

Limits to EU Powers

A Case Study of EU Regulatory Criminal Law

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Introduction

I. The Question of EU Competence after Lisbon

Prior to the Lisbon Treaty, EU law scholarship and the political debate was primarily preoccupied with the existence of EU competences¹ and the division of powers between Member States and the EU.² 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 were restraining national policy-making in sensitive and traditional national competences such as criminal law, taxation and economic policy. The fundamental problem lay in deciding to what extent Member States were still competent to make and carry out policy in these fields.³

However, the evolution of EU law and the developments after the ratification of the Lisbon Treaty suggest that EU scholars no longer need to focus on the question of the existence of powers. The development of ‘regulatory criminal law’⁴ competence of the EU is a case in point. Prior to Lisbon there was a long-standing debate on whether the Community *at all* had a competence to enforce its rules through criminal sanctions. The debate touched on the core of national autonomy as it had been assumed for a long time that concerns for state integrity automatically made criminal law a matter of Member State competence.⁵ The Commission advanced a Community criminal law competence on the basis that it was needed

¹ See Stephen Weatherill, ‘Competence creep and competence control’ (2004) 23 *Yearbook of European Law* 1; Paul Craig, ‘Competence: Clarity, Conferral, Containment and Consideration’ (2004) 29 *European Law Review* 323.

² See Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Alphen aan den Rijn, 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* (Oxford, Hart Publishing, 2009).

³ See Gareth Davies, ‘Subsidiarity: the wrong idea, in the wrong place, at the wrong time’ (2006) 43 *Common Market Law Review* 63, 80.

⁴ See Maria Fletcher, Bill Gilmore and Robin Lööf, *EU Criminal Law and Justice* (Cheltenham, Edward Elgar Publishing, 2008) 183, for a description of the concept.

⁵ 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* (Oxford, Oxford University Press, 2012) 74–78, 91–92.

for the effective enforcement of EU policies.⁶ The Council and the Member States strongly disagreed, arguing that the absence of an express conferral of competence in the Treaties together with concerns for sovereignty militated against recognising such a competence in the first pillar.⁷ 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 notorious judgments, *Environmental Crimes*⁸ and *Ship-Source Pollution*,⁹ that the Community had a competence to impose criminal sanctions if this was essential for the effective 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 explicitly conferred a competence on the EU to impose criminal sanctions to enforce substantive Union policies.¹⁰ This example of regulatory criminal law shows that the competence question in EU law doctrine has transformed in character. Instead of discussing the *existence* of competence, commentators now debate *how* EU competences should be *exercised*.¹¹

There was also a political debate that was equally concerned with a concern among EU citizens and politicians prior to Lisbon that the delimitation of competences between the Member States and the Union was not precise enough.¹² To find a solution to this problem the Laeken Declaration asked the Convention, which was responsible for the negotiation of the Lisbon Treaty, to devise a 'better division and definition of competence in the European Union'.¹³ Working Group no V on Complementary Competences,¹⁴ having taken on this task, suggested that the Treaties should contain a clean and easily understood delimitation of the

⁶ 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 such as Hanna G Sevenster, 'Criminal Law and EC Law' (1992) 29 *Common Market Law Review* 29, 53–59.

⁷ See Case C-176/03 *Commission v Council* (n 6), paras 26–27.

⁸ See Case C-176/03 *Commission v Council* (n 6), paras 47–48. The criminal law competence was conferred on the basis of Art 175 of the Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33 ('EC', 'EC Treaty').

⁹ See Case C-440/05 *Commission v Council* (n 6), paras 66–69. The Court inferred the competence on the basis of Art 80(2) EC.

¹⁰ See Art 83(2) of the Consolidated Version of the Treaty of the Functioning of the European Union [2010] OJ C 83/47 (TFEU).

¹¹ 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; Ester Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon', in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law After Lisbon* (Oxford, Oxford University Press, 2012) 334, 338–39. See generally for this development of EU law: Robert Schütze, *From Dual to Cooperative Federalism* (Oxford, Oxford University Press, 2009); Loïc Azoulay, 'Introduction: the Question of Competence', in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 7.

¹² 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.

¹³ See European Council, 'Laeken Declaration on the future of the European Union', 14–15 December 2001, 21–22.

¹⁴ See European Convention, CONV 375/1/02, 'Final Report of Working Group V on Complementary Competencies', Brussels, 4 November 2002.

competence granted to the Union in each policy field. Whilst more radical solutions, such as having a detailed definition of all Union competences were discussed in the negotiations, Working Group no V considered it sufficient to enshrine the ‘basic delimitation’ of competence in each policy area, while keeping the detailed definition of competence similar to the in the EC Treaty.¹⁵ The Member States ultimately decided to adopt, as suggested by the Convention, a competence catalogue and a description of the nature of EU powers which was enshrined in the Lisbon Treaty.¹⁶

Given the concern that the EU should not intrude on sensitive national policy fields it appears that the focus on a clear division of powers is misplaced. The more important question after Lisbon is how the EU exercises its powers. The competence catalogue does not solve the problem of ‘competence creep’¹⁷ that exists by virtue of the wide functional legal powers in Article 114 and Article 352 TFEU. Although the negotiations did place on the table radical proposals, such as removing those legal bases from the Treaties, Working Group no V nevertheless decided to maintain both Article 114 and Article 352 TFEU in order to preserve a certain degree of flexibility in the Treaty’s system of competence, allowing the Union to respond to new challenges.¹⁸ Maintaining these provisions largely intact, however, means there remains considerable scope for competence creep. Whilst, the EU does not, under the Lisbon Treaty, enjoy a competence to harmonise 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.¹⁹

Having shown by these examples that it no longer makes sense to examine the question of the existence of EU competences it is possible to state the question of this study which is to examine *how limits can be constructed to the exercise of EU powers*.

II. The Problems of the Existing Limits to EU Competences

The Treaties contain numerous limits to the exercise of EU competences. There is the principle of conferral,²⁰ which states that the EU can only act ‘within the

¹⁵ *ibid* 2–3.

¹⁶ See Arts 3–6 TFEU. The Lisbon Treaty distinguishes between different types of EU competences: exclusive competences, shared competences, coordinating competences and complementary competences, see Arts 2(1)–2(3) and 2(5) TFEU.

¹⁷ See Weatherill, ‘Competence creep and competence control’ (n 1) for this expression.

¹⁸ See CONV 375/1/02 (n 14) 14–15; CONV 47/02 (n 12) 10–11, 15.

¹⁹ See Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras 31–32; Davies (n 3), 72–75.

²⁰ See Art 5(2) of the Consolidated Version of the Treaty on European Union [2010] OJ C 83/13 (‘TEU’).

limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.²¹ In addition to the principle of conferral, there is the subsidiarity principle and the proportionality principle.²² The Lisbon Treaty has furthermore, by providing for a special review procedure for national parliaments of EU legislation,²³ by adopting a specific protocol on subsidiarity and proportionality,²⁴ and by adopting a new provision for the protection of the constitutional identity of Member States,²⁵ made an effort to construct new limits to the exercise of EU powers. It is also well-known that the Court in its jurisprudence has constructed limits to the EU's regulatory powers by requiring the EU legislator to show that measures pursued under Article 114 TFEU genuinely have as their objective the removal of obstacles to trade or 'appreciable' distortions to competition.²⁶ The Court has moreover repeatedly held that the question of competences is not a political choice as the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review.²⁷

Given all those limits, it is legitimate to question the need of embarking on an examination of how limits can be constructed to the exercise of competence. The point of this book is that there are problem with those limits. First, it seems that the theoretical limits to EU competences do not coincide with the practice. Already in the negotiations that led to the Lisbon Treaty, Working Group V raised the concern that the EU 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. The limits on competences have not been taken seriously by the EU institutions, allowing political reason to take precedence over observance of the rules on the exercise of competence in the Treaties.²⁸ These perceptions have been detrimental to the legitimacy of the Union in the eyes of its citizens and in the eyes of national

²¹ In addition to Art 5(2) TEU, there are a number of other provisions which expressly or implicitly reinforce the principle of conferral: Art 1(1) TEU; Art 3(6) TEU; Art 4(1) TEU; Art 13(2) TEU, Art 48(6) TEU; Art 2(1) TFEU; Art 2(2) TFEU; Art 4(1) TFEU; Art 7 TFEU; Art 19 TFEU; Art 130 TFEU; Art 207(6) TFEU; Art 226 TFEU; Art 314(10) TFEU; Art 351(3) TFEU.

²² Art 5 (3)–(4) TEU provides that: 'Under the principle of subsidiarity ... 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, ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. ... 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.'

²³ See Protocol (No 1) On the Role of National Parliaments in the European Union OJ [2010] C 83/203 ('Protocol No 1').

²⁴ See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality OJ [2010] C 83/206 ('Protocol No 2').

²⁵ See Art 4(2) TEU.

²⁶ See Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, paras 83–84, 106–07.

²⁷ See Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-02867, para 10.

²⁸ See Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2431–53; Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford, Hart Publishing, 2012) 66–76; Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review* 617, 654–55.

constitutional courts.²⁹ Secondly, the Treaties have not given the Court sufficient tools to seriously engage in competence control. Because the Union's competence is associated with its objectives and because important competence norms such as Article 114 and Article 352 TFEU are framed in a wide manner, the Court's task of supervising the exercise of this power is made very difficult. Thirdly, despite the existence of the principle of conferral, the EU institutions faces structural constraints that impede it from effectively sanction the vertical division of powers. These constraints have to do with the idea of integration which supports the view that the EU political institutions and the Court of Justice should give a wide interpretation of the EU's legislative powers.³⁰

What of the political limits to the exercise of EU competences? It is true that for a long time EU law has trusted the political safeguards of federalism and envisaged that the principal place for addressing the problems of 'competence creep' should lie in a stronger political monitoring of competences.³¹ The current Treaty system of competence monitoring is also founded on the assumption that the task of determining whether the Treaties confer on the Union competence to act in a specific case, and to what extent the subsidiarity and proportionality principle is being conformed to rests with the EU political institutions.³²

It is however questionable whether the political limits of the Treaties provide for sufficient safeguards of federalism. Self-interest and perverse incentives have led the 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.³³ The inadequacies of political control of competences have been most tellingly demonstrated by the use of Article 308 EC (now Article 352 TFEU). Joseph Weiler has noted that from 1973 until the entry into force of the Single European Act, there was a dramatic shift in the understanding of the qualitative scope of this provision. In a variety of fields, the 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.³⁴ Robert Schütze similarly observed that the Community decided to pursue the so-called 'flanking policies'

²⁹ See CONV 47/02 (n 12) 3–5, 16; Stephen Weatherill, 'Better Competence Monitoring' (2005) 30 *European Law Review* 23, 24–28.

³⁰ See below ch 2 III B for a development of these ideas.

³¹ 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, 854–60.

³² See CONV 47/02 (n 12) 10, 18.

³³ See Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (n 1) 324–25; Lucia Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley, *EU Law After Lisbon* (Oxford, Oxford University Press, 2012) 95–96.

³⁴ See Weiler, 'The Transformation of Europe' (n 28) 2444–46.

on the foundations of Article 308 EC despite the obvious linguistic contradiction this would entail. These wide readings meant that it would become impossible to find an activity which could not be brought within the 'objectives of the Treaty'. If the Union could adopt acts which endeavoured to achieve closer relations between the Member States, such a competence would be devoid of internal boundaries since all harmonisation increases the legal proximity between the Member States.³⁵

Such competence creep has not been limited to the general field of EU law, but also saturated the EU's initiatives in the field of criminal law.³⁶ Valsamis Mitsilegas and Robin Lööf have made the point clearly in their discussion of the EU's initiatives in the pre-Lisbon third pillar contending that the Member States repetitiously exceeded its remit in Article 34 when adopting measures on the minimum standards for procedural rights. Whilst observing that the EU's competence in this provision 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.³⁷

The application of subsidiarity and proportionality also reveals historically a poor record in providing a check against competence creep. The perception is that the EU's political institutions do not take these principles seriously. The legislative practice of subsidiarity illustrates the problem. The Commission has seldom been able to offer examples of when subsidiarity led to a decision not to advance a proposal.³⁸ The Council has been equally untrustworthy in protecting subsidiarity concerns in legislative practice. Once it is decided to introduce rules at EU level, the bargaining process involves 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.³⁹

³⁵ See Schütze (n 11) 135, 137, 155. 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 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 Parliament, as opposed to mere consultation, as was previously the case under Article 308 EC. Furthermore, it is clear that the need for recourse to this power will diminish, given that the Lisbon Treaty created new legal bases areas where Article 308 EC had previously been used. These predictions seems to be substantiated by post-Lisbon legislative practice: 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, 228–30, 252–56.

³⁶ See Herlin Karnell, *The Constitutional Dimension of European Criminal Law* (n 28); Samuli Miettinen, *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era* (DPhil, University of Helsinki, 2015).

³⁷ See Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277, 1305–07; Robin Lööf, 'Shooting from the Hip—Proposed Minimum Rights in Criminal Proceedings' 12 (2006) *European Law Journal* 421, 422–29.

³⁸ The Commission's recent reports are cases in point for this statement: Commission, 'Report from the Commission—Annual Report 2014 on Subsidiarity and Proportionality', COM (2015) 315; Report from the Commission on Subsidiarity and Proportionality, COM (2012) 373.

³⁹ See Weatherill, 'Better Competence Monitoring' (n 29) 26–28; Schütze (n 11), 256–57. See however, Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72, 74–79, for a recent and more positive assessment.

Despite this scepticism against political control of competences, it must be recognised that the Lisbon Treaty has enhanced the possibilities for stronger political control of the exercise of competence. The European Convention, which provided the intellectual impetus for the drafting of the Lisbon Treaty, suggested that monitoring of the exercise of EU competences should be intensified by strengthening control by national parliaments through an early warning mechanism.⁴⁰ 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 2⁴¹ (EWS), which allows national parliaments to review legislation on the basis of the principle of subsidiarity.⁴²

Notwithstanding the ambitious aspirations of the EWS, it is questionable whether it is capable of fully addressing concerns of competence creep. The first problem with the EWS is that one source of the EU's legitimacy—its capacity to address transnational collective action 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.⁴³ The second problem relates to the fact that the Lisbon Treaty does not allow national parliaments to review legislation on the basis of a 'lack of competence'⁴⁴ and proportionality.⁴⁵ The third concern is that national parliaments lack the ability to challenge Union legislation directly under Article 263 TFEU.⁴⁶

This being so, it still appears that the EWS procedure is a step in the right direction in the effort to reinforce the EU's competence monitoring system. Recent challenges to the Monti II Regulation⁴⁷ and the EPPO Proposal triggering a yellow card procedure⁴⁸ indicates that national parliaments can provide a check on the use of EU competences. For this reason this study also examines the input of national parliaments on the legislative procedure.⁴⁹ With the exception of national parliaments, it, however, appears that there are no other strong political

⁴⁰ See CONV 47/02 (n 12), 3–5; European Convention, CONV 353/02, 'Final report of Working Group IV on the role of national parliaments', Brussels, 22 October 2002, 10.

⁴¹ See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality (n 24).

⁴² See ch 7 for a comprehensive examination of this procedure.

⁴³ See Weatherill, 'Competence creep and competence control' (n 1) 33–43, 54.

⁴⁴ See Art 263(2) TFEU.

⁴⁵ See Federico Fabbrini and Katarzyna 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, 120–25.

⁴⁶ See Art 263(2)–(4).

⁴⁷ See Commission, Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130 final.

⁴⁸ See Commission, 'Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2', COM(2013) 851 final.

⁴⁹ See below ch 7.

monitoring mechanisms in the Treaties on the exercise of EU powers. Therefore the main concern of the book will be about the judicial duty to monitor the exercise of EU competences.

III. Main Arguments of the Book

The argument of the book is divided in two parts. First, building on the existing constraints on the EU legislator in its exercise of its powers and on the problems associated with those limits, the book 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 Part II of the book, constructed by interpreting the legal bases and principles restraining the exercise of EU competences according to conventional canons of interpretation of EU law.⁵⁰ The second line of argument contends that a better conceptual understanding of the limits to EU competences is emptied of practical meaning if those limits cannot be enforced by the EU Courts. For this reason, Part 1 of the book is devoted to tackle the institutional problems of challenging the exercise of EU powers before the Court.

This book constructs a comprehensive argument for how judicial enforcement of the limits of the Treaties could be improved. This argument is divided in three parts. In the first stage, it is argued that the Court's current standards and intensity of review is insufficient for attaining the objective of serious competence control. Secondly, it is contended that the Court's current problems of enforcing the EU competences can be accounted for on a dual basis: i) the Court's comparative institutional disadvantage in relation to the EU political institutions,⁵¹ and ii) on the basis of a lack of appropriate legal criteria in the Treaties.⁵² In the third stage, it is suggested that procedural review is a tool capable of enhancing judicial competence control and partly counter the institutional and conceptual problems of judicial review. Comprehensively discussing the case for procedural review, it is argued that a procedural legality test, of 'adequate reasoning' and 'relevant evidence' derived from the Court's ruling in *Spain v Council*⁵³ is the most appropriate standard for reviewing the exercise of EU legislative powers.⁵⁴ This test is then applied to discrete examples of EU criminal law legislation to show how the Court can monitor the exercise of Union competences.⁵⁵

The other strand of argument in the book is, as mentioned, that the limits of the Treaties can be reconceptualised by providing for more comprehensive and

⁵⁰ See Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 03415, paras 18–20.

⁵¹ See below ch 3 II.

⁵² See below ch 2 and ch 3.

⁵³ See Case C-310/04 *Spain v Council* [2006] ECR I-07285, paras 122–23.

⁵⁴ See below ch 3 III–IV.

⁵⁵ See below ch 4 I C and II C; ch 6 III.

exacting standards for legality. First, two substantive limits to EU competences are developed. The first one is the ‘essentiality’ condition, which is codified in Article 83(2) TFEU and also determines the EU’s general criminal law competence as it is derived from the *Environmental Crimes* judgment. A thorough examination of the new competence in Article 83(2) TFEU and of the EU’s general criminal law competence is conducted. Illustrating the argument by a review of the Market Abuse Crimes Directive⁵⁶ and the Environmental Crimes Directive⁵⁷ it is contended that the EU’s express and implied criminal law competence are constrained by the EU legislator’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.⁵⁸ The other important substantive limit to the exercise of EU powers is the subsidiarity principle.⁵⁹ The discussion of this principle is exemplified through an examination of the Market Abuse Crimes Directive and the EPPD Proposal.⁶⁰ It is maintained that subsidiarity requires that EU harmonisation can only take place if the EU legislator is able to demonstrate the existence of a transnational market failure⁶¹ or transnational interest making the Union a better avenue for exercising a shared competence.⁶²

Secondly, two procedural limits to EU competences are elaborated. The first one is the ‘harmonisation’ requirement in Article 83(2) TFEU which suggests that this competence can only be triggered if the EU legislator prior to the criminal law measure had adopted substantive harmonisation measures by means of regulations and directives through the ordinary or special legislative procedure prescribed for in Article 294 TFEU. That argument is represented by looking at the field EU market abuse regulation.⁶³ The other procedural limit to the exercise of EU competences is the requirement to act on the correct legal basis. This limit is examined in chapter 5 where the questions of the correct legal basis for the new

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ See below ch 4 I–III.

⁵⁹ See Art 5(3) TEU.

⁶⁰ See Commission, ‘Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’, COM (2013) 534 final.

⁶¹ ‘Market failure’ can be defined as ‘deviations from perfect markets due to some element of the functioning of the market structure’. This is, for example, the case if market signals do not properly reflect social costs and benefits, ie externalities. Externalities can arise from negative effects occurring in one state as a result of an activity that is regulated or not regulated in another Member State. The most important market failure for the EU internal market is imperfections of competition, ie where there are deviations of effective competition due to market power, distortions to competition and protectionist trade barriers: See World Trade Organization (WTO) Secretariat, ‘World Trade Report 2004—Exploring the linkage between the domestic policy environment and international trade’ 150–51; Jacques Pelkmans, ‘The Economics of Single Market Regulation’ (2012) Bruges European Economic Policy Briefings no 25/2012, 2–4.

⁶² See below ch 6 I–III; ch 7.

⁶³ See below ch 4 III.

proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law⁶⁴ and the right legal basis for the Fourth Anti-Money Laundering Directive ('Fourth AMLD') are comprehensively analysed.⁶⁵ It is argued that Article 83(2) TFEU is a *lex specialis* in relation to other legal bases in cases where the envisaged criminal law measures fall within the procedural and material scope of that provision. However, in relation to criminal law measures, which by providing for criminalisation through 'regulations', fall outside the textual confines of Article 83(2) TFEU, other Treaty articles such as Article 114 could be used.⁶⁶

IV. Case Study—EU Regulatory Criminal Law

Because the question of limits to EU competences is an ambitious one to explore, the scope of the enquiry has, in principle, been restricted to 'EU regulatory criminal law'. The topic of the book falls within the confines of EU Criminal Law,⁶⁷ which is a broad field covering all instances where the EU has normative influence on either substantive criminal law/criminal procedure or on the judicial cooperation between the Member States.⁶⁸ In substantive terms, it contains the legislative competences in Articles 82–86 TFEU and those legal bases providing for criminal law competence outside Title V.⁶⁹

To understand the notion of EU regulatory criminal law it is opportune to briefly review Article 83 TFEU. This is the main provision that governs the EU's competence to harmonise 'substantive criminal laws' in relation to offences and sanctions.⁷⁰ This provision has formalised the general national division between 'core' and 'regulatory criminal law' where Article 83(1) TFEU first deals with the

⁶⁴ See Commission, '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', COM (2012) 363 final ('PIF Proposal'). The Proposal and its legal basis are contested and it has been substantially amended by Council and Parliament in subsequent readings, see further details in ch 7 on the status of the PIF Proposal.

⁶⁵ See Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73.

⁶⁶ See below ch 5.

⁶⁷ See Christopher Harding and Joanna Banach-Gutierrez, 'The Emergent EU Criminal Policy: Identifying the Species' (2012) 37 *European Law Review* 758, 759, for the terminological issues concerning the concept of EU Criminal Law.

⁶⁸ See André Klip, *European Criminal Law* (Cambridge, Intersentia, 2012) 1–2; Helmut Satzger, *European and International Criminal Law* (Munich/Oxford, Beck/Hart Publishing, 2012) 43–44.

⁶⁹ See Harding and Gutierrez (n 67) 761.

⁷⁰ See Petter Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm, Jure, 2013) 19–20.

former category of offences. This provision lists ten offences⁷¹ for which the EU has a right to establish minimum rules concerning the definition of criminal offences and sanctions. These offences are considered to be of a ‘particularly serious nature’ and the provision assumes that these offences deserve criminalisation because of the general harm and damage incurred by such offences without any need to establish that such criminalisation is beneficial for the achievement of the Union’s objectives.⁷² Then there is regulatory criminal law in Article 83(2) TFEU, which 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.⁷³ EU regulatory criminal law is defined as encompassing all criminal law measures which are adopted ‘to ensure the effective implementation of a Union policy in an area which has been subject to regulatory harmonisation measures.’⁷⁴

The field of EU regulatory criminal law has been selected for two reasons. First, a study of this policy area, constituting a general field of EU policy⁷⁵ illustrates the limits to the exercise of EU competences. It also sheds new light on perennial constitutional questions such as the scope of EU internal market legislative competence and the choice of legal basis. The harmonization of EU regulatory criminal law, as other EU policies, has been proposed by scholars and the EU legislator under the functional power of Article 114 TFEU.⁷⁶ Secondly, it is argued that regulatory criminal law is an important policy field. The EU’s power to enforce its existing policies by criminal sanctions is not only a theoretical question but a practical one.⁷⁷ The EU has already adopted four regulatory criminal law measures, the Environmental Crimes Directive,⁷⁸ the Ship-Source Pollution

⁷¹ ‘Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.’

⁷² See Fletcher, Gilmore and Löf (n 4) 183.

⁷³ 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, 10–11; Memorandum by Maria Fletcher, in House of Lords’ European Union Committee, *The Treaty of Lisbon: an impact assessment*, 10th Report of Session 2007–08, Volume II: Evidence, HL Paper 62-II (London, The Stationery Office Limited) E 149, 150.

⁷⁴ See Art 83(2) TFEU.

⁷⁵ See Art 3(2) and Art 67 TFEU.

⁷⁶ 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’, COM (2006) 168 final. For scholarly support for the use of Article 114 TFEU for criminalisation: 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* (Oxford, Hart Publishing, 2003), 456–57.

⁷⁷ See further Valsamis Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and the Transformation of Justice in Europe*, (Oxford, Hart Publishing, 2016), ch 3.

⁷⁸ See n 57.

Crimes Directive⁷⁹ and the Employer Sanctions Directive,⁸⁰ the Market Abuse Crimes Directive⁸¹ and submitted two other proposals; the PIF Proposal⁸² and finally the Intellectual Property Crimes Proposal⁸³ which was subsequently rejected.⁸⁴ It is clear from the legislative practice and the Commission's Communication in 2011⁸⁵ that EU regulatory criminal law will remain a priority area for the EU legislator.

It will finally become apparent from the discussion that this book proceeds from a narrow understanding of EU regulatory criminal law.⁸⁶ With the exception of the analysis of the EPPO Proposal,⁸⁷ the book only deals with individual⁸⁸ criminal sanctions in a strict sense. This is not obvious from the concept of EU regulatory criminal law since this sometimes encompasses administrative sanctions/criminal sanctions in a broad sense. For example, the fines under competition law in Regulation 1/2003⁸⁹ would most likely fall within the definition of a 'criminal charge' according to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹⁰ This means that specific criminal law safeguards must be applied when such competition law fines are imposed. However, when it comes to this study, such administrative fines are not considered to be criminal in nature.⁹¹ The proposed definition of criminal sanctions in EU law is that such sanctions must communicate moral stigma, have a punitive purpose and finally entail intrusive and severe consequences for individuals, for example liberty deprivation.⁹² This implies that the book only examines imprisonment and

⁷⁹ 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.

⁸⁰ 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.

⁸¹ See n 56.

⁸² See above n 64 for full reference to this proposal.

⁸³ See above n 76 for full reference to this proposal.

⁸⁴ See Withdrawal of Obsolete Commission Proposals, 2010/C 252/04, OJ 252/7, 9.

⁸⁵ See COM (2011) 573 (n 73) 2, 5–6.

⁸⁶ The chosen definition of criminal sanctions becomes particularly relevant for the discussion in ch 5 on whether the Fourth Money Laundering Directive should have been adopted on the basis of Article 83 TFEU instead of Article 114 TFEU.

⁸⁷ See ch 7. Whilst not strictly concerning the EU's competence to impose criminal sanctions, the analysis of the national parliament's review of the EPPO Proposal is a matter of the EU's criminal law competence in a broad sense; ie the EU's competence to establish supra-national criminal enforcement bodies.

⁸⁸ Whilst several EU criminal law directives contain provision for criminal penalties for firms, it is more appropriate to focus on individual penalties since the discussion on the effectiveness of imprisonment only make sense within the framework of individual sanctions.

⁸⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

⁹⁰ Council of Europe, as amended by Protocols Nos. 11 and 14; 4 November 1950, ETS 5.

⁹¹ See Judgment of the European Court of Human Rights of 21 February 1984, *Öztürk v Germany*, Series A no 73 [1984] 6 EHRR 409, paras 47–49; Asp (n 70) 60–64.

⁹² See Asp (n 70) 64–68; Case C-440/05 *Commission v Council* (n 6), Opinion of AG Mazák, para 67.

other sanctions⁹³ that can be replaced by imprisonment sanctions if they are not complied with.⁹⁴ Imprisonment sanctions will be the main focus in the discussion of specific EU legislative measures.⁹⁵ It is arguably the imposition of imprisonment sanctions, in contrast to fines and other non-criminal sanctions, which makes a difference in terms of deterrence and the effectiveness of the enforcement system.⁹⁶ If the criminal sanctions imposed by Member States are to comply with the requirement of being ‘proportionate, dissuasive and effective’,⁹⁷ it is often necessary for Member States to impose ‘imprisonment sentences’ for the enforcement of the relevant EU policies.⁹⁸ It is furthermore clear that the EU legislator’s general argument for criminalisation in the field of EU regulatory criminal is based on the presupposition that imprisonment sanctions are needed for the effective and uniform application of EU law.⁹⁹

V. Chapter Synopsis

The book is divided in two parts and eight chapters. Part I (chapters two and three) is a general part examining the debate on the nature of the competence problems and the general issues of judicial review in setting limits to the exercise of EU powers. In order to construct limits to the exercise of EU competences, chapter two considers the three key principles in Article 5 TEU—conferral, subsidiarity; and proportionality—which guide the exercise of EU competences. It discusses the problems of these principles and particularly examines whether the limits imposed by the Court’s case law are apt to act as checks on the exercise of EU powers. Previous scholarly contributions criticising the conceptual basis for limiting the exercise of EU competences are also discussed and appraised. The chapter finally evaluates which principles are capable of challenging the exercise of EU competences before the Court.

⁹³ Criminal fines, conditional sentences, community service orders and probation orders.

⁹⁴ See Satzger (n 68) 51.

⁹⁵ See below ch 4 I–II.

⁹⁶ See Wouter PJ Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117, 138–48; Dan M Kahan, ‘What do alternative sanctions mean?’ (1996) 63 *University of Chicago Law Review* 593, 621–24, 645, 649, 652.

⁹⁷ This is the standard formula used in recent EU criminal law directives. The formula stems from the Court of Justice’s ruling in Case 68/88 *Commission v Greece* [1989] ECR 2965, para 24.

⁹⁸ See Michael G Faure, ‘Effective, proportional and dissuasive penalties in the implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges’ (2010) 19 *European Energy and Environmental Law Review* 256, 266–67;

⁹⁹ See Commission, ‘Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation’, COM (2011) 654 final (‘Market Abuse Crimes Proposal’) 2–3, 5; Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law’, COM (2007) 51 final, 2–3, 6.

Having established the principles against which EU legislation can be challenged, the book proceeds in chapter three to examine how judicial monitoring of the exercise of EU competences can be improved. The chapter also tries to develop a framework for reviewing EU legislation. It analyses not only conceptual problems with existing limits to EU competences, but also institutional factors that have militated against serious judicial review. In particular, it is examined how the Court, given its comparative institutional disadvantage in relation to the EU institutions, can engage in serious review of the exercise of EU competences. A procedural review framework is elaborated to enhance judicial enforcement of the limits of the Treaties. The final part of the chapter suggests, on the basis of this framework, a standard of review and test for legality for review of EU legislation.

Having tackled the institutional challenges for enhancing judicial enforcement of competences, Part II of the book applies the standard developed in chapters two and three by discussing specific limits to the exercise of Union competences. Chapter four considers the limits to the EU's implied and express criminal law competence. The first part re-examines the scope of the Union's general criminal law competence derived from the Court of Justices' *Environmental Crimes* judgment with a particular focus on the EU's implicit criminal law competence under Article 192 TFEU. There is particular focus on whether the 'essentiality' condition in the Court of Justice's case law can act as a check on the adoption of criminal law measures under Article 192 TFEU. This part also illustrates the application of the 'essentiality' condition by means of a thorough examination of the Environmental Crime Directive. The second part of the section is exclusively focused on the new legal basis for criminal sanctions: Article 83(2) TFEU. This part first considers the substantive conditions of Article 83(2) TFEU, ie the meaning of the 'essentiality' condition, the scope of judicial review under the provision and the meaning of 'effective implementation' of EU law. The scope of Article 83(2) is demonstrated by a comprehensive review the new Market Abuse Crimes Directive adopted under this provision. Secondly, the procedural conditions of Article 83(2) TFEU are examined. In particular, it is discussed whether the 'harmonisation' requirement in this provision can act as a check on EU criminalisation, with a specific focus on EU market abuse regulation.

Chapter five then examines the debate on legal basis for criminalisation measures after Lisbon Treaty. The chapter first considers the relationship between Article 114 TFEU and Article 83(2) TFEU, with particular reference to EU anti-money laundering legislation. This examination makes it possible to re-examine the limits to EU harmonisation under Article 114 TFEU. Finally, the recent debates on the right legal basis for the PIF Proposal are considered in depth. By closely analysing the Court of Justice's case law on right legal basis and the aim and content of the PIF Proposal, it is evaluated whether this proposal should be adopted under Article 83(2) TFEU rather than Article 325 TFEU as proposed by the Commission.

Chapter six considers the principle of subsidiarity as a check on the exercise of EU competences. The first part of the chapter examines how a reconstruction of the subsidiarity principle can help to challenge the basis for excessive EU

harmonisation in general and in relation to the field of EU criminal law. The second part of the chapter discusses the judicial enforcement of subsidiarity. There is a specific case study of whether the Market Abuse Crimes Directive conforms to the subsidiarity criterion. Chapter 7 then examines the role of national parliaments in addressing the exercise of EU criminal law competences. Given the national parliaments' enhanced mandate under the Treaties and Protocol No 2 to review EU legislation and recent challenges by parliaments to EU criminal law legislation, it is considered to what extent they can provide a political safeguard of federalism. A particular case study of the national parliaments' challenge to the EPPO Proposal illustrates the argument.

Chapter eight contains the conclusions of the book and an assessment of the lessons we can draw from the study for the EU law on competences.