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Union regulatory criminal law competence

Scope, limits and judicial review

Jacob Öberg

THE EU'S POLITICAL AND CONSTITUTIONAL SYSTEM

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Preface

A sharp line runs between, on the one hand, those who say no to the europeanisation of criminal law – who often represent the national criminal legal systems – and on the other, the euro-integrationists - who see the area of criminal law almost as any other policy area subject to legal harmonisation.

On the political level, the Commission has shown signs of using criminal law as a way of achieving more effectiveness of European legislation while the Council has, at least historically, maintained a more hesitant attitude to the possible achievements of the criminal penalty. Since the entry into force of the Lisbon Treaty, it is nevertheless a fact that the EU has a legal mandate to enact criminal legislation. So far, the number of criminal legal acts is still relatively limited but since the mandate is now in place, it is highly relevant to discuss the limits of the EU's criminal law mandate.

The author of this report raises critique against the development of criminal law, arguing that it has evolved through an illegitimate process, whereby the EU legislature has proceeded in the area even before a clear legal competence in the area was given to the EU, through a so-called competence creep. In his view, such competence creeps blur the legal mandates of the EU and may result in an expansion of EU policy areas that goes far beyond what was intended for by the Treaty drafters. After having expressed his concern for this development, the author suggests some interesting ideas on how the EU judiciary may better control the use of criminal law at EU level.

While the proposals of the author challenge the current institutional balance now in place, with a European Court paying quite large respect for the choices of the EU legislature, his ideas could not come at a better time. With the current financial crisis in Greece and with an increasing euro-scepticism in several EU Member States, a general debate on how the limits of EU power can be better controlled is perhaps exactly what the EU public needs. The ideas put forward in this report may inspire to such debate.

Eva Sjögren
Director

About the author

Jacob Öberg received an LLM from Stockholm University 2008 and defended his doctoral dissertation in 2014 at the European University Institute. He is currently employed as a Senior Lecturer in Law at Örebro University. His research interests lies primarily in EU criminal law, EU constitutional law and general criminal law. Öberg has furthermore published widely on those topics in journals such as Journal of Corporate Law Studies, Tilburg Law Review, European Criminal Law Review, New Journal of European Criminal Law and European Journal of Crime, Criminal Law and Criminal Justice.

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
Court	Court of Justice of the European Union
EC/Community	European Community/Treaty of the European Community
EU	European Union
FCC	German Federal Constitutional Court
Lisbon Treaty	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community
Protocol no 2	Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaty on the European Union and the Treaty on the Functioning of the European Union
UK	United Kingdom

Executive summary

Pursuant to the precepts of EU law, EU policy-makers must ensure that enacted EU legislation falls within the remit of the EU's competences. Prior to Lisbon, there was strong criticism by scholars and the general public that EU legislative institutions had illegitimately exceeded the mandate conferred by the treaties. The Laeken Declaration called on the Convention, which was responsible for drafting the new treaties, to find a way to better define and delimit the scope of EU competences. Whilst the Member States decided to adopt a competence catalogue and a clear description of the nature of EU powers in the Lisbon Treaty, it is clear that the suggested devices have not resolved the problem of 'competence creep' or responded to the question of how the EU should exercise its competences. Against this backdrop, this report analyses *how limits to the exercise of EU powers can be constructed*.

The report uses one of the new competences that the Union has obtained, the power to impose criminal sanctions, as a case study to suggest a mechanism by which legislative powers can be kept in check. While there are limits to the exercise of EU competences in the treaties and in the Court of Justice's jurisprudence, the report suggests that those limits are problematic. In particular, the Court does not have clear standards to examine whether the limits of the treaties have been exceeded by the Union legislature. By examining the scope of the EU's competence to impose criminal sanctions and by analysing current and proposed criminal law measures, the report develops appropriate criteria to control the exercise of EU powers.

The report makes two main arguments. The first strand of the argument contends that a better conceptual understanding of the limits of EU competences is not helpful unless those limits can be enforced by the European Courts. Whilst the current treaty system of competence monitoring is founded on the assumption of political control, history shows that it is unlikely that the political limits of the treaties provide sufficient safeguards against the illegitimate expansion of EU competences. It is therefore proposed that the main responsibility to provide checks against the exercise of EU powers lies with the EU judiciary. It is argued in the report that a procedural enquiry and a proposed objective legality standard can be employed to enhance competence control by the Court of Justice. The proposed legality benchmark, derived from the Court's ruling in *Spain v Council*, is that the Court must ask the EU legislature to provide 'adequate reasoning' and to show that it has taken into account 'relevant circumstances'. The suggested test of legality to monitor whether the standard has been met is that the EU legislature must have offered *at least one* compelling justification for the exercise of EU competences that is substantiated by 'relevant' and 'sufficient' evidence to adopt EU legislation. The examination of specific examples of EU legislation

shows that the EU legislature is not generally able to sustain its reasoning with adequate evidence. However, if the EU legislature wants to avoid complaints of competence creep, it is not sufficient to provide theoretically well-defended justifications. It can be legitimately argued that the EU legislature needs to have both more and better support for its actions and that the Court of Justice must enforce this 'evidentiary' obligation.

The second line of argument suggests that we need to reconstruct the existing limits to EU competences according to conventional canons of interpretation of EU law if they are to act as checks on the exercise of EU legislative powers. I propose three central arguments to address the issue of defining the limits of regulatory criminal law EU competences. First, I argue that the EU's express competence in Article 83(2) TFEU and its implied pre-Lisbon criminal law competence under Article 114 and Article 192 TFEU are constrained by the EU legislature's need to show that criminal sanctions are not only suitable, but also more effective than other non-criminal sanctions in the enforcement of EU policies. Secondly, I propose that the subsidiarity principle in Article 5(3) TEU requires that EU harmonisation can only take place if the EU legislature is able to demonstrate the existence of a market failure. Thirdly, I argue that the need to act on a right legal basis is an important limit to the exercise of EU competences. Taking the example of criminal law, it is shown that the Lisbon Treaty has not been able to resolve the problem of finding the right legal basis for EU criminal law legislation. Whilst the nature of Article 83(2) TFEU generally suggests that this is *lex specialis* in relation to other legal bases, it is suggested that other legal bases, such as Article 114 TFEU, can exceptionally be used in adopting EU regulations criminalising breaches against EU law. This is a serious concern for the Member States, as the use of other legal bases outside Title V entails that the Member States will not have the right to pull the emergency brake and that the UK and Ireland's opt-outs will not apply.

1 Introduction

Prior to the Lisbon Treaty, EU law scholarship and the political debate were primarily pre-occupied with the existence of EU competences and the division of powers between the Member States and the EU.[1] Gareth Davies aptly stated in 2006 that 'competence anxiety' was about safeguarding national autonomy in important policy fields. The point had been reached where EU law and requirements were touching on sensitive and traditional national competences - criminal law, the welfare State, taxation and economic policy. The fundamental problem lay in deciding the extent to which the EU could legislate and the extent to which the capacity of the Member States to make and carry out policy autonomously should be respected.[2]

However, the evolution of EU law and the ratification of the Lisbon Treaty suggest that EU scholars no longer have to focus on the question of the existence of powers. The development of the 'regulatory criminal law'[3] competence of the EU is a case in point. Prior to Lisbon, there was a long-standing debate on whether the European Community ('Community', 'EC') enjoyed the competence to enforce its rules through criminal sanctions. This was a discussion about the 'existence' of the competence. The debate certainly touched on the core of national autonomy, as it had been assumed for a long time that political sensitivity and concerns about state integrity automatically made criminal law a matter exclusively for the Member States.[4] The European Commission ('Commission') advanced an EC criminal law competence in criminal matters on the basis that it was needed for the effective enforcement of EU policies.[5] The Council of the European Union ('Council') and the Member States strongly disagreed, arguing that the absence of an express conferral of competence in the treaties, together with concerns for

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1 See Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence Between the EU and the Member States* (Kluwer Law International 2009); Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law* (Hart Publishing 2009); Paul Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 European Law Review 323.

2 Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 Common Market Law Review 63, 80.

3 See Maria Fletcher, Bill Gilmore and Robin Lööf, *EU Criminal Law and Justice* (Edward Elgar Publishing 2008) 183, for a description of the concept.

4 See Sandra Lavenex and William Wallace, 'Justice and Home Affairs- Towards a European Public Order' in Helen Wallace, William Wallace and Mark Pollack (eds), *Policy-Making in the European Union* (OUP 2005).

5 See Case C-176/03 *Commission v Council* [2005] ECR I-07879, paras 19-21; Case C- 440/05, *Commission Communities v Council* [2007] ECR I-09097, paras 24-25, 28-39. The idea that the effective enforcement of EU law would require criminal sanctions had been advanced earlier by scholars and Advocates General: Case C-240/90, *Germany v Commission* [1992] ECR I-05383, Opinion of AG Jacobs, para. 12; Hanna G Sevenster, 'Criminal Law and EC Law' (1992) 29 Common Market Law Review 29, 53-59.

sovereignty, militated against recognising such a competence in the first pillar.[6] The Court of Justice of the European Union ('Court', 'Court of Justice') was called on to settle the issue. The Court accepted the Commission's argument and recognised, in two famous judgements, *Environmental Crimes*[7] and *Ship-Source Pollution*[8], that the EC had a competence to impose criminal sanctions in the field of environmental law and maritime safety if this was essential for the enforcement of EU environmental policy. The debate on the existence of a first pillar competence was ultimately brought to an end by the Lisbon Treaty, which abandoned the pillar system and explicitly conferred a competence on the Union to impose criminal sanctions to enforce Union policies.[9] This example of regulatory criminal law shows that the competence question, both in the field of EU criminal law and in the general field of EU competences, has transformed in character. Instead of discussing the existence of competence, commentators now debate how EU competences should be exercised.[10]

There was also a political debate that was equally concerned with the existence of competences and the division of competences. The public perception among EU citizens and politicians prior to Lisbon was that the delimitation of competences between the Member States and the Union was not precise enough.[11] To find a solution to this problem, the Laeken Declaration asked the European Convention ('Convention'), which was responsible for the negotiation of future treaties, to devise a 'better division and definition of competence in the European Union'.[12] Working Group no V on Complementary Competences[13], having taken on this task, suggested that the treaties should contain a clean and easily understood delimitation of the competence granted to the Union in each policy field.[14] The Member States ultimately decided to adopt, as suggested by the Convention, a

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[6] See Case C- 176/03 *Commission v Council* (n 5), paras 26-27.

[7] See Case C-176/03 *Commission v Council* (n 5), paras 47-48. The criminal law competence was conferred on the basis of Article 175 of the Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33 ('EC' 'EC Treaty').

[8] See Case C-440/05 *Commission v Council* (n 5), paras 66-69. The Court inferred the competence on the basis of Article 80(2) EC.

[9] See Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2011) 364; Ester Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon', in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (OUP 2012) 333.

[10] See regarding EU criminal law: Steve Peers, 'Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon' (2011) 48 Common Market Law Review 661, 692, 693; Herlin-Karnell, 'EU Competence in Criminal Law After Lisbon' (n 9) 334, 338-339. See generally for this development of EU law: Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009); Loïc Azoulai, 'Introduction: The Question of Competence', in Loïc Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014) 7.

[11] See European Convention, CONV 47/02, 'Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored', Brussels, 15 May 2002, 3-5, 16.

[12] See European Council, 'Laeken Declaration on the future of the European Union', 14–15 December 2001, 21-22.

[13] See European Convention, CONV 375/1/02, 'Final Report of Working Group V on Complementary Competencies', Brussels, 4 November 2002.

[14] Ibid 2-3.

competence catalogue and a description of the nature of EU powers, which was later enshrined in the Lisbon Treaty.[15]

The focus in the Lisbon Treaty on the existence of competences and a clear division of powers is, however, misplaced. The more fundamental question after Lisbon is how the EU exercises its functional powers. The competence catalogue does not solve the problem of 'competence creep'[16] that exists by virtue of the wide functional legal powers in Article 114 and Article 352 TFEU. Whilst there were proposals to remove those legal bases from the treaties[17], the Convention, however, decided finally to keep these provisions. As it did not limit the scope of these provisions, the Convention also failed to remove all possibility of competence creep. Admittedly, the EU does not, under the Lisbon Treaty, enjoy a competence to harmonise the Member States' laws in relation to fields such as public health, education or culture. It is, nevertheless, perfectly entitled under Article 114 TFEU and Article 352 TFEU to enact legislation in these policy fields if that legislation benefits the internal market or if it is necessary for the pursuit of one of the Union's policies.[18]

Having shown by these examples that it no longer makes sense to examine the question of the existence of EU competences and that we must shift the focus to the question of how the competences are 'exercised', I can then state the research question of the report, which is to examine *how limits to the exercise of EU powers can be constructed*.

Because the research question is very broad, the scope of the enquiry has been restricted to the EU's 'regulatory criminal law' competence, i.e. the EU's powers to enforce its policies through criminal sanctions. The topic of the report falls within the confines of 'EU criminal law', which is a broad field covering all instances where the EU has a normative influence on either substantive criminal law/criminal procedure or on the judicial cooperation between the Member States in criminal matters. In more precise terms, EU criminal law contains the legislative competences in Articles 82-86 TFEU.[19] EU regulatory criminal law encompasses all criminal law measures which are adopted 'to ensure the implementation of a Union policy in an area which has been subject to EU

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[15] See Articles 3-6 of the Consolidated Version of the Treaty of the Functioning of the European Union [2010] OJ C 83/47 (TFEU). The Lisbon Treaty more particularly distinguishes between different types of EU competences: exclusive competences, shared competences, coordinating competences and complementary competences, see Article 2(1)-2(3) and 2(5) TFEU.

[16] See Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1 for this concept.

[17] See CONV 375/1/02 (n 13) 14-15; CONV 47/02 (n 11) 10-11, 15.

[18] See Paul Craig, *EU Administrative Law* (OUP 2012) 368-371, 386-390; Stephen Weatherill, 'Better Competence Monitoring' (2005) 30 European Law Review 23, 29-40.

[19] See Christopher Harding and Joanna Banach-Gutierrez, 'The Emergent EU Criminal Policy: Identifying the Species' (2012) 37 European Law Review 758, 759.

regulatory 'harmonisation measures'.[20] Regulatory criminal law thus covers all criminal law provisions aimed at achieving the political objectives of the Union; protection of the environment, protection of the financial market, the four freedoms and undistorted competition.[21]

EU regulatory criminal law has been chosen as a case study for two key reasons. First, it is clear from the legislative practice and the Commission's Communication in 2011[22] that EU regulatory criminal law will remain a priority area for the EU legislature. The EU had already adopted three regulatory criminal law measures pre-Lisbon[23]: the Environmental Crimes Directive[24], the Ship-Source Pollution Crimes Directive[25] and the Employer Sanctions Directive[26], and it submitted another proposal, the Intellectual Property Crimes Proposal, which was subsequently rejected.[27] Post-Lisbon, the EU legislature has recently enacted

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[20] See Article 83(2) TFEU.

[21] See Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', COM 2011/573 final ('COM 2011/573'), 10-11.

[22] See COM 2011/573 (n 21) 2, 5-6.

[23] Lisbon Treaty entered into force on 1 December 2009 when all the Member States had ratified the Treaty in accordance with their respective constitutional requirements; see Article 357 TFEU.

[24] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28. This directive was adopted on the basis of Article 175 EC (Article 192 TFEU).

[25] Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements [2009] OJ L 280/52. The directive was adopted on the basis of Article 80 (2) EC (Article 100(2) TFEU). The story of Directive 2009/123/EC is complex. The original Ship-Source Pollution Directive, Directive 2005/35/EC, had been amended by criminal law provisions in a separate Council decision (Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution OJ 2005 L 255/164 ('Framework Decision')), which was adopted on the basis of Articles 29, 31 and 34 of the Consolidated Version of the Treaty on European Union [2002] OJ C 325/5. The Framework Decision was later invalidated by the Court of Justices' judgement in the *Ship-Source Pollution* case (n 5), where the Court stated that the Framework Decision breached Article 47 EU, as there was a first pillar competence in Article 80(2) EC to adopt criminal sanctions for the enforcement of maritime safety rules. The Ship-Source Pollution Directive 2009/123/EC was therefore adopted to fill the legal vacuum after the Court's judgement (n 5) and amended thus Directive 2005/35/EC by adding the criminal law provisions that had been proposed through the repealed Framework Decision.

[26] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24. The Directive was adopted on the basis of Article 63(3) (b) EC (Article 79 TFEU).

[27] See Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights', Brussels, 26.4.2006, COM(2006) 168 final and Withdrawal of Obsolete Commission Proposals, 2010/C 252/04, OJ 252/7, 9. The Directive was proposed on the legal basis of Article 95 EC (Article 114 TFEU).

the Market Abuse Crimes Directive.[28] Secondly, EU regulatory criminal law also provokes and sheds new light on several classical constitutional questions about the scope of EU law: e.g. how far the subsidiarity principle may limit the exercise of EU competences[29] and issues of what should be the right legal basis for EU legislation.[30] A study of this field contributes, by highlighting the problems and inconsistencies in the current system, to a better understanding of the general EU constitutional order of competences.

The case study of EU regulatory criminal law has shaped the scope of this report. The report endeavours to construct the limits to EU competences in this area by exploring a new provision in the Lisbon Treaty, Article 83(2), by analysing the scope of Article 192 TFEU, by examining the relationship between Article 114 TFEU and Article 83(2) TFEU, and finally, through an analysis of the subsidiarity principle. The reason for selecting 192 TFEU is related to the fact that this legal basis was used for EU regulatory criminal law measures before the Lisbon Treaty and was arguably the 'correct' legal basis for the contested Environmental Crimes Directive.[31] Article 83(2) TFEU is chosen because it is the new legal basis specifically envisaged for criminal law under the Lisbon Treaty and because it is the legal basis for the new Market Abuse Crimes Directive. Subsidiarity was chosen because this principle is, after the changes made in the Lisbon Treaty, potentially an important check against excessive EU harmonisation.[32]

There are two strands of argument running through the report. The first strand of the argument contends that an enhanced understanding of the limits of EU competences is not helpful unless those limits can be enforced by the EU Courts. For this reason, I devote chapter 2 of the report to tackling the institutional, conceptual and practical problems of how the exercise of EU powers can be challenged before the Court. Secondly, the report suggests that we need to rethink the existing limits if they are to act as checks on the exercise of EU legislative powers. Limits are, as demonstrated in chapters 3-4 of the report, constructed by interpreting the legal bases and principles restraining the exercise of EU competences according to conventional canons of interpretation of EU law.[33]

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[28] See Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173/79 ('Market Abuse Crimes Directive'). The Directive was adopted on the basis of Article 83(2) TFEU.

[29] See chapter 4.

[30] See chapter 3- section III.

[31] See chapter 3- section I (A) for an account of the story of the adoption of the Environmental Crimes Directive (n 24).

[32] See Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (OUP 2012).

[33] See Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 03415, paras 18-20.

This report is divided into five chapters, including the introductory chapter. Having set out the purpose, the context, the scope and the research question of the report in chapter 1, chapter 2 then considers the general political, institutional and conceptual problems of limiting the exercise of EU competences. It examines particularly whether there are any principles under which the exercise of EU competences could be challenged before the Court of Justice. It focuses on three principles: the principle of conferral, the principle of subsidiarity and the principle of proportionality, and it evaluates, on the basis of a literature review and the Court's case-law, which of these principles are capable of challenging the exercise of EU competences before the Court. This part also develops a test for legality to be used throughout the report in examining the legality of EU legislation.

Chapter 3 of the report then applies the legality framework developed in chapter 2 by discussing the limits of the EU's pre-Lisbon 'dormant'[34] competence to impose criminal sanctions and the EU's express competence to impose criminal sanctions under Article 83(2) TFEU. The first section of the chapter discusses whether the 'essentiality' condition in the Court's case-law can act as a check on the adoption of criminal law measures under Article 192 TFEU. The second section of the chapter then considers the new provision on criminal law in the Lisbon Treaty, Article 83(2) TFEU. This part both considers the substantive conditions of Article 83(2) TFEU, i.e. the meaning of the 'essentiality' condition, and the procedural conditions of Article 83(2) TFEU, i.e. the 'harmonisation' requirement. The final section of chapter 3 examines what is the right legal basis for criminal law measures after the Lisbon Treaty. Chapter 4 also builds on chapter 2 by examining how a re-construction of the subsidiarity principle can help to challenge the basis for excessive EU harmonisation. To exemplify the argument, the chapter considers, as a case study, whether the Market Abuse Crimes Directive conforms to the subsidiarity principle. Chapter 5 finally includes reflections and some recommendations to the EU legislature for the future development of EU criminal law.

[34] See Michael Dougan, 'From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012) for this expression, 111. This pre-Lisbon competence derives from the Court of Justices' ruling in Case C-176/03 *Commission v Council* (n 5), para 48.

2 The problems of existing legal and political limits to EU competences

2.1 Introduction

The treaties contain numerous limits to the exercise of EU competences. There is the principle of conferral in Article 5(2) TEU, which states that the EU can only act within the limits of the competences conferred upon the EU in the treaties.[35] In addition to the principle of conferral, there is the subsidiarity principle and the proportionality principle.[36] The Court has also, in its jurisprudence, imposed some important limits. In the famous *Tobacco Advertising* judgement, the Court notably held that the EU legislature only has a competence to regulate the internal market if it shows that measures pursued under Article 114 TFEU genuinely have, as their objective, the removal of obstacles to trade or 'appreciable' distortions to competition.[37] Finally, there are also political safeguards for the control of EU competences. The Lisbon Treaty has, by providing for a special review procedure for national parliaments of EU legislation[38] and by adopting a specific protocol on subsidiarity and proportionality[39], made a serious effort to construct new non-judicial control mechanisms to the exercise of EU powers.

Given all of those limits, one may wonder if it is really necessary to examine how limits can be constructed to the exercise of EU competences. The simple answer to this is that there are serious problems with those limits. First, it seems that the theoretical limits to EU competences do not coincide with legislative or judicial practice. It has been convincingly sustained in the literature that the EU legislative institutions, with the approval of the Court of Justice, has been pursuing an illegitimate interpretation of EU powers, paying mere lip service to the principle of conferred powers, proportionality and subsidiarity in Article 5 TEU. This phenomenon of expansion or 'competence creep', as it is called in popular vocabulary, has mainly taken place by a broad and teleological

[35] In addition to Article 5(2) Consolidated Version of the Treaty on European Union [2010] OJ C 83/13 (TEU), there are a number of other provisions which expressly or implicitly reinforce the principle of conferral: Article 1(1) TEU; 3(6) TEU; Article 4(1) TEU; Article 13(2) TEU; 48(6) TEU; 2(1) TFEU; 2(2) TFEU; 4(1) TFEU; Article 7 TFEU; Article 19 TFEU; Article 130 TFEU; Article 207(6) TFEU; Article 226 TFEU; 314(10) TFEU; 351(3) TFEU.

[36] See Article 5 (3)-(4) TEU.

[37] See Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419 paras 83-84, 106-107.

[38] See Protocol (No 1) On the Role of National Parliaments in the European Union OJ [2010] C 83/203 ('Protocol no 1').

[39] See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality OJ [2010] C 83/206 ('Protocol no 2').

interpretation by EU political institutions of existing Treaty provisions, such as Article 114 and Article 352 TFEU.[40]

Such competence creep has not been limited to the general field of EU law, but also has saturated the EU's initiatives in the field of criminal law.[41] Valsamis Mitsilegas and Robin Lööf have made the point clearly in their discussion of the EU's initiatives in the third pillar on minimum procedural rights. They have contended that the Member States repetitiously exceeded its remit in the third pillar when adopting measures on the minimum standards for procedural rights, as the Treaty contained no express legal basis for such measures. Whilst observing that the EU's competence in Article 34 TEU was strictly limited to promoting mutual recognition, they concluded that the EU institutions pushed for measures in the field of criminal procedures that went beyond this objective.[42] Secondly, there are problems related to the structure of the EU legal order. Despite the explicit appeal to EU legislative institutions to only act within the limits conferred by the treaties, the EU institutions are not, because of structural constraints, well-placed to effectively monitor whether their legislative actions conform to the limits of the treaties. These constraints have to do with the idea of integration, which supports the view that EU political institutions and the Court must adopt a broad interpretation of the EU's legislative powers to accomplish the ambitious objectives of the treaties.[43]

Having set out the problem, we can move on to account for the structure of the chapter. The first section of the chapter discusses the political limits on the exercise of EU competences. The extent to which political control provides sufficient safeguards for controlling the illegitimate expansion of EU competences is particularly examined. The second section of the chapter moves on to examine the principles to challenge the exercise of EU competences and the possibilities of enforcing those principles before the Court of Justice. First, there is an analysis of the 'principle of conferral', which provides an account of the Court's current approach to review in competence litigation. This is followed by a discussion of whether this principle is a sufficient check on the exercise of EU competences. Then, the principle of proportionality is considered. Having evaluated the case-

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[40] See Weatherill, 'Better Competence Monitoring' (n 18) 24-25; Joseph Weiler, 'The European Union Belongs to Its Citizens: Three Immodest Proposals' (1997) 22 European Law Review 150, 155 for the general problems of 'competence creep' in the field of EU law.

[41] See Ester-Herlin Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012); Samuli Miettinen, *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era*, Doctoral Dissertation defended at University of Helsinki on 20 April 2015.

[42] See Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277, 1305-1307; Robin Lööf, 'Shooting from the Hip—Proposed Minimum Rights in Criminal Proceedings' 12 (2006) European Law Journal 421, 422-429.

[43] See François-Xavier Millet, 'The Respect for Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014), 255-259.

law and the literature, there is a discussion of whether this principle is destined to be unsuccessful in judicial litigation. The third principle to consider in the chapter is the subsidiarity principle. Based on an analysis of legal and judicial practice, and a discussion of the scholarly contributions on subsidiarity, whether subsidiarity is capable of challenging the exercise of EU competences before the Court is evaluated. The final section of the chapter addresses the issue of judicial enforcement. Recognising the Court's institutional constraints, it develops a test for the legality of 'adequate' reasoning and 'relevant' evidence to be used in the rest of the report to control the validity of EU legislation.

2.2 Political limits to the expansion of EU competences

The current Treaty system of competence monitoring is founded on the assumption of political control.[44] It is, however, questionable whether the political limits of the treaties provide sufficient safeguards against the illegitimate expansion of EU competences. Self-interest and perverse incentives have led EU political institutions to expand EU competences to the detriment of state powers. The history of EU law shows that leaving the issues of the limits of EU competences to the political institutions is a hazardous policy.[45]

The inadequacies of the political control of competences have been most tellingly demonstrated by the use of Article 352 TFEU. Joseph Weiler has noted that, from 1973 until the entry into force of the Single European Act in 1986, there was a dramatic shift in the understanding of the qualitative scope of Article 352 TFEU. In a variety of fields, the then-Community made use of this provision in a manner that was clearly inconsistent with a conventional interpretation of that provision. Only a radically broad reading of the article could justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states.[46] The application of subsidiarity and proportionality also reveals a poor record in providing a check against competence creep. The general observation is that the EU's political institutions do not take these principles seriously. The

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[44] See CONV 47/02 (n 11) 10, 18.

[45] See Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (n 1) 324-25; Herlin-Karnell, *Constitutional Dimension of European Criminal Law* (n 41) 66.

[46] See Joseph Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403, 2444-46. It should, however, be recognised that the concern for 'competence creep' by means of Article 352 TFEU may be less troublesome post-Lisbon. Whilst Article 352(1) TFEU is framed broadly in terms of the 'policies defined in the treaties', the unanimity requirement means, however, that it will be more difficult to use this power in an enlarged EU with 28 Member States. Article 352 TFEU also requires the consent of the European Parliament, as opposed to mere consultation, as was previously the case under Article 308 EC. It is also important to recognise that the need for recourse to this power will diminish, given that the Lisbon Treaty created new legal bases for action in the areas where Article 308 EC had previously been used. The prediction that recourse to Article 352 TFEU would be reduced has been shown to be partly true, as the legislative initiatives under Article 352 TFEU have diminished substantially with an output of 3-4 proposals a year; see Theodore Konstadinides, 'Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 Yearbook of European Law 227, 228-230, 252-256; Craig, *EU Administrative Law* (n 18) 387-388.

EU acts when the relevant majorities exist, with no one taking a keen interest in proportionality and subsidiarity concerns as a distinct set of considerations. Once it is decided to introduce rules at the EU level, the bargaining process involves the Member States seeking to secure a result as close as possible to their own pre-existing systems and to prevent the adoption of standards of protection lower than their own.[47]

Despite this scepticism against political control of competences, it must be recognised that the Convention, leading up to Lisbon, engaged in a specific effort to strengthen political safeguards. It suggested that the monitoring of the exercise of EU competences should be intensified by strengthening control by national parliaments through an early warning mechanism.[48] On the basis of the Convention's proposal, the Lisbon Treaty enshrined a direct involvement for national parliaments in the legislative procedure of the EU by means of the early warning system in Protocol no 2[49] (EWS), which allows national parliaments to review legislation on the basis of the principle of subsidiarity.[50]

It is nevertheless questionable whether the EWS is a solution capable of fully addressing the concerns of competence creep. The first problem with the EWS is that this monitoring system could aggravate the lack of transparency. The risk is that one source of the EU's legitimacy, its capacity to address transnational problems that Member States are unable to deal with individually, will be restrained by deference to another source of its legitimacy, the democratic processes within the individual Member States.[51] The second problem relates to the fact that the Lisbon Treaty does not allow national parliaments to challenge legislation directly under Article 263 TFEU. National parliaments are also precluded from reviewing legislation on the basis of a 'lack of competence'[52] and proportionality. Given this, it does not appear that there are, at this stage, sufficiently strong political limits in the treaties on the exercise of EU powers. Having said this, we move on to consider whether the legal limits provided by the treaties are more trustworthy than the political safeguards.

2.3 Principles limiting the exercise of EU competences

I will here briefly account for how the system of competence monitoring is

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47 See Weatherill, 'Better Competence Monitoring' (n 18) 26- 28.

48 See CONV 47/02 (n 11), 3-5; European Convention, CONV 353/02, 'Final report of Working Group IV on the role of national parliaments', Brussels, 22 October 2002, 10.

49 See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality (n 39).

50 See Federico Fabbrini and Kasia Granat, '"Yellow Card, but No Foul": The Role of the National Parliaments Under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 Common Market Law Review 115, 117-125; Weatherill, 'Competence Creep and Competence Control' (n 16) 33-43, 54.

51 See Stephen Weatherill, 'The Limits of Legislative Harmonisation Ten Years After Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide' (2011) 12 German Law Journal 827, 855-860.

52 See Article 263(2) TFEU.

constructed. It is well-known that one of the characteristic features of the EU is that it exercises, on the basis of the powers enshrined in the treaties, public authority. The EU has thus a legal capacity to unilaterally determine natural persons', legal persons' and Member States' legal or factual situation. However, while the EU has broad powers, its powers are limited. Article 5 TEU sets out the basic principles governing the exercise of EU competences. Because of the importance of this provision, it is appropriate to restate it *in extenso*:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the treaties to attain the objectives set out therein. Competences not conferred upon the Union in the treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only 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 at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level…
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties…

These three principles, conferral, subsidiarity and proportionality, are the principles which guide how EU powers can be exercised. Whilst the principles are not easy to distinguish, it may be stated that conferral decides *if* the EU *can* act at all, whereas subsidiarity determines *whether* the EU *should* act, whilst proportionality determines *how* the EU *should* act. Conferral, subsidiarity and proportionality are principles that always must be observed by the EU legislature when proposing EU legislation. If these principles are not adhered to when the EU legislature adopts legislation, the Court is empowered under Article 263 and Article 264 TFEU to annul such EU legislation.

It is arguable that other grounds, such as fundamental rights[53], can act as checks on the exercise of EU powers. This is particularly the case for EU criminal law, where several fundamental rights can restrict the exercise of EU legislative

[53] See Case C-293/12, *Digital Rights Ireland and Seitlinger and Others* (Court of Justice, 8 April 2014), where Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54, was found in breach of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

competences.[54] Having said that, it is appropriate to limit the enquiry to conferral, subsidiarity and proportionality, as these are the principles which are the most important for understanding the division of powers between the Union and its Member States.[55] For this reason, these principles also constitute the main pleas for challenging the exercise of EU competences.[56] These three pleas for review and the Court's approach to them will therefore be considered in turn.

2.3.1 Principle of conferral – theory and judicial review

The principle of conferral suggests that the exercise of EU competences is limited by the competences conferred upon it by the treaties and the objectives of the treaties. Therefore, it is always necessary to tie a Union measure to a legal basis in order to ensure that the objective at issue can validly be pursued under that provision. If a Member State, the Parliament, the Council or the Commission considers that a Union act does not fall within the scope of a legal basis, the legal act can be challenged through an action for annulment before the Court.[57]

But is the principle of conferral in Article 5(2) TEU a limit prone to work in judicial litigation? The judicial record suggests that the principle of conferral has not acted as a check to the exercise of EU competences. There are only two cases in the history of competence litigation, *Opinion 2/94*[58] and *Tobacco Advertising,*[59] where the Court annulled a whole piece of legislation or an envisaged an agreement for 'lack of competence'.

The first case where a proposed Union measure was considered to fall outside the Union's competence was the famous *Opinion 2/94* delivered on 28 March 1996. Here, the Court considered whether the EU had a competence under Article

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[54] See Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 675-688, 767-769; Whether the Court of Justice's negative opinion, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Court of Justice, Opinion of 18 December 2014), on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, will have any adverse impact on the status of fundamental rights within the EU remains to be seen. The previous judgement in *Digital Rights* (n 53), however, invalidating EU legislation on the basis of fundamental rights, cautiously indicates that there is no real need to be concerned about rights protection in the European Union.

[55] See Alan Dashwood, 'The Relationship Between the Member States and the European Union/ European Community' (2004) 41 Common Market Law Review 355, 356.

[56] Article 263 TFEU (1) - (2) provides: 'The Court of Justice of the European Union shall review the legality of legislative acts… …It shall for this purpose have jurisdiction… …on grounds of *lack of competence*, infringement of an essential procedural requirement, *infringement of the Treaties* or of any rule of law relating to their application, or misuse of powers…'. I added emphasis to underline that challenges brought against the exercise of EU competences on the basis of the principle of conferral could be brought under both 'lack of competence' and 'infringement to the Treaties', whilst challenges brought under subsidiarity and proportionality would have to be brought under the heading 'infringement of the Treaties'.

[57] See Article 263 (2) TFEU.

[58] See Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759

[59] See Case C–376/98 *Tobacco Advertising* (n 37).

352 TFEU to accede to the European Convention on Human Rights. The Court underlined that Article 352 TFEU could not serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaty as a whole, and in particular, by those that define the tasks of the Union. The Court observed that accession to the Convention would entail a substantial change in the Union system for the protection of human rights, in that it would entail the entry of the Union into a distinct international institutional system, as well as the integration of the provisions of the Convention into the EU legal order. Such a modification of the system for the protection of human rights in the EU, with equally fundamental institutional implications for the EU and for the Member States, would be of constitutional significance and go beyond the scope of Article 352 TFEU.[60]

The second case, where the Union was found to have acted outside its competence was the *Tobacco Advertising* judgement, where the German Government challenged the validity of the Tobacco Advertising Directive[61], *inter alia*, on the ground that it could not be adopted under Article 114 TFEU. Article 114 (1) TFEU entails a power for the EU to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. It is thus the key competence for the EU in the treaties to promote the internal market.

Although it is a broad competence, the Court of Justice held, in the *Tobacco Advertising Judgement*, that Article 114 TFEU could not be construed as vesting in the Union legislature a general power to regulate the internal market. Such an interpretation would not only be contrary to the express wording of Article 114 TFEU, but also incompatible with the principle of conferral. A mere finding of disparities suggesting an abstract risk of obstacles to the fundamental freedoms or potential distortions of competition was not sufficient to justify the choice of Article 114 TFEU as a legal base. If such evidence would be considered sufficient, the Court would be prevented from discharging the function entrusted to it by Article 19 TEU of ensuring that the law is observed in the interpretation and application of the Treaty. On the basis of these propositions, the Court proceeded to annul the Directive. According to the Court, the prohibitions on tobacco advertising in posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition on advertising spots in cinemas, did not in any way help to facilitate trade in the products concerned, nor were those prohibitions liable to remove 'appreciable distortions' to competition.[62]

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[60] See Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (n 58) 35-36.

[61] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ 1992 L 213/9.

[62] Case C-376/98 *Tobacco Advertising* (n 37) paras 83-84, 99-105, 109-116.

The rulings from the Court in *Tobacco Advertising* and *Opinion 2/94* gave, at first sight, the impression that the Court would be willing to police the exercise of EU competences.[63] It, however, appears that ensuing case-law on the scope of Article 114 and Article 352 TFEU casts serious doubts on the potency of the limits laid down in *Tobacco Advertising* and *Opinion 2/94*.[64]

In *Swedish Match*, a case decided in the aftermath of *Tobacco Advertising*, the Court gave a broad interpretation to Article 114 TFEU in relation to a challenge to a directive[65] prohibiting the marketing and selling of 'snuff' products. The Court found that there were national divergences in relation to the regulation of snuff products at the time of the adoption of the Snuff Directive. Some Member States had prohibited 'snuff', while others had not. Moreover, as the market in tobacco products is one in which trade between the Member States represents a relatively large part, those prohibitions on marketing contributed to a heterogeneous development of that market and were therefore such as to constitute obstacles to the free movement of goods.[66] Nevertheless, there was no evidence that a prohibition against marketing 'snuff' products improved the trade for that product. It rather seemed that the prohibition in the Snuff Directive, instead of facilitating trade, which presumably would be the main objective of a Directive adopted under Article 114 TFEU, completely banned trade in the product concerned.[67] Despite this, the Court accepted that the Union legislature had competence under Article 114 TFEU to adopt the 'Snuff' Directive.[68]

Alliance for Natural Health[69] is another case demonstrating the Court's weak enforcement of the limit that EU measures must have a link to the internal market. This case concerned a challenge to the legality of a number of provisions in the Food Stuffs Directive[70] prohibiting the marketing of certain foodstuff. The Directive had, as in the *Tobacco Advertising* and *Swedish Match* cases, been adopted under the legal basis of Article 114 TFEU. The claimants submitted that Article 114 TFEU was an inadequate legal basis for the prohibition on the marketing of certain food stuff, since this prohibition did not make any contribution to the internal market. The Court, however, observed that the recitals of the Directive

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[63] See for this argument, Alan Dashwood, 'Commentary' in (1996) Centre of European Legal Studies, Cambridge Occasional Paper No. 1, 'The Human Rights Opinion of the ECJ and its Constitutional Implications', 21-22, 24.

[64] See Weatherill, 'The Limits of Legislative Harmonisation' (n 51) 850.

[65] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L 194/ 26.

[66] See Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras 35-40.

[67] See Case C-58/08 *Vodafone* [2010] ECR I-04999, Opinion of AG Maduro, para. 13.

[68] See Case C-210/03 *Swedish Match* (n 66) para 33.

[69] See joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-06451.

[70] Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements [2002] OJ 2002 L 183/ 51.

showed that food supplements were regulated, before the Directive was adopted, by differing national rules liable to impede their free movement, and thus, had a direct impact on the functioning of the internal market. These assertions were demonstrated by the fact that a number of cases had been brought before the Court prior to the adoption of the Directive, relating to situations in which traders had encountered obstacles when marketing in another Member State than their own state to the establishment of food supplements lawfully marketed in their home Member State. In those circumstances, the Court accepted reliance on Article 114 TFEU for the Directive.[71]

Alliance for Natural Health showed that the EU legislature needs to do very little to show compliance with the conditions of Article 114 TFEU. The claim that there were obstacles to trade was supported by a simple reference to the preamble, stating that there were divergences in the regulation of food supplements in trade and that those divergences would potentially have an adverse effect on the internal market in the future. While divergent legislations in relation to the regulation of food supplements may give rise to obstacles to trade, this is too weak of a justification for harmonising national laws. If *Tobacco Advertising* had been properly enforced, then a simple mentioning of the justification in the recitals in the Food Stuff Directive would not have been accepted as sufficient to justify recourse to Article 114 TFEU.

Swedish Match, Alliance for Natural Health and other judgements on the scope of Article 114 TFEU[72] show that the Court has taken a questionable approach to the requirement in *Tobacco Advertising* that a link to the internal market should be demonstrated. There is also evidence in the case-law that the potential limits to the functional competence in Article 352 are difficult to enforce before the Court. Supposedly, the Court should enforce the limit in Article 352 TFEU that only 'Union objectives' can be pursued. If the objective of a Union legislative act would fall outside the definition of 'Union objectives', as defined in the treaties, e.g. objectives relating to the field of Common Foreign and Security Policy (CFSP)[73], it would supposedly be invalid under Article 352 TFEU.

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[71] See joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* (n 69) paras 35-39, 41-43.

[72] *Vodafone and BAT* also reinforces the impression that the Court has taken a lax approach to the scope of Article 114 TFEU. In *Vodafone*, the Court found that the potential risk that Member States would adopt divergent measures in the field of the price control of the provision of roaming services could create an obstacle to trade, and thus, justified the choice of Article 114 TFEU; see Case C-58/08 *Vodafone and Others* (n 67) paras 38-47. This is questionable, given the dicta in the *Tobacco Advertising* judgement that such obstacles must at least be 'likely' to occur; see Case C-376/98 *Tobacco Advertising* (n 37) para 86. In *BAT*, the Court allowed an export ban on the manufacture of cigarettes within the EU for export to non-Member countries to be adopted under Article 114 TFEU, although the ban only addressed potential 'future' obstacles to trade in cigarettes; see Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 81-88.

[73] Pursuant to Article 24 TEU '… legislative acts may not be adopted in the area of the Common Foreign and Security Policy'.

However, case-law indicates that this limit would not restrain the exercise of Union competences.

The *Kadi* case illustrates this point. In this case, it was clear that the objective of the Regulation[74], which imposed restrictive measures on Kadi and Al Barakaat, pursued a CFSP objective and not a Community[75] objective. The Community did not, at this stage, have a competence to combat terrorism, but only a competence under Articles 60 and 301 EC to authorise the adoption of sanctions against states. The Court, however, accepted that Articles 60, 301 and 308 EC (352 TFEU) conjointly included the objectives of imposing sanctions against individuals. Even if this objective did not fall within the Community's competences, Article 308 EC could, according to the Court, bridge the gap between the pillars and provide for this objective.[76]

Critically, it seems that the Court's reasoning failed to appreciate the distinction between means and objectives, and its conclusion flies in the face of the wording of Article 308 EC, which limited the Community's competence to 'one of the objectives of the Community'. The Court's ruling also undermined its earlier finding that Article 308 EC did not allow the adoption of Community measures that concerned one of the objectives under the EU Treaty in the sphere of external relations, including the CFSP.[77] In light of this, it is remarkable how the Court, later in the judgement, could come to the conclusion that Article 308 EC could include CFSP policies. This interpretation of Article 308 EC is difficult to square with the principle of conferral. If all provisions of the Treaty intend to pursue the common market, everything that the EU does will logically pursue the common market and will fall within the scope of the then Article 308 EC.[78]

The lessons from this discussion are quite straightforward. *Tobacco Advertising* and *Opinion 2/94* were two exceptions to the general approach of the Court of showing judicial deference to the Union legislature when it reviews measures adopted under the broad functional provisions in Article 114 and 352 TFEU. This brief analysis thus suggests that the limits imposed by the Court have failed

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[74] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9.

[75] I refer to the Community at this point because the case, decided prior to the ratification of the Lisbon Treaty, was concerned with the division between the different pillars.

[76] See Joined Cases C-402 and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras 226-231, 235.

[77] Ibid, paras 198-203.

[78] See Takis Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' Queen Mary School of Law Legal Studies Research Paper No. 12/2009, 6. (March 19, 2009). <http://ssrn.com/abstract=1365385>. Accessed 26 March 2015; See for a similar lenient review of the limits in Article 352 TFEU: Case 8/73 *Massey Ferguson* [1973] ECR 897.

to provide sufficient checks on the exercise of EU powers. In light of this, we have to examine whether the principle of conferral is still a meaningful principle to challenge the exercise of EU competence and analyse the reasons behind the Court's deferential approach.

There are practical, contextual and political explanations for why the principle of conferral has not worked as a principle limiting the exercise of EU competences. First, the treaties do not offer any clear-cut criteria for the Court to resolve competence disputes. Important Treaty provisions, such as Article 114 and Article 352 TFEU, are broad and functional, defined by the goal to be achieved. Since the limits imposed on the Union when exercising its functional competences, a link to 'market making' under Article 114 and a link to the Union's policies under Article 352 TFEU, lack precision, the Court's policy of deference is understandable.[79] Secondly, the teleological imperative of further political integration has placed constraints on the Court's effective enforcement of the principle of conferral. Strict judicial review of the exercise of EU competences would compromise the Union's capacity to act efficiently in order to fulfil the tasks of the treaties. The Court has instead supported expansive interpretations of the scope of Union competences in order to effectively attain the ambitious common market objectives.[80] The Court's 'purposive' and non-interventionist approach to interpreting the scope of EU competences fits well with the structure of the EU legal order. If the Union is to achieve the objectives and tasks set out in the treaties and resolve functional problems, the necessary powers must be placed at the service of the Union.[81] The Court's broad interpretation of the scope of Union competences also makes sense from a contextual perspective. The reality of the political environment is that the Member States have, by several Treaty amendments, affirmed the *telos* of European integration. They have done so by conferring additional competences to the Union, by providing the Union with new objectives to be achieved and by defining new policy areas where the Union shall take action.[82]

Moreover, it is also suggested that the Court of Justice, despite the discussed conceptual and political challenges for the Court, is up to the task of reviewing the exercise of EU competences. This being so, it is important to respond to the

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[79] See Weatherill, 'Competence Creep and Competence Control' (n 16) 25, 27, 46, 49; Derrick Wyatt, 'Community Competence to Regulate the Internal Market' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 128-136.

[80] See Weatherill, 'Better Competence Monitoring' (n 18) 30-31, 33; Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 410.

[81] See Pierre Pescatore, *Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Springer 1974, English Translation) 40-43, 50-51.

[82] See Paul Craig, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in Hans-Wolfgang Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 11–34.

challenge that the limits, imposed by the treaties and devised by the Court in *Tobacco Advertising* and *Opinion 2/94,* are insufficient. For this reason, I devote chapter 3 and chapter 4 of this report to reconstructing the existing limits to the exercise of EU competences. Without laying out the details, I will outline a couple of ideas to be developed later in the report. First, in order for the Court to maintain its own legitimacy, it must re-assert the limits imposed by *Tobacco Advertising* and *Opinion 2/94* and disallow Union measures which are used as instruments of 'general governance'[83] and annul measures that compromise the 'constitutional identity of the Union'.[84] The Court must, in cases of EU measures purporting to promote the internal market, require the EU legislature to show that there is a market failure that is of such a nature that only the EU can remedy it.[85] Secondly, the Court needs to be provided with a solid basis of evidence and reasoning to become a credible arbiter in competence disputes. I suggest a standard of legality asking the EU legislature to show that it has provided for adequate reasoning and taken into account all relevant evidence when adopting a piece of legislation.[86]

How can we then respond to the concern that the Court is not well-placed to review the exercise of EU competences? First, the evolution of Union law gives the Court good reasons to take a more serious stance on the exercise of EU competences. The increased emphasis, in the Lisbon Treaty, on the limitation of competences and the adoption of new protocols and the inclusion of new actors in the monitoring of EU competences demonstrate this point.[87] The treaties furthermore give the Court a broad mandate to adjudicate as a neutral arbiter of competences. Articles 5, 19(1) TEU and Article 263 TFEU empower the Court to review all secondary legislation on the basis of a 'lack of competence' and 'infringement of the treaties'. Secondly, there are additional considerations relating to the Court's own legitimacy which may prompt the Court to enforce the limits of the treaties more seriously after Lisbon. Pressure from national courts will probably induce the Court to become a trustworthy arbiter in competence disputes.[88] This is demonstrated by a notable recent challenge from the German Federal Constitutional Court (FCC) which expressed the view that they consider it their task to ensure that EU institutions do not amend the treaties and enact legislation *ultra vires*.[89] The increased emphasis on the limitation of competences, pressure from the FCC and the publicly voiced concern that the Court of Justice

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[83] See Wyatt, 'Community Competence to Regulate the Internal Market' (n 79) 136.

[84] See Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (n 58) paras 30, 35.

[85] See below chapter 4- section I, for an elaboration of this argument.

[86] See below section III in this chapter.

[87] See above in the introduction to this chapter for this point.

[88] See Mattias Kumm, 'Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 European Law Journal 503, 530.

[89] See Judgement of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgement*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), paras 226, 231, 237-242.

is not an objective arbiter in competence disputes, give the Court strong reasons to move to more intense judicial review in order to maintain its credibility.

2.3.2 Principle of proportionality – theory and judicial review

The principle of proportionality embodies a binding rule of primary law with which the Union legislature has to comply when it exercises its powers.[90] Protocol no 2 attached to the Lisbon Treaty substantiates the principle of proportionality, suggesting that 'any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of….proportionality'. The EU legislature is furthermore under a duty 'to take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved'.[91] Despite recent codifications of the principle, proportionality has been present since the early days of the Community as a general principle of law that has been fleshed out in the case-law of the Court. Pursuant to the Court's standard formula, proportionality implies that the Union legislature should consider whether the legislative measure is appropriate to reach the pursued objective[92], and if so, whether the legislative measure is indispensable for achieving the pursued objective (the 'least restrictive measure' test).[93] Finally, the principle requires that the Union legislative measure cannot entail excessive effects on the individual(s) affected by the legislative act (proportionality *stricto sensu*).[94]

But has proportionality worked before the EU Courts as a principle apt to challenge the exercise of EU competences? The case law suggests that proportionality cannot be easily employed to challenge Union legislative acts. Apart from the exception of *Spain v Council*[95], no general EU legislative acts have been struck down on the basis of proportionality. In order to illustrate the problems of judicial review, we should take a more detailed look at how the Court applies proportionality in cases concerned with broad EU policy measures.

Swedish Match provides a good illustration of the problems of judicial review. As we know from the previous section of this chapter, *Swedish Match* concerned a challenge to the Snuff Directive prohibiting the marketing of 'snuff'. In addition to their plea that the Directive was adopted on the wrong legal basis, the claimants argued that a prohibition of marketing 'snuff' products breached the proportionality principle, since the Union legislature had failed to take

[90] See Article 5(4) TEU.
[91] See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality (n 39) Article 5.
[92] See Case 116/82 *Commission v Germany* [1986] ECR 2519, para 21.
[93] See Case 382/87 *Buet and others v Ministère public* [1989] ECR 1235, paras 11-17.
[94] See Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras 23-30.
[95] Case C-310/04 *Spain v Council* [2006] ECR I-07285.

into account relevant available scientific information when the prohibition was adopted. The Court stated, with regard to the judicial review of proportionality, that the Union legislature must be allowed a broad discretion in the area of public health policies, which involve political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Only if a measure adopted in this field is 'manifestly inappropriate' in relation to the objective pursued can the legislative measure be invalidated. When assessing the 'suitability' of the prohibition, the Court then found that the preamble to the Snuff Directive showed that the prohibition was the only measure that was appropriate to cope with the danger that 'snuff' products would be used by young people. The Court noted that the scientific information available at the time of the adoption of the Directive allowed for neither the conclusion that the consumption of 'snuff' products presented no danger to human health nor that the harmful effects of 'snuff' products were lesser than those of other tobacco products. The adoption of the prohibition consequently took into account the development of scientific information. The Union legislature was also able to consider that a prohibition on the marketing of tobacco products for oral use was necessary. Other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product or at regulating the labelling of packaging of the product and its conditions of sale would not have the same preventive effect in terms of health protection.[96]

Swedish Match shows why proportionality, in cases where the Union legislature is faced with conflicting evidence and complex policy choices, will rarely be an obstacle for the EU legislature when proposing a legislative measure. It is not surprising that the measure was considered proportionate, as there were no less preventive measures which could achieve the objective of removing all the health risks of 'snuff products' to the same extent as a complete prohibition. Furthermore, given the fact that the evidence concerning the effects of 'snuff' products and its comparative health risks to other tobacco products was contested, it seems that the Court's conclusions on the necessity of the prohibition were justified.

The second case to discuss is *Spain v Council.* This is potentially an important case, since it is a rare example of how proportionality can be used to strike down parts of a general EU act. *Spain v Council* was concerned with a challenge to a Council Regulation on a new cotton support scheme.[97] Spain claimed that the Council Regulation was disproportionate because the Commission had failed to take into account relevant empirical evidence on the profitability of

[96] See Case C-210/03 *Swedish Match* (n 66), paras 48-57.

[97] Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 [2003] OJ 2003 L 270/1, inserted by Article 1(20) of Council Regulation (EC) No 864/2004 of 29 April 2004 [2004] OJ 2004 L 161/48 ('the Regulation').

cotton grown under the new support scheme.[98] In brief[99], the Court accepted Spain's arguments and held that the Commission had not provided for relevant information because it had failed, in its determination of the specific aid, to include direct labour costs and it did not perform a socio-economic study on the effects of the reform on ginning undertakings. The Commission thus failed to show that it had exercised its discretion, as it had not produced and clearly presented the basic facts that had to be taken into account as the basis for the contested measure. For this reason, the measure fell afoul of the proportionality principle.[100]

Although this case is an excellent example of how the Court should pursue a credible review, it cannot be interpreted as a strong example of the application of the proportionality principle. First, this case must be distinguished from other proportionality cases regarding the review of general legislative measures, since the annulment did not endanger the pursuit of a general EU policy scheme. Whilst the regulation at issue concerned common rules for direct support schemes under the common agricultural policy, the annulment was only concerned with a part of the measure, i.e. Chapter 10A of the regulation, which concerned the rules on support schemes for cotton production.[101] There were only three Member States which were directly concerned with the application of the support scheme for cotton: Portugal, Greece and Spain.[102] Secondly, the effects of the annulment were to be limited in time, so the Union would have a chance to adopt a new regulation.[103] In sum, the annulment of the measure would have limited consequences for the implementation of the Union's agricultural policy. For this reason, it appears that this case was an exception to the rule that the Court pays deference to the Union legislature's assessment of proportionality in challenges to general Union legislation.[104]

Another case demonstrating the problem of applying proportionality is the recent case of *Luxembourg v Parliament* and *Council*.[105] In this case, Luxembourg claimed that the directive on airport charges[106] infringed proportionality by including in its scope airports located in Member States where no airport reaches the minimum size laid down in the Directive and which have the highest passenger movements per year, regardless of the actual number of such

[98] See Case C-310/04 *Spain v Council* (n 95) paras 87-95.

[99] There is an extensive discussion of this case below in section III of this chapter.

[100] See Case C-310/04 *Spain v Council* (n 95), paras 116-118, 124-136.

[101] Ibid, paras 3-13 for a description of the legislative history of the act and an account of the relevant rules of the Regulation.

[102] See Article 110c of the Regulation (n 97).

[103] See Case C-310/04 *Spain v Council* (n 95) paras. 137-141.

[104] See Xavier Groussout, 'Judgment C-310/04' (2007) 44 Common Market Law Review 761, 772-773, for support of this argument.

[105] See Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-03727.

[106] Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges [2009] OJ 2009 L 70/ 11 ('Directive').

movements. The Court identified that the 'manifestly inappropriate' test also applied in this case, since the Directive was concerned with air transport matters, which is a field in which the EU legislature has a broad legislative discretion. Given the risk that airport managing bodies would be in a dominant position *vis-á-vis* the airport users and assume that position when fixing airport charges, the Court found that a common framework for establishing airport charges was an appropriate measure to prevent such a risk from occurring. The Court subsequently observed that Luxembourg had failed to propose any less restrictive measures which would ensure that the stated objective was attained as effectively as the common framework. Luxembourg also argued that the Directive was disproportionate on the basis that it imposed procedures and administrative burdens that were excessive in relation to the size of airports located in Member States where no airport reaches the threshold of 5 million passenger movements per year and which had the highest number of such movements. The Court, however, refuted this argument. First, the Directive provided only that Member States were to ensure that airport managing bodies instituted a procedure for regular consultation between them and airport users without stipulating the details of that consultation procedure. Secondly, it did not appear that the costs associated with the implementation of the Directive would cause airlines to decide to abandon an airport such as that of Luxembourg-Findel. In sum, there was no breach of the proportionality principle.[107]

Luxembourg v Parliament and Council shows the difficulty of applying the 'suitability' test in competence litigation. First, it was clearly very difficult for the Union legislature to find a measure that ensured that airport managing bodies did not misuse their dominant position, and at the same time, ensure that the measure did not discriminate between different airports in the Member States. By excluding airports such as Luxembourg-Findel, there could have been a claim for discriminatory treatment. Given these objectives, it appears that the inclusion in the Directive of main airports that had less than 5 million passenger movements per year was an appropriate measure.[108] The case also shows the Court's restraint in applying proportionality when the claimants have not adequately argued the case for the disproportionality of the measure. Since the standard of proof requires the applicant to show the presence of less restrictive measures[109], given Luxembourg's failure to suggest such measures, the Court could hardly have reached any conclusion other than that the common framework was 'necessary'.

While only three cases have been discussed in detail here, it is suggested that proportionality is not a very powerful ground for challenging broad Union

[107] Case C-176/09 *Luxembourg v Parliament and Council* (n 105) paras 60-84.
[108] Ibid, paras 41-51.
[109] Ibid, paras 98-104.

policy measures.[110] This argument is reinforced by the Court's rulings in other cases concerned with proportionality challenges to broad EU policy measures. The Union legislature has been allowed a broad discretion in areas which involve political, economic and social choices on its part, and where it is called on to undertake complex assessments. The Court has adopted a 'manifestly inappropriate' test in relation to areas such as agricultural policy[111], environmental policy[112], social policy[113] and health protection.[114] The Court has clearly limited the intensity of the judicial review of proportionality in relation to acts of a normative nature.[115] Furthermore, if one accepts the argument that *Spain v Council* was not concerned with the annulment of a broad Union policy scheme, there is no judgement in the history of the Court's jurisprudence annulling a general Union measure on the basis of the proportionality principle.

Moreover, it appears that there is no clear foundation in the case-law on proportionality for the Court to adopt a more intense review in cases in which the EU legislature adopts general normative acts. In cases concerning challenges to general Union legislative acts on the basis of proportionality, it is recognised that EU political institutions make policy choices. Whether a measure is 'suitable' for the implementation of a policy or what balance should be struck between different public and private interests are not questions upon which the Court is well-equipped to adjudicate. Whilst some commentators have suggested that procedural proportionality could be applied to overcome this problem[116], it is unclear whether this device will be effective in competence disputes. Procedural proportionality also requires the Court to enter into open-ended empirical and political assessments in relation to questions of the effectiveness of EU policies, as well as complex balancing exercises.[117] Nor could the Court impose the *Spain v Council* standard of review of 'relevant circumstances' and 'basic facts'[118] in cases of broad EU measures without facing the criticism that it was intruding on the EU legislature's discretion. The standard of showing 'relevant circumstances' and 'stating basic facts' would be too demanding an evidential standard to be placed on the EU legislature in its application of the proportionality principle.[119]

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[110] For support of this argument; see Weatherill, 'Competence Creep and Competence Control' (n 16)16-17, and Xavier Groussout and Sanja Bogojevic, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014) 250. For contrasting opinions to my argument, see Kumm, (n 88) 522-24, 528-29; Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (n 2) 81-83.

[111] See Case C-310/04 *Spain v Council* (n 98) paras 98-99.

[112] See Case C-27 and C-122/00, *Omega Air and other joined cases* [2000] ECR I-2569, paras 63-64.

[113] See Case C-84/94 *United Kingdom v Council* [1996] I-05755, para 58.

[114] See Case C-491/01 *BAT* (n 72) para 123.

[115] See Graínne De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105, 116, 125.

[116] See Koen Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3, 4-9, 15-16; Groussout and Bogojevic (n 110) 246, 252.

[117] See Kumm (n 88) 525, 528.

[118] See Case C-310/04 *Spain v Council* (n 95) paras 122-123.

[119] See Craig, *EU Administrative Law* (n 18) 592-593,600-604, 629-30, 639.

Finally, if proportionality should work as a restraint on the exercise of Union competences, this presupposes that the national autonomy feature is integrated into the proportionality *stricto sensu* test. There are, however, no hard criteria to assess whether a contested EU measure could objectively have been regarded as disproportionate, because it involved too great an interference in the regulatory autonomy of the Member States. Because of this, it will be very difficult to imagine how a minority of Member States could argue that a measure objectively entailed too great an intrusion on Member State values. The burden is also on the applicant to show that an incursion on Member State values is disproportionate *stricto sensu* in light of the EU objective before the Courts. This is not an easy task to discharge. The Union courts will already have decided that the contested measure withstands scrutiny under the suitability and necessity limbs of the test.[120] In sum, it seems that proportionality is not a ground apt for challenging Union measures before the Court, and it will therefore not be subject to a specific examination in this report.

2.3.3 Principle of subsidiarity – theory and judicial review

The principle of subsidiarity is a matter of whether regulations should be adopted at a centralised level or at a local level. There are three main arguments for moving decision-making power from a centralised level to local decision-making bodies. First, the diversity of collective preferences across Member States in conjunction with the benefits of reduced costs of experimentation and greater potential for innovation favours deciding policy questions at a lower level. Secondly, the values of legitimacy and democracy will be enhanced if decisions are taken at a lower level, since citizens will then be more involved and provided with more opportunities to have a meaningful say in the political process. Thirdly, cultural and national identities are more protected by moving decision-making power to the lower level.[121]

The principle of subsidiarity is now codified in the TEU.[122] Apart from the codification of the principle, the most important reform of the subsidiarity principle is the adoption of the new Protocol no 2. The Protocol implies that the Union is compelled to follow certain procedures for enacting legislation and suggests that the Union must show through qualitative, and wherever possible, quantitative evidence that a Union objective can be better achieved at the Union level.[123]

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[120] See Craig, *EU Administrative Law* (n 18) 601-604; Paul Craig 'Subsidiarity: A Political and Legal Analysis' (2012) 50 Journal of Common Market Studies 72, 83.

[121] Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (OUP 2012) 214, 224.

[122] See Article 5(3) TEU.

[123] See Protocol (No 2) on the application of the principles of subsidiarity and proportionality (n 39) Article 5.

Notwithstanding this, it appears that subsidiarity has played a marginal role in the Court's case-law as a principle restraining the exercise of EU competences. There are three concerns relating to the Court's application of subsidiarity. First, it appears that the Court has never annulled a measure on the basis of subsidiarity. This indicates that there is some inherent problem with the Court's current approach to the review of subsidiarity. The second part of the criticism is related to the fact that the Court's review does not extend to a review of 'material' subsidiarity.[124] The Court does not apply the substantive subsidiarity criteria in the Edinburgh Guidelines[125], i.e. it does not examine whether the Union measure at stake has transnational aspects which could not be satisfactorily regulated by national measures, whether Member State measures would conflict with the requirements of the Treaty or whether action at the Union level would provide clear benefits compared with action at the national level. If the Union legislature found that Union action could be better achieved at the Union level, the Court will not overturn these judgements.[126] Thirdly, the Court does not ask for evidence to establish compliance with subsidiarity. It appears sufficient for the Union legislature to simply assert, in the preamble, a need for Union action, without any justification for this need or without any enquiry into whether Member State action would be sufficient to achieve the objective.[127] Given the weak judicial record, we must examine whether subsidiarity is predestined to be a weak principle in restraining the exercise of EU competences.

The problem with the judicial review of subsidiarity has been related to the lack of firm justiciable limits and the principle's inherently political nature. The first critique to subsidiarity explains the Court's weak approach to it on a very fundamental basis by suggesting that subsidiarity is, in principle, a 'political' question. It has been suggested that the assessment of subsidiarity is too difficult for judges, because the issue of whether or not decision-making powers are best exercised at a central or a national level is a question of political and economic judgement, which falls outside the realm of legal reasoning.[128] The argument that the monitoring of subsidiarity is a 'political' question is flawed for legal and principled reasons. First, there is an explicit obligation on the Union courts to

[124] Case C-84/94 *United Kingdom v Council* (n 113) para 23; Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, paras 56-58.

[125] European Council, 'Conclusions adopted at Edinburgh European Council, Annex 1 to Part A: Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union' Bulletin of the European Communities 12-1992, 11-12 December 1992.

[126] See Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-07079, para 33; Case C-518/07 *Commission v Germany* [2010] ECR I-01885, paras 21-25, 54-55.

[127] See C-84/94 *United Kingdom v Council* (n 113) paras 74-77, 81; Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405, paras 26-28.

[128] See Lord Mackenzie Stuart, 'Subsidiarity: A Busted Flush?', in Deirdre Curtin and David O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworth Ltd 1992) 19.

apply subsidiarity. A 'political' question doctrine[129] is contrary to Articles 5(3) TEU, 263 TFEU and Article 8 of Protocol no 2, which mandate the Court to review EU legislation for compliance with subsidiarity. That the principle is justiciable is also supported by the case-law of the Court of Justice.[130] Second, there is an unacceptable 'moral cost' in allowing a potential legal violation of subsidiarity to go unsanctioned.[131] Acceptance of the doctrine would be a source of serious concern, since it would lead the Union courts to fall short of upholding the rule of law and absolve the Court from its judicial duty to uphold the law pursuant to Article 19 TEU.[132]

Although the 'political question' argument is not convincing, it has been cogently sustained that the legal content of subsidiarity is so weak that it makes judicial review of the principle impossible. The evidence for the conceptual problems of subsidiarity comes from the fact that subsidiarity has not yet, as mentioned above, been used to strike down EU legislation. The key problem is how subsidiarity should be argued in order to be successful in mounting a challenge. This problem is best illustrated by considering the case of the exercise of the functional competence in Article 114 TFEU. Davies has suggested that subsidiarity, instead of providing a method of balancing Member State and Union interests, assumes that the Union goals have absolute priority and simply asks who should implement them. His argument is demonstrated by the Court's case-law on the scope of Article 114 TFEU in relation to EU harmonisation measures. In such cases, a frequent challenge raised by Member States was that the EU harmonisation measure regulated areas such as public health were and still are primarily a Member State competence.[133] The subsidiarity argument was that the public health objectives of the measure could have been achieved just as well by the Member States acting alone. However, defining the EU harmonisation measure in terms of public health objectives is incomplete, since the aim of these EU measures was that of approximation as such, i.e. the removal of the problem arising from differences in Member States' law causing obstacles to the fundamental freedoms. Since Member States acting alone cannot harmonise, there is no subsidiarity criticism to be made. If the sole objective is to achieve uniformity in the law, it will always be necessary to provide for Union harmonisation. The consequence of this argument, if taken to its logical implications, is that subsidiarity challenges will always fail.[134]

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[129] See on the political question doctrine generally: Fritz Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 Yale Law Journal 517.

[130] See Case C-58/08 *Vodafone and Others* (n 67) paras 72-79; Case C-176/09 *Luxembourg v Parliament and Council* (n 105) paras 72-79.

[131] See Martin H Redish, 'Judicial Review and the "Political Question"' (1985) 79 Northwestern University Law Review 1031, 1060; Bruce V Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 Cambridge Law Journal 631, 633.

[132] See Case C-376/98 *Tobacco Advertising* (n 37) para 84, for the Court of Justice's recognition of its duty under the Treaties to review the exercise of EU competences.

[133] See Articles 6(a) and 168 (5) TFEU.

[134] See Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (n 2) 67-68, 73-75.

Despite Davies' sceptical observations, I would argue that there is still hope for subsidiarity as a ground capable of challenging the exercise of Union competences. In a substantive sense, a tightly argued case on subsidiarity must employ the limits imposed by the Court in *Tobacco Advertising* to question the EU's harmonisation competence.[135] A proper subsidiarity argument must seek to deconstruct the internal market justification for EU harmonisation. This is in contrast to current legislative practice, which consists of a simple statement from the EU legislature that the EU is, due to divergences in Member States' legislation in relation to a given subject, for example, more suited to achieving the objective of removing obstacles to trade or distortions of competition than Member States.[136] Such statements are mere assertions and are not supported by any evidence.

My proposal suggests that the EU legislature must show that there are 'appreciable' distortions of competition, genuine obstacles to trade or cross-border externalities to pass the subsidiarity test. Unless the Union is able to demonstrate that there is an imminent or present 'market failure', the issue should be left to the Member States to regulate.[137] From the perspective of judicial review, I suggest that the Court must move to apply subsidiarity in a procedural fashion. Procedural review is equally effective in relation to monitoring compliance with subsidiarity as it is in relation to review for compliance with the principle of conferral. The concern that the Court lacks the legitimacy or competence to review material subsidiarity can be rebutted through the employment of a procedural review of subsidiarity. The procedural enquiry should, as discussed in the following section, be implemented through a standard of legality asking the EU legislature to show that it has provided 'adequate reasoning' and has taken into account all 'relevant circumstances' relating to the subsidiarity question. The proposals for how the substantive application of subsidiarity can be improved will be further developed in chapter 4.

2.4 Setting the framework for a general standard of review and test for legality of EU legislation

It is now appropriate to discuss in more detail the standard for judicial review and test for legality that should be adopted by the Court. Whilst the Court, for reasons of legitimacy and competence[138], may be ill-equipped to reassess the factual evidence and the policy choices involved in designing EU legislation,

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[135] See Case C-376/98 *Tobacco Advertising* (n 37) paras 84, 86-87, 106-107.

[136] See Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1, recital 43; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57, recital 67.

[137] See Edward T Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41 Harvard International Law Journal 1, 75.

[138] See Neil Komesar, 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1988) 86 Michigan Law Review 657.

those reasons cannot be given such a broad interpretation as to disqualify the Court from being engaged in the judicial review of EU legislation. There is a solution to the problem of making judicial review of the limits to EU competences more effective. The suggestion here is that the Court should employ a procedural review enquiry to check whether the EU legislature has complied with the precepts of the treaties.

Procedural review is defined here as an approach to judicial review that compels the Court to consider whether the EU legislature's reasoning and evidence is sufficient to justify the exercise of general legislative powers. The Court's examination of the legislature's evidence and reasoning then constitutes a part of the Court's determination of the legality of EU legislation.[139]

The EU Courts have good reasons to adopt a procedural review approach to EU legislation. Procedural review allows the Court of Justice to control compliance with the limits of the treaties without intruding upon the Union legislature's discretion as to the appropriateness of a certain piece of legislation. Procedural review also facilitates the judicial task, since the Court, with adequate reasoning and evidence from the EU legislative institutions, will be empowered to review whether the precepts of EU law have been satisfied. Finally, procedural review can remedy the current transparency deficit in the EU decision-making procedure by requiring EU institutions to show that they were informed by an adequate factual foundation when they exercised their discretion.[140]

A procedural review enquiry entails a two-step examination of the legality of EU measures. First, it implies that the Court of Justice should look beyond the preamble of the measure and examine the adequacy of the reasoning. The Court must consider whether the reasons stated by the EU legislature in preparatory documents, such as explanatory memorandums and impact assessments, consultation documents and documents from other EU institutions ('legislative background documents') are pertinent for assessing compliance with the relevant principles of EU law. Taking into account 'relevant' circumstances means that the Court should examine whether the proposed justification makes sense, given the legal conditions for exercising the competence. One example is if the EU legislature employs an argument based on distortions of competition

[139] See Alberto Alemanno, 'The Emergence of Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 The Theory and Practice of Legislation 327, 332, 334-335; Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 Legisprudence 271, 272, 275, 279.

[140] See Joined cases C-154/04 and 155/04 *Alliance for Natural Health and Others* (n 69) para 133; Joanne Scott and Susan Sturm, 'Court as Catalysts: Re-thinking the Judicial Role in New Governance' (2007) 13 Columbia Journal of European Law 565, 586-91; Craig, 'The ECJ and Ultra Vires Action' (n 80) 427.

to justify the 'essentiality' of criminal sanctions under Article 83(2) TFEU.[141] Since the question of the 'essentiality' of criminal laws under this legal basis is only concerned with a comparison of criminal laws with other sanctions, it seems clearly incoherent to mingle internal market considerations with this assessment. Such considerations are not 'relevant factors'.[142] Secondly, the Court should consider whether the evidence in the legislative background documents is 'adequate' to substantiate the exercise of the legislative competence. If the EU legislature uses evidence concerning 'distortions of competition' to justify the 'essentiality' of criminal sanctions, it would also fail to conform to the legality standard of taking into account 'relevant circumstances'. This is because the 'essentiality' of criminal sanctions can only be justified on the basis of criminological evidence showing that criminal sanctions are a greater deterrent than other sanctions.[143]

This general test is still somewhat too vague to actually assess the legality of legislation. It is appropriate to give an example from the Court's case law that demonstrates both a proper standard and intensity of review. *Spain v Council* provides a perfect illustration for this purpose. As we know from above, in this case, Spain challenged a Council regulation on new support schemes for cotton on the basis that it infringed the proportionality principle by not taking into account relevant information when deciding upon the specific amount of aid granted under the scheme. The Court underlined, as regards the judicial review of the principle of proportionality, the wide discretion enjoyed by the Union legislature in the field of the Common Agricultural Policy (CAP). The legality of a CAP measure could therefore only be affected if the measure is manifestly inappropriate in terms of the objective which the EU institution is pursuing and if the institution at issue has manifestly exceeded the limits of its discretion. The Court then had to decide whether the EU legislature, when determining the amount of specific aid for cotton under the new aid scheme at 35% of the total aid under the previous scheme, had taken into account relevant information regarding the profitability of cotton growing under the new scheme.[144]

Up to this point, the Court simply followed its standard case-law on the review of proportionality within the sphere of broad EU policies. However, the Court dramatically changed this course of reasoning in paragraphs 122 and 123 by imposing a new standard of review and burden of proof on the EU legislature. Those paragraphs were crucial for the outcome and the general implications of the judgement and are therefore quoted *in extenso*:

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[141] See, for example, Commission, 'Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation', Brussels, 20.7.2010, COM (2011) 654 final ('Proposal', 'Market Abuse Crimes Proposal'), 3, 5, recital 7.

[142] See Case 310/04 *Spain v Council* (n 95) para 122.

[143] See below chapter 3- section I-II.

[144] See Case C-310/04 *Spain v Council* (n 95) paras 96-99, 104-105.

'However even though [such] judicial review of [proportionality] is of limited scope, it requires that the Community institutions which have adopted the act in question must be able to *show* before the Court that in adopting the act they actually *exercised their discretion*, which presupposes the *taking into consideration of all the relevant factors and circumstances* of the situation the act was intended to regulate. It follows that the institutions must at the very least be able to *produce and set out clearly and unequivocally the basic facts* which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended.'

On the basis of these general principles, the Court proceeded to annul the regulation. The Court noted that the Commission had failed to include certain labour costs in the comparative study of the foreseeable profitability of cotton growing under the new support scheme. The Court emphasised that the relevance of labour costs, for the purposes of calculating the production costs of cotton and the foreseeable profitability of that crop, could not be denied. The Court also found that the potential effects of the reform on the economic situation of the ginning undertakings, whilst being a 'basic factor' to be taken into account when assessing the profitability of the cotton scheme were not examined. The Court recognised that cotton production is not economically possible without the presence in the production regions of such undertakings operating under sustainable conditions, since cotton has little commercial value before being processed and cannot be transported over long distances. Given that the Commission had been unable to show that it had actually exercised its discretion when adopting the new support scheme by taking into account all the relevant circumstances, the Court concluded that there was a breach of the principle of proportionality.[145]

I argue that the benchmark suggested by *Spain v Council* provides a yardstick for what the Court should be doing to ensure that its review of EU legislation becomes credible. First, the Court's standard of review was an appropriate 'middle-way' solution between complete surrender to the EU legislature in cases of a review of policy issues and a comprehensive review of facts. While it did not mean that the Court would substitute the political assessments underpinning the contested regulation, it meant that the Court required the objectives of the legislation to be substantiated in order for the legislation to be held valid.[146] The Court's burden of proof requiring the EU institutions to show that it had exercised its discretion contributed to making the standard of review credible. This burden of proof deviated from the main rule that applicants in situations involving challenges to broad EU policies must show that the measures of the EU institutions were manifestly inappropriate for the objective pursued.[147] Finally, it is clear that the

[145] Ibid, paras 102, 131-135.
[146] See Groussout (n 104) 761; Groussout and Bogojevic (n 110) 247-48.
[147] See Case C-491/01 *BAT* (n 72) paras 123, 130, 140.

intensity of the Court's review was suitable to implement the legality standard. Instead of simply accepting the assertions made by the Commission on the relevance of specific factors, the Court independently examined whether the Commission had taken into account 'relevant information' when determining the amount of the specific aid for cotton.[148]

On the basis of the Court's ruling in *Spain v Council* and its subsequent judgements in *Kadi II*[149] and *Tetra Laval*[150], I suggest a test where the EU legislature first must articulate at least *one justification* which in theory is sufficiently compelling as a basis for sustaining compliance with the condition for exercising the competence. If the relevant competence norm or legal principle requires conformity to more than *one* condition, the EU legislature must offer an appropriate justification for *each* of the relevant conditions. The reference point for whether the reasons presented are justified in theory is the substantive justification for the exercise of EU competences, as has been developed and recognised by the general literature on EU law or criminal law and the Court's case-law. Furthermore, this test requires, as a minimum, the reasons offered in the preamble to be expressly linked to the conditions of the principle whose observance they should justify.[151]

Only in the second stage is it considered whether the reasons are backed up with 'relevant' evidence. In order to pass the evidence requirement, the EU legislature needs to show that one of the reasons which justified the EU legislature's compliance with the relevant conditions in the legal basis or the relevant EU rule is supported by sufficient and relevant evidence.[152] If there are several conditions in the relevant legal basis or in the relevant legal principle, the EU legislature must demonstrate the compliance of *each* condition with relevant evidence. This standard entails requirements in relation to both the quantity and the quality of the evidence. First, in order to prove a statement, it is normally necessary to refer to more than one source. If, for example, the evidence for a theoretically defensible claim consists of a reference to only one study or one scholarly article,

[148] See Case C- 310/04 *Spain v Council* (n 95) paras 110, 113-119, 131, 132-133.

[149] See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (Court of Justice, 18 July 2013).

[150] See Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-00987.

[151] See, however, Case C-233/94 *Germany v Council* (n 127) paras 26-28, where the Court concluded that the EU legislature, although it did not mention the subsidiarity principle, complied with subsidiarity when it reviewed the legality of the Deposit Guarantee Directive (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1994] OJ 1994 L 135/5); see discussion of this case below in chapter 4- section II, text to footnotes 350-352.

[152] See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n 149) paras 119, 124 and 130. This standard for the 'evidence' requirement is also supported by the Court's ruling in Case C-12/03 P *Commission v Tetra Laval* (n 150) para 39; 'Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.'

this would probably be insufficient. Secondly, the evidence needs to be of a reliable nature, for example, in the nature of statistical studies, policy studies or scientific articles, in order to pass the test. The evidence for a statement, for example, on the effects of criminalisation (Article 83(2) TFEU) cannot therefore be supported by only hearsay evidence, but must be supported by either relevant literature or relevant scientific studies.[153]

While the proposed test for review of the legality of EU legislation has a foundation in *Spain v Council*, it develops the Court's intensity of review further than the Court's general approach to the review of EU legislation. The Court has never, in its previous jurisprudence, imposed any requirement to submit evidence for compliance with certain stipulations of the treaties, such as 'quantitative' indicators in relation to subsidiarity or 'appreciable distortions to competition' in Article 114 TFEU. The Court accepts a simple reference in the preamble of legislative pieces and assertions of the EU institutions on the existence of certain factors and effects. Contrary to the Court's approach in *Germany v Council*[154] and *Swedish Match*[155], the suggested standard and test for legality does not accept mere reference to preambles as a justification for legislation, but requires references to evidence in legislative background documents, such as impact assessments and explanatory memorandums. The Court must also consider, in contrast to cases such as *Vodafone*[156] and *Alliance for Natural Health*[157], whether the evidence fits with the rationale for exercising the competence. This implies, as suggested above, that the EU legislature must refer to empirical evidence, whether that be a scientific study, scholarly articles or statistics, to support the measure. The central distinction from the Court's current approach is that my proposal asks the Court to be more intrusive when considering whether the necessary facts have been taken into account and whether relevant reasons have been provided before exonerating the EU legislature. If the EU legislature is not able to provide at least *one* theoretically compelling justification to defend compliance with the relevant condition or if the proposed justification is not defended by 'relevant' evidence, the Court should invalidate the proposed EU measure.[158]

Why then did I choose this threshold? First, it is a predictable and objective test. In the absence of some articulated criterion, the conclusion of 'inadequate reasoning' or 'irrelevant' evidence could be used to justify intervention in almost any circumstances. The yardstick here is, as mentioned, whether *one* of the

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[153] See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n 149) paras 151-162 for the application of the evidence standard.

[154] See Case C-233/94 *Germany v Parliament and Council* (n 127) paras 26-28.

[155] See Case C-210/03 *Swedish Match* (n 66) paras 36-41.

[156] See Case C-58/08 *Vodafone and Others* (n 67) paras 38-47.

[157] See Joined cases C-154/04 and 155/04 *Alliance for Natural Health and Others* (n 69) paras 35-40, 105-107.

[158] See Craig, 'The ECJ and Ultra Vires Action' (n 80) 412.

reasons relied upon in a legislative proposal constitutes, in itself, a sufficient basis to support that decision and is substantiated by sufficient evidence. Secondly, I chose this threshold for reasons of transparency. It is simply very hard to identify for the Court whether a measure conforms to the conditions of the treaties unless the EU legislature gives proper reasons for its conclusions and substantiates them with evidence.[159]

[159] See Case 45/86 *Commission v Council* [1987] ECR 1493, paras 8-10, 12; Martin Shapiro , 'The Giving Reasons Requirement' (1992) University of Chicago Legal Forum 179, 218-220; Scott and Sturm (n 140) 582-83, 586.

3 What are the limits to the Union´s competence to adopt criminal law?

3.1 Introduction

This chapter considers the limits of the Union's express and implied competence to adopt individual criminal sanctions under the legal bases of the treaties. The analysis is based on the general findings in chapter 2 on how limits to the exercise of EU competences can be reconstructed by interpreting the legislative powers of the treaties and by applying the test for legality developed in chapter 2 to review two pieces of EU criminal law legislation.

The chapter first takes stock of the debates in the literature and of the EU institutions following the Court's judgements in *Environmental Crimes* and *Ship-Source Pollution*. As noted in chapter 1, the Union lacked an express competence to enforce its policies by means of criminal law prior to the Lisbon Treaty. While concerns for state sovereignty and political inertia long held back the development of EU criminal law, this delay in the development of EU criminal law was finally ended by the above-mentioned judgements of the Court. In these judgements, the Court held that the EU had the power to impose criminal sanctions if this was essential for the effective enforcement of EU environmental policies.[160] The dominant view in the literature and at the Commission has been and is that the Court's rulings in *Environmental Crimes* and the *Ship-Source Pollution* express a general criminal law competence that could be exercised under most legal bases of the treaties. If competence to criminalise could not be found in the sectorial provisions of the treaties, e.g. Article 103 TFEU (competition policy), resort could always be had to the functional powers in Article 114 and Article 352 TFEU.[161] Based on this broad understanding of the judgements, the EU legislature adopted two directives, the Ship-Source Pollution Crimes Directive[162], on the basis of Article 100(2) TFEU, and the Environmental Crimes Directive[163], on the basis of Article 192 TFEU.

[160] See Case C-176/03 *Commission v Council* (n 5) para 48; Case C-440/05 *Commission v Council* (n 5) para 69.

[161] See Commission, 'Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgement of 13 September 2005' (Case C-176/03 Commission v Council), COM 2005 (583) final ('COM 2005/583'), 3, points 6-10; Wouter PJ Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 World Competition 117, 157; Dougan, 'From the Velvet Glove to the Iron Fist' (n 34) 103-104.

[162] See n 25 for full reference to the Ship-Source Pollutions Crimes Directive.

[163] See n 24 for full reference to the Environmental Crimes Directive.

Against this backdrop, the first section of the chapter considers the scope and limits of the EU's criminal law competence as derived from the *Environmental Crimes* judgement. The reader may ask if this question is relevant, given that the novel Article 83(2) of the TFEU, discussed in the second section of this chapter, clarifies that the Union has the competence to impose criminal law measures and criminal sanctions. To counter this argument, I sustain that it is still unclear, as argued in section III of this chapter, whether Article 83(2) TFEU constitutes a *lex specialis* to the other legal bases in the treaties, excluding the exercise of a criminal law competence on a different legal basis in the Treaty.[164] Moreover, the examined piece of legislation, the Environmental Crimes Directive, was adopted on the basis of Article 175 EC (192 TFEU). The issue of the legality of this Directive should thus be assessed primarily on the basis of the Court of Justice's pre-Lisbon case-law and the EU's general implied criminal law competence derived from this case-law.

The second section of the chapter examines the scope of the new provision on criminal law in the Lisbon Treaty, Article 83(2) TFEU. Despite the fact that a competence to enforce substantive Union polices through criminal sanctions has been expressly recognised in Article 83(2) TFEU, the question of the proper role for criminal sanctions in the enforcement of Union substantive policies remains largely unresolved.[165] Article 83(2) TFEU is one of the most debated provisions of the new Treaty. It is first contested because the Union has been given a general power to adopt criminal sanctions that is in sharp contrast to the Court's judgements in *Environmental Crimes*[166] and *Ship-Source Pollution*.[167] Secondly, the German Federal Constitutional Court, in its Lisbon Judgement, has prominently, due to the sensitive nature of criminal law for state sovereignty, expressed its reservations in relation to an excessive use of the Union's new criminal law powers.[168] Given the theoretically broad scope of this provision, i.e. that the EU can impose criminal sanctions for the 'effective implementation' of its policies, the second section of the chapter considers the limits to this new competence.

The third section of the chapter in turn tries to shed light on the question of the right legal basis for criminalisation measures. This question has been controversial both among commentators and Member States since the adoption of the Lisbon Treaty. It is contentious primarily because the Member States' safeguards in Title

[164] For support in the literature that the issue of a legal basis for criminal sanctions has not been resolved by the Lisbon Treaty, see Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' (n 9) 334, 340-344; Samuli Miettinen, 'Implied Ancillary Criminal Law Competence After Lisbon' (2013) 2 European Criminal Law Review 194; Dougan, 'From the Velvet Glove to the Iron Fist' (n 34) 109-112.

[165] See Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' (n 9) 334, 338-339.

[166] Case C-176/03 *Commission v Council* (n 5).

[167] Case C-440/05 *Commission v Council* (n 5) para 70; Peers, *EU Justice and Home Affairs Law* (n 54) 764.

[168] See *Lisbon Judgement* (n 89) para 226.

V of the TFEU, e.g. the right to pull an emergency brake if a proposed measure affects the fundamental aspects of that Member States' criminal justice system, do not apply if another legal basis in the treaties can be used for the adoption of criminal law measures. The use of other legal bases outside Title V would also mean that the United Kingdom and Ireland would not be able to employ the possibility of using their opt-outs, which apply to legislation within the AFSJ.[169]

The structure of the chapter is as follows. The first section of the chapter recapitulates and examines the EU's pre-Lisbon criminal law competence. This discussion particularly analyses whether the *Environmental Crimes judgement* expresses a general criminal law power in the EU to enforce its policies. I also account for the conditions for exercising the EU's dormant criminal law competences as derived from the Court's judgements. To show the application of the EU's general criminal law competence, I examine whether the Union legislature correctly exercised its competence to adopt the Environmental Crimes Directive under Article 192 TFEU. The second section of the chapter considers the scope of Article 83(2) TFEU in imposing criminal sanctions. It first considers the assessment of the substantive 'essentiality' criterion. The limits of the 'essentiality' requirement are demonstrated by an examination of the novel Market Abuse Crimes Directive.[170] The procedural requirement in Article 83(2) TFEU that there must be previous harmonisation measures in the policy field which the Union legislature intends to criminalise is then discussed and illustrated by a case study of EU market abuse policy. The final section of the chapter considers the right legal basis for criminal sanctions after the Lisbon Treaty. It specifically considers whether the general legal basis of Article 114 TFEU has priority over the *lex specialis* for criminal law, Article 83(2) TFEU, in terms of envisaged criminal law legislation.

3.2 Limits to the exercise of the Union´s criminal law competence prior to the Lisbon Treaty

3.2.1 Account of the environmental crimes and the ship-source pollution judgements

In order to properly explain the scope of the EU's criminal law competence as derived from the Court's rulings in *Environmental Crimes* and *Ship-Source Pollution*, it is appropriate to give a fuller account of the facts of these judgements.

In the *Environmental Crimes* judgement, the Council had enacted a framework decision on criminal law measures to protect the environment on the basis

[169] See House of Lords' European Union Committee, 'The Treaty of Lisbon: an impact assessment', 10th Report of Session 2007–08, Volume I: Report, HL Paper 62-I1, London: The Stationery Office Limited, paras 6.179-6.189; Miettinen, 'Implied Ancillary Criminal Law Competence' (n 164) 194-196.

[170] See n 28 for full reference to the Market Abuse Crimes Directive. This is the first directive adopted on the basis of Article 83(2) TFEU.

of the provisions of the (pre-Lisbon) Treaty on the European Union.[171] The Commission challenged this measure, arguing that since its predominant purpose was to protect the environment, the act should have been adopted under Article 175 EC (192 TFEU). The Court opined that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review including, in particular, the aim and the content of the measure. The Court found that both the content and the predominant purpose of the Framework Decision were to ensure environmental protection. The Court admitted that the Framework Decision entailed partial harmonisation of the criminal laws of the Member States and confirmed that, as a general rule, neither criminal law nor criminal procedure was a Community competence.[172] Nevertheless, in the next paragraph of the judgement, the Court radically altered its established case-law and recognised a Community criminal law competence:

'the last mentioned-finding (i.e. the absence of a general criminal law competence) does not prevent the Community legislature when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an *essential* measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are *fully effective.*'[173]

Based on this proposition, the Court went on to annul the Framework Decision. The Court underlined that the acts listed in the Framework Decision included infringements of a considerable number of Community measures, which were listed in the Annex to the proposed directive. The recitals of the Framework Decision further showed that the Council took the view that criminal penalties were essential for combating serious offences against the environment. Since both the aim and the content of the Framework Decision related to the protection of the environment, it should have been adopted on the basis of Article 175 EC. Given this, the Framework Decision encroached on the powers of the Community, infringed Article 47 TEU and had to be annulled.[174]

The Court's judgement was one of the most remarkable judgements delivered during the last decade. The finding of a Community criminal law competence was striking, particularly given the sensitive nature of criminal law for the Member States' sovereignty claims and the lack of such an express competence in the EC Treaty. However, soon after the Court's judgement in *Environmental Crimes*, a new inter-institutional battle was triggered. The Commission decided

[171] See Articles 31 and 34(2) of the [Pre-Lisbon] TEU and Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29/ 55; 'Framework Decision').

[172] Case C-176/03 *Commission v Council* (n 5) paras 46- 47.

[173] Ibid, para 48.

[174] Ibid, paras 49-53.

to challenge Council Framework Decision 2005/667/JHA[175] on criminal law measures in the enforcement of ship-source pollution, i.e. the *Ship-Source Pollution* judgement, on the basis that this Framework Decision encroached upon the Community's powers under Article 80 (2) EC.

The Court found that since requirements relating to environmental protection must be integrated into the implementation of Community policies, such protection must be regarded as an objective which also forms part of the common transport policy and could be promoted on the basis of Article 80(2) EC. The Court subsequently applied the 'objective legal basis test' and found that both the content and the main purpose of the Framework Decision were to ensure maritime safety and environmental protection. The Court then repeated the above cited formula from the *Environmental Crimes* judgement and opined that when the application of criminal penalties is an essential measure for combating serious environmental offences, the Community legislature could require the Member States to adopt such penalties. The Court found that the provisions in the Framework Decision related to conduct which was likely to cause particularly serious environmental damage infringing the Community rules on maritime safety. It also observed that the Council had taken the view that criminal penalties were necessary to ensure compliance with the Community rules on maritime safety. The Framework Decision should therefore have been adopted on the basis of Article 80(2) EC. The Court clarified that a determination of the type and level of criminal penalties did not fall within the Community's competence. Nonetheless, the Court concluded that the Framework Decision, in encroaching on the Community's powers in Article 80(2) EC, infringed Article 47 EU and had to be annulled.[176]

3.2.2 Do the environmental crimes judgement and the ship-source pollution judgement express a general criminal law competence?

Opinions have been divided on the issue of the scope of the EU's criminal law competence as expressed by the Court's judgements. A narrow interpretation of the Court's judgement in *Environmental Crimes* has been proposed, suggesting that EU criminal law measures can only be adopted when two conditions are fulfilled. First, the objective of environmental protection must be at stake, either due to serious violations of EU environmental rules or where the protection of the environment is materially affected by severe violations of other Union rules. Secondly, the Union must prove that the measure is essential to enforce EU environmental law.[177]

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[175] See n 25 for full reference to this framework decision.

[176] See Case 440/05, *Commission v Council* (n 5) paras 59-70, 74.

[177] This was the favoured interpretation by the United Kingdom, Ireland and Denmark; see House of Lords' European Union Committee, 42nd Report, Session 2005–06, 'The Criminal Law Competence of the European Community', Report with Evidence, HL Paper 227, 19, paras 44-45.

Whilst I agree with the second criterion, I believe that it cannot be maintained that the EU's general criminal law competence only applies to environmental law. In light of the structure of the pre-Lisbon treaties, it is difficult to accept the claim that the Court's ruling in *Environmental Crimes* was limited to environmental protection. Environmental policy is not more special than other areas of EU policies. Article 2 EC (3 TEU) did not establish any hierarchy between the Treaties' various objectives. Moreover, the treaties contained 'integration clauses' for other policy fields analogous to that concerned with environmental protection under Article 6 EC [178](Article 11 TEU).[179] Instead of a narrow interpretation of the judgement, I contend that the reasoning followed by the Court in the *Environmental Crimes* and the *Ship-Source Pollution* judgements establishes general principles for deciding the contours of the Union's power to impose criminal sanctions. This is due to the fact that the rationale for conferring a criminal law competence on the EU was premised on the 'effectiveness principle'. Given this, this competence must also apply in relation to any other EU policy (such as e.g. market abuse) which involves binding legislation whose effective implementation requires criminal penalties.[180]

The limits to the EU's general criminal law power as derived from the Court's case-law can be stated as follows. First, it entails an examination of whether criminal laws contribute to the 'effective implementation' of a specific EU policy. If the EU legislature demonstrates that criminal laws contribute to the 'effective implementation' of the Union policy, we should, in a second stage, consider whether other, non-criminal, sanctions would contribute in equal measure to the 'effective implementation' of this specific EU policy. Having shown that the Court's case-law expresses a general Union criminal law competence, the examination moves on to consider whether the Environmental Crime Directive adopted on the basis of Article 192 TFEU conforms to the conditions of this competence.

3.2.3 Was the Environmental Crimes Directive validly adopted under Article 192 TFEU?

The Environmental Crimes Directive sets forth a minimum set of serious environmental offences that should be considered criminal throughout the Community when committed intentionally or with at least serious negligence. These offences should be punishable by effective, proportionate and dissuasive criminal sanctions.[181] This section considers, on the basis of the legality standard developed in the previous chapter[182], whether the Directive conforms to the conditions of the Community's general criminal law competence. First, there

[178] See Article 3(2) EC; 153(2) EC.
[179] See Dougan, 'From the Velvet Glove to the Iron Fist' (n 34) 102-103.
[180] See Case C-440/05 *Commission v Council* (n 5) Opinion of AG Mázak, paras 97-99; COM 2005/583 (n 161) 3.
[181] See Environmental Crimes Directive (n 24) Articles 3 and 5.
[182] See above chapter 2- section III.

is an examination of whether there is 'adequate' reasoning to justify a resort to Article 192 TFEU. Secondly, there is an enquiry into whether the EU legislature has taken into account 'relevant evidence' showing that criminal laws are 'essential' for the effective implementation of Union environmental laws.

How then does criminal law contribute to the protection of the environment? The Commission's main argument is that criminal law is effective because it works as a deterrent for illegal activities. The Commission assumes that environmental crime is a typical white-collar crime, where the offenders are rational calculators aiming to making a profit, either from selling a product or from avoiding certain costs. Due to the nature of environmental offences, the imposition of criminal sanctions is thus the appropriate response.[183] This claim is well-supported by the relevant literature, which generally holds that criminal law is effective for enforcing environmental offences.[184]

Why then is criminal law 'essential', i.e. more effective than other non-criminal sanctions? The Commission argues that criminal laws have greater deterrence value than other sanctions. Existing Union and Member State measures are insufficient to ensure the effective implementation of Union environmental policies. The Environmental Liability Directive (ELD) only requires the operator to bear the costs for the preventive and remedial actions actually taken pursuant to that directive and fails to sanction the responsible operator.[185] Criminal sanctions are more effective, since they sanction a past illegal behaviour and prevent the repetition of the same illegal behaviour in the future.[186] The Commission seems, judged by the relevant literature, to be correct in the assumption that the civil liability regime established by the ELD has a weaker deterrent effect than criminal sanctions. This is because the individuals responsible for the offence are unlikely to be punished by the firm, and therefore, cannot be deterred by a liability regime such as that contained in the ELD, and because the current Union liability regime is directed against the operator, who can dispense with liability claims by passing them onto consumers.[187]

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[183] See Commission, 'Commission Staff Working Document, Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, Impact Assessment', Brussels, 9.2.2007, SEC (2007) 160 12, 23-24, 28, 30.

[184] See Gavin Hayman and Duncan Brack, 'International Environmental Crime: The Nature and Control of Environmental Black Markets', Royal Institute of International Affairs, 2002, 37. http://ec.europa.eu/environment/archives/docum/pdf/02544_environmental_crime_workshop.pdf>. Accessed 26 April 2015; Michael Faure and Günter Heine, *Criminal Enforcement of Environmental Law in the European Union* (Kluwer Law International 2005) 58.

[185] See Articles 2(6) and 8(1) of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/ 56 ('ELD').

[186] See SEC (2007) 160 (n 183) 24.

[187] See Ricardo Pereira, 'Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?' (2007) 16 European Energy and Environmental Law Review 254, 260-261; Geraldine S Moohr, 'An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime' (2003) 55 Florida Law Review 937, 969.

The Commission also claims that individual administrative fines are an inappropriate option, since Member States set their sanctions at a level that is too low. As the huge profits offenders enjoy are not calculated in the fines applied to their offences, the fines imposed on offenders are simply considered as an acceptable cost of doing business, taking into account the market prices and the low risk of detection. This general argument is also sustained by the criminal law literature.[188] The Commission also appeals to criminal law's social stigma. The stronger deterrent effect of criminal sanctions over administrative or civil sanctions is due to the moral disapproval connected to a criminal penalty and the inclusion of convictions in criminal records. This claim is also well-corroborated by criminal law scholars.[189] The Commission moreover considers that criminal law is more effective than other sanctions due to its stronger enforcement mechanisms.[190] This statement also seems to be generally recognised by experts on the enforcement of environmental law.[191]

Is there 'adequate reasoning' to support that criminal law is effective and essential for the enforcement of EU environmental policies? To test this, we should, according to the test developed in the previous chapter, monitor whether the reasons put forward by the Commission are defendable in theory, i.e. supported by the general criminological and criminal law literature on the effects of criminalisation.[192] Given that all the Commission's arguments, the deterrence argument and the social stigma of criminal law are supported by the relevant literature and by empirical studies, it seems that the Commission's reasoning is sufficient to pass the standard for legality. The Commission has also suggested two arguments that are sufficiently compelling to defend the superiority of criminal sanctions over non-criminal sanctions. These are the assumptions, well-defended in the literature, that the superior moral stigma of criminal law and the stronger enforcement tools associated with criminal law make it a more effective sanction than non-criminal sanctions.

What then is the evidence for the effectiveness and 'essentiality' of criminal laws in the implementation of Union environmental policies? First, to maintain the claim of criminal law's deterrence value, the Commission refers to international

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[188] See Martin F McDermott, 'Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation' (1982) 73 Journal of Criminal Law and Criminology 604, 614; Richard Macrory, 'Regulatory Justice—Making Sanctions Effective', Macrory Review, Cabinet Office, London, Final Report, November 2006, 47< http://webarchive.nationalarchives.gov.uk/20121212135622/http:/www.bis.gov.uk/files/file44593.pdf >. Accessed 7 April 2015.

[189] See Dan M Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 University of Chicago Law Review 591, 593, 650; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (CUP 2003) 220, 275-276.

[190] See Environmental Crimes Directive (n 24) recital 4; SEC (2007) 160 (n 183) 18, 24, 28, 35; Commission, 'Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law', Brussels, 9.2.2007, COM (2007) 51 final ('Environmental Crimes Proposal') 2;

[191] See Hayman and Brack (n 184) 22-24.

[192] See chapter 2- section III.

conventions that show that there is some common understanding that, for serious environmental crimes, the use of criminal law is effective.[193] This claim, however, seems to be unsubstantiated. While the submitted international conventions reveal a political conviction to enforce environmental laws through criminal sanctions, it seems that this conviction is not buttressed by any empirical support on the effectiveness of criminal laws. Secondly, the Commission refers to scientific studies in its impact assessment to support the view that environmental crimes are typical white collar crimes to which criminal sanctions are the appropriate response.[194] There is, nevertheless, no reference to the literature or studies of the legislative background documents supporting the claim that criminal laws provide a moral stigma or a greater moral stigma than administrative sanctions. Such evidence exists[195], and it is regrettable that the Commission failed to refer to it. Thirdly, the Commission submits evidence from the Member States that the use of criminal laws is a suitable tool for enforcement. It particularly refers to examples in Austria, Portugal and Finland, where in order to justify the use of effective investigation methods, such as technical surveillance, the interception of mail, and the recording, interception and tracing of telecommunications, there needs to be a risk that serious offences with high prison penalties will be committed. The evidence from the country examples, however, only demonstrates that severe prison sentences render criminal enforcement more effective. The availability of investigation methods is, however, a matter of the level of sanctions and not primarily a matter of whether the offence is criminalised. General criminalisation of infringements of EU environmental laws, without accompanying severe sanctions, will thus not necessarily lead to improved enforcement of EU environmental policies.[196] In relation to the superiority of criminal laws over individual administrative fines, the Commission refers to evidence from the UK House of Commons. This evidence suggests that the current low fines applied in the UK are merely a business cost, since many businesses in the UK currently see the payment of fines as the cheaper option to full environmental compliance.[197] The Commission then relies explicitly upon two studies, one study by TRAFFIC Europe[198] and one conducted by Huglo-

[193] See 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 UNTS 57/ [1992] ATS 7/ 28 ILM 657 (1989), Article 4(3); Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, 27 UST 1087; TIAS 8249; 993 UNTS 243, Article VIII (1); SEC (2007) 160 (n 183) 35.

[194] The article mentioned in the IA is Hayman and Brack's article; see n 184; SEC (2007) 160 (n 183) 12-13, 24.

[195] See above n 189 in the present chapter for such evidence.

[196] See SEC (2007) 160 (n 183)13-14.

[197] See House of Commons' Environmental Audits Committee: 'Report on Corporate Environmental Crime', Second Report of Session 2004-2005, HC 136, Evidence from Environmental Industries Commission, Ev 65-68, 20- 22; SEC (2007) 160 (n 183) 22-23.

[198] See Tobias Garstecki, 'Implementation of Article 16, Council Regulation (EC) No. 338/97 in the 25 Member States of the European Union' (2006) A TRAFFIC Europe Report for the European Commission, Brussels, 40.

Lepage & Associés, to show the insufficiency of national sanctioning regimes.[199] The TRAFFIC Europe report suggests that some national sanctioning regimes are inadequate to deal with the problem of punishing wildlife offences.[200] The Huglo-Lepage study shows that there are national divergences in terms of the nature of penalties imposed, the existence of penalties for certain offences and the level of the penalties imposed.[201] However, although the Commission has spent considerable effort to point out the insufficiency of existing national sanctioning regimes, there is no evidence in the legislative background documents to support the claim that criminal sanctions are superior to other, non-criminal sanctions, which is the main point in demonstrating compliance with the 'essentiality' condition. While such evidence exists in the literature[202], the Commission did not refer to it.

In order to pass the legality test, the EU legislature must first show that one of the reasons which justified why EU criminalisation is 'effective' for the enforcement of EU policies is supported by sufficient and relevant evidence (the 'effectiveness' criterion). The EU legislature must secondly show that at least one of the proposed justifications for the 'essentiality' of criminal laws is equally supported by relevant and sufficient evidence (the 'essentiality' criterion).[203] This test has not been met in this case. First, while the Commission proposed three reasons ('deterrence', 'social stigma' and 'strong enforcement') which justify why criminal laws are 'effective' for the enforcement of EU environmental laws, none of these reasons have been supported by sufficient and relevant evidence. Secondly, although the Commission submitted two reasons (criminal law's superior social stigma and better enforcement tools) which independently could justify criminal law's superiority over non-criminal sanctions, neither of those reasons were buttressed by relevant evidence to show how criminal laws are superior to non-criminal sanctions. In sum, it appears that the Environmental Crimes Directive has failed to pass the legality test outlined in the previous chapter.

3.3 Limits to the exercise of the Union´s criminal law competence after the Lisbon Treaty

The second section of this chapter considers the limits to the exercise of the Union's criminal law competence under Article 83(2) TFEU. For this purpose, it is appropriate to restate the wording of the provision:

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[199] See Huglo-Lepage & Associés, 'Criminal Penalties in EU Member States' Environmental Law', final report, 15/09/2003. <http://ec.europa.eu/environment/legal/crime/pdf/criminal_penalties2.pdf>. Accessed 26 April 2015.

[200] See Garstecki (n 198) 4-5, 18; SEC (2007) 160 (n 183) 14, 17-18.

[201] See SEC (2007) 160 (n 183) 18; 'Criminal Penalties in EU Member States' Environmental Law' (n 200) 354-55, 407-410, 542, 663-664, 708, 759, 828-830.

[202] See above n 187-188 in the present chapter for such evidence.

[203] See above chapter 2- section III.

'If the approximation of criminal laws and regulations of the Member States proves *essential* to ensure the *effective implementation* of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the *harmonisation measures in question*…'

I will consider in turn the three central and italicised conditions in this provision: i) that criminal law should be 'effective' for the enforcement of EU policies, ii) that they must be 'essential', i.e. that no other equally effective measures exist, and iii) that there must be previous 'harmonisation' measures in the area concerned.

3.3.1 Substantive limitations on the exercise of Union competence under Article 83(2) TFEU

a) Effective implementation of a Union policy

Although Article 83(2) TFEU presumes that criminal sanctions contribute to the 'effective implementation' of Union policies, we should examine what is actually meant by this concept. A general starting point for the discussion is the general concept of 'effectiveness' in EU law. It has been suggested in the literature that 'effectiveness' implies that law matters, i.e. that it has effects on economic, political and social life outside the law.[204] It therefore includes compliance, enforcement, impact and implementation. However, since the focus of the analysis in Article 83(2) TFEU is not concerned with the 'general effectiveness' of law, but rather, the 'effectiveness of criminal law' in relation to the enforcement of EU policies, we should dig deeper for a more appropriate concept.

Advocate General Kokott's definition in the *Berlusconi* case of what is an 'effective' criminal sanction is a more precise point of departure for the discussion. In her Opinion, AG Kokott argued that within the context of ascertaining what the term 'appropriate penalties' means in relation to the publication of false company documents, rules laying down penalties are 'effective' where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided and to attain the 'objectives' pursued by Union law. Furthermore, a penalty is 'dissuasive' when it prevents an individual from infringing the objectives pursued and the rules laid down by Union law.[205] Kokott's reasoning on 'dissuasiveness' is analytically sound. It is firmly based within the classical deterrence discourse, which suggests that the

[204] See Francis Snyder, 'Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 19.

[205] See Joined cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-03565, Opinion of AG Kokott, paras 88-89.

effectiveness of criminal penalties depends on the severity of the penalty.[206] Even more pertinent is Kokott's definition of appropriate criminal penalties, which envisage that criminal sanctions, in order to be 'effective', must be appropriate to achieve a certain EU objective or EU policy.[207]

This is arguably a correct definition of effectiveness in the field of criminal penalties. This definition is consistent with the practice of the Court and the Commission's official approach to criminal sanctions. The Commission has stated that sanctions can be considered 'effective' when they are capable of ensuring compliance with EU law.[208] The Court suggested in a similar way in the *Ship-Source Pollution* judgement that 'effectiveness' refers to the capacity of criminal penalties to achieve 'compliance' with Union rules and the extent to which rules are applied in practice and whether they are complied with in practice.[209] The definition proposed is therefore that 'effective implementation of Union policies' *is concerned with the extent to which criminal laws can contribute to achieving Union objectives in the policy area concerned.* The first part of the Article 83(2) TFEU test is thus that the Union legislature must show that criminal sanctions are susceptible of supporting the realisation of the Union objective in question.

b) The 'essentiality' condition

This subsection considers the second part of the test of Article 83(2) TFEU, the 'essentiality' condition, from a linguistic, systematic, contextual and functional perspective. We begin with a linguistic perspective. The ordinary meaning of 'essentiality' in the English language suggests that 'essential' means 'without factor x result, y cannot take place'. It means something that is indispensable or an absolute necessity for the attainment of a given objective.[210] To take a very simple example, one can imagine a situation in which a lower court shall, as a matter of procedure, consider both *res judicata* (i.e. law *x*) and *litispendens* (law *y*) to make a valid decision.[211] If either of these legal principles is disregarded, the judgement is not valid. Consequently, it is 'essential' that both *res judicata* and *litispendens* are considered to make a valid decision. It follows that 'essential', in the sense of Article 83(2) TFEU, implies semantically that 'without criminal sanctions (x), the effective implementation of Union policy (y) cannot take place'.[212] It is only when it is 'absolutely necessary/indispensable' for the effective

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[206] See Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169, 207-209; Jeremy Bentham, *The Rationale of Punishment* (Robert Heward 1830) 19-20.

[207] See similarly Case 326/88 *Hansen* [1990] ECR I-02911, Opinion of AG Van Gerven, para 8.

[208] See COM 2011/573 (n 21) 9.

[209] See Case C-440/05 *Commission v Council* (n 5) paras 68-69.

[210] See *Black's Law Dictionary* (6th edn, West Publishing Co 1990) 546, 1029-1030 for the definition of 'necessary' and 'necessity' which, in some contexts, have a similar meaning to 'essential'.

[211] See Swedish Code of Judicial Procedure of 1942 (SFS 1942:740), English Translation DS 1998:000, Chapter 13, Section 6 and Chapter 17, Section 11.

[212] That 'indispensable' has a nearly identical meaning as 'essential' is clear from Black's law Dictionary (n 210) 546, 773.

implementation of a Union policy that the Union should resort to criminal sanctions.[213] The linguistic interpretation of the 'essentiality' condition therefore suggests that the Union legislature will have a substantial burden when making the case for criminal law harmonisation under Article 83(2) TFEU.

The examination moves on to consider whether the linguistic interpretation of the 'essentiality' requirement fits with the Court's existing case-law. The Court has, as discussed in chapter 2[214], adopted a 'manifestly inappropriate' test and conferred a broad discretion to the EU institutions when examining the compatibility of general normative acts with the proportionality principle. Based on this case-law, it is arguable that the Court should apply a similar standard of legality under Article 83(2) TFEU as the proportionality test. This test implies that the intensity of the review would be light and that the lawfulness of a criminal law measure adopted under Article 83(2) TFEU can only be affected if it is 'manifestly inappropriate' in relation to the objective which the Union institutions are hoping to achieve.[215] Since the principles established by the Court in *Environmental Crimes* and *Ship-Source Pollution* are of general importance for determining the scope of the EU's criminal law competence, these rulings should also be taken into account in the analysis. In the *Environmental Crimes* and the *Ship-Source Pollution* judgements, the Court took a cautious approach and accepted the Council's assessment that criminal sanctions were 'essential' in those cases for the effective implementation of Union environmental law.[216] This test suggesting that the Court would be unable to question the Union legislature's choice, even when it appears on the face of it to be patently unreasonable, is an even weaker test than the 'manifestly inappropriate' test, which the Court employs when reviewing EU legislation in the field of common policies. The Court's approach could be criticised as incoherent and unprincipled. One could reasonably expect the Court to adopt a similar approach in the review of EU legislation in the field of criminal law as it has when reviewing EU legislation in the field of the internal market or in the fields of other common policies.[217] Furthermore, there are strong moral reasons to contest the Court's *de facto* slippery essentiality test. One would not envision the Court adopting a lighter test than 'manifestly inappropriate' in a field such as criminal law, which is sensitive for fundamental rights concerns and where such concerns militate against turning the 'essentiality' condition into a political question. Accepting such a test would exclude criminal law legislation from the judicial domain and would prevent the Court from discharging its judicial function.[218]

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[213] For support of this position: see Petter Asp, *The Substantive Criminal Law Competence of the EU–Towards an Area of Freedom, Security & Justice–Part 1* (Jure 2013) 130.

[214] See above chapter 2- section II (B).

[215] See Case C-210/03 *Swedish Match* (n 66) para 48.

[216] See Case C-176/03 *Commission v Council* (n 5) para 50; Case C-440/05 *Commission v Council* (n 5) para 68.

[217] See Asp (n 213) 131.

[218] See Redish (n 131); Harris (n 131) for the moral and principal problems of extremely light judicial review.

Whilst the analysis so far suggests that we should settle for the Court's current application of the 'manifestly inappropriate' standard for the review of Article 83(2) legislation adopted under Article 83(2) TFEU, I argue that the Court should involve itself in a more intense review of 'essentiality'. This is because the intensity with which the 'manifestly inappropriate' standard is applied in relation to the review of broad EU policies is ill-suited to police the exercise of the competence in Article 83(2) TFEU.[219]

First, I sustain that the nature of criminal law favours a more demanding enquiry into the legality of broad EU criminal law measures. Criminal penalties severely restrict the freedom of individuals, and they entail serious socio-ethical implications and severe stigmatisation of the offender.[220] Secondly, more serious judicial scrutiny of legislation adopted under Article 83(2) TFEU is also justified because of the 'essentiality' requirement's appeal to the principle of *ultima ratio*.[221] The *ultima ratio* principle requires criminal law to be used as a last resort and only employed when it has been established empirically that other less coercive measures are insufficient. If the 'essentiality' condition is interpreted in light of the *ultima ratio* principle, we should expect the EU legislature to show by empirical evidence that non-criminal sanctions are not effective in the enforcement of EU policy.[222] Such an application suggests a strict review of EU criminal law legislation. Thirdly, a more searching judicial enquiry is also supported by the political statements of Union institutions, which acknowledge the need to take the 'essentiality' requirement seriously. Both the Parliament and the Commission have underlined that the 'essentiality criterion' implies a need to analyse whether measures other than criminal law measures could not sufficiently ensure the policy implementation.[223]

Having argued for an intense review of the 'essentiality' requirement, we must consider how this condition should be enforced before the EU courts. In order for the Court to avoid going beyond its authority and entering into a 'substantive review'[224] of EU criminal law legislation, I suggest that the Court

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[219] For this point, see above chapter 2- section II (B).

[220] See Maria Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' (2011) 1 European Criminal Law Review 7, 17-21; Sakari Melander, 'Ultima Ratio in European Criminal Law' (2013) 3 European Criminal Law Review 45, 52.

[221] That the 'essentiality' condition should be considered in light of the principle of *ultima ratio* is clear from key policy documents; COM 2011/573 (n 21) 6-8, 12; European Council, 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens', (2010) OJ C 115/1, 4. 5. 2010, C 115/15.

[222] See Melander (n 220) 45-46, 50-51; Kaiafa-Gbandi (n 220) 17-19.

[223] See Parliament, 'Report on Legal Bases and Compliance with Community Law', (2001/2151(INI), Final A5-0180/2003, 22 May 2003, Explanatory Statement, point II, 8-10; COM 2011/573 (n 21) 5-7, 11.

[224] 'Substantive review' is defined as a review whereby the EU Courts determine the legality of legislation based strictly on an examination of the law's content or substance, without regard for the process through which it was enacted, see Bar-Siman-Tov (n 139) 279.

adopt a procedural review enquiry and apply the test of legality developed in chapter 2 to implement the 'essentiality' condition. This test of legality, requiring the EU legislature to offer reasons for the 'essentiality' of criminal laws that are compelling in theory and supported by relevant evidence, provides for more intensity than the Court's conventional 'manifestly inappropriate' test.

c) Application of the 'essentiality' requirement in Article 83(2) TFEU to the Market Abuse Crimes Directive

This sub-section examines, on the basis of the legality standard developed in chapter 2, whether the new Market Abuse Crimes Directive, adopted under Article 83(2) TFEU, conforms to the 'essentiality' condition. The Market Abuse Crimes Directive[225] defines three offences: insider dealing, unlawful disclosure of information and market manipulation, which should be regarded by Member States as criminal offences if committed intentionally and should be punishable by criminal sanctions which are effective, proportionate and dissuasive. In particular, the Member States shall ensure that the listed offences should be punishable by a maximum term of imprisonment of at least four years.[226] Given that the Market Abuse Crimes Directive is the first directive based on Article 83(2) TFEU, it is an illuminating example of how the 'essentiality' requirement should be enforced. The first question to examine is whether the Commission's reasoning is adequate to support the claim that criminalisation is 'effective' and 'essential' for the enforcement of EU market abuse policies.

The Commission advances one general argument for criminalisation. Criminal laws are 'effective' and 'essential' for the enforcement of EU market abuse policies because of their deterrence value. This argument is defended on three grounds. First, the social stigma of criminal sanctions gives it dissuasive value. Criminal sanctions express a particularly strong social disapproval towards individual offenders. This contention also explains why criminal sanctions are more effective than non-criminal sanctions. According to the Commission, criminal sanctions are of a qualitatively different nature, compared with administrative penalties, and therefore, are more dissuasive than non-criminal penalties.[227] This argument has strong support in the literature.[228] Secondly, the deterrent nature of criminal laws is explained with reference to the 'educative function' of criminal laws. The Commission suggests that establishing criminal offences for the most serious forms of market abuse improves deterrence, since it sets clear boundaries in law that emphasise that such behaviour is regarded as unacceptable.[229] Thirdly, the 'communicative' function of criminal law also contributes to the deterrent function of criminal law according to the Commission. It is contended that successful convictions for market abuse offences under criminal law often

[225] See n 28 for full reference to the Market Abuse Crimes Directive.
[226] See Market Abuse Crimes Directive (n 28) Articles 3- 5, 7(1)-(2), 9.
[227] See Market Abuse Crimes Proposal (n 141) 3.
[228] See n 189 for reference to the relevant literature supporting this point.
[229] See Market Abuse Crimes Proposal (n 141) 3; Market Abuse Crimes Directive (n 28) recital 6.

result in extensive media coverage, which helps to deter potential offenders, as it draws public attention to the commitment of competent authorities to tackling market abuse.[230] The second and the third arguments are defended by leading criminal law scholars.[231] The Commission also distrusts, on deterrence grounds, alternative non-criminal sanctions. It claims that the deterrent effect of civil sanctions is limited, as first, they do not cover all possible violations of EU financial services rules, and secondly, they cannot always be imposed due to difficulties in quantifying damages. In addition, the compensation of losses is not a deterrent in cases in which the profit derived from the violation is higher than the damages awarded. Nor, according to the Commission, are non-criminal fines the solution to the enforcement problem. Since violations of insider dealing regulations can lead to gains of several million euro, a fine of a few thousand euros, as provided in several Member States, does not seem to be sufficiently dissuasive.[232] The argument that non-criminal fines and civil liability sanctions generally are inferior to criminal sanctions is also well-supported by the scholarship.[233]

The test of legality for 'adequate reasoning' first requires us to control whether the reasons submitted are sufficient in theory to sustain the effectiveness of criminal laws.[234] This seems to be the case. The Commission's general claim that criminal laws act as a 'deterrent' is supported by three sub-arguments: the 'social stigma' of criminal laws, and the 'educative' and 'communicative' function of criminal laws. Since both the general claim and the three sub-arguments have support in the relevant literature, each of them offers an independent justification for criminal sanctions. Secondly, we control whether the Commission has proposed satisfactory reasoning for the contention that criminal laws are 'essential' for the enforcement of EU market abuse law. In this regard, it is suggested that the Market Abuse Crimes Directive should pass the test for 'adequate' reasoning. The Commission has suggested *one argument*, the moral stigma argument, which

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[230] See Market Abuse Crimes Directive (n 28) recitals 5, 6 and 7; Commission, 'Commission Staff Working Paper, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on insider dealing market manipulation (market abuse) and the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation', Brussels, 20.10.2011, SEC (2011) 1217 final, 165.

[231] For support of the deterrent function of criminal law due to its educative function: see Joel Feinberg, 'The Expressive Function of Punishment', in Joel Feinberg (ed), *Doing & Deserving: Essays in the Theory of Responsibility (*Princeton University Press 1970). For support of the deterrent function of criminal law due to its communicative function: Antony Duff, *Punishment, Communication, and Community (*OUP 2001).

[232] SEC (2011) 1217 (n 230) 26; Commission, 'Commission Staff Working Paper, Impact Assessment, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Reinforcing sanctioning regimes in the Financial Services Sector', Brussels, 8.12.2010 SEC (2010) 1496 final, 12-14, 19, 25-26.

[233] See above section I (C) in the present chapter, n 187-188, for references to the relevant literature supporting this point.

[234] See chapter 2- section III.

in itself, on the basis of the pertinent literature, explains why criminal laws are superior to non-criminal sanctions.[235]

The second part of the legality test involves determining whether the justifications offered to defend the 'effectiveness' of criminal sanctions and the 'essentiality' of criminal laws are backed up by 'relevant' and 'sufficient evidence'.[236] Are any of the Commission's justifications for the appropriateness of criminal laws supported by such evidence? The Commission relies on the statements of Margaret Cole, a former director of enforcement of the UK Financial Services Authority (FSA), to prove the effectiveness of criminal law in this area. Cole asserted that criminal laws are effective in enforcing market abuse rules since they provide strong deterrence. Her statement is also invoked to support the 'essentiality' of criminal laws. According to Cole, criminal sanctions, and in particular, custodial sentences, have a stronger dissuasive effect on potential market abuse offenders than administrative sanctions. On the basis of these statements, the Commission claims that some national regulators consider criminal sanctions to have a deterrent value.[237] This claim is, however, not convincing. The Commission misrepresents the reality, since 'some national regulators' refers only to the views of the director of one national regulator, i.e. the FSA. Moreover, the evidentiary value of Cole's statements is questionable, given the risk of bias. The director has a strong personal interest in promoting trust in the enforcement activities of the FSA and to assure the regulatory community and the public that its enforcement of market abuse regulation is effective. This evidence is thus not sufficient to prove the claims of the deterrent nature of criminal laws.

Secondly, the Commission refers to market cleanliness surveys from the FSA to demonstrate the effectiveness of criminal laws. By referring to those surveys, which demonstrate a reduction of pre-announcement price movements from 30.6% (in 2009) to 21.2% in 2010, the FSA claims that increased criminal enforcement had a positive effect on compliance. This evidence does not, however, as recognised by the FSA itself, prove any causal link between increased enforcement and the reduction in the indicator.[238] Many factors other than insider trading, such as media speculation or strategic leaks of information, could cause such movements.[239]

Thirdly, the Commission points to one company survey from the Office of Fair Trading (OFT) suggesting that criminal sanctions, and in particular,

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[235] See above in this chapter n 189 for references to the relevant literature.

[236] See above chapter 2- section III.

[237] See SEC (2011) 1217 (n 230) 166, at n 312; speech by Margaret Cole, 'How Enforcement Makes a Difference' 18 June 2008, <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0618_mc.shtml>. Accessed 8 April 2015.

[238] See UK Financial Services Authority, 'Annual report 2010/11', 62 http://www.fsa.gov.uk/pubs/annual/ar10_11/ar10_11.pdf. Accessed 9 April 2015.

[239] See SEC (2011) 1217 (n 230) 52 at n 127.

incarceration, is the strongest possible deterrent for a potential infringer.[240] The OFT report refers to an earlier OFT company survey which indicates that criminal penalties are mostly highly ranked by companies as a factor to promote compliance. While this study gives some support for the statement that criminal laws are superior over non-criminal sanctions, it is insufficient as evidence for the general superiority of criminal laws. First, since this study is not included in the Commission's impact assessment from 2011, it is questionable whether it can be counted as evidence for the increased effectiveness of criminal laws over non-criminal sanctions. Secondly, even if it would count as evidence for the greater effectiveness of criminal laws, this survey is limited to the assessment of penalties in the field of competition law.[241]

The additional evidence for the 'effectiveness' of criminal sanctions arises from an article by Michael Levi on the use of shaming within the context of corporate fraud. He suggests that criminal sanctions may, under certain conditions, contribute to the objective of increasing deterrence due to the stigma attached to criminal conduct. Although the argument gives some support for the effectiveness of criminal law, it is debatable whether it amounts to evidence of the 'essentiality' of criminal sanctions in the enforcement of market abuse rules. First, Levi's shaming argument only relates to the fraud offence, and the Commission does not explain how this argument could be used to justify criminal sanctions in the field of market abuse.[242] Secondly, the Commission's representation of the article is misleading. Instead of saying that 'criminal sanctions contribute strongly to the objective of increasing deterrence due to the stigma attached to criminal conduct'[243], Levi is very cautious in expressing the view that the shaming function of criminal sanctions is effective in achieving compliance with the rules of society.[244]

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[240] See London Economics, 'An Assessment of Discretionary Penalties Regimes' OFT1132, Report for the Office of Fair Trading (UK), October 2009, para 1.18, 3.32.

[241] See Deloitte and Touche, 'The Deterrent Effect of Competition Enforcement by the OFT', A report prepared for the OFT by Deloitte, November 2007, OFT 962, paras 1.23, 1.26, 5.58-5.59, 5.109-5.110 < http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf >. Accessed 9 April 2015.

[242] See Michael Levi, 'Suite Justice or Sweet Charity? Some Explorations of Shaming and Incapacitating Business Fraudsters' (2001) 4 Punishment and Society 147, 149; Market Abuse Crimes Proposal (n 144) 3.

[243] See SEC (2011) 1217 (n 230) 166.

[244] See Levi (n 242) 155, 158.

In addition, the Commission refers to 6 scientific articles[245] and studies, presumably to argue that criminal sanctions are more effective than non-criminal fines.[246] Having reviewed all of these studies, it is striking that none of them sustains that criminal sanctions generally are superior to non-criminal fines. Whilst the Commission has spent considerable time and effort to point out the insufficiency of existing national sanctioning regimes, there is no clear evidence to support the general claim that criminal sanctions are superior to other alternative sanctions.[247] Although there is convincing evidence in the literature that demonstrates the superiority of criminal sanctions over alternative sanctions for the enforcement of regulatory commands[248], the Commission has entirely failed to refer to such evidence.

It can also be regrettably observed that there is no discussion in the Impact Assessment of whether other alternative sanctions[249] on a Union level in combination, such as individual fines, trading prohibitions and civil liability, would be sufficient to ensure the effective implementation of Union environmental policies. Since the Union legislature has a competence under Article 114 TFEU to adopt several non-criminal sanctions to support the internal market[250], one really fails to understand why the Union legislature did not consider this option. Although the Union legislature need not prove that alternative non-criminal sanctions do not work on the Union level, there should be comprehensive references to evidence showing the superiority of criminal sanctions over administrative sanctions. Such references are completely lacking in the impact assessment. Moreover, it is incomprehensible how differences between the Member States' legislation would prove the insufficiency of national sanctioning regimes. There is no empirically established relationship whatsoever between differences between the Member States' legislation and its lack of

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[245] See John C Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007), 7 March 2007, Columbia Law and Economics Working Paper No 304<http://ssrn.com/abstract=967482>. Accessed 9 April 2015; Uldis Cerps, Greg Mathers and Anete Pajuste, 'Securities Laws Enforcement in Transition Economies' (2012), 20 December 2012<https://iweb.cerge-ei.cz/pdf/gdn/RRCV_100_paper_01.pdf >. Accessed 9 April 2015; Rafael La Porta, Florencio Lopez-De-Silanes and Andrei Shleifer 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1; Peik Granlund, 'Regulatory Choices in Global Financial Markets – Restoring the Role of Aggregate Utility in the Shaping of Market Supervision' (2008) Bank of Finland Research Discussion Papers 1/2008; Wouter PJ Wils, 'Optimal Antitrust Fines – Theory and Practice' (2006) 29 World Competition 183, 199; CRA International/City of London, 'Assessing the Effectiveness of Enforcement and Regulation' (2009), London, April 2009. <http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/research-2009/Assessing%20the%20Effectiveness%20of%20Enforcement%20and%20Regulation.pdf>. Accessed 9 April 2015.

[246] See SEC (2010) 1496 (n 232) 12.

[247] Ibid, 12-20.

[248] See n 187-189 for references to such literature.

[249] See Market Abuse Crimes Proposal (n 141) 2.

[250] See SEC (2010) 1496 (n 232) 20; Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771; Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), Brussels, 20.10.2011, COM(2011) 651 final ('MAR Proposal'), 5.

deterrent effect. As to the comparison between criminal laws and civil liability sanctions, it is also clear that the impact assessments preceding the Market Abuse Crimes Directive refer to no evidence supporting the contention that such sanctions are less effective than criminal sanctions.[251]

Does the evidence, despite this criticism, nevertheless pass the test of legality? As we know from above, there only needs to be sufficient and relevant evidence to support one of the reasons which constitutes an independent justification for criminalisation to pass the standard of legality. Since the Commission has been able to refer to three separate studies, the OFT survey, Levi's article and the market cleanliness survey, to support the notion that criminal laws have a deterrent effect, it has passed the test of legality in demonstrating that criminal laws are 'effective' for the enforcement of EU market abuse rules. However, it seems that the Commission has failed to show that criminal sanctions are more effective than non-criminal sanctions for the enforcement of EU market abuse policies ('essentiality' condition). Having dismissed the statements by Margaret Cole above, the market cleanliness study from FSA, Levi's article and the scientific studies on the impact of different levels of fines as inadequate or irrelevant, there is only one piece of evidence which supports the 'essentiality' of criminal laws. This is the OFT survey invoked by the Commission in its impact assessment. While this piece of evidence goes in the right direction, more than a single study must be produced as evidence in order to show that criminal laws are more effective than non-criminal sanctions. Even if we interpret the Commission's argument for the 'essentiality' of criminal laws as a general claim that criminal laws have a greater deterrence value than non-criminal sanctions, it is insufficient to support this thesis with only one relevant piece of evidence.[252] In sum, it seems that the Commission partly has failed to show, as required by the proposed test of legality, that the justifications offered for the 'essentiality' of criminal laws are supported by sufficient and relevant evidence. The Market Abuse Crimes Directive is thus not, as it stands, in conformity with Article 83(2) TFEU.

3.3.2 Is the harmonisation requirement in Article 83(2) TFEU a check on the exercise of Union competences?

This subsection of the chapter considers one of the procedural limits to the

[251] The impact assessment from 2010, SEC (2010) 1496 (n 232) 19, merely states that civil liability sanctions have a limited deterrent effect, while completely failing to compare such sanctions to criminal sanctions.

[252] There is, however, abundant evidence for the superiority of criminal laws over non-criminal sanctions. For comparison to civil liability: Urska Velikonja, 'Leverage, Sanctions, and Deterrence of Accounting Fraud' (2011) 44 University of California, Davis Law Review 1281, 1313-15; Macrory (n 188) 18-19. There is also evidence for the superiority of criminal laws over individual administrative fines: Cristopher D Stone, 'The Place of Enterprise Liability in the Control of Corporate Conduct' (1989) 90 Yale Law Journal 1, 46-48; Reinier H Kraakman 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 Yale Law Journal 857, 859.

exercise of EU competences under Article 83(2) TFEU: the 'harmonisation' requirement. The analysis begins by considering the definition of 'harmonisation' measures.

a) What is the meaning of 'harmonisation measures' in Article 83(2) TFEU?

When examining the meaning of 'harmonisation measures' in Article 83(2) TFEU, it is appropriate to consider first *when* harmonisation must have taken place. Steve Peers has argued that a criminal law measure cannot be adopted before the harmonisation measure due to the lack of a Union policy to implement. He claims, however, that it should be possible to adopt the harmonisation measure simultaneously with the criminal law measure, given that Article 83(2) TFEU is guided by the 'effectiveness' criterion.[253] While it seems reasonable, as Peers suggest, taking the effectiveness principle into account when interpreting this provision, as Article 83(2) TFEU explicitly refers to 'effective implementation', I believe it is questionable whether 'effectiveness' can be used to circumvent the textual constraints of Article 83(2) TFEU.[254]

In contrast to Peers' interpretation, it is claimed here that there can be no simultaneous adoption of the harmonisation measure and the criminal law directive. My argument is supported by the wording of Article 83(2) TFEU, which states that '(criminal law) directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question'. The wording 'as was followed' points to past legislative activity and suggests that the underlying harmonisation measure must already have been adopted before the criminal law measure is adopted. Furthermore, if harmonisation measures are not in place, the adoption of criminal law measures cannot logically prove to be 'essential to ensure the effective implementation of a Union policy', since such a policy would not exist. Additionally, this strict temporal interpretation meets the concern that the provision should not lead to hasty recourse to criminal sanctions.[255]

The second issue is what kind of harmonisation is necessary in order to justify the use of Article 83(2) TFEU. I argue, on the basis of textual and systematic considerations, that harmonisation must have taken place through secondary law in the form of regulations, directives or decisions and through procedures designated as the 'ordinary' or 'special' legislative procedures. To understand the argument, it is crucial to understand the meaning of 'ordinary' and 'special' legislative procedure and 'legislative acts' as they are defined in the treaties.[256] A

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[253] See Peers, *EU Justice and Home Affairs Law* (n 54*)* 776.

[254] See Trevor C Hartley, *The Constitutional Problems of the European Union* (Hart Publishing 1999) 48.

[255] See Asp (n 213) 133-134.

[256] See Alexander Türk, 'Law-Making After Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley, *EU Law After Lisbon* (OUP 2012) 66-74.

quick glance at Article 289 TFEU shows that there is a definition of which type of legislation is subject to the 'ordinary' or 'special' legislative procedures and which type of legislative procedures constitute the 'ordinary' and 'special' legislative procedures. First, since regulations, directives and decisions are the only types of acts that can constitute 'legislative' acts according to the treaties[257], it appears that 'harmonisation measures' in Article 83(2) TFEU must refer to such instruments. Secondly, previous 'harmonisation' measures in Article 83(2) TFEU must be 'legal acts'. To constitute a 'legal' act, an instrument must nevertheless be adopted by means of the 'ordinary' or 'special' legislative procedure pursuant to Article 289 TFEU. Legislative procedures in the treaties can, however, only be defined as 'special' or 'ordinary' legislative procedures if they are specifically designated as such by the specific legal basis providing the Union with the competence to act. It follows then from Article 289 TFEU and the general scheme of the treaties that Union measures adopted through procedures that are not designated as 'special' or 'ordinary' legislative procedures are not, by definition, 'legal acts', but are designated as non-legislative acts pursuant to Article 289(3) TFEU and Article 297(2) TFEU. Harmonisation that has taken place through treaty amendments or through other secondary measures that have been designated as non-legislative in character cannot therefore constitute 'harmonisation' measures under Article 83(2) TFEU.[258]

Another important question about Article 83(2) TFEU is the 'nature' of harmonisation which must be in place in order for the Union to exercise its competence under the said provision. Ester Herlin-Karnell suggests that there is not much in contemporary EU law that has not already been the subject of some kind of harmonisation by the EU and that could not be linked to the effectiveness criterion in Article 83(2) TFEU. The 'harmonisation' requirement does not therefore constitute an obstacle to the exercise of Union competences under Article 83(2) TFEU.[259] In slight contrast to Herlin-Karnell, the argument here is that the 'harmonisation' requirement could act as a check on the exercise of the power contained in Article 83(2) TFEU, since it first, as argued above, requires harmonisation through the 'ordinary' and 'special' legislative procedure, and secondly, because it demands harmonisation of a certain quality.

In order to determine the nature of harmonisation necessary to trigger Article 83(2) TFEU, we must dig deeper into the meaning of the term 'harmonisation' measures. A natural starting point for this enquiry is to examine how 'harmonisation' is defined elsewhere in the treaties. We therefore approach the question by examining Title VII, Chapter 3 of the TFEU, entitled 'Approximation of Laws'. It follows from Articles 114 (1), 115 (1) and 116 (1) TFEU that

[257] See Article 288(1) and Article 289(1) TFEU.
[258] See Dougan, 'From the Velvet Glove to the Iron Fist' (n 34) 109 and Türk (n 256) 69-70.
[259] See Ester Herlin-Karnell, 'White-collar Crime and European Financial Crises: Getting Tough on EU Market Abuse' (2012) 37 European Law Review 481, 485.

'harmonisation' refers to the approximation of the provisions laid down by the Member States' laws and regulations which have as their object the establishment and functioning of the internal market and to Union measures which have the aim of removing distortions to competition. Applying these general definitions to Article 83(2) TFEU, we can assume that the underlying harmonisation measures must have, as their object, either strengthening the internal market or maintaining competition in the common market. Harmonisation, from a qualitative perspective, furthermore entails a modification of the substance of internal laws by providing for common substantive EU laws in relation to certain policy fields.[260] This suggests that the precondition for employing Article 83(2) TFEU is 'substantive harmonisation'. Underlying harmonisation cannot thus concern marginal questions or merely superficial harmonisation.[261] Underlying harmonisation measures must either contain the substantive content of the rule whose infringement entails criminal sanctions, be a substantive definition describing the prohibited activity and/or be a measure prescribing sanctions for certain defined behaviour. Underlying harmonisation measures can, for example, as discussed in the next section, be expressed in terms of a prohibition on individuals or undertakings to engage in a specific activity. This interpretation of 'harmonisation' measures in Article 83(2) is sensitive from a criminal policy perspective. It appears premature to introduce criminal sanctions without specific evidence that a basic substantive approximation of non-criminal sanctions was insufficient to ensure effective compliance with the substantive EU rules.[262]

b) Application of the 'harmonisation' requirement to EU market abuse legislation

This subsection considers whether the Market Abuse Crimes Directive proposed under Article 83(2) TFEU was based on a 'harmonisation' measure, and thus, conforms to the 'harmonisation' requirement in said article.

In the current circumstances, the Commission could refer to either the Market Abuse Directive from 2003 (MAD)[263] or to the recently adopted Market Abuse Regulation (MAR)[264] as the underlying 'harmonisation' measures, given that

[260] See Anne Weyembergh, L'harmonisation des legislations penales: condition de l'espace pénal européen et révélateur de ses tensions (Bruxelles, édition de l'Université de Bruxelles 2004) 31-36 ; Felicitas M Tadić, 'How Harmonious Can Harmonisation Be? A Theoretical Approach Towards Harmonisation of (Criminal) Law' in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002) 17-18.

[261] See Asp (n 213) 135.

[262] See Asp (n 213) 135; Kaiafa-Gbandi (n 220) 17-19.

[263] See Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16 ('MAD').

[264] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1 ('MAR'). The MAR was adopted on 12 June 2014.

references to both of these measures have been made in the Market Abuse Crimes Directive.[265]

The EU legislature should, however, rely on the MAR, rather than the MAD, as a 'harmonisation' measure for the Market Abuse Crimes Directive. First, the MAR amends and replaces all of the provisions of the MAD, which will be repealed on 3 July 2016.[266] Whilst the MAD formally remains in force until this date, it seems moot, given the existence of the MAR to examine whether the MAD could constitute a 'harmonisation' measure.[267] Secondly, given the wide substantive scope of the MAR, the case for qualifying this measure as a 'substantive' harmonisation measure is more compelling than the corresponding case with respect to the MAD. The MAR, which establishes a common regulatory framework on market abuse, is far more ambitious than the MAD. The latter was not able to foresee the legal, financial, technological and market evolutions that have taken place during the last 10 years.[268] For example, whilst the MAD focused on financial instruments admitted to trading on a regulated market[269], the MAR covers not only those, but also instruments traded on a multilateral trading facility or an organised trading facility, irrespective of whether the trading takes place on a trading venue.[270] Moreover, while the MAD did not cover the regulation of commodities and commodity derivatives, the MAR has also extended the prohibitions on insider trading and market manipulations to trade in 'spot commodity contracts'.[271]

Having argued that the MAR is the relevant measure, it must be examined whether it constitutes a 'substantive' harmonisation measure. It is apparent that the EU legislature intended the MAR to be a 'substantive' harmonisation measure. The preamble of the MAR confirms that it is envisaged to approximate national laws, as well as to contribute to the proper functioning of the internal market by eliminating remaining obstacles to trade and significant distortions of competition, and by preventing further obstacles to trade and distortions of competition from arising.[272] Furthermore, the fact that the MAR was adopted

[265] See recitals 9, 17, 18, 22, 23 and Articles 1 (3) (a)- (c), Articles 2 (2), 2(4), 2(6)- (8), 2(14), Article 3(8), Article 4(2) and Article 13 of the Market Abuse Crimes Directive (n 28), which all refer to the MAR (n 263), while the explanatory memorandum and recitals 2, 4 and 7 of the Market Abuse Crimes Directive refer to the MAD (n 263).

[266] See MAR (n 264) recital 87, Article 37 and Article 39(2).

[267] The title of the MAR (n 264) is support for this: 'Regulation no 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and *repealing Directive 2003/6/EC of the* European Parliament and of the Council…'

[268] See MAR (n 264) recital 3 and Article 1.

[269] See MAR Proposal (n 250) 10-11, 18-19; MAD (n 263) Article 9.

[270] See MAR (n 264) recital 8.

[271] See MAR (n 264) Articles 7 and 12; MAR Proposal (n 251) 20-23.

[272] See MAR (n 264) recitals 4-6; MAR Proposal (n 251) 2.

on the basis of Article 114 TFEU[273], as well as the fact that both the preamble and the articles of the Market Abuse Crimes Directive refer to the MAR, support the conclusion that the MAR is indeed to be regarded as a 'substantive' harmonisation measure.[274]

The MAR is furthermore a *de facto* 'harmonisation' measure. The key harmonising feature of the MAR is that it lays down material prohibitions against insider dealing, unlawful disclosure of inside information and market manipulation. Also, to a large extent, those prohibitions are reproduced in the criminalisation provisions of the Market Abuse Crimes Directive. First, the prohibition of insider trading found in Articles 8 and 14 of the MAR conform, in essence, to Article 3(2) of the Market Abuse Crimes Directive. While the MAR prohibits behaviours in which a person possesses inside information and uses that information by acquiring or disposing of, for his/her own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, the Market Abuse Crimes Directive mirrors the MAR and criminalises the same actions.

Secondly, the prohibition against unlawful disclosure of inside information in Articles 10(1) and 14 of the MAR is consistent with the criminal offence in Article 4(2) of the Market Abuse Crimes Directive. The MAR prohibits disclosing inside information to any other person, unless such disclosure is made in the normal course of the exercise of his employment, profession or duties. The Market Abuse Crimes Directive replicates this provision and criminalises the same conduct.

Thirdly, in terms of market manipulation and dissemination offences, it seems that the criminalisation in the Market Abuse Crimes Directive[275] is derived directly from the prohibitions in the MAR.[276] While the MAR prohibits entering into a transaction, placing an order to trade or any other behaviour which: i) 'gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument related spot commodity contract', ii) 'secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level' and iii) '… behaviour which affects the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance', iv) 'transmitting false or misleading information or providing false

[273] See MAR (n 264) recital 4. Article 114 TFEU is one of the general harmonisation provisions of the Treaties. See above section II (B) (a) in the present chapter for a discussion of the concept of 'harmonisation' and Article 114 TFEU.

[274] See n 265 for all the references to the MAR in the Market Abuse Crimes Directive.

[275] See Market Abuse Crimes Directive (n 28), Articles 5 (2) (a-c) for criminalisation of 'market manipulation' and dissemination offences.

[276] The substantive prohibitions in the MAR (n 264) against market manipulation and dissemination offences appear from Article 12 and Article 15.

or misleading inputs or any other behaviour which manipulates the calculation of a benchmark,' the Market Abuse Crimes Directive perfectly complements the MAR by criminalising those behaviours.

Since the MAR provides that it is both intended to be and is a *de facto* 'substantive' harmonisation measure, it can be considered a 'harmonisation measure' within the meaning of Article 83(2) TFEU.

3.4 Choice of legal basis for Union criminal law measures

The final section of the chapter considers the right legal basis for criminal law measures after the Lisbon Treaty. In particular, it examines whether the existence of Article 83(2) TFEU means that the Union has surrendered its previously held powers, according to the Court's judgement in *Environmental Crimes*, to criminalise under other legal bases of the treaties. In order to assess whether Article 83(2) TFEU is of a *lex specialis* nature, we must examine it in relation to some other legal basis in the treaties which can be used for criminalisation. The logical point of comparison is the broad functional provision of Article 114 TFEU, since this provision has been proposed both by scholars and the EU legislature as constituting a proper legal basis for the harmonisation of EU regulatory criminal law.[277]

3.4.1 The nature of Article 114 TFEU in legal basis disputes

When analysing the question of whether Article 83(2) TFEU is a *lex specialis* in relation to Article 114 TFEU within the context of criminalisation measures, it is appropriate to first examine the latter provision. The expression 'save where otherwise provided in the treaties' in Article 114 TFEU ('*lex specialis* limitation') seems, at first sight, to suggest that this provision is a subsidiary legal basis to other more specific provisions of the treaties when it comes to achieving the internal market objectives in Article 26 TFEU. The consequence of this interpretation is that Article 83(2) TFEU presumably takes precedence over Article 114 TFEU. This being so, it seems that the Court's case-law casts doubts on the claim that Article 114 TFEU assumes a secondary priority in legal bases conflicts.

The early case-law on conflicting legal bases suggested that the only criterion which was necessary to give precedence to Article 114 TFEU over other more specific legal bases was that the conditions for recourse to the aforementioned provision were met. If the measure had a link to the internal market by either removing obstacles to trade or distortions of competition, Article 114 TFEU

[277] See the Intellectual Property Crimes Proposal (n 27) for an example of legislation proposed by the Commission on the basis of Article 114 TFEU. For scholarly support of the use of Article 114 TFEU for the criminalisation of EU Competition Law: Peter Whelan, 'Contemplating the Future: Personal Criminal Sanctions for Infringement of EC Competition Law' (2008) 19 King's Law Journal 364, 369; Manfred Zuleeg, 'Criminal Sanctions to Be Imposed on Individuals as Enforcement Instruments in European Competition Law' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 456-57.

took precedence over other legal bases. This case-law also suggested that Article 114 TFEU should, in legal basis litigation, be given a broad meaning. All legislation, which in one way or another was relevant for the competitive position of enterprises, fell within the ambit of Article 114 TFEU.[278]

Titanium Oxide is a good example to illustrate these points. In this case, which is concerned with an action for the annulment of the Waste Directive[279], the Commission contended that the directive, which was adopted under Article 192 TFEU, should have been adopted under Article 114 TFEU, since it was an internal market measure. The Court, which endeavoured to find the appropriate legal basis pursuant to its standard 'centre of gravity' test, came to the conclusion that the Waste Directive was equally concerned with environmental protection and the internal market. While the normal solution to the problem would be to adopt the Directive under a dual legal basis, this solution was not available in this case, since Article 114 TFEU and Article 192 TFEU provided for different decision-making procedures. The Court then, having again reviewed the aim and the content of the measure, found that since environmental protection should be integrated into legislation under Article 114 TFEU, and since different environmental legislation in the Member States could distort competition, Article 114 TFEU was the more appropriate legal basis.[280]

The Court's ruling requires some explanation. Whilst the measure was concerned with two legal bases, Article 114 TFEU (internal market) and Article 192 TFEU (on environmental protection), the Court rightly found that the environmental law component in the measure was weaker than the internal market component. Since the measure harmonised obligations concerning the treatment of waste from the titanium dioxide production process, the measure was primarily intended to equalise competitive conditions for firms in the titanium oxide business.[281] Since the treaties had provided that environmental protection should be integrated into the policies of the internal market, it was logical that the measure was brought into the framework of that legal basis.[282]

Herlin-Karnell has, on the basis of the Court's case-law on the scope of Article 114 TFEU, constructed an argument for why Article 114 TFEU should take precedence over Article 83(2) TFEU. Her specific claim is that the Market Abuse Crimes Proposal, proposed under Article 83(2) TFEU, should instead have been adopted under Article 114 TFEU. Her main concern is the absence of

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[278] See René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 Common Market Law Review 85, 107-109.

[279] Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L 201/56.

[280] See Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-02867, paras 2-25.

[281] See Waste Directive (n 279) recital 2 and Article 3.

[282] See Article 11 and Article 114(3) TFEU.

constraints for criminalisation under Article 83(2) TFEU. If it is accepted that the Market Abuse Crimes Proposal could be adopted under Article 83(2) TFEU, this would further undermine the limits to Union criminal law harmonisation. This is because Article 83(2) TFEU does not have any threshold in terms of 'market creation', which is what is required by Article 114 TFEU. Secondly, she submits that Article 114 TFEU is more suitable than Article 83(2) TFEU, because the Market Abuse Crimes Proposal is, in fact, an 'internal market' measure aiming to prevent market failures in the form of manipulative practices that lead to an inefficient allocation of resources and to control new integration risks. The monitoring of such risks and the prevention of market dysfunctions should be accommodated within Article 114 TFEU, since manipulative practices undermine trust in the internal market. Moreover, the case-law on the legal basis supports, according to Herlin-Karnell, the use of Article 114 TFEU for the Market Abuse Crimes Proposal. Pursuant to the *Tobacco Advertising II*[283] judgement, the only thing needed to trigger Article 114 TFEU is that the measure at issue contributes to 'market creation'.[284]

Although Herlin-Karnell's argument on the broad scope of Article 114 TFEU in legal basis litigation is compelling, it does not entirely capture the complex reality of this provision's status in relation to other legal bases. First, it is questionable whether *Tobacco Advertising II* can be used as evidence to demonstrate the priority of Article 114 TFEU in relation to other specific legal bases. In fact, none of the claimants in the case suggested any appropriate legal basis for the contested directive in *Tobacco Advertising II* other than Article 114 TFEU. This case was indeed about whether the Union had the competence *at all* to adopt the measure under the treaties.[285] Secondly, subsequent case-law after the *Titanium Oxide* judgement shows that the *lex specialis* limitation in Article 114 TFEU should be taken seriously.

Particularly illustrative of the subsidiary nature of Article 114 TFEU is *Commission v Council*.[286] In this case, the Commission argued that the directive on the recovery of indirect taxes[287], which had been adopted on the basis of Article 113 TFEU and Article 115 TFEU, was adopted on the wrong legal bases and should have been adopted on the basis of Article 114 TFEU, as it was primarily an internal market measure. The Court first restated the 'predominant purpose' rule, holding that the measure at issue should be adopted under the legal basis to which it was, by way of its content and aim, more closely connected. Then,

[283] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

[284] See Herlin-Karnell, 'White-collar Crime and European Financial Crises' (n 259) 485-87.

[285] See Case C-380/03 *Germany v Parliament and Council* (n 283) paras. 15-24, 45-65, 70-88.

[286] See Case C-338/01 *Commission v Council* [2004] ECR I-04829.

[287] Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties [2001] OJ 2001 L 175/17.

it went on to consider if, by way of exception, a dual legal basis could be used. The Court noted that the different decision-making procedures in Article 113 TFEU and Article 115 TFEU, on the one hand, and Article 114 TFEU, on the other hand, made it impossible to employ Article 114 TFEU conjointly with the first-mentioned legal bases. The Court then emphasised that the very wording of Article 114 TFEU provided that that article should only be applied if the Treaty does not provide otherwise. If the Treaty contains a more specific provision that is capable of constituting the legal basis for the Directive, it must be founded on such a provision. That was particularly the case with regard to Article 113 TFEU, so far as it concerned the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation. The Court also found that Article 114 (2) TFEU expressly excludes 'fiscal provisions' whose harmonisation therefore cannot take place on the basis of Article 114 TFEU. Given the fact that the aim and content of the Directive suggested that it was predominantly concerned with 'fiscal provisions' within the meaning of Article 114(2) TFEU, the Court concluded that Article 114 TFEU was not the appropriate legal basis for the directive.[288]

This case reinforces two lessons learned from earlier and subsequent case-law about the subsidiary nature of Article 114(1) TFEU in relation to other legal bases. First, if the proposed measure fits better under a specific legal basis, Article 114 TFEU should not be used for the measure.[289] Secondly, recourse to Article 114 TFEU is not justified where the proposed measure has only incidental or ancillary effects on trade or the competitive conditions of firms within the Union.[290] Having briefly analysed the nature of Article 114 TFEU in legal basis litigation, the following sub-section will consider the relationship between this provision and Article 83(2) TFEU.

3.4.2 The relationship between Article 83(2) TFEU and Article 114 TFEU with respect to criminalisation measures

Which of Article 114 and Article 83(2) TFEU will then have priority in legal basis litigation? In addition to the subsidiary nature of Article 114 TFEU discussed above, there is a systemic and teleological argument based on the new structure of the treaties supporting the view that that there is no implied criminal law competence outside Article 83(2) TFEU and that this provision is a *lex specialis* in relation to Article 114 TFEU. Petter Asp has presented this argument in the most compelling way. He submits that the new institutional setting, with special rules and arrangements for the criminal law cooperation, militates against interpreting articles outside Title V of the TFEU as entailing

[288] See Case C-338/01 *Commission v Council* (n 286) paras 13-14, 17-18, 54-57, 59-62, 67, 70-76.
[289] See Case C-533/03 *Commission v Council* [2006] ECR I-01025, paras 45-46.
[290] See Case C-155/91 *Commission v Council* [1993] ECR I-00939, paras 19-21; Case C-533/03 *Commission v Council* (n 289) para 48.

criminal law competence. The Member States have, by introducing Title V, via the Treaty, expressed their will to take control over the development of EU criminal law and have taken a step towards a limited supranational criminal law competence. First, the cooperation is equipped with an emergency brake and is subject to opt-out arrangements for some Member States. Secondly, the cooperation, as regards harmonisation of substantive criminal law, is limited to directives. He particularly queries as to why the Member States would bother to arrange for a specific institutional framework for criminal law if they still leave the door open for EU involvement via other articles. It would be inconsistent and make Article 83(2) TFEU superfluous if express provision is made in the Treaty for national safeguards and then those safeguards could be immediately circumvented by resorting to previous jurisprudence by the Court of Justice, i.e. the *Environmental Crimes* judgement,[291] to give a general criminal law competence under other legal bases of the treaties.[292]

While these are convincing arguments, they are not sufficient to altogether exclude the possibility of the exercise of a general criminal law competence under the treaties. First, it seems clear that the content and the aim of any proposed criminalisation measure will be decisive for the assessment of the correct legal basis. The Court of Justice will determine the right legal basis for criminal law measures on the basis of its centre of gravity test. In the case of conflict between Article 83(2) TFEU and Article 114 TFEU, the decisive assessment will then be whether the envisaged directive has a stronger criminal law component than an internal market constituent.[293]

Secondly, there is case-law casting doubt on whether specific legal bases in the treaties, such as Article 83(2) TFEU, will take precedence over implied competences. This case-law suggests that an express specific competence in one area of the treaties does not preclude the exercise of an implied more general competence elsewhere in the treaties. When an instrument claims particular acts are 'necessary', then the implied competence follows that necessity. The trigger for implied general competence is, as in the case of the general criminal law competence, the 'necessity' of the measures.[294] Given this, it is hard to see how criminal law could be excluded from an implied general competence where it is necessary for some other policy.[295]

[291] See Case C-176/03 *Commission v Council* (n 5) para 48.

[292] See Asp (n 213) 151-52, 163; House of Lords' European Union Committee, 'The Treaty of Lisbon' (n 169) para 6.188.

[293] See Case C-300/89 *Titanium Dioxide* (n 280) paras 10, 22-25; Case C-155/91 *Commission v Council* (n 290) paras 7, 19-21; Case C-36/98 *Spain* v *Council* [2001] ECR I–779, para 59.

[294] See Case C-176/03 *Commission v Council* (n 5) para 48.

[295] See Miettinen, 'Implied Ancillary criminal Law Competence' (n 164) 209.

European Parliament v Council[296] illustrates these observations. In this case, the Court had to assess the right legal basis for a measure concerned with the collection of information for the EU's energy policy.[297] The Court held that the general legal basis on energy in Article 194 TFEU had priority over the specific legal basis in Article 337 TFEU in the area of information collection. The Court found that the aim and content of the contested regulation revealed that it related essentially to the implementation of a system for the collection of information relating to investment projects in energy infrastructure. This system was a prerequisite to allow the EU to take the appropriate measures to achieve the objectives laid down in Article 194(1) TFEU, in particular as regards the functioning of the internal energy market, the security of the EU's energy supply, the promotion of energy efficiency and the development of new and renewable energies. An implied general competence to collect information could therefore, since it was 'necessary' for the achievement of the objectives in Article 194(2) TFEU, be attached to the energy competence in Article 194 TFEU, even though an express competence to collect information was available elsewhere in the treaties.[298]

Thirdly, even though the *telos* of Article 83 TFEU and Title V of the treaties may provide an indication that this was intended to be the sole legal basis for criminalisation measures, this intention has not been fully realised. Article 83 TFEU cannot impede the exercise of implied criminal law competences elsewhere in the treaties in a situation where the envisaged measure falls outside the scope of this provision. First, given the narrow remit of Article 83(2) TFEU, it seems unreasonable that the treaty drafters had the intention of removing the previously held competence under the Court of Justice's jurisprudence. Article 83(2) TFEU does not cover criminalisation in the form of 'regulations' or criminalisation in such fields that have not been subject to 'harmonisation' measures.[299] This would, in fact, mean that the EU would not *at all* have the competence to adopt regulations criminalising breaches against EU law. It is unlikely that this is the bargain that the Member States struck when they negotiated the Lisbon Treaty. Furthermore, there is no clear textual indication in the treaties that the harmonisation of criminal laws would be prohibited under provisions of the treaties other than those in Title V. If the drafters of the treaties had had an intention to expressly reserve criminal law harmonisation to Title V of the treaties, they should have expressed this by means of more unambiguous

[296] See Case C-490/10 *Parliament v Council* (Court of Justice, 6 September 2012).

[297] Council Regulation (EU, Euratom) No 617/2010 of 24 June 2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) No 736/96 [2010] OJ L 180/7.

[298] Case C-490/10 *Parliament v Council* (n 296) paras 49-79.

[299] It is, for example, unclear whether Article 83(2) TFEU would allow for criminalisation in the field of EU competition policy, as the relevant rules in this field are contained in the primary Treaty provisions, Article 101 and Article 102 TFEU, and not in legislative acts *per se*, and such measures as are adopted by the Union institutions have been designated as non-legislative in character, i.e. Articles 103 TFEU, see Dougan, 'From the Velvet Glove to the Iron Fist' (n 34) 109.

wording. Finally, and most importantly, it is essential to recognise that the scope of the EU's general criminal law competence is driven by the objectives of the European Union. The competence, deriving from the Court's judgement in *Environmental Crimes*, is conditioned on the 'effectiveness' criterion and applies to all fields of EU policies.[300] The catalogue of Union powers is based on 'policies', i.e. on substantive matters, with regard to the purposes and objectives in Articles 2 and 3 TEU. The Union's implied criminal law powers are of an instrumental and horizontal nature. Those powers are used as an enforcement tool, 'a means to an end'[301], to the benefit of all or nearly all forms of Union regulatory policies.[302]

The fact that the exercise of the EU's implied criminal law competence is linked to the 'effectiveness' criterion and the policies of the EU cannot be underestimated. The exercise of this competence can undoubtedly be contained within the broad remit of the functional power in Article 114 TFEU. Since the Union only needs to show a link to 'market making' when it legislates under Article 114 TFEU, it is difficult to sustain that criminalisation measures could not be encompassed under the scope of this provision.[303] The teleological imperative of further market integration provides the impetus for an expansive interpretation of this competence encompassing additional criminalisation powers in order to enhance the effectiveness of Union law. This 'purposive' approach to interpreting the scope of the EU's competence under Article 114 TFEU fits well with the structure of the EU legal order.[304] The treaties list several objectives that the Union should achieve, among them, the reinforcement of the internal market and the creation of an area of freedom, security and justice.[305] If the Union is to achieve the objective of creating an internal market and enforce those policies effectively, the necessary criminal powers must be placed at the service of the Union.[306]

Given all of these reasons, it is premature to assume that the EU's competence in criminal law would be unequivocally restrained to Article 83(2) TFEU. Having said this, we should give an example of when the EU could actually use provisions other than Article 83(2) TFEU.

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[300] See Case C-176/03 *Commission v Council* (n 5) para 48.

[301] For this expression: Valsamis Mitsilegas, 'Constitutional Principles of the European Community and European Criminal Law' (2006) 8 European Journal of Law Reform 301, 307.

[302] See Case C-240/90 *Germany v Commission* (n 5) Opinion of AG Jacobs, para 12.

[303] See Weatherill, 'Competence Creep and Competence Control' (n 16) 1, 25, 27, 46, 49; Wyatt, 'Community Competence to Regulate the Internal Market' (n 79) 128-136; Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2, 6. doi:10.1111/eulj.12079.

[304] See Weatherill, 'Better Competence Monitoring' (n 18) 25-28; Robert Schütze, *European Constitutional Law* (CUP 2012) 154-156.

[305] See Articles 3(2) and 3(3) TEU.

[306] See Pescatore (n 81) 40-43, 50-51.

Let us assume that the Union considered adopting a 'regulation' which both 'criminalised' and 'de-criminalised' certain activities. The fictive reason for adopting a regulation is that the Commission considers that criminal laws enforced by means of directives lead to a fragmented application of Union law, since directives give too much scope in the implementation phase to Member States. The Union concludes therefore that the only effective way of enforcing the specific Union policy is through a 'regulation'. The reason for including de-criminalisation provisions in the Regulation is to restrain the over-penalisation trend currently present in the Member States. Although one could stretch the interpretation of Article 83(2) TFEU very far, it is difficult to argue that such a measure falls within the remit of said provision. Given that the Union only has the power to adopt 'directives' pursuant to Article 83(2) TFEU, and given that it can only 'criminalise' under that provision, a cogent argument could be made that Article 114 TFEU could be used for such a 'residual' measure.[307] Having said that, it is clear that most proposals in the field of criminal law, which will, as envisaged by Title V of the treaties, be concerned with 'directives' and 'criminalisation', could thus not be adopted under other legal bases of the treaties due to the existence of Article 83 TFEU. If, however, the envisaged criminal law measure falls outside the scope of Article 83(2) TFEU, because the proposed measure, for example, is a 'regulation', there could be a case for employing another legal basis, such as Article 114 TFEU.[308]

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[307] This position is partly supported by the Commission's recent proposal on the criminalisation of fraud against the EU budget which suggested that there is a criminal law competence under Article 325 TFEU; 'Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law', Brussels, 11.7.2012, COM (2012) 363 final. The Council and the Parliament, however, disagreed with the Commission and sustained that Article 83(2) TFEU should be the correct legal basis. It also appears that the Parliament and the Council will ensure that the proposal ultimately is adopted under Article 83(2) TFEU; see European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law', Committee on Budgetary Control Committee on Civil Liberties, Justice and Home Affairs A7-0251/2014, 25.3.2014.

[308] Recent legislative practice suggests that the EU legislature will employ Article 114 TFEU for the general internal market part of the measure and Article 83(2) TFEU for the criminal law part when there is a potential conflict between these provisions. The proposal for a Fourth Money Laundering Directive, 'Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing', Strasbourg, 5.2.2013, COM(2013) 45 final, is the perfect example to illustrate these points. This Directive, although it contains rules which have an effect on national criminal law, has been proposed under the legal basis of Article 114 TFEU, as the Commission contends that divergences in the regulation of money laundering create problems for the functioning of the internal market. The Commission, however, intends to complement and reinforce the current proposal by adopting a separate proposal containing criminal law provisions. For the criminal law part, it intends to use Article 83(1) TFEU. This may be an appropriate way for the EU legislature to avoid 'competence creep' under Article 114 TFEU for criminalisation measures. This is also a legitimate practice, as it respects the will of the Member States to retain the safeguards of Title V in terms of criminal law measures. Notwithstanding this, it does not appear that this practice will overcome the problems associated with a dormant EU criminal law under Article 114 TFEU. As there is no competence to adopt 'regulations' in Article 83 TFEU, there would still be a way for the EU institutions to trigger the use of Article 114 TFEU. It is only to be hoped that the Commission will be sensible and use the framework of Title V for criminal law measures to avoid the potential for conflicts outlined above.

4 Can subsidiarity act as a check on the exercise of Union competences?

4.1 Introduction

This chapter examines the potential of subsidiarity as a ground to challenge EU legislation. The principle of subsidiarity is one of the most contested issues in EU law scholarship. While the debate on whether subsidiarity can be enforced by the EU Courts[309] has been settled by the Court of Justice[310], how subsidiarity can be made operational still remains to be considered. It has been sustained that subsidiarity's weak conceptual contours have made it unworkable as a legal principle that restricts the exercise of Union competences.[311] This allegation is well-defended by a judicial record demonstrating that the Court, so far, has been unable to develop criteria with which subsidiarity can be applied to limit the exercise of EU competences. Observers have, with good reason, denounced the Court for not taking subsidiarity seriously.[312] Those observers have not, however, yet developed any appropriate criteria against which the Court can control compliance with subsidiarity. Given this 'gap' in the literature, this chapter will consider how subsidiarity can be made operational.

The discussion on subsidiarity has also suffered from conceptual confusion. For example, while some commentators have conceptualised subsidiarity as 'federal proportionality'[313] and as a 'matter of competence'[314], others have focused on subsidiarity's meaning as a tool to strengthen 'legal diversity' and 'national self-determination'.[315] I suggest that the problems of delineating subsidiarity from 'competence' and 'proportionality' have undermined the effectiveness of the principle as a limit on the exercise of EU competences.[316] Conceptually,

[309] See George Bermann 'Taking Subsidiarity Seriously' (1994) 94 Columbia Law Review 332; AG Toth, 'Is Subsidiarity Justiciable?' (1994) 19 European Law Review 269.

[310] See n 130 for references to relevant case-law supporting the justiciability of subsidiarity.

[311] See Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (n 2) 68-75.

[312] See Schütze, *From Dual to Cooperative Federalism* (n 10) 250-256; Gráinne De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 Journal of Common Market Studies 214, 224-225.

[313] See Schütze, *From Dual to Cooperative Federalism* (n 10) 263-265.

[314] See Philip Kiiver, *The Early Warning System for the Principle of Subsidiarity* (Routledge 2012) 75, 98, 100.

[315] See Alexia Herwig, 'Federalism, the EU and International Law', in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 66-68.

[316] Unfortunately, it appears that the Court of Justice has contributed to the problem by not being able to really distinguish between competence, subsidiarity and proportionality; see Case C-491/01, *BAT* (n 72). In this case, the Court conflated the subsidiarity test both with the competence question (para 182) and the proportionality assessment (para 184).

subsidiarity cannot be transformed into a proportionality mechanism or into a competence issue. It provides neither substantive protection for national autonomy nor a balancing mechanism between the interests of the Member States and the interests of the EU. Subsidiarity's aim is to ensure economic efficiency and democratic legitimacy[317], and it asks 'who' should implement the EU's regulatory objectives. This is a strict question of whether a specific measure, in a field in which Member States and the Union share competence, should, given its objective, and the nature and the geographical scope of the problem, be adopted by the Member States or the Union.[318] Whilst values such as 'democracy' or 'national self-determination' may influence the interpretation of the subsidiarity concept, we must first, in order to implement these values, construct proper legal criteria that can structure the analysis.

Against this backdrop, we can present the outline of the chapter. The first section of the chapter tries to respond to the conceptual challenges of subsidiarity. In a substantive sense, the chapter builds on and develops the argument from chapter 2 that subsidiarity must be constructed as a principle challenging the internal market justification. In the second section of the chapter, the subsidiarity concept developed in the chapter is applied to a case study in the field of EU criminal policy: the recently adopted Market Abuse Crimes Directive[319]. By applying the standard of legality developed in chapter 2 on 'adequate reasoning' and 'relevant evidence', how subsidiarity can be enforced is shown. Because the Market Abuse Crimes Directive and the accompanying proposal and impact assessment encompass a subsidiarity justification, it is a perfect example for testing the theories developed in the chapter.

4.2 Material subsidiarity and the internal market justification

In order to understand the concrete content of the principle of subsidiarity, we should closely review the Edinburgh Guidelines[320], which provide substantive guidelines on how subsidiarity should be conceptualised.[321] These guidelines list three criteria that must be taken into account in assessing the need for Union

[317] See Nicholas W Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 European Law Journal 308.

[318] See Koen Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (1994) 17 Fordham International Law Journal 846, 875.

[319] See n 28 for full refearence to the Directive.

[320] See Edinburgh Guidelines (n 125) 18-19.

[321] The Court assumes that the Edinburgh Guidelines, as they were codified by the Amsterdam Protocol (no 30) on the application of the principles of subsidiarity and proportionality [1997] OJ C 321/308, provide an authoritative definition of subsidiarity, see Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* (n 69) para 102; Case C-58/08 *Vodafone and Others* (n 67) paras 72-74.

action: i) the 'cross-border' criterion; ii) the 'EU objective' criterion; and iii) the 'clear benefits' criterion.[322]

I commence by considering the cross-border criterion, since this is the primary rationale for Union action in the guidelines. The fact that an issue is of a cross-border nature is one of the core justifications for Union harmonisation under the treaties.[323] The clearest cases in which the scale or effects of a certain problem require Union action are those involving 'transnational' elements. The scope of Union competences, both in the field of legislative action[324] and the application of the free movement rules[325], have often required that a cross-border aspect is demonstrated. EU action is justified where a problem affects more than one Member State at the same time, and de-centralised decision-making by independent states cannot adequately promote the welfare of citizens because of various kinds of cross-border externalities or spill-overs. There is a 'collective action' problem in this situation since independent Member States' costs in regulating the problem are higher than the cost of common EU action.[326]

Whilst it is true that the 'cross-border' nature of the regulated problem may support Union action under the subsidiarity principle, I maintain that there are limits to the use of this justification. If the matter and the nature of the problem have a national dimension without any externalities or only incidentally affect more than one Member State, we should be very suspicious of the Union's right to act in the matter.[327] Incidental or theoretical cross-border effects cannot, as the Court stated in the *Tobacco Advertising* judgement, be used as a reason for

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[322] The Edinburgh Guidelines (n 125) 18-19 state that the following criteria should be considered when deciding whether a matter requires Union action under the subsidiarity principle:
' - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.'

[323] Several competences in the AFSJ are, for example, limited in this way: see Article 81(1) TFEU, 81(2) (B) TFEU, 81(3) TFEU; Article 82(2) TFEU; Article 83(1) TFEU; Article 88(1) TFEU.

[324] See Gráinne De Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper no. 7/1999, 25.

[325] See regarding the scope of application of the fundamental freedoms in the field of citizenship: Koen Lenaerts, '"Civis Europaeus Sum": From the Cross-border Link to the Status of Citizen of the Union' (2011) 3 FMW Online Journal of Free Movement of Workers 6, 6-7. <http://ec.europa.eu/social/main.jsp?catId=737&langId=sv&pubId=6193&type=1&furtherPubs=no>. Accessed 17 April 2015.

[326] See Frederick J Lee, 'Global Institutional Choice' (2010) 85 New York University Law Review 328, 330-332, 349-352, for a general description of the application of subsidiarity to resolve collective action problems.

[327] See Kiiver (n 314) 93; Josephine Van Zeben, 'Regulatory Competence Allocation: The Missing Link in Theories of Federalism' (2012) Law, Institutions and Economics in Nanterre Workshop, Paris, France, 11 December 2012, 30 <http://economix.fr/pdf/seminaires/lien/Van-Zeben.pdf>. Accessed 17 April 2015.

exercising the EU's internal market competence under Article 114 TFEU.[328] The only tasks which should be assigned to the Union are those whose effects extend beyond national frontiers. The cross-border criterion should thus be considered in conjunction with the 'clear benefits' criterion in the Edinburgh Guidelines, meaning that Union legislation must entail concrete benefits in terms of dealing with the cross-border problem.

The second criterion in the Edinburgh Guidelines suggests that there is a need for EU action if it is necessary to protect EU objectives[329] or to avoid significant damage to Member State interests. Whilst the need to protect general Treaty objectives can substantiate the need for EU action, it is no coincidence that the guidelines explicitly indicate distortions of competition and restrictions to trade as central objectives. Those references allude to the most important justification for arguing that EU, rather than Member State action, is warranted: the need to create and maintain an internal market.[330] Given this, the argument of the remaining part of this section will focus on the internal market justification as a rationale for EU harmonisation.

The internal market justification is a wide one for the EU legislature to employ when justifying the need for Union action. Potentially, any difference in the laws of the different Member States is capable of being construed as a potential distortion in the conditions of competition between states or as a barrier to the fundamental freedoms. When the Court defines an obstacle in the context of free movement law, it also defines the kinds of things that may be harmonised. This wide interpretation of the internal market is supported by the Union legislative institutions' use of a legal basis in Article 114 TFEU suggesting that there are no constraints on Union action when employing the internal market justification.[331]

By contrast, I argue that limits to the use of the internal market paradigm must be constructed in order to avoid an indefinite expansion of Union competences and to protect national diversity. The most effective technique of providing some limits to the internal market rationale is to subject this justification to the above-mentioned 'clear benefits' criterion. Consistently with the 'clear benefits' criterion, in order to regulate the internal market, the Union should demonstrate that only Member State action will lead to or has led to a market failure that can only be remedied by Union action.[332]

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[328] See Case C- 376/98 *Tobacco Advertising* (n 37) paras 83-84.

[329] See Article 3 TEU.

[330] See Article 3(3) TEU; Article 4(2) (a) TFEU. This justification is explicitly enshrined as a basis for Union action under Article 114 TFEU and Article 115 TFEU.

[331] See De Búrca, 'Re-appraising Subsidiarity's Significance' (n 324) 25-27.

[332] See Bermann (n 309) 370, 383-84; Kumm (n 88) 520-21, 524.

That the internal market justification must be subjected to a test requiring the Union to show 'clear benefits' is supported by the Court's ruling in *Tobacco Advertising*. As noted by Thomas Horsley, the Court's core subsidiarity test has not developed under the subsidiarity heading, but through the Court's case-law on the scope of Article 114 TFEU. Horsley's argument is that *Tobacco Advertising* was not so much setting limits to the competence of Article 114 TFEU as operationalising the subsidiarity principle.[333] The classical pronouncements of the Court that the Union does not enjoy a general power to regulate the internal market and that it has to show 'appreciable distortions to competition' amounted to a strong reinforcement of the subsidiarity principle. A mere finding of disparities between national rules and an abstract risk of distortions of competition was not, according to the Court, sufficient to justify the choice of Article 114 TFEU as a legal basis.[334]

On the basis of the Court's ruling, I argue that the 'clear benefits' criterion demands that it is necessary for the EU legislature to show that a measure 'objectively' contributes to the internal market. Market analysis, actual and predicted economic consequences of measures and different scenarios, as evidenced by impact assessments, should be the benchmarks to decide whether the EU should regulate under Article 114 TFEU. The balance ought to be tipped in favour of EU action only when the transnational dimension of a problem and the actual failures of the national regulatory process substantially increase the beneficial effects of EU intervention.[335]

The question of whether subsidiarity always requires that the proposed Union measure provide for 'clear benefits' is, however, a contested issue. Apart from my proposed 'decentralised'[336] interpretation of subsidiarity, there is a 'centralising' interpretation of the Edinburgh guidelines. The 'centralising' interpretation means that Member States must surrender their regulatory powers whenever a problem can be better tackled at the collective level. Factors such as the effect or the scale of the operation, trans-frontier problems, including cases of potential market distortions where some Member States were able to act and others were not able to do so, and the necessity to ensure that competition is not distorted within the common market, can justify Union action.[337]

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[333] See Thomas Horsley, 'Subsidiarity and the Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 Journal of Common Market Studies 267, 269-270.

[334] See Case C- 376/98 *Tobacco Advertising* (n 37) paras 84, 106-107.

[335] See Fabbrini and Granat (n 50) 124; Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (n 303) 17-18.

[336] See Deborah Z Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29 Common Market Law Review 1107, 1124.

[337] See Commission, 'Communication on the Principle of Subsidiarity for Transmission to the Council and Parliament', 25 European Communities Bulletin, SEC (92) 1990 final, Brussels, 27 October 1992, 2.

Koen Lenaerts is an advocate of this interpretation. He argues, within the context of EU environmental law, that the Edinburgh Guidelines contain an extremely low threshold with regard to the need for Union action and submits that 'any kind of' of cross-border spill-over effects justify Union action under those guidelines. First, he observes that spill-overs in the field of environmental law arise from the fact that Member States might fear that the imposition of strict environmental standards and their enforcement could discourage industry and put the national economy at a competitive disadvantage relative to other Member States. Such a 'regulatory race to the bottom' could be avoided by Union action and is therefore justified under the second guideline and 'the need to correct distortion of competition'. He then employs the third guideline to support Union action. Even if Member States may be capable of producing the required outcome, Union action is more 'efficient' than the individual Member States in achieving the objectives of the proposed action.[338]

Lenaert's interpretation of the Edinburgh Guidelines is at variance with the narrow interpretation proposed above. Whilst Lenaerts argues that any cross-border problem will do to justify EU action or that any effect on the internal market will do to justify EU action, I sustain that it is insufficient for Union action to be simply more efficient. The Edinburgh Guidelines require 'clear benefits' in order to justify Union intervention. Such an interpretation would be compatible with the 'decentralising' aim of subsidiarity.[339] The central distinction between the 'centralising' interpretation and the 'narrow' interpretation is related to evidence. The distinction becomes evident when examining Lenaert's example on environmental spill-overs. Under the narrow interpretation, it is not sufficient to refer to a potential spill-over to make the case for EU harmonisation. There must be actual evidence that the existence of 'spill-over' risks is giving rise to a 'regulatory race' where states compete with each other by ever more lenient environmental laws. The EU legislature must also show that it is 'likely' that the risk will be realised.[340] Conversely, the 'centralising' interpretation accepts the risk of potential spill-overs as a justification for Union action.

The proposed limits drawn from the Court's jurisprudence and the Edinburgh Guidelines are, however, not only legal inventions, but also are well-defended by the economic and regulatory literature. The limits of *Tobacco Advertising*, considered in light of economic theory, boils down to a test of establishing a 'market failure' in order to justify harmonisation. First, it must be shown that national disparities give rise or risk giving rise to 'market failures'. Secondly, Union action must be more efficient than Member State action in avoiding or

[338] See Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union' (n 318) 865, 879-881, 885.
[339] See Swaine (n 137) 53-54.
[340] See Case C- 376/98 *Tobacco Advertising* (n 37) paras 84-86, 106-107.

remedying those failures by increasing social welfare, taking into account the costs of the new rules.[341]

The Commission often relies on 'distortions of competition' and 'race to the bottom' reasoning to justify harmonisation. Its recent proposals to harmonise national criminal laws in relation to infringements of EU regulatory schemes are cases in point. In these proposals, the Commission assumes that differences in Member States' sanctioning regimes may create a regulatory 'race to the bottom' in order to attract investment and firms. Firms in this scenario are subject to different costs for compliance because of different regulatory standards, putting firms in a jurisdiction with stringent regimes under a competitive disadvantage, giving rise to competitive distortions.[342] The Commission's general race to the bottom assumption has, however, been fiercely challenged by the regulatory scholarship and criminal law scholars.

Evidence from the regulatory literature suggests that race to the bottom scenarios have overestimated the role played by regulation in market behaviour. David Vogel, discussing race to the bottom and environmental standards in the US, notes that while state jurisdictions compete with one another to attract investment, they have generally not chosen to do so by maintaining lower environmental standards. On the contrary, many state standards are stricter than federal ones. Empirical research also shows that industrial location is sensitive to factors other than regulations, such as local opposition to new plants, delays, a well-developed industrial base, labour costs, access to markets and other non-regulatory variables. The upshot of this research is that international competition for comparative advantage will not necessarily lead to a race to the bottom.[343] Luca Enriques and Matteo Gatti also illustrate why arguments of 'distortions of competition' are not persuasive when contemplating Union harmonisation of national company laws. They reject the view that 'market failures' can be dealt with better by EU institutions than by Member States. With no European 'Delaware' in sight, they maintain that rules to prevent a race to the bottom are unwarranted. The level playing field concept, as a rationale for harmonisation, does not work either, since, far from lowering transaction costs, actual Union harmonisation has raised them and will plausibly also do so in the future.[344]

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[341] See e.g. Niamh Moloney, *EC Securities Regulation* (2nd edn, OUP 2008) 27; Van Zeben (n 327) 15, 23.

[342] See SEC (2007) 160 (n 183) 24; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reinforcing sanctioning regimes in the financial services sector', Brussels, 8.12.2010, COM (2010) 716 final, 10.

[343] See David Vogel, 'Trading Up and Governing Across: Transnational Governance and Environmental Protection' (1997) 4 Journal of European Public Policy 556-559, 561; Claudio M Radaelli, 'The Puzzle of Regulatory Competition' (2004) 24 Journal of Public Policy 1, 2-3, 5-6, 8.

[344] See Luca Enriques and Matteo Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union' (2006) 27 University of Pennsylvania Journal of International Economic Law 939, 969, 978, 998.

The criminal law scholarship has also shown scepticism towards the use of 'safe haven' scenarios as a justification for the harmonisation of criminal laws. To an equal extent as the regulatory scholars mentioned above, they suggest that the competitive parameter of sanctioning regimes has little significance in relation to factors such as wage costs, infrastructure, tax and duty rules, environmental rules, proximity to primary produce, etc. Not much criminological evidence supports the proposition that criminal activities are strategically planned with the purpose of exploiting differences between legal orders. In the absence of a European Delaware with weak enforcement standards where criminals would decide to engage in regulatory offences, the case for Union action in criminal law is, in principle, a weak case.[345]

To summarise the argument, subsidiarity entails a right for Member States to diverge. The 'clear' benefits criterion in the Edinburgh guidelines prescribes a standard of proof which entails a presumption against action at the EU level. If the question of clear benefits at the Union level is in doubt, that doubt must be resolved in favour of the exercise of national policy choices.[346] This strict interpretation of subsidiarity is supported by the fact that the EU must, pursuant to the Edinburgh guidelines and the new Protocol no 2, substantiate the need for EU action by quantitative and qualitative indicators.[347]

The subsidiarity principle must also be judicially enforced. In order not to overstretch the capacities and the legitimacy of the Court[348], I suggest that the Court apply the test developed in chapter 2 of 'adequate' reasoning and 'relevant' evidence. This test of legality requires that at *least one* of the reasons proposed by the EU legislature is capable, on the basis of the pertinent literature and the Court's case-law, of constituting a justification for subsidiarity compliance. The second part of the test for legality, the requirement of 'relevant evidence', demands that *one of the justifications* invoked to sustain compliance with the substantive subsidiarity criteria can be defended with relevant evidence.[349]

We can take one example from the Court's case-law, *Germany v Council,* to illustrate what kind of reasoning would not meet the proposed procedural subsidiarity test. The problem in this case was that the Commission had failed

[345] See Thomas Elholm, 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 191, 221; Kimmo Nuotio, 'Harmonization of Criminal Sanctions in the European Union- Criminal Law Science Fiction' in Asbjørn Strandbakken and Erling Johannes Husabø (eds), *Harmonization of Criminal Law in Europe* (Intersentia 2005) 92.

[346] See Derrick Wyatt, 'Could a Yellow Card for National Parliaments Strengthen Judicial As Well As Political Policing of Subsidiarity?' (2006) 2 Croatian Yearbook of European Law and Policy1, 8-9; Swaine (n 137) 55, 57-58.

[347] See Edinburgh Guidelines (n 125) 20; Protocol (No 2) on the application of the principles of subsidiarity and proportionality (n 39) Article 5.

[348] See Bermann (n 309) 336-337.

[349] See for discussion of the test, chapter 2- section III.

to mention subsidiarity in the contested Deposit Guarantee Directive. Despite this, the Court held that the measure conformed to the subsidiarity principle. The Court mentioned the recital in which the Commission pointed to a scenario in which 'deposits in a credit institution that has branches in other Member States become unavailable' and that it was 'indispensable to ensure a harmonised minimum level of deposit protection wherever deposits are located in the Community'. The Court also pointed to the preamble, in which the Commission had asserted that 'a decision regarding the guarantee scheme which is competent in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office has repercussions which are felt outside the borders of each Member State.' According to the Court, this showed that, in the Union legislature's view, the aim of its action could, because of the cross-border dimensions of the intended action, be best achieved at the Union level.[350]

The Commission's statement of reasons was not acceptable in this case due to the fact that the EU legislature had failed to offer *one reason* which could independently justify compliance with the subsidiarity criterion. In fact, none of the recitals in the Directive expressly mentioned the subsidiarity criterion. In this case, it would have been logical to assert subsidiarity compliance by pointing to the fact that divergent depositor schemes gave rise to 'obstacles to the freedom of the establishment' or 'distortions of competition' and that such problems could only be remedied by EU action. Such reasons were also mentioned in the preamble to the directive.[351] The EU legislature did not, however, try to make a link between those reasons and the subsidiarity criterion. Those reasons were instead offered to demonstrate why the measure was consistent with the designated legal basis of Article 57(2) EC.[352]

It is also appropriate to exemplify the application of the 'evidence' criterion with a concrete example. The 2006 Intellectual Property Crimes Proposal is illustrative in this regard.[353] The Commission claimed in this proposal that intellectual property infringements are of a global scale and linked to organised crime, thereby requiring Union action. The Commission also suggested that the major disparities between the national systems of penalties do not allow the holders of intellectual property rights to benefit from an equivalent level of protection throughout the Union and thereby hamper the proper functioning of the internal market. According to the Commission, the Proposal also, while approximating legislation, respected the different legal traditions and systems of the Member States. The direct objective of the initiative, which was to protect intellectual property, could therefore be better achieved at the Union level. For

[350] See Case C-233/94 *Germany v Parliament and Council* (n 127) paras 27-28.
[351] See Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1994] OJ L 135/5, recitals 1, 5, 13 and 15.
[352] See Case C- 233/94 *Germany v Parliament and Council* (n 127) paras 13-20.
[353] See n 27 for full reference to this Proposal.

all of these reasons, according to the Commission, the proposal complied with the principle of subsidiarity.[354]

In terms of evidence, the Proposal must be criticised. The Commission has failed to offer any evidence to support the statement which was offered as a justification for subsidiarity compliance, that considerable disparities in national laws on the protection of intellectual property holders give rise to obstacles to trade. It is not shown how different levels of protection of intellectual property rights give rise to 'market failures', creating a need for Union action. The key problem with the Proposal is that the Commission makes a number of assertions about the cross-border nature of the problem, divergences and its relationship with organised crimes, without referring to any empirical sources. The Commission seems to presume that its arguments have no need for evidence. That is, however, not the case. The evidence requirement mandates that the Commission, at the very least, must refer to some credible sources when it seeks to demonstrate the need for Union action. Since there is no evidence to support the Commission's assertions, the Proposal falls foul of the evidence requirement.[355]

4.3 Practical application of subsidiarity to the Market Abuses Crimes Directive

The very recently adopted Market Abuse Crimes Directive[356] is a useful example to clarify the limits imposed by the subsidiarity principle. This directive harmonises, as noted above, national criminal laws by defining three market abuse offences, i.e. insider dealing, unlawful disclosure of inside information and market manipulation, which, if committed intentionally, must be regarded by Member States as criminal offences and must be punishable by effective, proportionate and dissuasive criminal sanctions.[357]

The purpose here is to enquire whether the EU legislature, on the basis of the proposed test of legality, correctly exercised its competence in conformity with the subsidiarity principle when it adopted the Market Abuse Crimes Directive. First, whether the proposal to the Directive is adequately reasoned from a subsidiarity perspective is discussed. Secondly, whether there is 'relevant' evidence in the legislative background documents to sustain that the Market Abuse Crimes Directive was adopted in conformity with the subsidiarity principle is analysed.

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[354] See Intellectual Property Crimes Proposal (n 27) 1-3, 9.

[355] See for criticism of this proposal: Reto Hilty, Annette Kur and Alexander Peukert, 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and of the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights', IIC 436, 22.9.2006, 1-3. <http://www.ip.mpg.de/files/pdf2/Comments-EnforcementOfIP-Rights.pdf>. Accessed 20 April 2015.

[356] See above chapter 3- section II (A) (c) and chapter 3-section II (B) (b) for a previous discussion of this proposal within the framework of Article 83(2) TFEU.

[357] See Market Abuse Crimes Directive (n 28) Articles 3-5, 7, 9.

When assessing the first part of the test, it seems that the EU legislature, when adopting the Market Abuse Crimes Directive, met the demands of 'adequate reasoning'. This is because it has offered, in accordance with the proposed test of legality, *one* justification which can, consistent with the substantive subsidiarity test, demonstrate subsidiarity compliance. The substantive subsidiarity criterion demands that a market failure be identified and that EU action gives 'clear benefits' through the planned legislative measure to correct this failure.[358]

The Commission has identified one market failure, namely, potential distortions to competition, that justifies harmonised definitions of market abuse. The Commission's logic is based on the fear of 'safe havens' and a 'race to the bottom'. Unless there are common Union-wide definitions of the relevant offences and in the absence of a common criminalisation requirement throughout the Union, perpetrators of market abuse would choose to commit their violations in the jurisdiction that has the most lenient sanctioning regime. Legal diversity in sanctioning results in different costs for the undertakings engaged in financial services activities, leading to competitive disadvantages for undertakings from certain Member States.[359] This concern is well-defended by the relevant literature.[360] Furthermore, the Commission asserts that, unless harmonised criminal law measures for the enforcement of market abuse offences are adopted, Member States would compete with each other to attract undertakings in relation to the severity of the sanctioning regime, giving rise to a regulatory 'race to the bottom'.[361] This assumption is also recognised by prominent scholars as an acceptable reason for harmonisation.[362]

We should also check whether the Commission, in the legislative background documents, has provided *one* reason which explains why EU action has 'clear benefits' in relation to Member State action. In this regard, it also seems that the Commission has met the standard of 'adequate' reasoning. It argues that the EU has a comparative advantage in regulating market abuse because the problem of market abuse has a 'transnational' dimension. Market abuse has a cross-border dimension, since the relevant conduct can occur in one or more Member States other than where the market concerned is localised and because the relevant actors might operate in different countries.[363] The scholarship supports the assumption that the cross-border dimension of a problem is a valid reason for

[358] See above section I in the present chapter for an account of this test.

[359] See SEC (2011) 1217 (n 230) 53-54, 125,166, 171; SEC (2010) 1496 (n 232) 14-15, 22.

[360] See Sevenster (n 5) 53-56; Joachim Vogel, 'Why is the Harmonisation of Penal Law Necessary? A Comment' in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002) 61.

[361] See Market Abuse Crimes Proposal (n 141) 3, 5; SEC (2010) 1496 (n 232) 15.

[362] See William L Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 Yale Law Journal 663, 668, 701-705; Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) Centre for Business Research, University of Cambridge Working Paper No. 323, March 2006, 4-5.

[363] See Market Abuse Crimes Proposal (n 141) 3, 5; SEC (2011) 1217 (n 230) 33.

EU action and that market abuse, because of the increasingly integrated EU financial market, has an important transnational dimension.[364]

Has then the Commission submitted sufficient evidence to sustain that the Market Abuse Crimes Directive conformed to the subsidiarity principle? First, let us look at the Commission's claim that harmonisation of the Member States' criminal law rules in relation to market abuse offences is necessary to avoid a market failure in the form of distortion of competition. The Commission endeavours to substantiate this claim by referring to the fact that there is divergence in the Member States' definitions of market abuse offences and divergence in the Member States' legislation in terms of the nature of sanctions imposed for market abuse offences. The Commission specifically points to the report published by the Committee of European Securities Regulators (CESR) on the administrative and criminal sanctions available in the Member States under the market abuse directive (MAD).[365] The CESR's report and the summary of this report in the Impact Assessment show the following. First, neither the offence of insider dealing nor market manipulation is subject to criminal sanctions in all EU Member States. The report demonstrates that two out of 27 Member States do not impose imprisonment for infringements of Article 2 of the Market Abuse Directive 2003/6/EC (MAD[366]) providing for insider dealing by a primary insider, whereas five Member States do not impose criminal sanctions for the offence of disclosure of inside information by a primary insider in Article 3(a). Moreover, it appears that only two Member States lack criminal sanctions for the offence of 'tipping' by primary insiders contained in Article 3b MAD, whilst four Member States do not provide for criminal sanctions for insider dealing by secondary insiders (Article 4 MAD). It also emerges that eight Member States lack criminal sanctions for improper disclosure of insider information by secondary insiders pursuant to Article 4 in MAD, whereas six Member States lack criminal sanctions for 'tipping' by secondary insiders (Article 4 MAD). Finally, it is clear that four Member States do not criminalise infringements of Article 5 of the MAD providing for market manipulation cases. The Commission argues that these divergences give rise to safe havens and a race to the bottom, thus creating a risk of distortions of competition.[367]

Despite having offered this evidence on the divergence in the Member States' legislation on market abuse, I argue that the Commission has not been able to meet the test of 'sufficient' and 'relevant evidence'. This is because the

[364] See Van Zeben (n 327) 30; Guido A Ferrarini, 'The European Market Abuse Directive' (2004) 41 Common Market Law Review 711, 717-718.

[365] Committee of European Securities Regulators, 'Executive Summary to the Report on Administrative Measures and Sanctions as well as the Criminal Sanctions Available in Member States Under the Market Abuse Directive (MAD)', CESR/08-099, 28 February 2008. The report was drafted based on the legal situation on 17 Oct 2007.

[366] See n 263 for full reference to this directive.

[367] See CESR Report (n 365) 264-3, 5; SEC (2011) 1217 (n 230) 124-125.

Commission's only evidence, i.e. the CESR report, does not validate the far-reaching conclusion that these divergences will give rise to distortions of competition. Whilst the EU legislature can use Article 114 TFEU to avoid the emergence of future obstacles to trade resulting from the multifarious development of national laws in relation to the sanctioning of market abuse, the emergence of such obstacles must be 'likely'. This means that there cannot be an abstract risk of distortions of competition. Instead, there must be proof that the risk will be realised in the immediate future.[368]

Whilst the report supports that the national divergences in the regulation of market abuse may in theory give rise to distortions of competition, it does not prove it to be likely that these potential distortions will become concrete. The existence of 'hypothetical' risk for distortions of competition is not sufficient as a justification for EU legislation under Article 114 TFEU.[369] Subsidiarity compliance can only be justified if there is proof of an imminent risk of a 'race to the bottom'. The 'race-to-the-bottom' hypothesis is based on several theoretical assumptions which must be demonstrated. First, there must be conditions of economic interdependence in which a Member State unilaterally lowers regulatory standards in order to attract mobile factors of production, typically capital and highly skilled labour. Secondly, it is assumed that other Member States would lose business, revenue and human capital, and that they would therefore react by lowering their own standards. In the final stage, it is predicted that jurisdictional competition would create a cycle of regulatory moves that concludes with all countries in a position that is worse than the one they could have secured by coordinating their policies.[370]

The CESR report does not provide support for these assumptions. Although it can be assumed that there is economic interdependence in the EU financial market, the report does not demonstrate that divergences in the criminalisation of market abuse and criminal sanctions for such offences have caused any Member State to unilaterally lower its enforcement standards. Given the absence of evidence of the existence of safe haven states with lenient market abuse sanctioning regimes where potential perpetrators would decide to engage in insider dealing transactions, the case for Union action is feeble. There is no specific or general evidence in the proposal and the impact assessments from 2010 and 2011 to support the presence of an imminent risk that market failures in the form of safe havens will occur in the field of market abuse. This lack of evidence is to be regretted. It would have been perfectly feasible for the

[368] See Case C-376/98 *Tobacco Advertising* (n 37) paras 84, 86, 106-107, 109.

[369] There is an abundance of economic literature contesting that the mere presence of divergences provides a reason for harmonisation, see Filomena Chirico and Pierre Larouche, 'Chapter 2: Convergence and Divergence, in Law and Economics and Comparative Law', in Pierre Larouche and Péter Cserne (eds), *National Legal Systems and Globalization* (Springer 2012) 21-22, 28-29, with references to further literature.

[370] See Radaelli (n 343) 2; Enriques and Gatti (n 344) 966.

Commission to refer to academic articles[371], national studies, company surveys or other sources to establish the risk of distortions of competition arising from different sanctioning regimes. The Commission has, however, failed to refer to even such general evidence.

In sum, since the Commission has been unable to submit proof to fulfil the requisite standard of 'sufficient' and 'relevant' evidence to sustain the distortion of competition argument, the Market Abuse Crimes Directive must consequently be condemned as not conforming to the subsidiarity principle.

[371] See Anne Weyembergh, 'The Functions of Approximation of Penal Legislation Within the European Union' (2005) 12 Maastricht Journal of European and Comparative Law 149, 164; Sevenster (n 5) 54-55.

5 Main recommendations of the report

This chapter summarises the main recommendations of the report and makes some observations regarding their broader implications.

The report contained two main arguments that ran throughout the study. First, it was suggested that the main way to establish limits to the exercise of EU competences is to interpret the legal bases of the treaties and to develop appropriate criteria under which the legality of EU legislation can be assessed. By reviewing discrete EU criminalisation measures, such as the Environmental Crimes Directive,[372] the Intellectual Property Crimes Proposal[373] and the Market Abuse Crimes Directive[374], and by generally examining the scope of the EU's power under the legal bases of the treaties to impose criminal sanctions[375] and the scope of the subsidiarity principle in setting limits to the exercise of EU competences[376], the report demonstrated the constraints faced by the EU legislature when exercising its legislative powers.

Secondly, noting that the limits of the treaties, to be taken seriously, also must be judicially enforced, the report developed an argument for a more intense and evidence-based judicial review. It proposed a procedural standard of legality which requires the EU legislature to show that it has adequately reasoned its decisions and taken into account relevant evidence. I will begin by discussing the second argument.

5.1 Judicial enforcement of the limits of the treaties

This section summarises and reflects on the main findings of chapter 2. The second chapter of the report provided the backbone for the rest of the report by accounting for the problems of judicial enforcement and by developing a test for legality to be used to analyse discrete pieces of EU legislation in the rest of the report.

5.1.1 More objective criteria and external checks on the Court are needed to overcome conceptual and structural problems in monitoring the exercise of EU competences

The second chapter illustrated the problems of judicial review by analysing the three most important principles limiting the exercise of EU competences:

[372] See above chapter 3- section I (C).
[373] See above chapter 4- section I.
[374] See above chapter 3- section II (A) (c); chapter 3-section II (B) (b); chapter 4- section II.
[375] See above chapter 3.
[376] See above chapter 4.

'conferral', 'subsidiarity' and 'proportionality'. By examining the impact of these principles before the Court of Justice, the chapter reinforced the general recognition in the scholarship that the theoretical limits to EU competences do not coincide with practice. It was maintained that the Court's problem in enforcing the limits is both conceptual and structural. First, the Court has not been provided with objective criteria to enforce the limits of the treaties. The weak legal content of the principles that are supposed to constrain EU action force the Court to engage in empirical and political questions to determine the remit of EU competences. This is not a task that the Court is willing to assume, given its fragile legitimacy in re-assessing the EU legislature's political choices. Secondly, given the overarching objective of further European integration, the Court has not been structurally well-placed to engage in a strict review of EU competences.[377] While recognising these problems, I argued that there was still hope for stronger judicial enforcement of the limits of the treaties.

First, I tentatively suggested that EU scholarship must offer a comprehensive conceptual basis for controlling the exercise of EU competences to enable stronger judicial review of the limits of the treaties. I devoted chapters 3-4 to demonstrating how both substantive and procedural limits can be constructed for the exercise of EU competences. Secondly, I dismissed the concern that the Court is not well-placed to review the exercise of EU competences. The evolution of EU law gives the Court good reason to take a more serious stance in competence litigation. The increased emphasis in the Lisbon Treaty on the limitation of competences, the adoption of new protocols and the introduction of new actors in the monitoring of EU competences and the pressure from national constitutional courts give the Court strong reasons to move to a more intense form of judicial review in order to maintain its credibility.[378]

5.1.2 Procedural review is the key solution to improve judicial review of EU legislation

Chapter 2 also tried to develop, taking into account the problems of judicial enforcement, a framework for legality review. Although the Court of Justice may be well-placed to review EU legislation and even whether there is a conceptual basis for challenging the exercise of EU competences, it was argued that the Court needs a judicial mechanism to become a credible arbiter in competence disputes. One of the key problems for the Court in enforcing the limits of the treaties is the institutional constraints it faces in terms of legitimacy and competence in relation to the EU legislature. While such constraints have permeated the Court of Justice's practice in relation to its review of the exercise of broad Treaty powers, such reasons cannot be given too broad an interpretation, such as to disqualify the Court from the area of competence review.[379] But how should the Court then develop a more intense form of judicial review?

[377] See above chapter 2- section II (A).
[378] This thought was further developed above in chapter 2- section II (A).
[379] See above chapter 2- section III.

There are different options for the Court of Justice. The Court could engage in more intense substantive review or develop new heads of review. The reasons based on institutional legitimacy and competence make it difficult for the Court to move to more intense substantive review.[380] The main recommendation for remedying the institutional problems of the judicial enforcement of existing EU limits was for the Court to examine the evidential basis for the legislative measure and to change the focus from 'substantive review'[381] to 'procedural review'. I defined procedural review as an approach to judicial review that requires the Court to consider whether the EU legislature's reasoning and evidence are adequate to support the exercise of its legislative powers. Procedural review was found to be attractive for several reasons. First, since such a review requires the EU political institutions to provide the Court with adequate justifications and evidence, the Court becomes empowered to review whether EU legislation conforms to the treaties. Secondly, because such review is neither focused on the appropriateness of legislation nor intrudes on the EU legislature's sphere of discretion, the Court is well-equipped to fulfil this task. Thirdly, since procedural review forces the EU legislature to openly justify its legislative choices, transparency is likely to be improved by means of procedural review.[382]

5.1.3 A test of legality which demands that the EU legislature articulate at least one compelling rationale for EU action that is substantiated with 'relevant' evidence is appropriate to enforce the limits of the treaties

What then should be the proper standard of review and test for judicial review? While the Court traditionally has favoured a deferential standard of 'manifestly inappropriate' in relation to the review of broad EU policies and a very high threshold for judicial intervention, it seems that this approach to judicial review has fallen short of achieving credible judicial enforcement.[383] Due to the inadequacy of the Court's current approach to judicial review, I developed, on the basis of the procedural review framework, a specific standard of review and test for legality for the review of all broad EU policy measures. I distilled the standard of review from the Court's judgement in *Spain v Council*, which provided an appropriate benchmark. The proposed standard of review suggests that the EU legislature must offer 'adequate reasoning' and 'relevant evidence' to maintain that a proposed legislative measure conforms to the limits of the treaties.[384]

But what test of legality should be chosen to control the legality of EU legislation? There are important considerations involved in choosing a proper test for legality.

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[380] See Bar-Siman-Tov (n 139) 287-288; Craig, *EU Administrative Law* (n 18) 439-440.
[381] See above n 224 for definition of this concept.
[382] See above chapter 2- section III.
[383] See above chapter 2- section II (B).
[384] See Case C-310/04 *Spain v Council* (n 95) paras 122-123.

A high threshold for legality will give leeway to the EU institutions in its effort to pursue further EU integration and not stretch the Court's institutional capacities by forcing it to become involved in difficult political and constitutional choices. A more demanding test for legality will, however, push the EU legislature to prepare more evidence-based legislation and will also increase the legitimacy of the Court of Justice and the EU's legislative procedure. I regarded the latter considerations as more important when designing the test. I therefore suggested, on the basis of the Court's rulings in *Kadi II*[385] and *Tetra Laval*[386], an intrusive test to control whether the proposed standard of 'adequate reasoning' and 'relevant evidence' has been met. First, the EU legislature must articulate at least *one justification*, which in theory is sufficient as a basis for exercising the competence. The benchmark, when examining whether the justifications are 'adequate', is the relevant scientific literature and the Court of Justice's case-law. If the proposed justifications are considered adequate, the second limb of the test considers whether these justifications are supported by 'relevant' evidence. This test requires the evidence to be of a certain quantity and quality. To support the rationale for exercising the competence, there must be references in the legislative background documents to at least two different sources. In order to be reliable, the evidence submitted must be in the form of statistical studies, policy studies and/or scientific articles.[387]

5.2 Reconstructing the limits of the treaties

This section summarises and reflects on the main findings of chapters 3-4. These chapters used the EU's competence to impose criminal sanctions as an example of how limits to the EU's competences can be constructed. By reviewing concrete examples of EU criminal law measures on the basis of the standard and test of legality developed in chapter 2, it was shown how the limits to the treaties can be enforced.

5.2.1 The EU legislature and the Court of Justice must move towards a more evidence-based test of legality for EU legislation

The outcome of the scrutiny of specific pieces of EU criminal law measures was that few pieces of EU legislation seemed to hold up to the proposed standard of legality of 'adequate reasoning' and 'relevant evidence'.[388] Whilst it often seems that the EU legislature is able to meet the criterion of 'adequate' reasoning when justifying EU legislation, the difficult question, as shown from the examination, is for the EU legislature to provide sufficient proof to fulfil the evidence standard. The upshot of the analysis is that, while the EU legislature is surely

[385] See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n 149) paras 118-119, 124.

[386] See Case C-12/03 P *Commission v Tetra Laval* (n 150) para 39.

[387] See above chapter 2- section III.

[388] See above for a practical analysis of legislation: chapter 3- section I (C); chapter 3- section II (A) (c); chapter 4- section I-II.

able to invoke some evidence to justify its actions, the evidence presented is not generally of such quality and quantity to match the EU legislature's broad claims of compliance with the conditions of the relevant legal basis.[389] This suggests that what is really missing in the EU legislature's current legal analysis of the exercise of EU competences is a lack of 'relevant' evidence. It is equally true that the analysis of 'relevant' evidence is what is lacking in the Court of Justice's jurisprudence. In general terms, it appears that the Court's current test only requires that reasoning is provided for compliance with competence-conferring conditions, not that the reasoning is substantiated with evidence. As shown in this report, the Court's current approach is, however, inadequate, and it has adversely affected the procedure for the drafting of EU legislation.[390]

The general conclusion then appears to be that the current way of drafting EU legislation, which is supported by the Court of Justice, is based on hypothetical scenarios and unproven assumptions regarding the existence of certain problems and the predicted positive consequences of EU action. However, if the EU legislature wishes to improve its legitimacy and if the Court wishes to become a credible arbiter between Member States and the EU in competence disputes, it may not be sufficient for the Court to control the EU legislature's reasoning. It can be legitimately argued that the EU legislature needs to provide both more and better support for its actions and that the Court must enforce these 'evidentiary' obligations. Otherwise, it is difficult to ascertain whether the EU legislature has exercised its discretion correctly.[391]

5.2.2 The 'essentiality' condition is a substantive limitation apt to act as a check on the exercise of the EU's criminal law competence

Chapter 3 examined the remit of the EU's implied and express criminal law competence. One of the central limits to the exercise of EU criminal law competences is the need to establish the 'essentiality' of criminal law for the effective implementation of EU policies. This requirement applies both to the EU's general criminal law power, as derived from the Court of Justice's pre-Lisbon jurisprudence, and to the new power contained in Article 83(2) TFEU.

The report demonstrated, by examining some recently adopted EU criminal law measures[392], that the 'essentiality' requirement can act as a check on the exercise of the EU's criminal law competences. The Court of Justice's previous practice was challenged, and it was contended that the light 'essentiality' test, evidenced by the judgements in *Environmental Crimes* and *Ship-Source Pollution,*

[389] See above chapter 3- section I (C) for an analysis of the Environmental Crimes Directive and chapter 3- section II (A) (c) and chapter 4- section II for an analysis of the Market Abuse Crimes Directive.

[390] See Weatherill, 'The Limits of Legislative Harmonisation' (n 51) 844.

[391] See Case C-310/04 *Spain v Council* (n 95) paras 122-135.

[392] See above chapter 3- section I (C); chapter 3- section II (A) (c).

was flawed. Assuming that the function of judicial review is to ensure that the Union institutions do not disregard the constitutional limits of the Treaty, a stricter standard of review was shown to be desirable. The enquiry used legal, moral and criminological arguments to contest the rationale for the exercise of EU criminal law competences.[393] I contended that, in order to be able to exercise its criminal law competence under Article 83(2) TFEU and Article 192 TFEU, the Union must prove, on a case by case basis, by reference to criminological evidence, that criminal sanctions are 'essential' for the 'effective' implementation of Union policies.[394]

The case study of EU criminal law placed the nature of the issues that shape judicial review in sharp relief. It was shown how respect for fundamental rights and principles of judicial protection necessarily sharpen the judicial review of EU criminal law legislation. Consequently, the report argued for a strict test of judicial review under Article 83(2) TFEU. Because criminal penalties are liable to infringe individual's fundamental right to freedom of movement and because the imposition of criminal sanctions entails severe stigmatisation of the offender and substantial social costs, intense judicial review of criminal law measures is justified.[395]

The potency of the 'essentiality' condition was illustrated by its application to the Market Abuse Crimes Directive and to the Environmental Crimes Directive. Both of these case studies showed that the EU legislature was unable to fulfil the requirement of 'relevant' evidence as required by the legality test developed in chapter 2. In both cases, the Commission's only compelling justification, the 'deterrence' argument, was not supported by sufficient evidence that could uphold the superiority of criminal over non-criminal sanctions. This suggests that the EU legislature justifies criminal law legislation on questionable premises which are not backed by proven facts. This examination also regrettably shows that the EU legislature currently employs its criminal law competence without considering available non-criminal sanctions and without any clear idea about why criminal sanctions are necessary.[396]

This approach of the EU legislature must be condemned. If the conditions for exercising the EU's express and implied criminal law competence had been different and only required that criminal laws be suitable for the ' enforcement' of EU policies, the Environmental Crimes Directive and the Market Abuse Crimes Directive would surely have passed the suggested legality standard. However, the EU legislature intended that criminal laws should only be used in exceptional situations when other non-criminal measures were shown to be

[393] See above chapter 3- section II (A) (b).
[394] See above chapter 3- section I (B); chapter 3- section II (A) (a) - (b).
[395] See above chapter 3- section II (A) (b).
[396] See above chapter 3- section I (C); chapter 3-section II (A) (c).

deficient.[397] These examples showed that the EU legislature needs to seek out and refer to more substantial and reliable evidence to convince the general public that EU criminalisation is 'essential' for the enforcement of EU rules.

If the EU legislature did not have sufficient evidence at its disposal for criminalisation, what could then have been the rationale for pursuing these initiatives? It is plausible to argue that there are 'expressive' reasons behind these initiatives. The report shows that the EU has decided to take a stand against certain conduct in the field of environmental law, insider dealing and intellectual property, even if the evidence to support these legislative initiatives was insufficient to sustain the claim that criminal law is the most effective measure for the enforcement of these policies. The 'expressive' dimension has saturated the EU's recent criminal law initiatives.[398]

What are those reasons then? The expressive dimension is to communicate a common sense of justice and to underline that 'certain forms of conduct are unacceptable'.[399] This observation is well-supported by the Commission's Green Paper on criminal sanctions. In this document, the Commission stated that, by defining common offences and penalties, the Union would be putting out a symbolic message that certain forms of conduct are unacceptable and punished on an equal basis. The approximation of penalties would help give the general public a shared sense of justice, which is one of the conditions for establishing an area of freedom, security and justice.[400]

Nevertheless, the current treaties provide no clear authorisation for harmonising criminal law on expressive grounds. I maintain that the EU will endanger its legitimacy if it keeps enforcing its policies through criminal sanctions on such grounds. The EU should adopt a conservative approach and refrain from harmonising criminal laws in the absence of a real practical need and a firm legal basis for harmonisation. This means that the EU should limit itself to harmonising national criminal laws in instances in which criminalisation is 'essential' to implement existing EU rules.[401]

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[397] See CONV 426/02, 'Final report of Working Group X "Freedom, Security and Justice"', Brussels, 2 December 2002, 10; CONV 727/03, 'Draft sections of Part Three with comments', Brussels, 27 May 2003, 32.

[398] See Jenia Iontcheva Turner, 'The Expressive Dimension of EU Criminal Law' (2012) 60 American Journal of Comparative Law 555, 557.

[399] See Market Abuse Crimes Proposal (n 141) recital 7.

[400] See Commission, 'Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union', Brussels, 30.04.2004, COM (2004)334 final, 9.

[401] See Turner (n 398) 579.

5.2.3 One of the key substantive limits to the exercise of EU harmonisation powers is the need to show a serious risk of 'market failures'

Chapter 4 of the report examined, within the framework of the subsidiarity principle, the relationship between criminal law and the internal market. It was maintained that the main way to challenge the rationale of the exercise of EU competences is to examine the validity of the assumptions underlying EU harmonisation pursued for the benefit of the internal market. I argued that EU internal market harmonisation can only be pursued on the basis of proof of a risk of 'market failure'. This approach to subsidiarity was not only supported by comprehensive research on regulatory policies and economic arguments, but sustained by the Court of Justice's judgement in *Tobacco Advertising*.[402]

EU criminal law was a case in point for challenging the internal market justification. It was first shown that the EU legislature's general theoretical assumption that national divergences in relation to the definition of offences or divergences between Member States' sanctioning regime laws leads to distortions of competition in the form of safe havens and a race to the bottom is misplaced. The existence of such divergences cannot, in themselves, justify a broad harmonisation of criminal laws, as there is no logical relationship between divergences of laws and distortions of competition.[403] The empirical research instead suggests that differences in sanctioning regimes or differences in criminalisation have very little impact on the choice of location for firms or on the tendency of Member States to engage in regulatory races to the bottom.[404]

Secondly, I showed, by examining two concrete examples of EU criminal law measures, that this argument was also flawed in practice. On the basis of the test developed in chapter 2 that *at least one* compelling justification for compliance must be submitted for compliance with the 'market failure' criterion and that this justification must be supported with 'sufficient' and 'relevant' evidence, I showed that neither the Intellectual Property Crimes Proposal[405] nor the Market Abuse Crimes Directive[406] conformed to the proposed limits on harmonisation.

These examples show that while EU harmonisation is often defended on the basis of the EU's commitment to protect the internal market, the EU legislature's justification for approximation on the basis of alleged 'market failures' is often not supported by the facts of the individual case. This cautiously suggests that, in relation to harmonising criminal law measures, the objective of the EU legislature is harmonisation as such. Harmonisation of national criminal laws

[402] See above chapter 4- section I.
[403] See Case C- 376/98 *Tobacco Advertising* (n 37) para 84.
[404] See above chapter 4- section I.
[405] See above chapter 4- section I.
[406] See above chapter 4- section II.

cannot, however, be a goal in itself, but must meet the precepts of the treaties and only be triggered if there is a legitimate justification for approximation.[407]

5.2.4 One of the important procedural limits on the exercise of EU criminal law powers is the need to have harmonisation measures in place before the adoption of criminalisation measures

Chapter 3 of the report also examined some procedural limitations on the exercise of EU regulatory criminal law competences. One of these limitations is that the EU, under Article 83(2) TFEU, must have 'harmonisation measures' in place before it can adopt criminal law measures. I proposed that it is only secondary legislation adopted through the 'ordinary' or 'special' legislative procedures, which has been adopted prior to the criminal law directive, that can constitute a 'harmonisation' measure within the meaning of Article 83(2) TFEU. This entails that harmonisation through Treaty amendments, non-legislative acts or international agreements would not qualify as 'harmonisation' measures under Article 83(2) TFEU. It was also argued that the precondition for employing Article 83(2) TFEU is 'substantive' harmonisation of the relevant prohibitions or harmonisation of conditions for non-criminal liability which describe the prohibited types of behaviour in detail.[408]

I examined the application of the 'harmonisation' requirement by considering the EU Market Abuse Law. It was shown that the 2014 Market Abuse Regulation (MAR) provides for sufficient 'harmonisation' within the meaning of Article 83(2) TFEU to sustain the recently adopted Market Abuse Crimes Directive. The MAR was first intended to constitute a 'substantive' harmonisation measure. It was adopted on the legal basis of Article 114 TFEU, which is the general harmonisation provision of the treaties, and it also aims to remove distortions of competition arising from divergent national laws on the regulation of market abuse. It was also found to be a *de facto* 'substantive' harmonisation measure. This is because it lays down the material prohibitions against insider dealing, unlawful disclosure of inside information and market manipulation, which are then directly linked to the description of the offences in the Market Abuse Crimes Directive.[409]

This example showed why it is 'essential' for the EU to adopt harmonisation measures before it resorts to criminalisation. First, unless the EU has rules in place in a specific area, there is no logical necessity to have criminal rules. Secondly, if we intend criminal law to be the last resort, we should first try non-criminal harmonisation measures. Only if such harmonisation proves

[407] See Vogel (n 360) 56.
[408] See above chapter 3- section II (B) (a).
[409] See above chapter 3- section II (B) (b).

insufficient to achieve compliance with the underlying EU rules is there a need to adopt criminal sanctions.[410]

5.2.5 The Lisbon Treaty did not resolve the problem of establishing the right legal basis for EU criminal legislation

Another important problem concerning the scope of EU criminal law competence is how we should determine the correct legal basis for criminal law measures after the Lisbon Treaty. By scrutinising the relationship between Article 83(2) TFEU and Article 114 TFEU, I demonstrated that the Lisbon Treaty, despite the Member States' attempt to limit criminal law cooperation to Title V, has not been able to resolve the potential for litigation over the appropriate legal basis for criminalisation measures.

First, it was nevertheless admitted that Article 83(2) TFEU has assumed the role of *lex specialis* within the field of criminal sanctions for the enforcement of EU policies. The existence of Article 83(2) TFEU could, for example, restrain the adoption of criminal law measures under other legal bases of the treaties such as the broad functional power of Article 114 TFEU. The wording 'save where otherwise provided' in Article 114 TFEU and the Court's case-law on the scope of Article 114 TFEU suggests that this provision is subsidiarity to other more specific legal bases. Given the fact that most EU criminal law proposals will fall within the scope of Article 83(2) TFEU, it seems that the existence of this *lex specialis* provision generally impedes the exercise of criminal law powers under other legal bases of the treaties.[411]

However, Article 83(2) TFEU cannot entirely extinguish the exercise of an implied criminal law competence under other provisions of the treaties. This is first because there is no express prohibition in the treaties against criminalisation measures being adopted under other provisions in the treaties. If the intention was that criminalisation powers should be restrained to Article 83(2) TFEU, this intention should have been made explicit in the treaties. Secondly, the narrow scope for criminalisation under Article 83(2) TFEU for the enforcement of EU policies militates against this being the sole legal basis for criminalisation measures. EU criminal law measures in the form of 'regulations' fall outside the scope of the power contained in Article 83(2) TFEU. It is unlikely that Member States would have agreed that the EU would have no competence to criminalise by means of 'regulations'. Thirdly, since the scope of the EU's dormant criminal law competence, deriving from the Court's judgements in *Environmental Crimes*, is driven by the 'effectiveness' principle, it seems implausible and against the 'integrationist' objectives of the European Union that EU criminal law

[410] See Asp (n 213) 133-135; Dougan, 'From the Velvet Glove to the Iron Fist' (n 34) 109-111.
[411] See above chapter 3- section III.

competence would be restricted to Article 83(2) TFEU.[412] Criminal law can therefore, subsequent to the Lisbon Treaty, be pursued under different legal bases in the treaties depending on the content of the measure. The legal bases of Article 114 TFEU (market abuse[413]) and Article 192 TFEU (environment[414]) would be strong candidates for such measures.

These findings reinforced a well-known lesson from EU law that the treaties have created a complex system of specific and general legal competences which is inconsistent in many ways. Since the system of competences is founded on the EU's objectives, given the fact that not all of the EU's competences are specifically designated for one specific policy, and because there are no clear demarcation criteria between the different competences, there is plenty of space for disputes over the right legal basis for a potential EU measure.[415] This discussion reinforces the initial observation of the report that the EU, by enshrining reserved powers to the Member States and by describing the nature of EU powers in certain fields, was not able to construct a sharp dividing line between the powers of the EU and the Member States.[416] If the Member States wish to draw a clearer demarcation line between the different treaty competences and between the EU's powers and their own, the treaties would have to be renegotiated and drafted differently. There would have to be an additional provision in Title V of the TFEU to the effect that EU criminal law harmonisation can only be pursued under Article 83 TFEU.

[412] See above chapter 3- section III.
[413] See above chapter 3- section II (A) (c).
[414] See above chapter 3- section I (C).
[415] See Weatherill, 'Competence Creep and Competence Control' (n 16) 4-5.
[416] See above chapter 1.

6 References

6.1 Table of cases

European Union Cases

Court of Justice

Case 8/73 *Massey Ferguson* [1973] ECR 897

Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727

Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415

Case 116/82 *Commission v Germany* [1986] ECR 2519

Case C-45/86 *Commission v Council* [1987] ECR 1493

Case 382/87 *Buet and others v Ministère public* [1989] ECR 1235

Case 326/88 *Hansen* [1990] ECR I-02911

Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-02867

Case C-240/90 *Germany v Commission* [1992] ECR I-05383

Case C-295/90 *Parliament v Council* [1992] ECR I-939

Case C-155/91 *Commission v Council* [1993] ECR I-00939

Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759

Case C-84/94 *United Kingdom v Council* [1996] I-05755

Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405

Joined Cases C-248-9/95 *SAM Schiffart and Stapf v Germany* [1997] ECR I-4475

Case C-36/98 *Spain* v *Council* [2001] ECR I–779

Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419

Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-07079

Joined cases C-27 and C-122/00 *Omega Air and others* [2000] ECR I-2569

Case C-338/01 *Commission v Council* [2004] ECR I-04829

Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453

Joined cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-03565

Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-00987

Case C-110/03 *Belgium v Commission* [2005] ECR I-2801

Case C-176/03 *Commission v Council* [2005] ECR I-07879

Case C-210/03 *Swedish Match* [2004] ECR I-11893

Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573

Case C-436/03 *Parliament v Council* [2006] ECR I-03733

Case C-533/03 *Commission v Council* [2006] ECR I-01025

Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* [2005] ECR I-06451

Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771

Case C- 310/04 *Spain v Council* [2006] ECR I-07285
Joined Cases C-402 and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351
Case C- 440/05 *Commission v Council* [2007] ECR I-09097
Case C-518/07 *Commission v Germany* [2010] ECR I-01885
Case C-58/08 *Vodafone and Others* [2010] ECR I-04999
Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-03727
Case C-490/10 *Parliament v Council* (Court of Justice, 6 September 2012)
Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (Court of Justice, 18 July 2013)
Case C-293/12 *Digital Rights Ireland and Seitlinger and Others* (Court of Justice, 8 April 2014)
Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Court of Justice, Opinion of 18 December 2014)
Cases from Member States' constitutional courts
Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, BvE 5/08, 2 BvR 1010/08, BvR 1022/08, BvR 1259/08, BvR182/09 (2009)

6.2 Table of legislation

Treaties

Consolidated Version of the Treaty on European Union [2002] OJ C 325/5
Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33
Consolidated Version of the Treaty on European Union [2010] OJ C 83/13
Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47

Protocols

Protocol (no 30) on the application of the principles of subsidiarity and proportionality OJ [1997] C 321/308
Protocol (No 1) On the Role of National Parliaments in the European Union OJ [2010] C 83/203
Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality OJ [2010] C 83/206
Charter of Fundamental Rights of the European Union [2010] OJ C 83/389
Conventions
European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, 27 UST 1087; TIAS 8249; 993 UNTS 243

1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 UNTS 57/ [1992] ATS 7/ 28 ILM 657 (1989)

Directives

Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L 201/56

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1994] OJ L 135/5

Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9

Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L 194/26

Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/ EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties [2001] OJ 2001 L 175/ 17

Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements [2002] OJ L 183/ 51

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/ 56

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54

Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28

Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges [2009] OJ L 70/11

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24

Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements [2009] OJ L 280/52

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57

Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173/79

Regulations

Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9

Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 [2003] OJ L 270/ 1, inserted by Article 1(20) of Council Regulation (EC) No 864/2004 of 29 April 2004 [2004] OJ L 161/48

Council Regulation (EU, Euratom) No 617/2010 of 24 June 2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) No 736/96 [2010] OJ L 180/7

Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1

Framework decisions

Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law [2003] OJ L 29/55

Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution [2005] OJ L 255/164

Impact Assessments

Commission Staff Working Document, Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, Impact Assessment', Brussels, 9.2.2007, SEC (2007) 160

Commission Staff Working Paper, Impact Assessment, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Reinforcing sanctioning regimes in the Financial Services Sector**,** Brussels, 8.12.2010 SEC (2010) 1496 final

Commission Staff Working Paper, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on insider dealing market manipulation (market abuse) and the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, Brussels, 20.10.2011, SEC (2011) 1217 final

Commission Proposals

Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights', Brussels, 26.4.2006, COM (2006) 168 final

Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law', Brussels, 9.2.2007, COM (2007) 51 final

Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), Brussels, 20.10.2011, COM (2011) 651 final

Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, Brussels, 20.10.2011, COM (2011) 654 final

Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law', Brussels, 11.7.2012, COM (2012) 363 final

Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing**,** Strasbourg, 5.2.2013, COM(2013) 45 final

Position and statements from European Parliament

'Report on Legal Bases and Compliance with Community Law', (2001/2151(INI), Final A5-0180/2003, 22 May 2003

'Report on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law', Committee on Budgetary Control Committee on Civil Liberties, Justice and Home Affairs A7-0251/2014, 25.3.2014

Withdrawn proposals from the Commission

Withdrawal of Obsolete Commission Proposals, 2010/C 252/04, OJ 252/7

Political guidelines

European Council,

'Conclusions adopted at Edinburgh European Council, Annex 1 to Part A: Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union' Bulletin of the European Communities 12-1992, 11-12 December 1992

'Laeken Declaration on the future of the European Union', 14–15 December 2001

'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens' (2010) OJ C 115/1, 4. 5. 2010

European Convention,

CONV 47/02, Discussion Paper, 'Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored', Brussels, 15 May 2002

CONV 353/02, 'Final report of Working Group IV on the role of national parliaments', Brussels, 22 October 2002

CONV 375/1/02, 'Final Report of Working Group V on Complementary Competencies', Brussels, 4 November 2002

CONV 426/02, 'Final report of Working Group X "Freedom, Security and Justice" ', Brussels, 2 December 2002

CONV 727/03, 'Draft sections of Part Three with comments', Brussels, 27 May 2003

Commission,

'Communication on the Principle of Subsidiarity for Transmission to the Council and Parliament', 25 European Communities Bulletin, Brussels, 27 October 1992, SEC (92) 1990 final

'Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union', Brussels, 30.04.2004, COM (2004)334 final

'Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council)', COM 2005 (583) final

'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reinforcing sanctioning regimes in the financial services sector', Brussels, 8.12.2010, COM (2010) 716 final

'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions- Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', COM (2011) 573 final

National legislation

Swedish Code of Judicial Procedure of 1942 (SFS 1942:740), English Translation DS 1998:000

6.3 Bibliography

Articles and books

Black's Law Dictionary (6th edn, West Publishing co 1990)

Alemanno A, 'The Emergence of Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 The Theory and Practice of Legislation 327

Asp P, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Jure 2013)

Azoulai L,'Introduction: the Question of Competence' in L Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014)

Barber NW, 'The Limited Modesty of Subsidiarity' (2005) 11 European Law Journal 308

Barents R, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 Common Market Law Review 85

Bar-Siman-Tov I,' Semiprocedural Judicial Review' (2012) 6 Legisprudence 271

Becker G,'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169

Bentham J, *The Rationale of Punishment* (Robert Heward 1830)

Bermann GA, 'Taking Subsidiarity Seriously' (1994) 94 Columbia Law Review 332

Biondi A, 'Subsidiarity in the Courtroom' in A Biondi, P Eeckhout and S Ripley (eds) *EU Law after Lisbon* (OUP 2012)

Cary WL, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 Yale Law Journal 663

Cass DZ 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29 Common Market Law Review 1107

Cerps U, Mathers G and Pajuste, A 'Securities Laws Enforcement in Transition Economies' (2012), 20 December 2012, <https://iweb.cerge-ei.cz/pdf/gdn/RRCV_100_paper_01.pdf > Accessed 9 April 2015
Chirico F and Larouche P, 'Chapter 2: Convergence and Divergence, in Law and Economics and Comparative Law', in Pierre Larouche and Péter Cserne (eds), *National Legal Systems and Globalization* (Springer 2012)
Coffee Jr JC, 'Law and the Market: The Impact of Enforcement' (2007), 7 March 2007, Columbia Law and Economics Working Paper No 304 <http://ssrn.com/abstract=967482>. Accessed 9 April 2015
Craig P, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 European Law Review 323
-- 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395
--*The Lisbon Treaty: Law, Politics and Treaty reform* (OUP 2011)
-- 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in Hans-Wolfgang Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012)
--*EU Administrative Law* (2nd edn, OUP 2012)
--'Subsidiarity: A Political and Legal Analysis' (2012) 50 Journal of Common Market Studies 72
Dashwood A, 'Commentary' in (1996) Centre for European Legal Studies, Cambridge Occasional Paper No. 1, 'The Human Rights Opinion of the ECJ and its Constitutional Implications'
--'The Relationship Between the Member States and the European Union/ European Community' (2004) 41 Common Market Law Review 355
Davies G, 'Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 Common Market Law Review 63
-- 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2. doi:10.1111/eulj.12079
Deakin S,' Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) Centre for Business Research, University Of Cambridge Working Paper No. 323, March 2006
De Búrca G, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105
-- 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 Journal of Common Market Studies 214
--'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper no. 7/1999
Dougan M, 'From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law' in M Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012)
Duff A, *Punishment, Communication, and Community (*OUP 2001)

Elholm T, 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 191

Enriques L and Gatti M, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union' (2006) 27 University of Pennsylvania Journal of International Economic Law 939

Fabbrini F and Granat K, '"Yellow card, but no foul": The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike' (2013) 50 Common Market Law Review 115

Faure MG and Heine G, *Criminal Enforcement of Environmental Law in the European Union* (Kluwer Law International 2005)

Feinberg J 'The Expressive Function of Punishment', in J Feinberg, *Doing & deserving; essays in the theory of responsibility (*Princeton University Press 1970)

Ferrarini GA, 'The European Market Abuse Directive' (2004) 41 Common Market Law Review 711

Fletcher M, Gilmore B and Lööf R, *EU Criminal Law and Justice* (Edward Elgar Publishing 2008)

Gobert J and Punch M, *Rethinking Corporate Crime* (CUP 2003)

Granlund P, 'Regulatory choices in global financial markets – restoring the role of aggregate utility in the shaping of market supervision', (2008) Bank of Finland Research Discussion Papers 1/2008

Groussout X, 'Judgment C-310/04, Kingdom of Spain v Council of the European Union' (2007) 44 Common Market Law Review 761

-- and Bogojevic S, ' Subsidiarity as a Procedural Safeguard of Federalism' in L Azoulai, *The Question of Competence in the European Union* (OUP 2014)

Harding C, and Banach-Guttierez J, 'The Emergent EU Criminal Policy: Identifying the Species' (2012) 37 European Law Review 758

Harris BV, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 Cambridge Law Journal 631

Hartley TC, *The Constitutional Problems of the European Union* (Hart Publishing 1999)

Hayman G and Brack D,' International Environmental Crime: The Nature and Control of Environmental Black Markets', Royal Institute of International Affairs, 2002. <http://ec.europa.eu/environment/docum/pdf/02544_environmental_crime_workshop.pdf>. Accessed 26 April 2015

Herlin-Karnell E, ' EU Competence in Criminal Law after Lisbon', in A Biondi, P Eeckhout and S Ripley (eds) *EU Law After Lisbon* (OUP 2012)

--*The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012)

--'White-collar crime and European financial crises: getting tough on EU market abuse' (2012) 37 European Law Review 481

Herwig A, 'Federalism, the EU and international law', in E Cloots, G De Baere and S Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012)

Horsley T, 'Subsidiarity and the Court of Justice: Missing Pieces in the Subsidiarity Jigsaw' (2012) 50 Journal of Common Market Studies 267

Kaiafa-Gbandi M, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' (2011) 1 European Criminal Law Review 7

Kahan DM, 'What do alternative sanctions mean?' (1996) 63 University of Chicago Law Review 591

Kiiver P, *The Early Warning System for the Principle of Subsidiarity* (Routledge 2012)

Komesar N, 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1988) 86 Michigan Law Review 657

Konstadinides T, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Kluwer Law International 2009)

--'Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 Yearbook of European Law 227

Kraakman RH 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 Yale Law Journal 857

Kumm M, 'Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' 12 (2006) European Law Journal 503

La Porta R, Lopez-De-Silanes F and Shleifer A 'What Works in Securities Laws?', (2006) 61 Journal of Finance 1

Lavenex S and Wallace W, 'Justice and Home Affairs- Towards a European Public Order' in H Wallace H, W Wallace W and M Pollack (eds), *Policy-Making in the European Union* (OUP 2005)

Lee FJ, 'Global Institutional Choice' (2010) 85 New York University Law Review 328

Lenaerts K, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (1994) 17 Fordham International Law Journal 846

-- 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3

-- ' "Civis europaeus sum": from the cross-border link to the status of citizen of the Union' (2011) 3 FMW Online journal of free movement of workers. <http://ec.europa.eu/social/main.jsp?catId=737&langId=sv&pubId=6193&type=1&furtherPubs=no> Accessed 17 April 2015

Levi M, 'Suite justice or sweet charity? Some explorations of shaming and incapacitating business fraudsters' (2001) 4 Punishment and Society 147

Lööf R, 'Shooting from the Hip–Proposed Minimum Rights in Criminal Proceedings' 12 (2006) European Law Journal 421
Mackenzie Stuart L, 'Subsidiarity: A Busted Flush?' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworth Ltd 1992)
McDermott MF, 'Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation' (1982) 73 Journal of Criminal Law and Criminology 604
Melander S, 'Ultima Ratio in European Criminal Law' (2013) 3 European Criminal Law Review 45
Miettinen S, 'Implied ancillary criminal law competence after Lisbon' (2013) 2 European Criminal Law Review 194
--*The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era*, Doctoral Dissertation defended at University of Helsinki on 20 April 2015
Millet FX, 'The Respect for Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism', in L Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014)
Mitsilegas V, 'Constitutional Principles of the European Community and European Criminal Law' (2006) 8 European Journal of Law Reform 301
--'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277
Moohr GS, 'An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime' (2003) 55 Florida Law Review 937
Moloney N, *EC Securities Regulation* (2nd edn, OUP 2008)
Nuotio K, 'Harmonization of Criminal Sanctions in the European Union-Criminal Law Science Fiction' in A Strandbakken and EJ Husabø (eds), *Harmonization of Criminal Law in Europe* (Intersentia 2005)
Peers S, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011)
-- 'Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon' (2011) 48 Common Market Law Review 661
Pereira R, 'Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?' (2007) 16 European Energy and Environmental Law Review 254
Pescatore P, *Law of Integration: emergence of a new phenomenon in international relations, based on the experience of the European communities* (Springer 1974, English Translation)
Radaelli CM, 'The Puzzle of Regulatory Competition' (2004) 24 Journal of Public Policy 1
Redish MH, 'Judicial Review and the "Political Question" ' (1985) 79 Northwestern University Law Review 1031
Scharpf F, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 Yale Law Journal 517
Schütze R, *From Dual to Cooperative Federalism* (OUP 2009)
--*European Constitutional Law* (CUP 2012)

Scott J and Sturm S 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 Columbia Journal of European Law 565
Sevenster HG, 'Criminal Law and EC Law' (1992) 29 Common Market Law Review 29
Shapiro M, 'The Giving Reasons Requirement' (1992) University of Chicago Legal Forum 179
Snyder F, 'Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19
Stone CD, 'The Place of Enterprise Liability in the Control of Corporate Conduct' (1980) 90 Yale Law Journal 1
Swaine ET' Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41 Harvard International Law Journal 1
Tadić FM, 'How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law' in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002)
Toth AG' Is Subsidiarity justiciable?' (1994) 19 European Law Review 269
Tridimas PT, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' Queen Mary School of Law Legal Studies Research Paper No. 12/2009, 6. (March 19, 2009). <http://ssrn.com/abstract=1365385>. Accessed 26 March 2015
Türk A, 'Law-Making After Lisbon' in A Biondi, P Eeckhout and S Ripley, *EU Law After Lisbon* (OUP 2012)
Turner JI, 'The Expressive Dimension of EU Criminal Law', (2012) 60 American Journal of Comparative Law 555
Van Zeben J,' Regulatory Competence Allocation: The Missing Link in Theories of Federalism' (2012) Law, Institutions and Economics in Nantere Workshop, Paris, France, 11 December 2012, <http://economix.fr/pdf/seminaires/lien/Van-Zeben.pdf>. Accessed 17 April 2015
Velikonja U, 'Leverage, Sanctions, and Deterrence of Accounting Fraud' (2011) 44 University of California, Davis Law Review 1281
Vogel D 'Trading up and governing across: transnational governance and environmental protection' (1997) 4 Journal of European Public Policy 556
Vogel J 'Why is the harmonisation of penal law necessary? A comment' in A Klip and H van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002)
Von Bogdandy A and Bast J, 'The Federal Order of Competences' in A von Bogdandy and J Bast , *Principles of European Constitutional Law* (Hart Publishing 2009)
Weatherill S, 'Competence creep and competence control' (2004) 23 Yearbook of European Law 1
--'Better Competence Monitoring' (2005) 30 European Law Review 23
--'The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court's case law has become a "drafting guide' (2011) 12 German Law Journal 827

Weiler J H H, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403

-- 'The European Union Belongs to its Citizens: Three Immodest Proposals' (1997) 22 European Law Review 150

Weyembergh A, *L'harmonisation des legislations penales: condition de l'espace pinal europeen et revelateur de ses tensions* (Bruxelles, édition de l'Université de Bruxelles 2004)

-- 'The Functions of Approximation of Penal Legislation Within the European Union' (2005) 12 Maastricht Journal of European and Comparative Law 149

Whelan P, 'Contemplating the Future: Personal Criminal Sanctions for Infringement of EC Competition Law' (2008) 19 King's Law Journal 364

Wils WPJ, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 World Competition 117

-- 'Optimal Antitrust fines – theory and practice' (2006) 29 World Competition 183

Wyatt D, 'Could a Yellow Card for National Parliaments strengthen Judicial as well as Political Policing of Subsidiarity?' (2006) 2 Croatian Yearbook of European Law and Policy 1

--'Community Competence to Regulate the Internal Market', in M Dougan and S Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009)

Zuleeg M, 'Criminal Sanctions to be Imposed on Individuals as Enforcement Instruments in European Competition Law' in C D Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003)

Reports and studies

Committee of European Securities Regulators, ' Executive Summary to the Report on Administrative Measures and Sanctions as well as the Criminal Sanctions Available in Member States Under the Market Abuse Directive (MAD)', CESR/08-099, 28 February 2008

CRA International/City of London, 'Assessing the Effectiveness of Enforcement and Regulation' (2009), London, April 2009. http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/research-2009/Assessing%20the%20Effectiveness%20of%20Enforcement%20and%20Regulation.pdf> Accessed 9 April 2015

Deloitte and Touche, 'The deterrent effect of competition enforcement by the OFT', A report prepared for the OFT by Deloitte, November 2007, OFT 962. < http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf > Accessed 9 April 2015

Garstecki T 'Implementation of Article 16, Council Regulation (EC) No. 338/97 in the 25 Member States of the European Union' (2006) A TRAFFIC Europe Report for the European Commission, Brussels

Hilty R, Kur A and Peukert A, 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and of the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights', IIC 436, 22.9.2006. <http://www.ip.mpg.de/files/pdf2/Comments-EnforcementOfIP-Rights.pdf>. Accessed 20 April 2015

House of Commons' Environmental Audits Committee: 'Report on Corporate Environmental Crime', Second Report of Session 2004-2005, HC 136

House of Lords' European Union Committee, 'The Criminal Law Competence of the European Community', 42nd Report of Session 2005–06, Report with Evidence, HL Paper 227, London: The Stationery Office Limited

House of Lords' European Union Committee, 'The Treaty of Lisbon: an impact assessment' '10th Report of Session 2007–08, Volume I: Report, HL Paper 62-I1, London: The Stationery Office Limited

Huglo-Lepage &Associés, 'Criminal penalties in EU member States' environmental law', final report, 15/09/2003. <http://ec.europa.eu/environment/legal/crime/pdf/criminal_penalties2.pdf> Accessed 29 April 2015

London Economics, 'An assessment of discretionary penalties regimes' OFT1132, Report for the Office of Fair Trading (UK), October 2009

Macrory R, 'Regulatory Justice–Making Sanctions Effective', Macrory Review, Cabinet Office, London, Final Report, November 2006. < http://webarchive.nationalarchives.gov.uk/20121212135622/http:/www.bis.gov.uk/files/file44593.pdf >. Accessed 7 April 2015

UK Financial Services Authority, 'Annual report 2010/11' (2011) <http://www.fsa.gov.uk/pubs/annual/ar10_11/ar10_11.pdf>. Accessed 9 April 2015

Speeches

Cole M, 'How Enforcement Makes a Difference' Speech of 18 June 2008. <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0618_mc.shtml>. Accessed 8 April 2015

Svensk sammanfattning

Enligt grundläggande unionsrättsliga principer måste EU-lagstiftaren se till att unionslagstiftning faller inom ramen för unionens befogenheter*. Innan Lissabonfördraget trädde i kraft, riktade såväl doktrinen som allmänheten stark kritik mot att EU-lagstiftaren under lång tid och på ett otillåtet sätt hade överskridit det mandat som fördragen tilldelat dem. Laekendeklarationen uppdrog åt det Europeiska konventet, som var ansvarigt för att upprätta det nya fördraget, att finna en bättre avgränsning och definition av omfattningen av unionens befogenheter. Men trots att medlemsstaterna bestämde sig för att anta en kompetenskatalog och en tydlig beskrivning av karaktären av unionens befogenheter, står det klart att det inte har löst problemen med ”krypande kompetenser” eller besvarat frågan om hur EU ska utöva sina befogenheter. Mot den bakgrunden analyserar rapporten hur begränsningar av utövandet av unionens befogenheter kan utformas.

Rapporten använder en av de nya befogenheterna som unionen erhållit – kompetensen att anta straffrättsliga sanktioner – som fallstudie för att föreslå en mekanism genom vilken unionens lagstiftningsbefogenheter kan kontrolleras. Även om fördragen fastslår att det finns avgränsningar i fördragen och i EU-domstolens praxis för utövandet av unionens befogenheter, konstaterar rapporten att dessa avgränsningar är problematiska. I synnerhet framgår det att EU-domstolen saknar tydliga riktlinjer för att bedöma om fördragets begränsningar av unionens befogenheter har överskridits av EU-lagstiftaren. Genom att undersöka räckvidden av unionens befogenhet att anta straffrättsliga sanktioner, och genom att analysera existerande och föreslagna straffrättsliga EU-lagstiftningsakter, utvecklar rapporten lämpliga kriterier för att granska utövandet av unionens befogenheter.

Rapporten drar två viktiga slutsatser. Den första är att en bättre teoretisk förståelse av avgränsningarna av unionens befogenheter är fruktlös om dessa avgränsningar inte kan tillämpas av EU-domstolen. Trots att det nuvarande systemet för att övervaka utövandet av unionens kompetenser är baserat på ett antagande om politisk kontroll, visar praxis att det är osannolikt att de politiska mekanismerna ger tillräckliga garantier mot otillåten expansion av unionens

* I EU:s fördrag anges vilka politikområden EU har rätt att besluta om. Det kallas tilldelade befogenheter, vilket innebär att medlemsländerna har gett EU makt inom dessa områden. I fördraget om unionens funktionssätt, EUF-fördraget, finns en uppräkning av politikområden och vilken befogenhet EU har inom respektive område. Den uppräkningen kallas för kompetenskatalogen och är indelad i tre delar: (1) områden där EU har ensamrätt att lagstifta (exklusiv befogenhet); (2) områden där både EU och medlemsländerna har rätt att lagstifta (delad befogenhet) samt (3) områden där endast har befogenhet att stödja, samordna eller komplettera medlemsländernas åtgärder. Med ”krypande kompetenser” menas att EU utökar sina befogenheter på områden där man saknar mandat. (Källa: EU-upplysningen)

befogenheter. Rapporten föreslår därför att huvudansvaret för att kontrollera utövandet av unionens befogenheter skall åligga unionens domstolar. I rapporten argumenteras det för att en processuell domstolsprövning mot bakgrund av en objektiv prövningsram är den bästa lösningen för att förstärka EU-domstolens kompetenskontroll.

Den föreslagna standarden, härledd från EU-domstolens avgörande i målet *Spanien mot rådet*, är att EU-lagstiftaren ska tillhandahålla en ”adekvat motivering” och påvisa att den har beaktat de ”relevanta omständigheterna”. Testet för att kontrollera om den antagna standarden har efterlevts är om EU-lagstiftaren när den föreslagit lagstiftning har presenterat *minst ett* övertygande argument för befogenhetsutövning som underbyggs av ”relevant” och ”tillräcklig” bevisning. Den närmare undersökningen av utvalda lagstiftningsakter i rapporten visar att EU-lagstiftaren inte generellt klarar av att understödja sina argument med tillräcklig bevisning. Men om EU-lagstiftaren vill undvika anklagelser om krypande kompetensförskjutning, räcker det inte att tillhandahålla teoretiskt hållbara motiveringar för EU-lagstiftning. Det krävs snarare att EU-lagstiftaren baserar sina lagstiftningsåtgärder på en stark och övertygande utredning och att EU-domstolen strikt tillser att EU-lagstiftaren fullgör sina åtaganden.

Den andra slutsatsen är att vi behöver rekonstruera de existerande befogenhetsavgränsningarna om dessa ska kunna fungera som garanti mot expansion av unionens befogenheter. I rapporten ges tre förslag till hur man bör förhålla sig till problemet med att definiera avgränsningarna av unionens regulatoriska straffrättskompetens. Först konstateras att unionens uttryckliga kompetens i artikel 83(2) FEUF och unionens underförstådda straffrättsbefogenheter enligt artikel 114 och artikel 192 FEUF är begränsade av EU-lagstiftarens skyldighet att visa att straffrättsliga sanktioner inte bara är lämpliga, utan även mer effektiva än andra icke-straffrättsliga sanktioner i fullgörandet av unionens politik. Därefter fastslås att subsidiaritetsprincipen i artikel 5(3) EUF kräver att unionsrättsliga harmoniseringsakter bara kan antas om EU-lagstiftaren har lyckats visa att det existerar eller finns en risk för ett ”marknadsmisslyckande”. Slutligen hävdas att kravet att agera på korrekt rättslig grund är en viktig avgränsning för utövandet av unionens befogenheter. Genom fallstudien av straffrätten, visas att Lissabonfördraget inte har löst problemet med vad som är korrekt rättslig grund för straffrättslig unionslagstiftning. Oaktat att artikel 83(2) FEUF generellt antyder att detta är en *lex specialis* i förhållande till andra rättsliga grunder, påpekas i rapporten att andra rättsliga grunder i fördragen – såsom artikel 114 FEUF – i undantagsfall kan användas för antagande av unionsrättsliga förordningar som kriminaliserar överträdelser av EU-rätten. Detta är problematiskt för medlemsstaterna, eftersom andra rättsliga grunder utanför avdelning V i fördraget medför att medlemsstaterna inte har en rätt att dra i den så kallade nödbromsen samt att Storbritanniens och Irlands möjlighet till undantag inom området för frihet, säkerhet och rättvisa inte längre gäller.

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"…the current treaties provide no clear authorisation for harmonising criminal law on expressive grounds. I maintain that the EU will endanger its legitimacy if it keeps enforcing its policies through criminal sanctions on such grounds. The EU should adopt a conservative approach and refrain from harmonising criminal laws in the absence of a real practical need and a firm legal basis for harmonisation. This means that the EU should limit itself to harmonising national criminal laws in instances in which criminalisation is 'essential' to implement existing EU rules."

Jacob Öberg

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