Articles

Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ

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Abstract

Defining competences in EU law has always been problematic, notwithstanding the inclusion since the Treaty of Maastrict of the principle of conferred powers as central to the constitutional character of the EU. Under the principle of conferral, the Union only has those powers actually conferred by the Treaties. However, the concepts of a common market or of 'ever-closer Union' have a conceptual scope that potentially, in effect, negates the principle of conferral. This article argues that the framework of norm conflict offers conceptual insight into the dynamics of determining and limiting EU competence. In particular, it draws on the distinction between *lex specialis* and *lex generalis* to understand different ways of treating competence norms in legal reasoning. Following a discussion of the concept of competence norms, this conceptual framework is applied to two case studies: (1) on the right to strike and (2) the general law of external relations.

A. Introduction

The phenomenon of competence creep and the difficulties of identifying the limits of Community/Union competence have been well noted in the academic literature:[1] "There is a school of thought that no opportunity should be missed of moving the Community caravan forward, if necessary by night marches".[2] The same author goes on to observe:

> "... there was a time when it would have been considered impolite in Community circles to talk about drawing lines at all. That has changed; and I

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[1] See in particular Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14(2) JOURNAL OF PUBLIC POLICY 95 (1994); Stephen Weatherill, *Competence Creep and Competence Control*, 23 YEARBOOK OF EUROPEAN LAW 1, 5-12 (2004).

[2] Alan Dashwood, *The Limits of European Community Powers*, 21 EUROPEAN LAW REVIEW (ELR) 113, 113 (1996).

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> believe the change is healthy, and evidence of the growing maturity of the order."[3]

The exact *overall* extent of Community powers relative to the powers of the Member States was not stated in the Treaty of Rome founding the European Economic Community in 1957.[4] Instead, specific legal bases[5] were set out for particular Community policies. Nor did the Treaty of Rome or the other two founding Treaties address the possible reversibility of the transfer of competence from the Member States to the Communities, now Union. Characteristically, the ECJ asserted irrevocability,[6] but constitutional principle and Member State practice tend not to support that view,[7] a point now made explicit in Article 50 TEU providing for Member State withdrawal. Despite its centrality to the character of the EU,[8] there has thus always been a certain ambiguity about the question of competence.[9]

The Treaty of Lisbon makes some attempt to delineate different types of competences, by distinguishing between those that are exclusive, shared, or complementary.[10] A clearer delineation of, in particular, vertical competence boundaries between the Member States and the Union has been on the political agenda at least since the Declaration of Laeken in 2001.[11] Horizontal competences, *i.e.* between the institutions, have become less prominent as a concern since co-decision has become the norm post-Maastricht, compared to the

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[3] *Id.*, 128.

[4] RICHARD SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW 130 (2009).

[5] The variety of which has been described as an 'archipelago' by former Italian Prime Minister and Foreign Minister Lamberto Dini: CONV 1234/02, 19[t] June 2002, 6, as cited in Stephen Weatherill, *Competence and Legitimacy*, in THE OUTER LIMITS OF EUROPEAN UNION LAW 19 (C. Barnard & O. Odudu eds., 2009).

[6] See, *e.g.* Case 7/71, *Commission v. France*, 1971 E.C.R. 1003, 1018.

[7] See D. Obradovic, *Repatriation of Powers in the European Community*, 34 COMMON MARKET LAW REVIEW (CMLREV) 59 (1997). Articles 10(4)-(5) of the Protocol on Transitional Provisions to the Lisbon Treaty permit the UK to repudiate existing Third Pillar measures: see Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 CMLREV 617, 683 (2008).

[8] In this article, the term 'Community' is used where it is found in existing caselaw and 'Union' is used in more general discussion. For the most part, references are to provisions of the European Community Treaty (ECT) (replaced by Lisbon with the Treaty on the Functioning of the European Union or TFEU) and Treaty on European Union (TEU) pre-Lisbon, as the Treaty of Lisbon has only come into effect since 1 December 2009 and so must caselaw pre-date the changes that Lisbon introduced (the Article numbers as amended by Lisbon are also generally given for ease of reference).

[9] Z.C. Mayer, *Competences – Reloaded? The Vertical Division of Powers in the EU and the new European Constitution*, 3(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (IJCL) 493, 493 (2005), noting it is a recurring issue in EU law.

[10] Article 2 TFEU.

[11] THE FUTURE OF THE EU: DECLARATION OF LAEKEN, document of the Belgian presidency, 15 December 2001, part 11A.

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period after the Single European Act 1986 (SEA). Following the SEA, a variety of different legislative procedures prevailed, according different competences to the institutions and mainly to the European Parliament, thus making the choice of legislative basis and differentiation of competence a matter of practical institutional importance.[12] Horizontal competences are governed by the principle of 'institutional balance' and are outside the scope of this article, which is concerned with the vertical competence relationship between the Member States and the Union.[13]

The greatest vertical challenge to the competence of the Member States came from the two general competence clauses in the Treaties, that relating to the internal market, (ex) Article 95 ECT (now Article 114 of the Treaty on the Functioning of the European Union or TFEU), and the gap-filling competence clause in (ex) Article 308 ECT (now Article 352 TFEU).[14] A tendency toward 'competence creep' can be seen in the extensive use by the Council (of Ministers) and by the European Court of Justice (ECJ) of Article 308 ECT to extend institutional competence beyond that expressly provided for in the Treaties. And although *Opinion 2/94*,[15] discussed further below, represents one of the most explicit articulations by the ECJ of the limits of Article 308, in which the ECJ identified 'the general framework of the Treaties' as the outer boundary to its use, the judgment did not represent a general trend in the caselaw toward restrictive interpretation of competences.

Article 308 ECT/352 TFEU is a residual powers clause allowing the Union to adopt measures necessary for attaining Treaty objectives when no more specific legal basis is available. Despite "reassuring (and late appearing)" words from the ECJ that Article 308 ECT could not be used as basis for widening Community powers beyond the general framework of the Treaty,[16] "... there has been widespread concern, in particular amongst the *Länder* [states of Germany], that this article was used by the Council as a basis for the surreptitious erosion of Member State powers".[17] Prior to Lisbon, Article 308 read as follows:

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[12] Leonor Moral Soriano, *Vertical Judicial Disputes over Legal Bases*, 30(2) WEST EUROPEAN POLITICS 321, 324 (2007).

[13] See generally J-P. Jacqué, *The Principle of Institutional Balance*, 41 CMLREV 383, 384 (2004); Alan Dashwood, *The Institutional Framework and the Institutional Balance*, in 50 YEARS OF THE EUROPEAN TREATIES: LOOKING BACK AND THINKING FORWARD (Michael Dougan & S. Currie eds., 2009).

[14] The German Federal Constitutional Court has noted that Article 308 ECT could be used to extend competence: *Brunner*, BVerfGE 89, 155; [1994] 1 CMLREV 57, para. 210.

[15] *Opinion 2/94 Re Accession of the Community to the European Convention on Human Rights*, 1996 E.C.R. 1-1759.

[16] *Id.*, para. 30.

[17] Gráinne de Búrca & Bruno de Witte, *The Delimitation of Powers Between the EU and its Member States*, in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 216 (Anthony Arnull & Daniel Wincott eds., 2002).

> "If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European parliament, take the appropriate measures."[18]

On the question of whether the requirement for unanimity by the Member States for the use of Article 308 ECT could be thought a guarantee against competence creep and its over use, "The ignoble answer is that there all kinds of ways of bribing and coercing delegations in a minority of one or two [in the Council of Ministers] on a matter to which the unanimity rule applies".[19] Weiler well described the potential scope of Article 308: "... it became virtually impossible to find any activity which could not be brought within the "objectives of the Treaty".[20] This is because of the broad generality with which the Treaty objectives can be described, namely, the achievement of 'ever-close Union' and of a common market.

This article argues that the theory of norm conflict can provide a conceptual framework for a clearer understanding and delimitation of competence in the EU, especially by articulating the significance of the *lex-generalis-lex specialis* distinction in the context of competing competence claims. As a matter of practice, to date, the distinction has not generally been explicitly drawn. Up to 2002, about 700 legislative measures were adopted under Article 308 ECT.[21] Relating this to rules of norm conflict, the institutions, both the Council and the ECJ (the latter in its judgments on the legal basis of legislation), have been quite willing to resort to the *lex generalis* of ex Article 308 ECT in the absence of competence norms constituting *lex specialis*.[22] Article 95 ECT (now Article 114 TFEU), the other most general Treaty competence provision, has also been used extensively by the

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[18] The Treaty of Lisbon modified this by requiring the consent of the European Parliament. Further, compared to Article 308 ECT, the wording of Article 352 TFEU is broader in referring to the objectives of the Union in *toto*, not just to the common market. However, as Dougan notes, this may make little practical difference given the broad reading of Article 308: Dougan, *supra* note 7, 655. Article 352 TFEU also excludes its application to the Common Foreign and Security Policy (CFSP), as well as requiring the Commission to bring proposals to the attention of national parliaments.

[19] Dashwood, *supra* note 2, 124. Dashwood based his comments on his own experience working in the Council Secretariat.

[20] Joseph H.H. Weiler, *The Transformation of Europe* 100(8) YALE LAW JOURNAL (YALE LJ) 2403, 2445-2446 (1991).

[21] *Id.*, 217. Schütze notes that the extensive use of the provisions runs the risk of subverting the idea of enumerated powers: SCHÜTZE, *supra* note 4, 134.

[22] Although Article 308 ECT (now Article 352 TFEU) has hardly ever been articulated officially or in academic discussion as a fallback from *lex specialis*, Dashwood noted that "There has never been any doubt that the absence of a specific legal basis in the Treaty is a legal condition precedent for recourse to Article 235", citing Case 242/87, *ERASMUS*, 1989 E.C.R. 1425: Dashwood, *supra* note 2, 123.

Council.[23] Article 95 ECT provided for the approximation of laws relating to the establishing or functioning of the internal market.[24] For its part, the ECJ expansively interpreted Article 95 in caselaw, of which *Spain v. Council* is probably the high point. The ECJ held there that the harmonization power relative to the internal market in Article 95 could be used to prevent even any *future* obstacles to trade or a potential fragmentation of the internal market.[25] As almost any diversity of national laws could be understood as a potential future obstacle to free movement or to undistorted competition, they could be brought within this framework. On one view, ex Article 308 ECT is broader than ex Article 95 in referring to the 'objectives of the Community', as opposed to the reference in ex Article 95 more particularly to 'the internal market'. However, the internal market itself can be so broadly conceptualized that the potential for competence creep is substantial here too.

The ECJ later qualified its approach to Article 95 in *Tobacco Advertising*,[26] a case that well illustrates diverging approaches to defining competence norms. The ECJ here excluded from the scope of the internal market under then Article 100a ECT (later Article 95 ECT) a Directive prohibiting tobacco advertising:

> "77. The first indent of Article 129(4) of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.
>
> 78. But that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. Indeed, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies.

[23] See de Búrca & de Witte (note 17), 215-216. Unlike Article 308 ECT, Article 95 did not require unanimity in the Council (though as Dashwood, quoted above, indicates, the extent of unanimity as a restraint on Union enterprises of ambition is questionable). See further generally, H.G. Krenzler & C. Pitschas, *Progress or Stagnation? The Common Commercial Policy after Nice*, 6 EUROPEAN FOREIGN AFFAIRS REVIEW (EFAR) 291 (2001); SCHÜTZE, *supra* note 4, 143-151.

[24] See, *e.g.* discussion in SCHÜTZE, *supra* note 4, 143, relates 'establishment' to the elimination of obstacles to trade and 'functioning' to the removal of distortions on competition. Article 114 TFEU now refers to the 'internal market', instead of common market, though the difference seems slight given the scope of the free movement and competition principles.

[25] Case C-350/92, *Spain v Council*, 1995 E.C.R. I-1985, para. 35. See discussion in SCHÜTZE, *supra* note 4, 144-146.

[26] Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419.

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> 79. Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty."[27]

This is an implicit invocation of *lex specialis*: the specificity in the matter of public health of Article 129 ECT (now Article 149 TFEU) could not be circumvented by relying on the more general internal market power in Article 100a/95 to harmonize on purely health-related grounds. *Tobacco Advertising* has been generally interpreted as placing important limits on the Community's harmonization power,[28] yet the full significance of the judgment can arguably only be explained within a framework of norm conflict theory. It is because *lex specialis* has a limiting effect that the case represented a "new judicial wind"[29] in contrast to the *lex generalis* of teleology dis-moored from particular Treaty provisions.[30] *Tobacco Advertising* though is not typical, despite being offered as evidence that the ECJ now takes the limits of competence seriously.[31] For example, in the recent *Kadi* decision, the ECJ held the Community had competence to impose sanctions on individuals, though the most specific Treaty provisions, then Articles 60 and 301 ECT, only related to sanctions with third States.[32] Similarly, the *Viking* and *Laval* decisions represent an important opposing tendency to *Tobacco Advertising* and are discussed in more detail below.

An obvious historical example of extension of Community competence by the ECJ, based on the general scheme of Treaties or principles abstracted from a number of specific Treaty

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[27] This reasoning is in sharp contrast with that which prevailed in *Laval* and *Viking*, discussed further below.

[28] Mayer, *supra* note 9, 501; Dougan, *supra* note 7, 654; SCHÜTZE *supra* note 4, 144-151. Schütze describes the test in *Tobacco Advertising* as one of 'a centre of gravity', 150.

[29] As described by Dougan, *supra* note 7, 654.

[30] Article 352 TFEU, which replaces Article 308 ECT, expressly prevents its use to circumvent specific exclusions of harmonization. It provides in paragraph 3 that '[m]easures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonisation". See SCHÜTZE, *supra* note 4, 150-151, at n. 91.

[31] Mayer, *supra* note 9, 501; Dougan, *supra* note 7, 654.

[32] Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2008] ECR I-6351,paras. 211, 213, 216, 222-227, 229-230. See generally M. Karayigit, *The Yusuf and Kadi Judgments: The Scope of the EC Competence in Respect of Restrictive Measures*, 33 LEGAL ISSUES OF EUROPEAN INTEGRATION 379 (2006); Alan Dashwood, *Article 308 EC as the Outer Limit of Expressly Conferred Community Competence* in Barnard & Odudu (eds.), *supra* note 5, 41-42. Dashwood suggests that the extension of measures from States, as envisaged in Articles 60 and 301 ECT, to individuals, as provided by the contested measures in *Kadi*, amounted to the enhancement of an existing mechanism and thus did not go beyond the general framework of the Treaties. Nonetheless, it might be argued that given the punitive effect of the sanctions, their novelty as legal instruments, and the significant qualitative difference with sanctions imposed on States, a stricter approach to construction might have been warranted. The wording of Article 60 ECT has been broadened under Lisbon to include sanctions against natural persons: see Article 75 TFEU.

provisions rather than either of these general competence clauses, was the Court's creation of the doctrine of parallelism. Under this doctrine, the exercise of an internal Community competence gives rise to external Community competence that pre-empts Member States exercising an equivalent or overlapping competence.[33] Further, the specific Treaty provisions on free movement and the prevention of distortion of competition have also been broadly interpreted. The caselaw that established that non-discriminatory obstacles to free movement came within the remit of the Treaties[34] and the broad reading of 'distortion of competition', which together make up the common market whose objectives Article 308 was to further,[35] has greatly expanded the competence of the EU to the point that it is now difficult to say that any matter is entirely outside of Community/Union competence.[36] Such was the breadth with which specific competences were interpreted, Article 308 ECT may not be considered decisive as a basis for extending competence.

Thus, as one commentator notes: "Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences than those assigned to the Community."[37] Common tax rules, a common contract code, harmonized education systems to ease migration of persons, and a single language are all arguably within the conceptual reach of the overarching principles of free movement and undistorted competition.[38] Yet Article 5 TEU clearly defines the EU as an organization of conferred and not unlimited competence. There thus exists a conflict between the explicit self-

[33] Case 22/70, *Commission v. Council (Re European Road Transport Agreement) ('ERTA'))*, 1971 E.C.R. 263, paras. 17-19, 28-31.

[34] Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, paras. 5-9; Case 120/78, *Rewe-Zentrale AG (Cassis de Dijon)*, 1979 E.C.R. 649, paras. 8-14.

[35] Dashwood suggests that the term 'internal market' should be preferred in Article 235 European Economic Community (EEC) Treaty (as Article 308 ECT was numbered pre-Maastricht) to the "notoriously open-textured concept" of a common market: Dashwood, *supra* note 2, 123. It might be thought that 'internal market', for instance, would seem not to obviously include, on the surface, external relations. However, as the European Court of Justice (ECJ) has drawn a link between internal and external powers through the doctrine of parallelism, the drafting change might not make much difference in practice, though it seems worth making in principle. By comparison, Article 352 TFEU, introduced by the Lisbon Treaty, refers to neither the 'common market' nor 'internal market' and instead simply refers to the 'policies defined in the Treaties', which is possibly broader still than 'common market'.

[36] Weatherill, *supra* note 5, 19-20, noting that the likelihood of preventing obstacles to free movement as a basis for legislative competence "is so lacking in precision and predictability that … one may readily regard the Court's stance as now more concerned with 'competence-enhancing'…".

[37] Gareth Davies, *Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time*, 43 CMLREV 63, 63, 65 (2006). See also PAUL CRAIG, *Competence and Subsidiarity* in EU ADMINISTRATIVE LAW 40-44 (2006); Armin Von Bogdandy & Jürgen Bast, *The Union's Powers: A Question of Competence. The Vertical Order of Competences and Proposals for its Reform*, 38 CMLREV 227, 238 (2002); Soriano, *supra* note 12, 329.

[38] Davies, *id.*

articulation by the EU and by the Member States of EU competence and the reality of institutional practice within the EU system whereby the conceptual pull of the concept of 'internal market' or 'common market' make defining the limits of EU competence very difficult.[39] Remarkably, almost 50 years after the founding of the Union, Mayer notes that at the Convention on the Future of Europe, many delegates may not have understood the scope of the internal market.[40]

This article examines differing or conflicting approaches to defining EU competences in legal reasoning. It first looks at jurisprudential writing on the concept of competence, which helps our understanding of the application and interpretation of competence norms, before discussing norm conflict rules in the context of contemporary legal theory. The general approach is consistent with the idea of the universalizability of legal reasoning: namely, that an *ex ante*, general understanding of the interpretation of competence norms is possible. In other words, it is possible to systematize their interpretation, which does not consist of a 'wilderness of single instances' made on a case-by-case basis.[41] Two case studies are examined on the operation in practice of norm conflicts rules: (1) on the issue of Union competence relating to strikes and (2) on the general law of external relations.

B. Competence as a Legal Concept

Competence as a legal concept, described as important yet elusive by Bulygin,[42] entails a power to change legal relations.[43] Hohfeld described a power as the opposite of a

[39] See, *e.g.* Weatherill, *supra* note 5, 18.

[40] Mayer, *supra* note 9, 511. The Convention on the Future of Europe drew up the text of the un-ratified Treaty Establishing a Constitution for Europe (29th October 2004, CIG 87/2/04 REV), which was the basis nonetheless for much of the Lisbon Treaty.

[41] Suggesting that competence claims will necessarily differ from case to case, see CRAIG, *supra* note 37, 404. See also Soriano, *supra* note 12, 325.

[42] Eugenio Bulygin, *On Norms of Competence*, 11(3) LAW AND PHILOSOPHY (L. & P.) 201, 201 (1992). See further generally on competence norms: HERBERT L.A. HART, THE CONCEPT OF LAW (2nd ed. 1994); Torben Spaak, THE CONCEPT OF COMPETENCE (1994); Torben Spaak, *Norms that Confer Competence*, 16(1) RATIO JURIS (RJ) 89 (2003), Torben Spaak, *Explicating the Concept of Legal Competence*, SOCIAL SCIENCE RESEARCH NETWORK WORKING PAPER (2008), available at < http://ssrn.com/abstract=1014402 > (last accessed 31 May 2010). Generally on competence in EU law, see, *e.g.* Pollack, *supra* note 1; Dashwood, *supra* note 2; Obradovic, *supra* note 7; Krenzler & Pitschas, *supra* note 23; Von Bogdandy & Bast, *supra* note 37; de Búrca & de Witte, *supra* note 17; Gareth Davies, *The Post-Laeken Division of Competences*, 28 ELR 686 (2003); Alan Dashwood, *The Relationship Between the Member States and the European Union*, 41 CMLREV 355 (2004); Paul Craig, *Competence: Clarity, Conferral, Containment and Consideration*, 29 ELR 323-344 (2004); Robin White, *Conflicting Competences: Free Movement Rules and Immigration Laws*, 29 ELR 385-396 (2004); Weatherill, *supra* note 1; Stephen Weatherill, *Better Competence Monitoring*, 30 *ELR* 23 (2005); Mayer, *supra* note 9; Derek Wyatt, *The Growing Competence of the European Community*, 16(3) EUROPEAN BUSINESS LAW REVIEW (EBLR) 483 (2005); CRAIG, *supra* note 37; Karayigit, *supra* note 32; Soriano, *supra* note 12; E. Herlin-Karnell, *Light Weapons' and the Dynamics of Art 47 TEU – The EC's Armoury of Ever Expanding Competences*, 71(6) MODERN LAW REVIEW (MLR) 987-1014 (2008); S. SIEBERSON, DIVIDING LINES

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disability. As a correlative, it entails liability on others to respect the exercise of power. Hohfeld understood it as "one's affirmative 'control' over a given legal relation".[44] Bulygin identified nullity as a distinctive feature of competence, in that an absence of legal competence entails a legal nullity. Hart had distinguished a nullity from a sanction, the latter being a consequence upon failure to comply with a rule.[45] With a power-conferring rule, there is no consequence as such for its breach, just the absence of a defined legal relationship. In this way, competence as a concept can be understood as entailing a fundamental failure of legality, a basic invalidity (though not a sanction), not just, *e.g.* illegality or dis-application of one norm due to a conflict of norms valid on their own individual terms.[46] Invalidity is thus an important consequence of the mis-application of a competence norm, in contrast to other norms. Competence is thus linked to legitimacy in a very direct way.[47]

A central issue in literature on competence is the extent to which competence norms are free-standing norms in their own right or 'fragments' of other norms. Kelsen favored the view that they are fragments of other norms and not fully norms. For Kelsen, a legal norm properly understood was "a primary norm which stipulates the sanction".[48] Hart criticized the idea that orders to officials to apply sanctions embody true norms, of which other norms (such as competence norms) are fragments, as failing to capture the social, rule-like character of laws in general. For Hart, laws are not reducible to the notion of sanctions.[49]

The idea of legal powers or competence rules as fragments of other rules reflects more generally two contrasting approaches to understanding them: first, on a reductive view, competence norms are reducible to other norms, usually, to norms of conduct, *i.e.* a command or a permission.[50] The contrasting position is that of Hart, namely, that

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BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES (2008); D. Eisenhut, *Delimitation of EU-Competences under the First and Second Pillar: A View Between ECOWAS and the Treaty of Lisbon*, 10(5) GERMAN LAW JOURNAL (GLJ) 585 (2009); SCHÜTZE, *supra* note 4; Stephen Weatherill, *supra* note 5; Dashwood, *supra* note 32; Herwig C.H. Hofmann, *Which Limits? Control of Powers in an Integrated Legal System*, in C. Barnard & O. Odudu eds., *supra* note 5.

[43] Anglo-American legal theory tends to use the term 'power' instead of 'competence': Bulygin, *id*, 202.

[44] Wesley Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE LJ 16, 55 (1913-1914).

[45] HART, *supra* note 42, 30-35.

[46] See JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW, 278-326 (2003); Spaak (2003), *supra* note 42, 91-92. Spaak suggests the idea of competence is necessary to understand the concept of validity.

[47] See, *e.g.* Weatherill (2009), *supra* note 42, 17.

[48] HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 63 (1949).

[49] HART, *supra* note 42, 38.

[50] See Bulygin, *supra* note 42, 204.

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competence norms are fully norms in their own right, which cannot be reduced to another type of norm. From the perspective of norm conflict theory, this is important in relating competence norms to other norms. To what extent are they free-standing, as norms that in effect can impose or apply themselves, so that understanding these norms does not depend on the mediation of other norms? Hart's criticism of the association of norms with sanctions seems accurate as failing to capture the full range of legal norms and what is commonly understood as a norm. Thus, the prohibition on murder is itself a norm, rather than, as on the reductive view, the application of a sanction for murder being the norm to which the prohibition on murder is related as 'a fragment'.

Similarly with competence norms, the ability to change legal relations is a norm itself, even though failure to exercise a competence norm does not entail a sanction. Kelsen's (reductive) view "purchase[d] the pleasing uniformity of pattern to which [it] reduce[d] all laws at too high a price: that of distorting the different social functions which different types of legal rule perform".[51] Law is not just about dealing with 'bad men' so as to be related in essence to sanctions: the "law is used to control, to guide, and to plan life out of court."[52] Power-conferring rules are thought of in ordinary social life in different ways than rules conferring duties: power conferring rules "confer a huge and distinctive amenity".[53] However, both would ordinarily be considered norms in a social sense as emphasized by Hart.

Power-conferring or competence norms are distinctive in creating an amenity, *i.e.* the capacity to change legal relations. To understand them more fully though, it is necessary to understand how they relate to other norms. This interaction with other norms is what is relevant for norm conflict theory, understood as including differing interpretative norms. An adequate conceptual understanding of competence or power is needed to understand, for example, systematic interpretation.[54] To assist further with this conceptual understanding, a basic question needs to be further addressed: what exactly constitutes a 'norm'?

Spaak follows Hart & Raz in answering this question by considering a norm to be a reason for action.[55] The idea of reasons for action as providing an account of norms is appealing because it supports the claim that law makes social life to be a supreme reason for

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[51] HART, *supra* note 42, 38.

[52] *Id.* 40.

[53] *Id.*, 41. Bulygin noted he was convinced by Hart's arguments: *supra* note 42, 204.

[54] Spaak (2003), *supra* note 42, 102.

[55] Spaak considers reasons for action or guidance for human behaviour as implicit in Hart's internal point of view: Spaak (2003), *supra* note 42, 93; generally JOSEPH RAZ, PRACTICAL REASONS AND NORMS (2nd ed. 1990).

action.[56] Von Wright understood norms as prescriptions, being norms issued by a norm-giver to one or more norm-subjects because the norm-giver wants the norm-subjects to act in a certain way.[57] In Spaak's view, this understanding of a norm facilitates a distinction to be made between competence norms themselves[58] and norms that confer competence.[59] Competence norms are not themselves full norms, and in this regard they can be compared to merely technical norms: "duty-imposing norms but not competence norms are (complete) norms in the sense they give (complete) reasons for action".[60] Norms that confer competence are addressed to legal officials and impose a duty on legal officials to recognize the conferral and exercise of competence.[61] In reality, it seems these two types of norms (competence-conferring norms and competence norms themselves) will generally coincide. The actual exercise of a competence presupposes the norm conferring the competence. Article 86 TFEU could be considered both a norm conferring competence and a competence norm. It both creates the legal basis for the establishment of a European Public Prosecutor (EPP) (in this respect it is a norm that confers competence on the Member States to do so within the EU legal system), but it also defines the competence of the EPP to some extent (*e.g.* by stipulating its jurisdiction relates to crimes against the financial interests of the Union and providing for extension to cover serious crimes of cross-border concern).

Spaak seems correct in describing competence norms as technical norms or subsidiary norms that are a means to an end. They are created by other competence-conferring norms for specific ends or purposes. Here, there seems a regress as to the exact origin of constitutional competence norms, which perhaps ultimately is determined by brute politics, rather than legal theory. A norm creates a power or competence, but the norm creating the power or competence presupposes a power or norm to create such competence conferral, and so on. Competence norms thus need to be interpreted in light of the constitutional framework determining what the 'origins' and 'ends' are of competence. In other words, there is a chain of validity, one norm creates another norm and each of these norms has to be interpreted.

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[56] Spaak (2003), *supra* note 42, 94.

[57] GEORG H. VON WRIGHT, NORM AND ACTION, 7-8 (1963), discussed in Spaak (2003), *supra* note 42, 92-94.

[58] These are competence norms *simpliciter*, saying that by performing a certain kind of act in a certain kind of situation they can bring about a certain change in legal positions: Spaak, *id.*, 94.

[59] More briefly, Soriano makes a similar distinction between enabling (equivalent to competence conferring norms) and standard-setting norms (equivalent to competence norms): Soriano, *supra* note 12, 323.

[60] Spaak (2003), *supra* note 42, 90.

[61] *Id.* "To exercise a competence is to bring about the intended change of legal positions by performing a competence-exercising act": *Id.*, 90. See further SPAAK (1994), chap. 5, *supra* note 42.

The idea of a chain of validity of competence norms points to a constitutional anchoring of competence norms, which can be related to the principle of conferral in EU law. Differing approaches to interpretation in light of this principle of conferral are possible: should systematic interpretation be related to *lex generalis* or to *lex specialis*? Here, there is a link between originalist interpretation and *lex specialis*, since *lex specialis* logically more closely reflects the will of the law-maker or constituent power. How do specific attributions of competence relate to the more general competence of the EU? For example, specific Treaty provisions on the extent of EU competence in the matter of a right to strike can be, and have been in the caselaw of the ECJ, related to the general competence of the EU to achieve a common market or internal market. Whether *lex specialis* or *lex generalis* should be preferred in a scenario like this can be related to the idea of competence norms entailing a chain of validity back to constitutional norms. The final part of the article seeks to explain how differing approaches of relating to competence norms reflect differing underlying substantive values through a series of case studies.

Related to a conceptual understanding of competence or power is the idea of implied powers. Two broad approaches to this can be identified, and here again different substantive values underlie the differing approaches. Hartley identifies the narrow approach in the following terms:

> "According to the narrow formulation, the existence of a given power implies also the existence of any other power which is reasonably necessary for the exercise of the former; according to the wide formulation, the existence of a given objective or function implies the existence of any power reasonably necessary to attain it."[62]

Thus, the narrow view relies on the idea of necessary implication: the implied power must be considered to exist, indispensably, in virtue of the express power.[63] The wide view is looser: it relates to a reasonable assessment of the achievement of an objective or function. Relating power to the achievement of objectives could be further related to the issue of levels of generality in legal reasoning: how broadly is objective or purpose to be stated?[64] The *lex specialis-lex generalis* distinction thus arises here too. A view of the

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[62] T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW, 106 (5th ed. 2003).

[63] Weiler commented that the extent of the use of ex Article 308 ECT "... was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense": Weiler, *supra* note 20, 2445. See also Dashwood, *supra* note 2, 124, noting that an extensive doctrine of implied powers would not be consistent with the principle of attributed or conferred powers. On the role of implication in law generally, see Lawrence Claus, *Implication and the Concept of a Constitution*, 69(11) AUSTRALIAN LAW JOURNAL 887 (1995), also distinguishing between broad and narrow approaches.

[64] See generally Julius Stone, *The* Ratio *of the* Ratio Decidendi, 22(6) MODERN LAW REVIEW 597 (1959). In an EU context, see Gerard Conway, *Levels of Generality in the Legal Reasoning of the European Court of Justice*, 14(6) EUROPEAN LAW JOURNAL 787 (2008).

constraint applicable here as just one of 'reasonableness' to achieve any Treaty objective gives considerable scope to a doctrine of implied powers. As Ely observed in the context of US constitutional law, 'reasonableness' as a constitutional standard is empty in that (good) reasons and the good exercise of reason can only connect premises with conclusions, but cannot justify the values implicit in the premises.[65] Reasonableness related to a premise as broad as 'ever- closer Union' allows considerable room for development and creativity. A broad approach to implied powers as relating to the 'reasonable' achievement of objectives points to output legitimacy, whereas the narrow approach ties in with rule of law and accountability concerns through clearly delineating public power.[66] The connection with output legitimacy is suggestive only, however: the qualification of 'reasonable', given broad premises, says little about the content of the implied powers that might result, and a claim to output legitimacy would thus be contestable.

Hartley identifies the adoption of the narrow approach to implied powers as early as 1956,[67] and an apparent wide view in the *Germany v. Commission*[68] decision in 1987. However, though not expressed in terms of implied powers, many of the constitutionalizing decisions of the ECJ's development of new constitutional doctrines in the absence of an express legal basis in the Treaties (*e.g.* direct effect, supremacy, parallelism in external relations,[69] State liability) rest implicitly on a broad conception of implied powers.

A further conceptual distinction between types of competence is that between negative and regulatory competences, suggested by Mayer.[70] A negative competence is a power to prevent the exercise of power or competence by another party. A regulatory competence enables the adoption of positive rules stipulating how legal relations are to operate. The distinction is similar to that between a prohibition and a permission. A negative competence is a power to exclude something from being done or a power to prohibit

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[65] JOHN H. ELY, DEMOCRACY AND DISTRUST, 56-60 (1980).

[66] See generally, *e.g.* Weatherill (2009), *supra* note 42, 25-27, linking flexible competences to effective problem-solving. On input legitimacy, see FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE OR DEMOCRATIC?, 9 et seq (1999).

[67] Case 8/55, *Fédération Charbonnière de Belghique v. High Authority*, 1956 E.C.R. 245, 280. See also Case 165/87, *Commission v. Council*, 1988 E.C.R. 5545.

[68] Cases 281, 283-5, 287/85, *Germany v. Commission*, 1987 E.C.R. 3203, where the ECJ held that the Commission had an implied legislative power obliging the Member States to consult and inform it regarding draft measures and agreements in the social field given that the Treaty stated "the Commission shall have the task of promoting close cooperation between Member States in the social field" The ECJ stated the test for the existence of an implied power was that it was indispensable in order to carry out a task assigned by the Treaty (para. 28). See also, *e.g.* Case C-176/03, *Commission v. Council*, 2005 E.C.R. I-7879.

[69] Regarding parallelism, see, *e.g.* Dashwood (1996), *supra* note 2, 125.

[70] Mayer, *supra* note 9, 494, 508-509.

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something, a regulatory competence is a power or permission to positively determine, in a more general and comprehensive way, legal relations and legal change. Analytically or linguistically it may be possible to frame a negative power in positive terms and vice versa. The distinction may thus be one of degree. An example concerns a prohibition on gender discrimination in EU law. Somewhat controversially, the ECJ held that this prohibition extended to employment in the German military, even though EU competence was traditionally considered inapplicable to military and defence matters.[71] Though the EU could not purport to regulate the military in positive terms, a general prohibition on employment discrimination could apply in virtue of EU law. The prohibition could be framed in positive terms as a stipulation requiring the employment on equal terms in the military of men and women. However, it is a very confined and specific type of competence that in no way extends to a general military EU competence, and thus the articulation 'negative competence' seems to more accurately capture its scope. The distinction is useful in EU law, as further indicated below, because the term 'competence' is sometimes confined in EU discourse to legislative or regulatory competence, whereas in ECJ practice, the competence of the EU may often, as Mayer notes, extend further to a negative or prohibitive scope.[72]

C. Norm Conflict Rules

I. The Reasons for Conflicts of Norm

Conflict is to some extent a feature of any legal system. Some general reasons can be identified for this (while other reasons are specific to the EU). Any legal system must contend with competing pulls of unity and specificity,[73] between, for example, hierarchically higher norms and hierarchically lower norms, between more general and more specific norms, and between substantive norms and systemic or secondary norms.[74]

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[71] Case C-186/01, *Alexander Dory v. Bundesrepublik*, 2003 E.C.R. I-2479, discussed *id*. Spaak (2008), *supra* note 42, 11, uses the term regulatory competence in a different sense to mean an exercise of an existing competence norm, as opposed to the creation of a competence norm.

[72] Mayer, *supra* note 9, 494, 508-509, 511.

[73] Gilbert Guillaume, *The Proliferation of International Judicial bodies: The Outlook for the International Legal Order*, SPEECH TO THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY BY HIS EXCELLENCY JUDGE GILBERT GUILLAUME (PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE), 27 October 2004, 4, available online at < http://www.icj-cij.org/presscom/index.php?p1=6&p2=1&pr=85&search=%22nagymaros%22 > (last visited 7 December 2009) and cited in PAUWELYN, *supra* note 46, 1.

[74] *I.e.* the distinction between substantive primary rules and secondary rules that govern how (substantive) primary rules (rules of change, rules of adjudication, rule of recognition) come into being and are changed, enforced, and judged. The distinction is of course attributable to Hart: HART, *supra* note 42, 80-81.

1. The Temporal Element

Some degree of temporal norm conflict, *e.g.* the prosaic example of a contradiction between later and earlier norms, is inevitable in any legal system, even a primitive one. The simple example of a later law repealing an earlier law is an instance of norm conflict, even if its resolution is normally very straightforward through a *lex posterior* maxim.

2. Vagueness and Generality

Vagueness and different degrees of specificity can create ambiguity as to which law is most suitably applicable. A degree of vagueness is inevitable in any legal system in that it is difficult or impossible for a law to comprehensively enumerate in detail every factual situation to which it is applied. Laws therefore have some degree of generality.

3. Complexity of Subject Matter

Legal systems are relatively complex, governing as they do whole societies, or schemes of cooperation between whole societies at the international or transnational level. Further, in most legal systems, there exists more than one source of law, *e.g.* both legislative norms and judicial decisions interpreting those norms. Where more than one source of law exists, some mechanisms for relating differently sourced norms to each other are necessary.

4. Value Pluralism

While social complexity might be thought to vary greatly between legal systems in primitive societies and those in the pluralistic West, the fact of value pluralism is becoming increasingly pervasive in many jurisdictions globally and it is probably now justified to consider it as a cause of norm conflict inherent in contemporary legal systems generally. Value pluralism[75] creates norm conflict in at least two respects: (1) it increases the likelihood of a reflection of disparate values reflected in different laws, resulting in a reduction of overall or global coherence of the law and making more likely conflicts in the event of overlapping laws; (2) it renders more contestable the judicial role in filling in gaps in the law, in that the value choices that are entailed in judicial creativity are less likely to reflect societal consensus. Such value choices are, therefore, more likely to increase unpredictability and the likely differential interpretation and application of the legal framework prior to judicial clarification through gap-filling.

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[75] See generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999); SAMANTHA BESSON, THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW (2006). See also PAUWELYN, *supra*, note 46, 102-103.

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5. Discontinuity in the Identity of the Law-Maker

The lack of continuity of the identity of the law-maker can also result in norm conflict. A single, continuous law-maker is more likely to demonstrate consistency of views and knowledge of the potential of new law to conflict with existing law.

6. Norm Conflict in the EU

In addition to these causes of conflict, which are likely to feature in any legal system, causes specific to the EU can be identified, including; linguistic pluralism,[76] interaction with the Council of Europe system;[77] and, in particular, first, the division of competences (as in any federal or quasi-federal system) between the EU and the Member States and, second, the general relationship of EU law with international law or the continuing tension between distinctive EU supranationalism and inter-governmentalism.

II. The Theory of Norm Conflict Resolution

Norm conflict resolution has long been known as an issue in legal theory and legal reasoning. Of 20th-century legal theorists, Kelsen devoted perhaps most to the question of norm conflict. In contemporary Anglo-American legal theory, however, norm conflict seems surprisingly under-discussed, at least in a direct, explicit way. Nonetheless, the work of a number of leading theorists has at least clear implications for it. Dworkin's general conception of law and legal reasoning emphasizes the capacity of law to achieve a coherent whole in a way that downplays the problem of norm conflict. Famously, Dworkin posits the existence of an ideal judge Hercules who seeks to fashion from existing data of the law the most coherent rendering of its implicit principles to achieve a judgment in a particular case, *i.e.* to fashion the principles that answer the current problem in a way that best fits with the overall morality of the law.[78] However, a difficulty with Dworkin's position is that the standard of coherence or fit is largely indeterminate and under-specified in his

[76] See, *e.g.* Karen McAuliffe, *Enlargement at the European Court of Justice: Law, Language and Translation*, 14(6) EUROPEAN LAW JOURNAL 806 (2008).

[77] See generally Francis E. Dowrick, *Overlapping European Laws*, 27(3) INTERNATIONAL & COMPARATIVE LAW QUARTERLY 629 (1978); Toni Joris & Jan Vandenberghe, *The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?*, 15(1) COLUMBIA JOURNAL OF EUROPEAN LAW 1 (2008-2009).

[78] RONALD DWORKIN, LAW'S EMPIRE, 228-258 (1986). See Lorenzo Zucca, CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA, 12 (2007), noting that both Alexy and Dworkin assume a coherent order of values.

account. Coherence (taken as going beyond a minimal concept of non-contradiction)[79] is a semantically ambiguous concept and is thus to some degree a subjective element.[80] Bertea argues that coherence should thus not be considered as self-sufficient and self-exhaustive source of justification, but a tool suitable for reconsidering the results yielded by other argumentative techniques (*i.e.* it is a secondary type of justification),[81] for example, textual techniques.[82] Recognition that Dworkin's concept of best fit or coherence is not all that useful as a meta-criterion of interpretation is quite widespread in the literature. It has been labeled 'fantastic';[83] Hart suggested that "there are no actual legal systems where this full holistic criterion is used, but only systems like English law and American law where more modest exercises of constructive interpretation are undertaken…";[84] Schlag describes it as "not entirely empty, but useless".[85] And although Dworkin has acknowledged that no human judge could really accomplish the feat of the mythical Hercules, he nonetheless presents it as an operative standard.[86] However, this does not provide a clear answer, since the ideal or standard itself, global coherence, seems itself indeterminate. Among the specific difficulties Dworkin's thesis raises is whether it refers to global or local coherence,[87] the unpacking of values in a coherence analysis,[88] and whether tight or loose coherence matters.[89]

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[79] Joseph Raz, *The Relevance of Coherence*, in ETHICS IN THE PUBLIC DOMAIN, 280 (1994).

[80] Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, 25(3) OXFORD JOURNAL OF LEGAL STUDIES (OJLS) 369-391 (2005) ('Bertea, 2005a'). See also Stefano Bertea, 'Looking for Coherence within the European Community', 11(2) EUROPEAN LAW JOURNAL 154 (2005).

[81] Bertea (2005a), *id.*, 383.

[82] *Id.*, 379, 387.

[83] ZUCCA, *supra* note 78, 5.

[84] HART, *supra* note 42, 268.

[85] Pierre Schlag, *Authorizing Interpretation*, 30(3) CONNECTICUT LAW REVIEW 1065, 1087 (1998).

[86] DWORKIN, *supra* note 78, 285.

[87] Julie Dickson, *Interpretation and Coherence in Legal Reasoning*, STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Summer 2005 Edition), Edward N. Zalta (ed.) URL = < http://plato.stanford.edu/entries/legal-reas-interpret/ > (last accessed 29 January 2008), citing Barbara Levenbook, *The Role of Coherence in Legal Reasoning*, 3(3) L. & PHIL. 355 (1984). For a response (though not citing Leavenbook), see DWORKIN, *supra* note 78, 251-256.

[88] Samantha Besson, *How International is the European Legal Order: Retracing Tuori's steps in the exploration of European legal pluralism*, 5 NO FOUNDATIONS – JOURNAL OF EXTREME LEGAL POSITIVISM 50, 57 (April 2008).

[89] Lawrence Alexander & Kenneth Kress, *Against Legal Principles*, IN *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY*, 313-314 (Andrei Marmor ed., 1995).

Raz comes from the opposite perspective, supposing that law in general reflects a mass of conflicting goals and principles.[90] Raz's way out is to consider that judges should engage in moral reasoning to decide between alternative *prima facie* legal reasons, *i.e.* to resolve *prima facie* norm conflict. Although rejecting global coherence or strong monism whereby law is conceived as speaking with one voice, he is prepared to accept the importance of local coherence, for reasons related to predictability and ordinary rule of law considerations:[91] "Thus, this is another context in which coherence comes in to its own, another context in which precedent acquires a natural force, where there is reason to follow it even in countries which do not have a formal doctrine of precedent."[92] Both Raz and Dworkin seem to converge on an expansive role for the judiciary, Raz explicitly so, Dworkin suggesting the judiciary is bound by the standard of fit or coherence. However, much doubt has been cast as to what extent Dworkin's concept of 'best fit' represents a constraining standard.

A distinction can thus be drawn between a rule-bound approach to norm conflict resolution and a more global or principles-driven approach; ultimately, both Dworkin and Raz seem to converge on the latter. Comparatively, rules have a more conclusive character than principles,[93] their application entails less interpretative input and in that sense 'they do more work'.[94] The rules-principles distinction is well-established in legal theory, though theorists have been less clear as to how legal reasoning can mediate and control or determine the influence of principles in legal reasoning.[95] It is not the case though that these rules of norm conflict entirely exclude questions of value choice in norm conflict resolution, for they themselves rest on certain values or logical preferences. However, once posited and given authoritative status of norm conflict rules in a legal system, these rules tend to pre-empt a variable application of values by different courts or judges, by disposing of the question of choice according to the terms of the rule. This section next examines the values underlying the traditional norm conflict maxims of *lex superior*, *lex*

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[90] J. Raz, *The Role of Coherence*, in ETHICS IN THE PUBLIC DOMAIN, 294 (2nd ed. 1994).

[91] *Id.*, 318-320.

[92] *Id.*, 318.

[93] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 24-25 (rev. ed. 1978). Dworkin also characterizes principles as relating to rights only, preferring the term 'policy' to indicate considerations relating to the general or collective interest (see, *e.g.* id, 90).

[94] Thomas Hickman, *The Substance and Structure of Proportionality*, PUBLIC LAW 694 (2008), 716, referring to proportionality.

[95] See, *e.g.* Alexander & Kress, *supra* note 89, esp. 301-309 (there is no correct way of defining the weight to be attached to legal principles and that legal principles tend to collapse into equivalence to moral principles); Dimitrios Kyritsis, *Principles, Policies and the Power of Courts*, 20(2) CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 379, 383-385 (2007) (policies may justify the restriction of rights and that policies may be the basis of legal rights through creating a legitimate expectation).

specialis, and *lex posterior* and seeks to relate the discussion to the articulation of values in EU law.

A preliminary issue concerns the status of norm conflict maxims as *a priori* valid or alternatively as products of custom[96] and thus contingent and variable. It is submitted that the traditional maxims of norm conflict resolution have similarly universalizable character in that they are, to at least some extent, propositions of logic. This is consistent with what is generally accepted as the universalizable character of legal reasoning.[97] In any legal system, *lex superior* must apply to some extent, for the secondary rules must have a more or less implicit superiority over substantive or primary rules in so far as the former may be used to amend or abrogate the latter. Given the phenomenon of the variability of levels of generality with which to characterise the scope of rules, purposes, and rights in legal reasoning, some application of *lex specialis* seems inevitable to produce some degree of consistency, coherence, and predictability. It does this by privileging the more specific formulation. Similarly, *lex posterior* seems to have a non-contingent status in so far as any legal systems must recognize the possibility to change the law and thus to give preference to a more recent law.[98] What may be more a matter of custom is the extent to which these norm conflict rules have force and weight in legal reasoning, *e.g.* contrast the operation of *lex superior* in a system of constitutional review as opposed to the UK system of parliamentary sovereignty. A final point to note concerns conflict *stricto sensu* and accumulation or overlap of norms: norms may overlap, but not contradict or conflict with each other (*e.g.* in the case of overlapping *lex generalis* and *lex specialis*). Both types of conflict are addressed in this article.[99] Each of these norm conflict rules are now briefly considered in more detail.

1. Lex superior

A *lex superior* rule is perhaps the simplest way of solving norm conflicts in law: when two norms conflict, one has a higher status and thus applies. Its simplicity at a conceptual level as a solution belies the difficulty that may exist in determining if a given norm should have

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[96] Suggesting they are a matter of custom, see John W. Harris, *Kelsen and Normative Consistency*, in, *Essays on Kelsen*, 213 (Richard Tur & William Twining eds., 1986).

[97] On the universal character of legal reasoning in general, see *e.g.* NEIL MACCORMICK, LEGAL THEORY AND LEGAL REASONING, 6, 99 (1978), respectively linking universalizability and rationality to the principle of formal justice that like cases be treated alike; Alexander Peczenik, *Moral and Ontological Justification of Legal Reasoning*, 4(2) L AND P 289, 293–298 (1985); ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION, 191-195, 292-297 (1989); Jeana Sharankova, *The Principle of Universalizability and its Semiosis*, 13(1) INTERNATIONAL JOURNAL OF THE SEMIOTICS OF LAW 29 (2000); Ronald Dworkin, *Hart's Postscript and the Character of Legal Philosophy*, 24(1) OJLS 1, 36 (2004).

[98] See, *e.g.* the discussion of rules of change in HART (note 41), 95-96.

[99] See PAUWELYN, note 46, 161-164.

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superior status. This problem is especially acute in EU law given the strong supremacy claims of the ECJ and the resistance such unqualified supremacy claims have encountered in national constitutional law. In legal theory, the most elaborate explanation of the role of a *lex superior* can be found in the theory of Hans Kelsen.[100] He developed the idea of a chain of norms, each norm itself deriving validity from a hierarchically superior norm until eventually an originating norm could be posited, from which all other norms derived their validity. Kelsen described his theory as pure in that unlike other positivist accounts and natural law accounts it did not relate the theory of law to social facts or to moral postulates.[101]

The ultimate status and application of *lex superior* as a rule of norm conflict is perhaps the most contested of all questions of EU law, especially when presented in sharp terms as a conflict between the ultimate constitutional claims to legitimacy of the EU and the Member States.[102]

2. Lex specialis

The general principle of *lex specialis derog legi generali* ('*lex specialis*')[103] has long been a technique of norm conflict resolution. The principle requires that the more specific rule be applied over and above the more general rule.[104] Emer de Vattel, one of the fathers of modern international law, said *lex specialis* should prevail "because special matter admits of fewer exceptions than that which is general: it is enjoined with greater precision, and appears to have been more pointedly intended".[105] The rationale for the principle can thus be said to have several elements: (a) it reflects a rational principle that whatever is most

[100] On the Kantian background to Kelsen's thinking and his use of the transcendental method, see, *e.g.* Stanley Paulson, *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, 12(3) OJLS 311 (1992).

[101] See, *e.g.* Hans Kelsen, *The Pure Theory of Law, its Method and Fundamental Concepts*, 50 LAW QUARTERLY REVIEW (LQR) 474 (1934) and 51 LQR 517 (1935) (perhaps a counter-intuitive use of the term 'pure' in disconnecting it from morality).

[102] In particular, see the well-known judgments of the German Federal Constitutional Court *Wüensche Handelsgesellschaft*, 1987 3 CMLREV. 225; *Brunner v. European Treaty*, 1994 1 CMLREV. 57; *Lisbon Treaty Case*, BVerfG, 2 BvE 2/08, judgment of 30th June 2009, available at: <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html > (in English, last accessed 22 January 2010).

[103] The term '*jus singulare*' from Roman law is sometimes also used: see, *e.g.* FERDINAND MACKELDEY, ROMAN LAW (trans by MA. Dropsie) (1883), secs. 196-197, cited in Hohfeld, *supra* note 44, 38.

[104] The principle is expressed in Article 55 of the *Articles on State Responsibility adopted by the International Law Commission in 2001*, UN GAOR, 56th Sess, Supp No 10, 43, UN Doc A/56/10 (2001).

[105] EMER DE VATTEL, LES DROITS DES GENS OU PRINCIPES DE LA LOI NATURELLE (1758) (reprinted 1916), Liv. II, Chap. VII, para. 316.

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specifically stipulated is more wished for by the law-maker or States; (b) it contributes to the efficacy of law by (i) removing the need for more *ad hoc* exceptions to the general rules of responsibility or liability and (ii) allowing for greater precision; and (c) in transnational law, it is an expression of State sovereignty, in that it permits States to adopt their own agreed rules for responsibility between them.[106]

Though there is a clear rationale for the rule in that it logically provides a clearer way of expressing the intention of the law-maker, some issues need further examination: in particular, how far does the rule go? In other words, how to determine the rule's specificity? This is related to the more general problem of levels of generality in legal reasoning. The same text might permit of more than one characterization, at differing levels of generality. For example, does a provision on the payment of reparation only relate to money or does it extend to dispute settlement in general, *e.g.* if a provision stipulates that reparation shall be the subject of an arbitral mechanism? However, the principle of *lex specialis* seems to answer this potential problem itself, by indicating the most specific level of generality is the appropriate one. This can be given a determinate content in practice by looking to the most relevant and specific legal tradition.[107] Thus, two conceptions of *lex specialis* might be identified:

i. A narrow understanding, as a straightforward conflict rule: if a specific rule does apply, and so does a general one, *and* the two conflict, the more specific rules is to be applied. The more specific rule has a restrictive effect, since application of general principles tends to permit supplementation or extension of specific rules;

ii. In the event of accumulation only (*i.e.* there is no conflict between a general and a more specific norm), a more general understanding by which *lex specialis* is an interpretative consideration, and its rationale as noted above, relates to the recovery of the intention of the law-maker, and which entails looking to the most specific relevant legal tradition when interpreting ambiguous clauses or concepts. It is important to note that the application of

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[106] The International Court of Justice has recognized the principle in a number of cases: *Hungary v. Slovakia ('Gabčíkovo-Nagymaros Project')*, ICJ Reports 1997, para. 12, holding a treaty to be *lex specialis* relative to the law on State responsibility; *Nicaragua v. US (Military and Paramilitary Activities In and against Nicaragua) (Merits)*, ICJ Reports 1986, para. 274, describing treaties as *lex specialis* relative to custom. The ECJ has also recognized the principle explicitly in a range of cases, typically in the case of secondary legislation: see *e.g.* Case C-444/00, *Mayer Parry Recycling*, 2003 E.C.R. I-6163, paras. 51 and 57, where the Court held that "Directive 94/62 must be considered to a special provision (a *lex specialis*) vis-à-vis Directive 75/442, so that its provisions prevail over those of Directive 75/442 in situations which it specifically seeks to regulate." See also, *e.g.* Case C-252/05, *R (Thames Water Utilities Ltd.) v. Bromley Magistrates' Court (Interested party: Environment Agency)*, judgment of 10 May 2007, paras. 39-41 (where the validity of *lex specialis* was recognized but held not to apply to the provisions in issue). It recognised *lex specialis* implicitly in interpreting the EC Treaty in Case C-376/98, *Tobacco Advertising*, *supra* note 26.

[107] See generally LAWRENCE TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1988), 21-23; Conway, *supra* note 64.

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lex specialis excludes *lex generalis*, otherwise *lex specialis* might be the first stage of the reasoning but would be eclipsed or superseded by (an interpretation based on) *lex generalis*.[108]

A feedback effect may take place if *lex specialis* is consistently applied that may minimize legislative inconsistency: if courts systematically adopt *lex specialis*, the law-maker may also become attuned to the principle and the need for legislation to deliberately reflect it.

3. Lex posterior

Lex posterior derogat lege priori ('*lex posterior*') requires that the most recent enactment have priority over earlier enactments. As with *lex specialis*, it reflects a rational principle: that which is willed most recently is more greatly willed. *Lex posterior* can be said to arise usually through inadvertence by the law-maker, since it can be supposed that a law-maker will not deliberately or knowingly have enacted or accepted the continuing enactment of contradictory laws. It can thus be supposed that a later law will normally explicitly repeal an earlier law that it contradicts. For reasons of practicality, it is not always possible to achieve this, given the sheer number of rules in any legal system and the regular need for new laws, meaning that a fully comprehensive and exhaustive examination of all existing laws is not always feasible when a new law is enacted and in any case might still err by omission.

A legal system which has no means of prioritizing between successive competing and contradictory norms is unreasonable and impossible to comply with. An obvious limitation on *lex posterior* is that a subsequent law cannot derogate from a prior norm at a higher level in the legal hierarchy of sources, in which case *lex superior* prevails. The principle is relatively unproblematic except when it applies to laws at the same level of legal hierarchy, where the first law deals with much more important matters and implied repeal or implied derogation by a later law dealing with less important matters it is difficult to attribute this to the law-maker. Given the hierarchy of sources in EU law, where the Treaties are in effect the equivalent of a superior constitutional norm, this problem does not really arise (though it does arise, *e.g.* in the UK,[109] which lacks a formal distinction between constitutional and ordinary laws).

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[108] INTERNATIONAL LAW COMMISSION/MARTII KOSKENNIEMI, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, A/CN.4/L.682, 13th April 2006, paras. 89-92. For a contrary view, see PAUWELYN, *supra* note 46, 410-412.

[109] The issue has not yet been squarely confronted by the House of Lords (now the Supreme Court), but the Administrative Court has suggested that a later, ordinary or 'non-constitutional' Act of Parliament can only repeal an earlier Act of Parliament of a constitutional nature by express repeal: *Thoburn v. Sunderland City Council*, 2002 EWHC 195 (Admin), paras. 60-67 (per Laws LJ.).

D. Conflicts of Competence Norms in the EU and the Principle of Subsidiarity

Consistent with a tendency to adopt a pro-integration interpretation in questions of competence, the ECJ has made limited use of the principle of subsidiarity,[110] which was intended it seems to counter an assumption that integration of competences was necessarily desirable as an end in itself.[111] Introduced by the Treaty of Maastricht in 1992, the principle requires, in essence, that it must be demonstrated that action can be better achieved at Community or Union level to justify the exercise of competence.[112] It is concerned with the *exercise*, rather than the existence of competence, and only applies to non-exclusive powers.[113] In *Germany v. European Parliament and Council*,[114] the Court held that it was not necessary of Community measures to refer to the subsidiarity principle. In a later decision, the Court set a threshold of review that would render the subsidiarity principle of very limited legal significance as a limit on Community or Union action, by suggesting that a diversity of national rules could of itself create barriers to the common market and that harmonization thus satisfied subsidiarity:

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[110] Soriano, *supra* note 12, 331-332; PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS (4th ed. 2008), 105.

[111] See Wyatt, s*upra* note 42, 487-488, criticizing the ECJ for thus being selective about the constitutional values it promotes.

[112] Article 5(3) EU Treaty:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or regional level or local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at Union level".

Article 5(3) TEU also refers to Protocol on the Application of the Principles of Subsidiarity and Proportionality. An equivalent clause was included in the Single European Act 1986, inserting Article 130r(4) EEC Treaty, specifically for environmental matters. See SCHÜTZE, *supra* note 4, 248.

[113] See Obradovic, *supra* note 7, 77-78. A very large body of literature has developed on subsidiarity and the following list refers to the more frequently cited and/or more recent contributions: *Theodore Schilling, Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously*, NEW YORK UNIVERSITY JEAN MONNET WORKING PAPER NO. 10/1995 (1995); Gráinne de Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36(2) *Journal of Criminal Market Studies* 217 (1998); Andreas Føllesdal, *Subsidiarity and Democratic Deliberation*, ARENA WORKING PAPERS NO. 21/99 (1999); ANTONIO ESTELLA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE (2002); Nick Barber, *The Limited Modesty of Subsidiarity*, 11(3) *ELJ* 308 (2005); Matthias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union*, 12(4) *ELJ* 503 (2006); Davies, *supra* note 37; Ester Herlin-Karnell, Subsidiarity *in the Area of EU Justice and Home Affairs Law – A Lost Cause?*, 15(3) ELJ 351 (2009). See further references in SCHÜTZE (2009), 244, n. 7.

[114] Case C-233/94, *Germany v. European Parliament and Council*, 1997 E.C.R. I-2405, paras 26–28.

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> "With regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another, they may constitute, as is noted in the fifth recital in the preamble to the PPE Directive, a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature."[115]

However, as almost any diversity of national rules could be conceptualized as a potential obstacle to a common market, on this approach, harmonization is almost necessarily rendered consistent with subsidiarity at a conceptual level.[116] Amongst academic analyses, Estella's assessment is consistent with the view that subsidiarity does not permit of a clear allocation of competence between different levels:

> "The functional interconnection between regulatory areas... makes the task of establishing clear dividing lines difficult. Even in those areas in which there seem to be clear reasons in favour of national, or even regional or local regulation ... it will always be possible to argue that due to the close relationship between these areas and the development of the single market, some Community intervention will always be necessary."[117]

Subsidiarity is not a straightforward or simple concept. However, the ECJ could adopt some threshold of scrutiny, such as a requirement for reasons or justification for the exercise of Union competence going beyond an assertion that national divergences of laws are necessarily less compatible with the common market than harmonization.[118] Kumm has proposed the following layered series of rule-like criteria to form a specific test to give

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[115] Case C-103/01, *Commission v. Germany*, 2003 E.C.R. I-5369, paras. 46-47. Similarly, see Case C-491/01, *R v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd.*, 2002 E.C.R. 1-11453, paras. 177-185; Case C-154/04, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd. v. Secretary of State for Health*, 2005 E.C.R. I-6451, paras. 106-108.

[116] As noted by, *e.g.* Soriano, *supra* note 12, 331; SCHÜTZE, *supra* note 4, 254, describing this line of reasoning by the ECJ as an 'ontological tautology'. This general point was made by the ECJ itself in *Tobacco Advertising* in relation to the scope of Community competition law, where it observed that if any potential impact on competition was enough to bring a matter within the competence of the Community, its "legislative competence would be practically unlimited": Case 376/98, *Germany v. Parliament*, *supra* note 26, paras. 106-107. Following Case C-300/89 *Commission v. Council Titanium Dioxide*, 1991 E.C.R. I-2867, para. 23, the ECJ said such an impact must be 'appreciable': Case 376/98, *Germany v. Parliament*, *id.*, para. 106. The decision in *Kadi* seems open to the criticism of not articulating how the appreciable impact standard applied to the inclusion of sanctions against individuals under the First Pillar as an internal market issue: see, Joined Cases C-402/05 P and C-415/05 P, *Kadi, supra* note 32, paras. 228-231.

[117] Estella, *supra* note 113, 114-115.

[118] See, *e.g.* CRAIG, *supra* note 37, 426-427.

teeth to the principle as a tool of judicial review: federal or Union intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of Member States' regulatory autonomy.[119]

Kumm's approach seems to have the advantage of structured specificity through factoring in the importance of Member State autonomy as a constraining consideration. Proportionality on Kumm's test is related to a more empirical factor of jurisdictional suitability, *i.e.* which jurisdiction is best suited to exercising competence. It is not about weighing incommensurable qualities against each other, as is the case with proportionality as a tool of the definition of rights and of their limitations.[120] The more empirical jurisdictional context of proportionality as an element of subsidiarity can be procedurally supported by requiring hard evidence of jurisdictional suitability. By requiring competence claims to be weighed against Member State autonomy, a presumption is created against the exercise of competence at a higher level and an empirically-bound burden of proof to justify any higher competence claim. Kumm's approach thus conceives of subsidiarity as having significant exclusionary force because a competence claim must be presented as the optimal solution to a collective action problem: "It excludes as besides the point, for example, arguments concerning what the Court of Justice calls the *effet utile* of furthering integration", because integration is no longer an end in itself.[121]

E. Case Studies: (1) An Example from 'Social Europe', (2) External Relations

I. An Example from 'Social Europe'

Although explicitly economic in orientation at the Treaty of Rome, what is now the Union always had since its founding at least some competence in what can be considered 'social Europe',[122] through the inclusion of the provision for equal pay for equal work. This

[119] Kumm, *supra* note 113. See also Davies, *supra* note 37, 76-77, noting that the Commission's application of subsidiarity does not give any explicit consideration to national autonomy.

[120] Kumm, *supra* note 113, 524.

[121] *Id.*, 520.

[122] See generally, recently, *e.g.* ANTHONY GIDDENS, PATRICK DIAMOND & ROGER LIDDLE, GLOBAL EUROPE SOCIAL EUROPE (2006); BRIAN BERCUSSON, EUROPEAN LABOUR LAW (2nd ed. 2009), 5-12; Christian Joerges & Florian Rödl, *Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in* Viking *and* Laval, 15(1) *ELJ* 1-2 (2009), describing 'Social Europe' as "the ensemble of European social and labour law and policy and social rights.... A wide and opaque field...".

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provision was broadly interpreted by the ECJ to further gender equality[123] and was significant more generally in developing a sense of progressive legitimacy for the Community. This section considers a more recent development in the social field, namely, the question of differing approaches to competence norms in the area of strike action by employees within the Union.

In *Viking*[124] and *Laval*,[125] the ECJ brought aspects of employment law within the scope of the free movement principles and thus within the competence of the EU, despite the limitation on Union competence contained in the EC Treaty on the issue of strikes. Article 137 EC Treaty provided for the introduction of directives on, *inter alia*, working conditions, information and consultation of workers, the representation and collective defence of the interests of workers and employers, and equality at work between men and women. The text of Article 137(5) ECT (now Article 153(5) TFEU) stated specifically that its provisions shall not apply to pay, the right of association, the *right to strike* or the *right to impose lock-outs*. Article 137 here can be understood as *lex specialis* indicating the nature of Community competence in labour and employment law. As noted above, however, the principle of free movement (and the principle of undistorted completion) has the conceptual potential to conflict with any rules demonstrating national diversity in a way that would restrict free movement (and almost any diversity of national rules can be understood as a restriction on free movement in the abstract).

This conceptual potential[126] is reflected in the following passage from *Viking*:

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[123] See Case 80/70, *Defrenne v. Belgian State* ('*Defrenne I*'), 1971 E.C.R. 1-445; Case 43/75, *Defrenne v. SABENA* ('*Defrenne II*'), 1976 E.C.R. 455; Case 149/77, *Defrenne v. SABENA*, 1978 E.C.R. 1365 ('*Defrenne III*') interpreting Article 119EEC Treaty (now Article 157 TFEU).

[124] Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, 2007 E.C.R. I-10779. The facts concerned collective action taken by a Finnish trade union and by the International transport Workers' Federation against a Finnish ferry operator, which reflagged a vessel from Finland to Estonia in order to reduce labour costs. The ECJ held that whether such a restriction on the freedom to provide services could be justified in the circumstances was matter for the national court (*id.*, para. 81 onwards) according to the test established in previous caselaw for such restrictions (*id.*, para. 75).

[125] Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareföbundet*, 2007 E.C.R. I-11767. The facts concerned collective action taken by a Swedish trade union against a Latvian company, which had a Swedish subsidiary to which workers were posted to provide a building service in Sweden, in an attempt by the trade union to enforce the provision of a Swedish collective agreement concerning minimum pay. For academic discussion of *Viking* and *Laval*, see, *e.g.* Anne C.L. Davies, *One Step Forward, Two Steps Back? The* Viking *and* Laval *Cases in the ECJ*, 37(2) INDUSTRIAL LAW JOURNAL 126 (2008); Alicia Hinarejos, *Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms, 8(4) HUMAN RIGHTS LAW REVIEW 714 (2008); Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union – The* Laval *and* Viking *Case before the ECJ*, 9(2) GLJ 125-161 (2008); Rebecca Zahn, *The* Viking *and* Laval *Cases in the Context of European Enlargement*, 3 WEB JOURNAL OF CURRENT LEGAL ISSUES (2008); and from a constitutional perspective, Joerges & Rödl, *supra* note 122.

[126] The scope of free movement has also recently become a point of contention in the context of the rights of spouses of EU citizens from third countries: see, *e.g.* Steve Peers, *Free Movement, Immigration Control and Constitutional Conflict*, 5(2) EUROPEAN CONSTITUTIONAL LAW REVIEW 173 (2009).

> "... In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member State's are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law..., even if, in the areas which fall outside the scope of the Community's competence."[127]

In effect here, the Court stated that EC law may have effect even outside the scope of Community competence. This, conceptually, seems contradictory. The application of EU law changes legal relations, and it makes little sense, if the term competence is to have the specific meaning generally attributed to it in legal reasoning, to say that the requirement to comply with Community law does not involve competence. The change in legal relations here related to the validity of the claimed right to strike or otherwise. In Hohfeldian terms, this amounts to a power or its synonym, competence (or to use the distinction drawn by Mayer, the ECJ is really saying that the EU has a negative competence, even though it does not have a regulatory one).

The passage above from *Viking* is clearly different in approach to that quoted above from *Tobacco Advertising*, where the ECJ noted that if any impact on competition was sufficient to render national rules *rationae materiae* within Community competence, the Community legislature's competence would be unlimited[128] and the ECJ thus set a threshold of appreciable effect or impact on competition to engage Community competence.[129] The ECJ could have held similarly in *Viking* and *Laval* that a substantial negation of free movement was required before the right to strike could be limited by Community provisions, but as the judgment stands, it is difficult to conceptualize the limits of Union competence now in labour and employment law.[130] The effect of the ECJ decision in *Laval* was to prevent Sweden from permitting trade union action in order to pressure an employer to provide a minimum wage greater than that provided for by Community secondary legislation,[131]

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[127] Case C-438/05, *Viking*, *supra* note 124, paras. 39-40. See also the Opinion of Advocate General Maduro in *Viking*, at paras. 23-28; Case C-341/05, *Laval*, *supra* note 125, paras. 87-88.

[128] Case 376/98, *Germany v. Parliament*, *supra* note 26, paras. 106-107. See, *e.g.* Dougan, *supra* note 7, 654, referring to the 'new judicial wind' on competence issues in light of *Tobacco Advertising*.

[129] Case C-376/98, *Germany v. Parliament and Council*, *supra* note 26, para. 66.

[130] Criticising the vagueness of the ECJ criteria in *Laval* and *Viking*, see Zahn, *supra* note 124.

[131] Case C-341/05, *Laval*, *supra* note 125, para. 70.

which does not obviously seem to entail a substantial impairment of free movement in general.[132]

The reasoning in the *Albany*[133] case on competition, rather than free movement, is also in contrast with that in *Viking* and *Laval* concerning the exclusion of strikes or collective action from the scope of the common market. In *Albany*, strikes were held to be excluded from the scope of Community competition law. Advocate General Maduro in *Viking* sought to distinguish the reasoning of the ECJ in *Albany*:

> "Moreover, the underlying concern in *Albany* appears to have been to avoid a possible contradiction in the Treaty. The Treaty encourages social dialogue leading to the conclusion of collective agreements on working conditions and wages. However, this objective would be seriously undermined if the Treaty were, at the same time, to prohibit such agreements by reason of their inherent effects on competition. Accordingly, collective agreements must enjoy a 'limited antitrust immunity'. By contrast, the Treaty provisions on freedom of movement present no such risk of contradiction, since, as I pointed out above, these provisions can be reconciled with social policy objectives."[134]

This difference identified between the scope of the competition and free movement principles here appears to be that the bringing of strikes or collective action within the competition principle would automatically render them unlawful, whereas the scope for exceptions under free movement prevents this overreach. This presents *Albany* as an attempt to prevent a systemic conflict. However, this reasoning would be more persuasive if Article 81 EC Treaty (now Article 101 TFEU) on competition competence permitted of no exception, whereas it does provide for exceptions relating to, *inter alia*, "improving the production or distribution of goods or to promoting technical or economic progress". The right to strike could be considered to come within the concept of economic progress, since it relates to the welfare of workers which could be considered a prerequisite for such

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[132] Case C-341/05, *Laval*, id, the ECJ held that free movement principles might legitimately be restricted by the fundamental right to strike (para. 57), but that "... however, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective actions forms cannot be justified with regard to such an objective" (para 108). When such an objective could have justifying force is unclear. Compared to *Viking*, the ECJ decision in *Laval* seems to leave national courts with less autonomy or discretion in balancing the free movement principle with legitimate exceptions (*e.g.* compare para. 65 in *Viking*).

[133] Case C-67/96, *Albany*, 1999 E.C.R. I-5751, paras. 59-64. The facts concerned a collective agreement between organisations representing employers and workers setting up a sectoral pension fund to which affiliation was made compulsory.

[134] See para. 27 of the Opinion of Advocate General Maduro.

progress.[135] On this view, *Albany* does not present a different problem of conflict to *Laval* and *Viking*.

The caselaw thus reflects differing approaches to the *lex-generalis-lex specialis* distinction. The ECJ does not, however, as a rule, explicate its judgments in these terms (though it occasionally refers to *lex specialis* in the context of secondary legislation). Norm conflict is thus not explicit. The practical importance of the distinction is apparent from the very different conclusions that can result from its application or not. Applying *lex specialis* in *Viking* and *Laval*, *i.e.* Article 137(5), would have permitted the strike action. The inarticulacy in the caselaw is perhaps strategic. Failing to make explicit interpretative assumptions makes inconsistency less readily apparent, thus facilitating judicial choice and discretion. Greater articulacy on these matters would represent a type of judicial accountability by increasing the burden of persuasion when different cases take inconsistent approaches to the question of delimiting competence norms. The application of *lex generalis* in *Viking* and *Laval* seems clearly open to the criticism of denuding the principle of conferral of any significance, apart from the conceptual confusion as the use of the term 'competence' in the judgments. Even the express exclusion of Union competence by the Member States can be circumvented through the encompassing scope of the free movement principles.[136]

Joerges & Rödl have recently argued that supranational conflict of laws provides a framework for understanding the EU legal system. Their work bears out the potential for conflict as a lens for analysing the dynamics of EU law (although their approach is a broader contextual account of EU law and does not focus on the theory of norm conflict in terms of traditional norm conflict maxims such as *lex superior* and *lex specialis*). On *Laval* and *Viking*, they note the fundamental character of the conflict between the economic freedoms envisaged in the Treaties and national constitutional orders:

> "… [European particularity] was underlined at the beginning, namely the sectoral decoupling of the social from the economic constitution – and the difficulties involved in the establishment of a European *Sozialstaat*. The ECJ's argument implies that European economic freedoms, rhetorically tamed only by an unspecified social dimension of the Union, trump the labour and social constitution (*Arbeits* and *Sozialverfassung*) of a Member State. In view of the obstacles to the establishment of a comprehensive European welfare state, the respect for the common European legacy of *Sozialstaatlichkeit* seems to require both the acceptance of European diversity and judicial self-restraint

[135] For a broad view as to the scope of Article 81 EC Treaty, suggesting that factors other than purely economic in the narrow sense should be considered relevant, see RICHARD WHISH, COMPETITION LAW (5th ed. 2003), 152-155.

[136] See, e. g. Joerges & Rödl, *supra* note 122, 17-18, criticising the decision on this ground and noting that Advocate General Mengozzi negated too the effects of Article 137(5) ECT.

> whenever European economic freedoms come into conflict with national welfare state traditions. … [The ECJ] is not legitimised to reorganise the interdependence of Europe's social and economic constitutions, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*."[137]

The approach in the present work suggests adding to this analysis by explaining what occurred at the level of legal reasoning to result in the judgments in *Laval* and *Viking*, which was to give priority to *lex generalis* of free movement over the *lex specialis* of the exclusion of the right to strike from Community competence. What this offers is an understanding of how future such cases might be decided. In other words, the potential for results like *Viking* and *Laval* that seem to overcome the principle of conferral can be avoided where the *lex specialis* principle informs legal reasoning. As mentioned, the nature of EU competence as revealed in *Viking* and *Laval* could be considered a negative competence: the EU could not regulate generally how strikes were to operate in the Member States, but it could prohibit their use in particular instances, namely, where strikes inhibit free movement between Member States. This can suggest how future Treaty amendments might more effectively delimit EU competence, by expressly stating, for example, that 'no EU law may have the effect of restricting the right to strike'.[138]

A final comment concerns subsidiarity. There was no discussion in the judgments of the cost or weighing of Union competence relative to Member State autonomy on the matter of industrial action. As Joerges & Rödl note, strikes and industrial action are part of the delicate balance of social welfare at the Member State level. The Union, in contrast, lacks the sense of a *demos* that would enable the development of a European-wide welfare system.[139] That points toward caution and restraint in any claim for Union competence and would suggest a lack of empirical support for the jurisdictional suitability of the EU in industrial relations.[140]

I. The General Law of External Relations[141]

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[137] Joerges & Rödl, *supra* note 122, 18.

[138] Currently, Article 153(5) TFEU (ex Article 137(5) ECT) states that "The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

[139] Joerges & Rödl, *supra* note 122, 15, and referring to "European usurpation of Member States' labour constitutions".

[140] Another significant effect of *Laval* and *Viking* was to extend horizontal direct effect to trade unions: see ibid, 13-15; Hinarejos, *supra* note 125, 722.

[141] This section is concerned with external relations arising from what was previously the Community Pillar, rather than with the CFSP. For recent discussion of the boundary line between the CFSP and general external relations pursuant to the common market, see *e.g.* Eisenhut, *supra* note 42; Herlin-Karnell, *supra* note 113.

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The role of the ECJ has been especially central in the development of the Union's external relations law, and this section examines some of the leading judgments of the Court on the general power of the Union in external relations. The ECJ has been instrumental here chiefly through the development of the doctrine of parallelism, whereby it held that the exercise of an internal Community competence gave rise to external Community competence that pre-empted Member States exercising an equivalent or overlapping competence, *i.e.* that Community competence could be exclusive.[142] The founding decision in *ERTA* on the parallelism doctrine was one that went considerably beyond the text of the Treaties, as is apparent from the judgment:

> "12. In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy – a category into which, essentially, the AETR falls – one must turn to the general system of Community law in the sphere of relations with third countries.
> ...
> 17. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."[143]

In these passages, the ECJ considered that the absence of express provisions conferring a general international legal capacity or power to conclude international agreements did not prevent a conclusion it held such a power. Systemic arguments then provided a basis for the conclusion of the Community general external power. The Court decisively established the significance of its ruling, concluding that this implied power was exclusive and pre-empted that of the Member States where common rules were adopted (instead of concluding, for example, that its general treaty-making power was concurrent, as suggested by the Commission[144]). Neither the existence nor the exclusivity of this treaty-making power with third countries was expressly to be found in the text. There were some textual contra-indications in that the express attribution of treaty-making powers to the Community in specific matters may be taken to imply the exclusion of such a general

[142] Case 22/70, *ERTA, supra* note 33, paras. 17-19, 28-31. The Court also held in *ERTA* that the implied external competence entailed by the doctrine of parallelism could arise where the Community had not yet exercised any internal competence if Member State action could place in jeopardy or undermine the Community objective sought to be attained, although it seemed to place more weight on the latter requirement in *Opinion 1/94 Re WTO Agreement*, 1994 E.C.R. I 5267.

[143] Case 22/70, *ERTA, supra* note 33, paras. 12,17.

[144] *Id.*, para. 11.

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power, since the specific provisions attributing treaty-making power were rendered redundant by the attribution of a general power. This latter approach is reflected in the traditional interpretative maxim of '*expressio unius est exclusio alterius*', *i.e.* to express or include one thing implies the exclusion of another, or of the alternative, which is related to the more general principle that the law-maker should not be interpreted to act in vain unless there is some indication that the words were meant as 'mere surplusage', *i.e.* as simply an elaboration of and subsidiary to other words.[145]

The ECJ did refer to one textual support, namely that the Treaty attributed legal personality to the Community. However, this does not entail the conclusion of a treaty-making power; the Community may have legal personality as an entity that can be sued or can sue, for example, which does not necessarily sustain the conclusion of pre-emption or exclusive competence. The general style of the above passage is a good example of what Lasser calls the magisterial or declaratory style of judgment in which dialectical reasoning is minimised;[146] there is little discursive analysis weighing up each side of the argument. In particular, the passage does not show in any detail how the general scheme of the Treaty necessitated the Court's conclusion by showing a chain of validity linked to the idea of conferral, and there is no articulation of the *lex generalis-lex specialis* distinction. At that stage of the development of the Community, the principle of conferral had not been articulated in the Treaties, though it could be considered implicit[147] in the fact that the Member States authored the Treaties *qua* States through exercising the secondary rules of international law.[148]

Differences emerged in the caselaw on the question of the exercise of internal powers as a pre-requisite for the existence of exclusive parallel external powers: *Kramer* suggested there must first be internal exercise of competence,[149] *Inland Waterways* suggested the opposite.[150] Later in *Opinion 1/94*, the ECJ clarified *Inland Waterways* by stating it applied only where external competence could not be realistically exercised without the initial

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[145] See, *e.g.* the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor* v. *Stanislav Galic*, IT-98-29-T, Trial Chamber I, 5th December 2003, para. 91. See also Brunno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 483, 505, 507 (2006).

[146] MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 103-115 (2004).

[147] See, *e.g.* Dashwood, *supra* note 42, 357.

[148] See generally Bruno de Witte, Rules *of Change in International Law: How Special is the European Community?*, 25 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 299 (1994).

[149] Cases 3, 4 & 6/76, *Kramer*, 1976 E.C.R. 1279.

[150] *Opinion 1/76 Re Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels*, 1977 E.C.R. 741.

exercise of external competence.[151] Further cases clarified that this competence only became exclusive when the area of competence in question is "already covered to a large extent by Community rules progressively adopted ... with a view to achieving an ever greater degree of harmonization";[152] when internal measures become sufficiently harmonized to have the effect of pre-emption is not fully clear.[153] Exclusive competence arises where international action by the member States would affect internal rules or distort their scope.[154]

Perhaps the high point of the creativity of the Court on competence involved the issue of the proposed creation of a new court for wide economic integration under the European Economic Agreement (EEA). In *Opinion 1/91*,[155] the ECJ held that the creation of such a court was contrary to Community law:

> "3. ... Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law."
>
> It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law.[156]

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[151] *Opinion 1/94 Re WTO Agreement*, *supra* note 142, at paras. 85-86.

[152] *Opinion 2/91 Re Convention No. 170 International Labour Organisation on Safety in the Use of Chemicals at Work*, 1993 E.C.R. I-1061, para. 25.

[153] See, *e.g.* CRAIG, *supra* note 37, 412.

[154] Case C-467/98, *Commission v. Germany*, 2002 E.C.R. I-9855. See CRAIG, *supra* note 37, 414-415.

[155] *Opinion 1/91 Re European Economic Area Agreement I*, 1991 E.C.R. 6079.

[156] *Id.*, at 6081-6082.

Shaw observed that here "[the ECJ] intervened directly in the exercise of sovereign will by the Member States".[157] Constantinesco suggests that what the ECJ did was to give priority to some constitutionally expressed principles over others, where a discrepancy occurs between them; that it engages in what he terms 'super-constitutionality', which may mean one constitutionally expressed rule cannot be applied or fulfilled.[158] In *Opinion 1/91*, the ECJ did appear to act as a supra-constitutional body, since it ruled out the apparent adoption by the constituent power of the EC, *i.e.* the Member States, of a body with overlapping competence with the Community.

The ECJ thus seemed to implicitly posit the existence of some *lex superior* higher even than the Treaty. This suggests that although the Community originated in an act of the Member States, the Member States are no longer fully 'masters of the Treaties'.[159] More recently, the Court confirmed that exclusive competence may arise where not expressly conferred, but where it results from the from a specific analysis of the relationship between the matter in question (the facts concerned an international agreement) and Community law and further, that the development of Community law, in so far as it could be foreseen, should be taken into account in applying the test in *Opinion 2/91* of 'an area which is already covered to a large extent by Community rules'.[160] The latter confirms the prospective, developmental character of teleological interpretation employed by the Court, geared toward the systemic *lex generalis* of integration, in contrast to a retrospective, originalist analysis focused on *lex specialis*.

If *Opinion 1/91* represents the high point of Union claims to competence, *Opinion 2/94* represents one of the most explicit articulations by the ECJ of its limits. The ECJ refused in this case to identify the protection of human rights as one of the objectives of the Community so as to enable the Community to accede to the European Convention on Human Rights[161] under Article 308 ECT (Article 308 had been invoked to justify accession by the Community given the absence of any express provision in the treaties for accession). The ECJ qualified the scope of Article 308 as follows:

> "That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the

[157] Jo Shaw, *European Union Legal Studies in Crisis? Towards a New Dynamic*, 16(2) OJLS 231, 239 (1996).

[158] Valentin Constantinesco, *The ECJ as Law-maker:* Praeter aut Contra Legem*?*, in JUDICIAL REVIEW IN EUROPEAN LAW: ESSAYS IN HONOUR OF LORD SLYNN, 79 (David O'Keeffe & Antonio Bavasso eds., 2001).

[159] See generally Karen Alter, *Who are "Masters of the Treaties"? European Governments and the European Court of Justice*, 52(1) INTERNATIONAL ORAGANIZATION 121 (1998).

[160] *Opinion 1/03 Re Lugano Convention*, 2006 E.C.R. I–1145, paras. 124-126.

[161] 1950, ETS no. 05.

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> provisions of the Treaty as a whole and, in particular, by those that define the tasks and activities of the Community. On any view, [Article 308] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."[162]

Thus, as Schütze observes, the 'constitutional identity' of the Union places a limit on the external powers and of Article 308 ECT.[163] Nonetheless, outside the specific context of Article 308, it seems hard not to note that the ECJ has hardly consistently applied throughout its history the notion of substantive amendment as a limit to its interpretation of the scope of the Treaties, given its origination of the doctrines of, for example, supremacy, direct effect, parallelism, and fundamental rights. Nonetheless, the case does illustrate the risk of very brushstroke characterizations of the role of the ECJ purporting to describe its role over 50 years of integration: its caselaw is not always "manically pro-integrative"[164] (although a, somewhat at least, skeptical reading of the decision in *Opinion 2/94* suggests that it may have primarily reflected a desire of the ECJ not to submit itself to a superior jurisdiction by the European Court of Human Rights[165]).

The argument in the present work for a greater role for *lex specialis* as a tool of norm conflict resolution might be thought open to challenge where overlap exists between competences and one is not clearly more specifically tailored. The exclusive application of *lex specialis* here runs counter to ECJ caselaw recognizing that more than one competence may be at stake in the adoption of a law or international treaty. Reflecting the difficulty of the issue, there are in fact somewhat differing tendencies in ECJ caselaw, a difficulty exacerbated by the fact that the ECJ does not articulate the *lex generalis-lex specialis* distinction. In *Opinion 1/94 Re World Trade Organisation Agreement*,[166] the ECJ *implicitly* invoked *lex specialis* in relating the Common Commercial Policy to the treatment of nationals of non-member countries on crossing the external frontiers:

> "46. As regards natural persons, it is clear from Article 3 of the Treaty, which distinguishes between 'a common commercial policy' in paragraph (b) and 'measures concerning the entry and movement of persons' in paragraph (d),

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[162] Opinion 2/94, *supra* note 15, para. 30.

[163] SCHÜTZE, *supra* note 4, 142.

[164] Stephen Weatherill, *Activism and Restraint in the European Court of Justice*, in *ASSERTING JURISDICTION:* INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES, 255, 271 (Patrick Capps, Malcolm Evans & Stratos Konstadinidis eds., 2003).

[165] CRAIG, *supra* note 37, 408. The question has been superseded by Treaty amendment, with Article 6(2) TEU (post-Lisbon) providing for EU accession to the ECHR.

[166] *Opinion 1/94 Re WTO Agreement*, *supra* note 142.

> that the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy. More generally, the existence in the Treaty of specific chapters on the free movement of natural and legal persons shows that those matters do not fall within the common commercial policy."[167]

Schütze described as 'strange' the implication that all those sectors covered elsewhere in the Treaty were excluded from the scope of the Common Commercial Policy and comments that the Court later "corrected the unfortunate wording".[168] Schütze here cites *Opinion 2/00 Re Cartagena Protocol*,[169] from which the following seems the most relevant passage:

> "23. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component (see the *Waste Directive judgment*, paragraphs 19 and 21, Case C-42/97 *Parliament v Council* [1999] ECR I-869, paragraphs 39 and 40, and Spain v Council, cited above, paragraph 59). By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases (see, to that effect, the *Titanium Dioxide* judgment, paragraphs 13 and 17, and Case C-42/97 *Parliament v. Council*, paragraph 38)."[170]

This passage, however, does not exclude *lex specialis* as a tool for resolving norm conflict or accumulation, rather it notes the possibility that laws may overlap and still be applicable, but that one may be preponderantly relevant and thus be the main legal basis. On this approach, *lex specialis* is reflected in the idea of preponderance and thus underpins the choice of legal basis, unless different provisions are equally relevant. The question of 'equal relevance' seems one of fact rather than generality in legal formulation, and this shows that *lex specialis* does not always provide a basis for a choice between two norms, but this does not exclude its application in so far as specificity does provide a workable

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.[167] *Id.*, para. 46.

[168] SCHÜTZE, *supra* note 4, 172.

[169] 2001 E.C.R. I–9713. On the facts, the ECJ in effect applied *lex specialis*, holding that the environmental provisions of the EC Treaty related to the primary purpose of the international treaty in dispute and thus (ex) Article 175 ECT was the correct legal basis.

[170] *Id.*, para. 23.

ground for preferring one legal basis over another. In other words, multiple, quite highly general laws may not admit of *lex specialis* as an explanation of their relationship with each other. The most practical solution to this issue seems to be careful legislative drafting so as to make the choice of legal basis, and reasons for it, explicit.

The systemic, very general character of the reasoning of the ECJ in external relations is shown particularly clearly in the area of mixed agreements, which arises in the case of shared competence between the Union and the Member States. The practice in this situation is for both the Member States and the Union to become parties to the agreements, and the question has arisen in caselaw of the extent of the exclusivity of *ECJ jurisdiction* over these agreements, as opposed to the *correct legal basis for their adoption,* the latter being the issue in the cases discussed above. Applying the logic of uniformity and effectiveness often present in its constitutionalizing decisions, the ECJ in *MOX Plant* has held that it has exclusive jurisdiction over such mixed agreements, thereby precluding a Member State from bringing proceedings in an international tribunal.[171] The case represents an interesting example of the interaction of *lex generalis* and *lex specialis*, because the Treaties contain a provision that quite specifically addresses the question of the exclusivity of ECJ jurisdiction. Article 292 ECT (retained as Article 344 TFEU following Lisbon) provided that the Member States undertake 'not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided therein'.

Ireland brought proceedings before a tribunal under the United Nations Convention on the Law of the Sea.[172] The ECJ decided the issue on the basis both of a systemic argument and Article 292. It noted that "a breach [of Article 292] involved a manifest risk that the jurisdictional order laid down in the Treaties and consequently the autonomy of the Community legal system may be adversely affected".[173] However, *lex specialis*, *i.e.* the literal wording of Article 292, was not dispositive of the question, for as Ireland argued, the initiation of proceedings before an arbitral tribunal constituted a method of dispute settlement provided for in the EC Treaty, within the terms of Article 292 EC, since the Community was a party to UNCLOS and thus UNCLOS was part of Community law.[174] Secondly, Article 292 could have been construed more narrowly to refer to the Treaties

[171] Case C-459/03, *European Commission v. Ireland* (*'MOX Plant'*), 2006 E.C.R. 1-4635. For discussion, see Paul James Cardwell, *Who Decides? The ECJ Judgment on Jurisdiction in the MOX Plant Dispute*, 19(1) JOURNAL OF ENVIRONMENTAL LAW 121 (2006); Nicholas Lavranos, *The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?*, 19(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 223 (2006); Cesare PR. Romano, '(Case Note) Case C-459/03, Commission of the European Communities v. Ireland', 101(1) AMERICAN JOURNAL OF INTERNATIONAL LAW 171 (2007).

[172] December 1982, 1833 UNTS 396.

[173] Case C-459/03, *MOX Plant*, *supra* note 171, para. 154.

[174] See *id.*, para. 130.

only, not to secondary legislation or especially international agreements, especially since the exclusivity of the external competence was a creation of the ECJ, rather than the Treaties. *Lex specialis*, *i.e*. Article 292, thus did not provide a complete solution, though the limitation of literal argument in supporting the Court's conclusion was not fully canvassed in the judgment.[175] Based on teleological argumentation as to the effectiveness of the Community legal order, the familiar integration narrative, the ECJ ruled out any overlap of norms of jurisdictional competence. This is a kind of generic coherence argument. *Lex posterior*, which would privilege UNCLOS, did not provide a clear solution, because what was at stake was an interpretation of *lex superior*, *i.e.* the EU Treaties. The case well illustrates the choice between minimalist and expansive approaches to interpretation in the absence of a clear rule of norm conflict providing a solution. Unsurprisingly, the ECJ adopted an expansive approach to enhance the specificity of the Community or Union legal order,[176] in contrast to a softer, more minimalist approach of simply applying traditional principles of comity in international law.

Subsidiarity has not generally been discussed in caselaw on external relations, nor does it seem to have been much argued before the ECJ. It does, however, have implications for this area. To demonstrate that the law of external relations respects subsidiarity, some analysis is needed for why the limitation of Member States' autonomy is necessary to achieve the Union's objectives and is thus worth the cost to Member States' freedom of action. For example, in *MOX Plant*, the ECJ could have offered a justification as to why concurrent jurisdiction of other courts was necessarily harmful to the Union, especially given the international law doctrine of comity whereby international courts and tribunals seek to facilitate each other's jurisdiction as much as possible.[177] The traditional ECJ approach of differentiating the Union legal order from public international law seems, of itself, too general to discharge that burden of persuasion in specific cases. *Opinion 1/03*,[178]

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[175] In response to Ireland's argument that recourse to UNCLOS could be construed as a method of settlement within the scope of Article 292, the ECJ simply observed "an international agreement such as the Convention cannot affect the exclusive jurisdiction of the Court": *id.*, para. 132.

[176] See Soriano, *supra* note 12, 331, noting with reference to the overall approach of the ECJ to competence (in its interpretation of Articles 95 and 308 ECT and of the subsidiarity principle), "The consequences for member states' defence of their political interest could not be more negative…".

[177] The ECJ simply declared the risk to the Community order to be 'manifest' even though Ireland had offered an assurance that it would not seek to litigate any provisions of Community law in an arbitral tribunal: Case C-459/03, *MOX Plant*, *supra* note 171, para. 154-156. On the latter point, the Advocate General offered somewhat more explicit reasoning, suggesting the fact that provisions of Community law coincided with international rules that Ireland had asked to be adjudicated by a tribunal was enough to breach Article 292 ECT: see Opinion of Advocate General Maduro, 18th January 2006, para. 51. This line of reasoning, however, has potentially very extensive implications on a broad reading: any rule of international law that coincides with EU law cannot be litigated by a Member State before an international court or tribunal.

[178] *Opinion 1/03Re Lugano Convention*, *supra* note 157.

on the Lugano Convention[179] and private international law, provides another example. Here, the ECJ held that the Community had exclusive competence to deal with the jurisdiction and enforcement of judgments in civil and commercial matters.[180] As Kruger notes, the effect of this was to limit the contractual freedom of private parties to choose a forum for dispute resolution and also to restrict the ability of Member States to conclude bilateral agreements with non-EU States, even though in both cases it may be commercially beneficial to have relative freedom of action.[181]

F. Conclusion

This article has sought to demonstrate the differing ways that competence norms can be addressed in legal reasoning by the ECJ. Competence norms are distinct relative to other legal norms in the conferring of an ability or amenity to change legal relations. The relationship between competence conferring norms and the exercise of a competence norm helps reveal an important structural feature of competence norms as concepts, their relationship to each other in a chain of validity. This has implications for their treatment in legal reasoning. First, it suggests that the idea of 'conferral' is inherent in a competence norm, and indeed conferral has been articulated explicitly through EU Treaty revisions. The context of the principle of conferral can be said to be the sensitive issue of the status and role of the Member States as 'Masters of the Treaties': can the Member States alone confer competence, or is competence by the institutions self-generating through the mechanism of expansive legal reasoning? The explicit articulation by the Treaties of constitutional principles could be taken to provide an unequivocal answer to this question, against the idea of self-generating competences.

However, the reality of institutional practice and of the legal reasoning of the ECJ suggests a more complex answer in practice. Flexibility and ambiguity characterize the question of competence in EU law.[182] There are sharp differences in how competence norms are mediated in legal reasoning. Perhaps most importantly is the distinction between *lex specialis* and *lex generalis*, which can be understood as relating to the phenomenon of levels of generality in legal reasoning. Applying *lex specialis* much more fully reflects the idea of conferral, as *lex specialis* logically reflects the will of the constituent power. The

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[179] Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988, 28 *ILM* 620 (1989).

[180] Opinion 1/03, *supra* note 157, paras. 150-173.

[181] Thalia Kruger, *Opinion 1/03, Competence of the Community to conclude the new Lugano Convention on the Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 12 COLUMBIA JOURNAL OF EUROPEAN LAW 189, 198-199 (2006-2007).

[182] Obradovic, *supra* note 7, 84-85; Soriano, *supra* note 12, 333.

effect would be to exclude the use of Article 114 TFEU (ex Article 95 ECT) when a more specific Treaty basis is available. Surprisingly under-articulated in EU legal literature, the *lex specialis-lex generalis* distinction explains the differing treatments of competence norms in *Tobacco Advertising* and the *Laval* and *Viking* line of caselaw. *Lex specialis* localizes the identification of Treaty objectives to a particular policy field,[183] as opposed to a global teleology linked to the highest level of generality in the Union system of enhanced integration. It thus offers a conceptual key to understanding the differing treatment of competence norms in caselaw, while normatively supporting the idea of limited and conferred powers. It gives practical substance in legal reasoning to Dashwood's view that "The technique of specific and detailed attribution … remains the most effective method of setting identifiable limits to the competences of the European Union".[184] Somewhat in contrast to Article 114 TFEU, Article 352 TFEU (ex 308 ECT) by definition invokes *lex generalis*, in that it applies when a more specific Treaty basis is not available to achieve a Treaty policy (not just referring to the 'internal market', as does Article 114 TFEU, though 'internal market' can be very broadly conceptualized). A narrow approach to the idea of implied powers is needed to avoid the use of this provision to circumvent the principle of conferral, although it is open to debate as to what extent the limit identified in the caselaw, the 'general framework of the Treaties', is a constraint, since the Treaties can always be conceptualized at a high level of generality. A test based on subsidiary or ancillary powers would be more constraining.

The different possibilities for applying the subsidiarity principle, which is a principle for resolving conflict between the competing competences of the Member States and the Union, are also under-articulated in the caselaw, though they have been more fully canvassed in the legal literature. A key to rendering subsidiarity more meaningful as a tool of judicial review is the integration of Member State autonomy as part of the weighing exercise in a subsidiarity test. This has an evidential implication of requiring cogent evidence to justify a claim of comparative efficiency for the exercise of competence at the Union level. It also serves to exclude the approach in ECJ caselaw of equating the existence of diversity of Member State laws as a justification in and of itself for the exercise of Union competence. The latter tendency effectively negates subsidiarity and more generally the principle of conferral as a meaningful control or limit on Union competence. This tendency thus creates a problem of sharp conflict between constitutional self-articulation by the EU and institutional practice as mediated through the legal reasoning of the ECJ.

[183] On the application of Article 308 ECT in this more specific sense, see SCHÜTZE, *supra* note 4, 136-137.

[184] Dashwood (2004), *supra* note 42, 380.