to one predominant EU policy field, but rather it is related to a range of EU competences. Understood as disclosure of information that is in the public interest, whistleblowing is equally relevant for ensuring environmental protection as it is for revealing corruption in any field (whether public sector or private, on issues as diverse as air transport or a sports company).²⁹ Upon examining the Treaty provisions more closely, the following areas of competence of the EU are relevant for whistleblower protection:

- Article 153 TFEU on social policy
- Article 114 TFEU on the internal market
- Article 325 TFEU on protecting the financial interest of the Union
- Article 191 and 192 TFEU on environmental protection
- Article 168 TFEU on public health
- Article 169 TFEU on consumer protection
- Article 50 TFEU on freedom of establishment
- Article 101 and 102 TFEU on competition and dominant market position
- Article 100 TFEU on sea and air transport

In addition to these specific EU competences, the EU Charter of Fundamental Rights stipulates rights that pertain to whistleblowing. Although these rights cannot serve as a legal basis for the enactment of legislation, they entitle whistleblowers to:

- Article 11 on freedom of expression
- Article 20 on equality before the law
- Article 30 on protection in the event of unjustified dismissal
- Article 31 on fair and just working conditions
- Article 37 on environmental protection
- Article 38 on consumer protection
- Article 47 on effective remedy and fair trial

²⁹ For more detailed arguments regarding the diversity of issues covered by whistleblowing and the added value of EU action see: <https://www.greens-efa.eu/files/doc/docs/c703e0c1e3e0d70f87d3996bf319dc7b.pdf>

While whistleblowing relates to all the EU fields mentioned above, legally a proposal could not equally invoke all of the different Treaty provisions in order to legislate on the matter. Yet, some of these provisions do provide the EU with competences that are sufficient to establish legislation either as a stand-alone provision or in combination with other provisions.

➤ **Article 153 TFEU**

This provision provides the EU with legislative powers to address working conditions and as a result provide workers with protection in variety of issues, including for disclosure of information in the public interest. Applying this provision to whistleblower protection ensures that every working relation in the EU, whether in the private or public sector, would enjoy equal minimum levels of protection in terms of disclosure and therefore ensures the highest level of unity in how reporting should be done in the EU as well as ensuring the highest level of legal certainty because it applies across the board in terms of fields and sectors. While some hesitation may be expressed on applying a provision regarding social policy in the field of whistleblower protection, in the EU practice this provision for example has been applied in the past by the Commission to intervene in fields that were not immediately clearly linked, such as that of migration, and while such intervention was contested at the time by the Member States, it was withheld by the Court.³⁰

➤ **Article 114 TFEU**

This Treaty article provides the EU with legislative powers as far as the realisation of objectives of the internal market are concerned. Unquestionably, public disclosure plays a critical role for a well functioning and competitive internal market, as recognised also by the Commission in its Inception Impact Assessment.³¹ The CJEU has held that the internal market legal basis cannot be used as a legal basis for a measure whose effects on the internal market are only incidental or ancillary to another purpose.³² In this respect, whistleblowing is a core instrument to ensure the functioning of an equal playing field for all companies in all Member States and is

³⁰ Cases 281, 283-285, 287/85 Germany v Commission ECLI:EU:C:1987:351

³¹ http://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_241_whistleblower_protection_en.pdf

³² Case C-155/91 Commission v Council (Waste Directive) [1993] ECR I-939, para 19-21

critical for a culture of corporate responsibility. In fact, the salience of whistleblowing for a more efficient and competitive internal market is already evident through the existing EU regulations and directives that address the internal market and issues of reporting and disclosure provided in Table 1 of this report (above, see also Annex for details).

➤ **Article 83 TFEU**

Article 83 TFEU falls under the chapter of the EU’s shared competences with the Member States regarding criminal matters and it provides powers for the EU to approximate national legislation in relation to enumerated issues. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Article 83 TFEU could enable the EU to impose on Member States to consider a crime the prosecution of individuals engaging into whistleblowing. Such a step under Article 83(1) would have to be limited to cases involving a cross-border element, whereas under paragraph 2 of the same article, it is required that the policy has been subject to harmonisation measures. This provision is utilised to combat failure to implement EU obligations as well as if the aim of the measure is to ensure that the EU policy is fully effective.³³ Considering that there is no current separate EU policy on whistleblower protection at the national level, the applicability of this provision is not foreseeable as a stand-alone provision.

Table 2. Comparing different legal Bases

TREATY PROVISION	POSITIVE ASPECTS	SHORTFALLS
Article 153 TFEU EU competence to legislate on working	Focused on workers and their protection (hence this is most directly linked to the whistleblower and not merely the act of reporting).	It provides for a supportive and complementary competence, whereby the EU legislature may adopt directives containing minimum requirements for

³³ Case C-440/05 Commission v Council ECLI:EU:C:2007:625

<p>conditions</p>	<p>Procedurally: Under Art 154 TFEU the Commission has a duty to consult with European social partners when the Commission initiates (i) a legislative proposal, (ii) in social policy, (iii) for fields as defined in Art 153 TFEU. If the European social partners do not come with a conclusion during the consultation process, the Commission nevertheless retains the right to continue preparing its legislative proposal.</p> <p>Substantively: Protection across the board covering both the public and private sector, which is the main issue that no other legal route thus far considered is able to meet.</p>	<p>gradual implementation, which must avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of SMEs.</p>
<p>Article 114 TFEU</p> <p>EU competence to legislate on internal market</p>	<p>A long series of acts in which the EU deals with non-market values in internal market legislation. The justification is the achievement of non-economic common objectives and this type of justification has been used for harmonisation of national laws and regulations in many policies of the EU (environment, social policy, migration etc).</p> <p>Example of broadly defined justification for an EU act for non-market goal, see Directive 77/187, stating ‘whereas differences still remain in MS as regards the extent of the protection of employees in this respect and these differences should be reduced, whereas the differences can have a direct effect on the functioning of the common market’.</p> <p>Another example is how cultural policy was being developed through internal</p>	<p>No general power to regulate the internal market (see Case 376/98 Germany vs Parliament and Council).</p> <p>Cannot be combined with Article 153 TFEU.</p> <p>Would address only the private sector.</p>

	<p>market. Policy concerns can be pursued through the internal market legislation even when those concerns cannot otherwise be addressed by EU legislation (see Directive 93/7).</p>	
<p>Article 83 TFEU EU competence in criminal law matters</p>	<p>Could provide a strong protection as far as prohibiting prosecution of whistleblowers is concerned.</p>	<p>Specifically relates to criminal law, questionable to what extent it can address other areas of law.</p> <p>Cannot be used as a stand-alone provision for an act that would provide active protection to whistleblowers, it can merely stipulate that prosecution of whistleblowers would be a criminal offence.</p> <p>Questionable if and to what extent it can be combined with other legal bases, especially since this provision is within criminal law.</p>

4. MULTIPLE LEGAL BASES

The EU can rely on multiple legal bases for establishing legislation. Many cases before the Court have given rise to questions about the requirements in order for the legislator to establish a legal act based on multiple legal bases. A more recent restatement of the principles by which the Court rules on these issues is the Case C-155/07 Parliament v Council.³⁴ The gist of the case law is first, that multiple legal bases can only be combined if it is not possible to define one predominant purpose of the measure in question, and second, it is a mandatory requirement that those legal bases are compatible in terms of the prescribed legislative procedure. The Court will look at the predominant aim and content of the measure to decide the legal base. The Court examines the principles on which the measure is based and its ideological content rather than the effects of the measure.³⁵ When more legal bases are used, the Court will apply the so-called ‘centre of gravity’ criterion, i.e. identifying what is the principle aim as opposed to the ancillary objective of the measure. This in turn means that the legislator needs to caution on what could be chosen as the primary aim of the legal act.

What possible legal bases could be combined for legislation on whistleblower protection? Drawing from existing practice of EU laws with multiple legal bases, Article 114 TFEU could be invoked in conjunction with Article 26 TFEU, Art 192(1) TFEU, Art 168.³⁶ The European Commission has opted for these legal bases in the past for issues regarding the internal market and measures that are of a protective nature. Considering the widespread evidence that whistleblower protection is crucial for anti-corruption and ensuring that the market is an equal playing field, it could be imagined that such a legal route could be taken. The addition of environmental protection and public health is also feasible as the EU has a more general obligation to take these aspects into account in all of its policies.

There are no existing examples of combining Articles 153 TFEU, Art 114 TFEU and 192 TFEU. Furthermore, it is questionable whether Art 153 TFEU and Art 114 could be utilised for the purposes of enacting the same legal act when taking into account substantive and procedural limitations and requirements. Regarding

³⁴ Case C-155/07 Parliament v Council ECLI:EU:C:2008:605

³⁵ See Case C-155/91 Commission v Council (Framework Directive on Waste) [1993] ECR I-939

³⁶ See combining Art 114 TFEU and Art 192(1) TFEU: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0028>

substantive reasons, the aims of these provisions differ, although they are not contradictory and it could be argued that an act could combine objectives of social policy and internal market concurrently.

With regard to procedural aspects, in line with case law, several specific aspects should be examined: first, whether there is a predominant purpose of the measure which should hence be based on a single legal basis. Second, if “the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases”,³⁷ but it must be ascertained whether indeed these provisions together would be considered as “indissociable” and whether “each component has to be equally essential to the measure”³⁸ in order for measure to take effect. Thirdly, no dual or multiple legal bases is possible where the procedures laid down for each legal base are incompatible with each other.³⁹ This third requirement in particular gives rise to a challenge in the context of whistleblowing protection because Article 114 TFEU and Article 153 TFEU have differences in their the legislative procedure especially regarding consultations, namely the latter requires consultation of the management and labour in line with Art 154 TFEU.

The emphasis on compatibility of procedures for enacting a measure arises due to the different powers and roles of the EU institutions, particularly the Council and the European Parliament. With regard to the Council these differences would pertain to the required voting (QMJ or unanimity) whereas for the European Parliament this aspect relates to whether the EP is a co-legislator in line with the ordinary legislative procedure or whether a special procedure applies where the EP has merely assenting powers. In line with the Case C-155/07 *Parliament v Council*, it could be argued that the mere fact that procedures are not fully the same would not necessarily lead the Court to rule on them as incompatible as long as the powers of the institutions remain intact or the powers of the European Parliament are not decreased.⁴⁰ If the EU institutions’ powers are not negatively affected, i.e. having less

³⁷ Case C-533/03 *Commission v Council* [2006] ECR I-1025, paragraph 45

³⁸ Case C-155/07 *Parliament v Council* ECLI:EU:C:2008:605

³⁹ Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139, paragraph 14; Case C-338/01 *Commission v Council*, paragraph 57; Case C-94/03 *Commission v Council* [2006] ECR I-1, paragraph 52; and Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, paragraph 57

⁴⁰ See particularly the argument of the Court, para 79: “In contrast to the situation in *Titanium dioxide*, in the circumstances of the present case the use of a dual legal basis consisting of Articles 179 EC and 181a EC would not encroach upon the Parliament’s rights (see, to that effect,

powers due to one provision or more powers due to the other provision, differences *per se* would not seem to be a barrier in combining multiple legal bases. Hence, the procedural differences arising from Article 114 TFEU and Article 153 TFEU are not with regard to the role of the EP and Council, as both provisions foresee an ordinary legislative procedure, but with regard to external consultation. Nevertheless, there is another procedural issue relating to the requirement of Article 153 TFEU for the measures under this article to not impose administrative, financial and legal constraints to small and medium-size undertakings. The crucial difference however is that Article 153 TFEU applies for measures that establish minimum requirements for gradual implementation in the Member States, whereas Article 114 TFEU stipulates powers for the approximations of laws. The latter would deem the combination of these two provisions incompatible.

Case C-94/03 *Commission v Council*, paragraph 54, and *Commission v Parliament and Council*, paragraph 59). The use of Article 179 EC involves greater participation by the Parliament since it provides for the adoption of the measure by the ‘co-decision’ procedure. Moreover, it was not stated before the Court that such a dual legal basis would not be possible, from the point of view of legislative technique”

Annex 1 EU Legislation Relating to Implied Competence

Directive 2008/99 on the protection of the environment through criminal law [2008] O.J. L328/28.

Legal basis is pre-Lisbon equivalent of Art. 192 TFEU

Directive 2009/123 amending Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements [2009] O.J. L280/52.

Legal basis is pre-Lisbon equivalent of Art. 100 TFEU

Regulation 1232/2010 concerning European Union financial contributions to the International Fund for Ireland (2007 to 2010) [2010] O.J. L346/1.

Based on Arts. 175 (economic, social, territorial cohesion) and 352 TFEU

Council Regulation 55/2013 concerning the extension of the scope of Regulation (EU) No 1214/2011 of the European Parliament and of the Council on the professional cross-border transport of euro cash by road between euro area Member States [2013] O.J. L21/1.

Based on Art. 352 TFEU

Council Regulation 216/2013 on the electronic publication of the Official Journal of the European Union [2013] O.J. L69/1.

Based on Art. 352 TFEU

Council Regulation 390/2014 establishing the ‘Europe for Citizens’ programme for the period 2014-2020 [2014] O.J. L115/3.

Based on Art. 352 TFEU

Council Regulation 2015/496 amending Regulation (EEC, Euratom) No 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence [2015] O.J. L79/1.

Based on Art. 352 TFEU

Council Regulation 2015/768 extending to the non-participating Member States the application of Regulation (EU) No 331/2014 of the European Parliament and of the Council establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the ‘Pericles 2020’ programme) [2015] O.J. L121/1.

Based on Art. 352 TFEU

Annex 2 Case Law on the Development of Multiple Legal Bases and the ‘Centre of Gravity’ Test

Case 45/86 Commission v. Council [1987] ECR 1493.

Relevant paragraph: 11.

Case 165/87 Commission v. Council [1988] ECR 5545.

Relevant paragraph: 11.

Case C-300/89 Commission v. Council (Titanium Dioxide) [1991] ECR I-2867.

Relevant paragraph: 10, 17-21.

Case C-155/91 Commission v Council (Waste Directive) [1993] ECR I-939.

Relevant paragraph: 19-21.

Case C-42/97 European Parliament v. Council [1999] ECR I-869.

Relevant paragraph: 36, 38-40, 43.

Case C-376/98 Germany v. European Parliament and Council (Tobacco Advertising) [2000] ECR I-8419.

Relevant paragraph: 59, 84.

Opinion 2/00 Cartagena Protocol [2001] ECR I-9713.

Relevant paragraph: 22-23.

Case C-336/00 Austria v. Huber [2002] ECR I-7699.

Relevant paragraph: 30-31.

Case C-338/01 Commission v. Council (Recovery of Indirect Taxes) [2004] ECR I-4829.

Relevant paragraph: 55-60.

Case C-94/03 Commission v. Council [2006] ECR I-1.

Relevant paragraph: 52-54.

Case C-178/03 Commission v. EP & Council [2006] ECR I-107.

Relevant paragraph: 57-59.

Case C-130/10 EP v. Council (Smart Sanctions) [2012] EU:C:2012:472

Relevant paragraph: 42-48.

Case C-490/10 EP v. Council [2012] EU:C:2012:525

Relevant paragraph: 44-47, 66-74, 79.

Case C-377/12 Commission v. Council (PCA Philippines) [2014] EU:C:2014:1903,
Relevant paragraph: 34, 51-55, 59.

Case C-263/14 EP v. Council (Pirate Transfer Agreement Tanzania) [2016]
EU:C:2016:435
Relevant paragraph: 43-44, 55.

Annex 3 EU Legislation with Combined Legal Bases including Article 114 TFEU

Regulation No 2015/2284⁴¹ repealing Council Directive 76/621/EEC relating to the fixing of the maximum level of erucic acid in oils and fats and Council Regulation (EC) No 320/2006 establishing a temporary scheme for the restructuring of the sugar industry

*Based on Article 42 TFEU, Article 43(2) TFEU and Article 114 TFEU
Combination internal market and agriculture policy*

Regulation No 658/2014⁴² on fees payable to the European Medicines Agency for the conduct of pharmacovigilance activities in respect of medicinal products for human use

*Based on Article 114 TFEU and point (c) of Article 168(4) TFEU
Combination internal market and public health*

Regulation No 1381/2013⁴³ establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020

Based on:

Article 19(2) TFEU = Non-discrimination, providing for ordinary legislative procedure (OLP), excluding harmonisation of the laws of MS

Article 21(2) TFEU = Free movement of citizens, “if action by the Union should prove necessary to attain [objectives in Art 21(1) of every citizens having the freedom to move and reside] and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1”.

Article 114 TFEU = Internal market

Article 168 TFEU = Public health

⁴¹ https://www.fsai.ie/uploadedFiles/Reg2015_2284.pdf

⁴² http://ec.europa.eu/health/sites/health/files/files/eudralex/vol-1/reg_2014_658/reg_2014_658_en.pdf

⁴³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0062:0072:en:PDF>

Article 169 TFEU = Consumer protection

Article 197 TFEU = Administrative cooperation

Regulation No 1286/2013⁴⁴ establishing an action programme to improve the operation of taxation systems in the European Union for the period 2014-2020 (Fiscalis 2020) and repealing Decision No 1482/2007/EC

Based on:

Article 114 TFEU = Internal market

Article 197 TFEU = Administrative cooperation = “The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.”

Annex 4 (Selected) Existing Law based on Article 153 TFEU (and Combined with Other Legal Bases)

Decision (EU) 2016/344⁴⁵ on establishing a European Platform to enhance cooperation in tackling undeclared work

Based only on Art 153(2)

Decision 940/2011/EU⁴⁶ on the European Year for Active Ageing and Solidarity between Generations (2012)

Based only on Article 153(2)

Council Decision 2017/38⁴⁷ on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part

Based on Article 43(2) TFEU, Article 91 TFEU, Article 100(2) TFEU, Article 153(2) TFEU, Article 192(1) TFEU and the first subparagraph of Article 207(4) TFEU, in conjunction with Article 218(5) TFEU.

⁴⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0025:0032:EN:PDF>

⁴⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0344>

⁴⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011D0940>

⁴⁷ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.011.01.1080.01.ENG

Regulation No 1296/2013⁴⁸ on a European Union Programme for Employment and Social Innovation and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion.

Based on Article 46(d) TFEU, Article 149 TFEU, Article 153(2)(a) TFEU and to the third paragraph of Article 175 TFEU

Directive 2013/35/EU⁴⁹ on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC

Based on Article 153(2)

Directive 2014/27/EU⁵⁰ amending Council Directives 92/58/EEC, 92/85/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures

Based only on Article 153(2)

⁴⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1296>

⁴⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0035>

⁵⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0027>