I. INTRODUCTION

This book examines the constitutional dimension of European criminal law. The specific focus of the book is the competence question in EU criminal law and how effectiveness has driven its constitutional adaptation and development. The book considers the vertical delimitation of powers between the EU and its Member States. The concept of European criminal law has always been very patchy and has only gained impetus in recent years. Prior to the entry into force of the Lisbon Treaty, criminal law was primarily a third pillar intergovernmental matter within the framework of the Treaty of Amsterdam. The major issue, therefore, was the horizontal delimitation of powers between the former first and third pillars in the EU. This book investigates the development of criminal law in the EU from the failure of the Constitutional Treaty in 2005, to the entry into force of the Lisbon Treaty in 2009, which elevated criminal law to a central constitutional position. However, in spite of the non-ratification and ill-fated destiny of the Constitutional Treaty in 2005 and the uncertain wait for the Lisbon Treaty, the European Court of Justice concluded that there could be an EU supranational competence if this was needed to safeguard the environment effectively. Without doubt, few cases concerning criminal law in a European context have received as much attention as Case C-176/03, Commission v Council (hereafter Case C-176/03), which highlighted the general problem of the delimitation of competences between the former first and third pillars and stated that criminal law could be a matter for the EU legislator if the principle of full effectiveness so required. So, until recently, criminal law in the EU context straddled in the border between the first and the third pillars but could be considered to fall within the scope of the first pillar if this was required for the EU law to be fully effective. This case opened up a vague and ill-defined competence in this judicial area which fuelled a debate concerning the exact limits of competence. The aim of this book is, therefore, to explore the meaning of ‘effectiveness’ and examine how it has been used as an authority of EU law to open up areas thought to lie – in part or in

whole – within the autonomy of Member States. This raises several issues. For example, is the concept of ‘effectiveness’ in EU law different from ‘effectiveness’ in criminal law? Is it possible to simply translate the harmonisation of trade standards into the harmonisation of criminal provisions? Clearly, these issues also illuminate the difficult question of how to reconcile effective EU action with respect for human rights in criminal law matters at the EU level.

Moreover, as will be explained, the principle of effectiveness has primarily and traditionally been seen as a question of the enforcement of EU legal rights in national courts. However, the judgment in Case C-176/03 could also be interpreted to mean that showing the ‘effectiveness’ of an EU rule is a precondition to establishing the EU’s competence to act in the first place. These questions are important to analyse. The reason for this is twofold – first criminal law is very different, for example, from private law in its power to impose ‘legitimate violence’ on individuals and therefore a cautious approach should be taken to avoid the inflationary use or abuse of the criminal law. Secondly, it is dangerous to view the principle of effectiveness as a carte blanche for harmonisation, as this would run counter to the concept of conferred powers as stipulated in Article 5(1–2) Treaty on European Union (TEU) and Article 7 Treaty on the Functioning of the European Union (TFEU).

This book seeks to examine the principle of effectiveness, which has become the key drive in the pursuit of the constitutional evolution of European criminal law. More specifically, the book investigates the constitutional implications of reasoning based on ‘effectiveness’ and how it has developed from an enforcement issue in European law to a more independent principle at the constitutional level when justifying EU powers. The main theme running through this book is the tension between effectiveness concerns and the legitimacy question of EU criminal law. It is argued that criminal law at the EU level has developed rapidly without taking the time to reflect on the premises on which it is based. The contention is that the EU has pushed forward with criminal law initiatives leading to the development of a preventive regime, while the protection of the individual has been largely left behind. Thus, in order to understand the changes for the criminal law as brought by the Lisbon Treaty it is necessary to put it into context. This book serves that purpose. It will embark on a constitutional tour of EU criminal law and explain how the principle of effectiveness has driven this whole area forward. The Lisbon Treaty solves, to some extent, the big question of whether a competence to harmonise criminal law at the supranational level exists by simply asserting that it does. In other words, the Lisbon Treaty provides for a specific basis for such a crime-fighting mission by listing a whole range of crime-fighting activities as set out in Articles 82 and 83 TFEU. The main question is how to decide and monitor the contours of these provisions and how to ensure that procedural rights in criminal law are protected.

This short introduction intends to offer some preliminary background information as to why such a study is important.
II. BRIEF COMMENT ON THE HISTORY OF EU CRIMINAL LAW

When discussing the concept of European criminal law it is easy to get the impression that it is the result of the general success of the EU. However, viewed from a historical perspective it is actually quite difficult to find a sensible meaning for the ‘Europeanisation’ of a criminal law which is already ‘European’, having been inspired by ideas developed during the Enlightenment. Nevertheless, there are considerable differences between the different Member States. It is, moreover, precisely the combination of these ‘cultural similarities’ and ‘cultural disparities’ that makes the concept of European criminal law so complex. For example, it is often pointed out that there is currently insufficient mutual trust between the Member States that have divergent criminal laws, to justify the application of the internal market principle of mutual recognition to the field of EU criminal law.

In any case, until recently, the assumption was that criminal law fell outside the legislative competence of the EU. Indeed, criminal law was initially of little interest to the EU legislator who was more concerned with the notion of free movement and the functioning and establishment of the internal market. There was, in short, no need to interfere in the sensitive field of criminal law. As stated though above, the current ‘Europeanisation’ of criminal law is not a new phenomenon, as the general lines of the future orientation of a ‘European criminal law’ were already the basis for Kant’s *Perpetual Peace* in 1795. Therefore, although criminal law is a fairly recent actor on the Union stage in terms of ‘EU criminal law’, the notion of ‘European’ criminal law as such is far from new. After all, it should be recalled that there was a time when ‘Europe’ represented a more enlightened and proportionate penal system than the national systems. For example, the Enlightenment brought with it a criminal law system more inspired by humanism and the introduction of the principles of proportionality and legality. Today, in slightly exaggerated terms, the opposite appears to be the case, with EU law running the risk of relying on the appealing concept of enforcement at the possible expense of sufficient legal safeguards. This is especially true, as will be discussed below, in the areas of combating terrorism, money laundering, and in crime

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prevention at the EU level, where the notion of effectiveness seems to play an increasingly dominant role in the legislative debate.

III. STRUCTURE OF THE BOOK

In examining these issues, this book starts by looking at the famous patchwork pattern of criminal law in the EU and how it was formed. The development of EU criminal law will be explored against the general background of the impact of effectiveness as both an enforcement mechanism and a competence parameter. It also highlight the fact that there is no clear-cut division between enforcement and competence issues and that effectiveness is a chameleonic concept. Yet, the problem is that it is far from clear that effectiveness in criminal law mirrors ‘effectiveness’ as interpreted by the Court or the European Commission. We will begin this exercise by tracing the EU colonisation of criminal law in chapter two, outlining the journey of criminal law in the EU to show how it has emerged from a third pillar issue to a supranational question. In addition, chapter two considers the implications of the Lisbon Treaty by introducing the main changes in criminal law as well as the extended jurisdiction of the Court in this area.

A. Effectiveness as Enforcement

In chapter three, the principle of effectiveness is examined in further detail. In doing so this chapter considers the meaning of effectiveness in EU law generally by tracing its origin in the classic EU context before applying it to the former third pillar, and subsequently to the area of freedom, security and justice (AFSJ) following the Lisbon Treaty. It is argued that there has been an implementation imbalance within the former EU third pillar between the attractiveness of effective enforcement of EU law, and the dangers of one-sided integration where legal protection of the individual is neglected, despite this being an area where such safeguards are most needed. In addition, this chapter discusses the extent to which the Lisbon Treaty has changed the framework of criminal law. It then investigates ‘effectiveness’ as a general principle of criminal law and cautiously argues that this principle is a tricky parameter when deciding on criminalisation.

B. Constitutional Effectiveness

This book then scrutinises effectiveness as a constitutional axiom. Chapter four maps the development of the principle of effectiveness in EU law as a constitutional principle for confirming competences. This is in many ways the chapter on which the book is based, as it attempts to construct a theoretical framework for the analysis of effectiveness in EU criminal law. In particular, the chapter exam-
ines Case C-176/03 more closely and considers how the Court established a new meaning of ‘effectiveness’ in their reading of the case and its wider implications. Part I introduces the topic of this chapter and explains the conundrums of effectiveness by analysing it in the light of the conferral of powers in the EU. Although the focus is on criminal law, the aim is to construct a broader setting in order to show the underlying concerns permeating this area. In so doing, the chapter seeks to illuminate the wider question of European powers. Arguably, it is necessary to look at the background picture before looking more specifically at the details of European criminal law and the question of competences. In other words, the aim is to place the notion of a supranational criminal law competence in context. Hence, the chapter covers the general constitutional questions in the EU, such as the objectives of the EU and the conferral of competences.

An important aim of this chapter is to track the objectives of the EU in the light of the effectiveness principle. Part II of the chapter serves this purpose. In particular, this part of the chapter sets out to explore the dynamics and the history of the wide-ranging former portal provision of the *acquis communautaire*, ex Article 47 TEU and to consider what we can learn from it with respect to the Lisbon Treaty. The purpose of doing so is to investigate how criminal law was already being transferred prior to the Lisbon Treaty as part of the Court of Justice’s heavy reliance on the effectiveness principle coupled with the wide contours of the *acquis communautaire*. Thus, part II seeks to tie this question to the constitutional question of effectiveness in the EU and show how the competence threshold was being manipulated to extend into new areas. The section considers how much has really changed in this area since the entry into force of the Lisbon Treaty. The intention is to show that even though it is true that Opinion 2/94 was clear that the objectives of the Treaty cannot be expanded by themselves, the meaning of this assertion remained unclear, as in practice the scope of this provision remained unstable, as was demonstrated by the *Kadi* case. In particular, this part of the chapter tries to explain that the issue of what is to be counted as an EU objective revealed a similar vagueness to that of the effectiveness principle, where the effectiveness imperative has become part of the EU objectives. The chapter also analyses the new Article 13 TEU and the question of institutional balance and the continuing aspirations for effectiveness.

Part III of chapter four then investigates the constitutional scope of Article 114 TFEU, and thereby briefly dissects the myriad of legal scholarship here. More specifically, this part intends to explore how much weight Case C-176/03 could bear before collapsing under Article 114 TFEU. In doing so, this study focuses on the snowball effect of this ruling and the eagerness to legislate that followed in its wake. Moreover, the part examines the Article 114 TFEU conundrums by looking specifically at the market concept in the context of the possibilities of harmonising criminal law by scrutinising the notions of obstacles to trade and the

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distortion of competition. The starting point for this discussion is naturally the new lex specialis function of Article 83 TFEU and the boundaries of the notion of EU criminal law particularly with regard to how far it will be possible to rely on Article 114 TFEU in the future. Yet although Lisbon provides for quite strictly drafted provisions on criminal law competence, it has also resulted in slippery provisions that would allow legislation ‘when necessary’ for the effective implementation of an EU policy which has been the subject of harmonisation measures as stipulated in Article 83 TFEU.

In part IV the issues of subsidiarity and proportionality are explored in the context of European criminal law in order to show that these principles appear to play a less significant role in EU criminal law as well as in the mainstream EU framework. This is particularly alarming as the very notions of subsidiarity and proportionality should be reflected in the ultima ratio of criminal law. This chapter also discusses the new function of the national parliaments in this area as well as problems with penal populism and the wider issues of balancing in the AFSJ and the extent to which criminal law is different from other areas.

Part V of this chapter links such reasoning to the flexibility provision of enhanced cooperation. The purpose is to show the dangers in ‘moving forward’ blindly at the expense of adequate attention being paid to what such cooperation means from the perspective of coherence. This part of the chapter examines the mechanisms of enhanced cooperation with regard to criminal law and the emergency brake in particular and argues that the emergency brake provided by the Lisbon Treaty might not be significant in practice as nine Member States can always move forward by establishing automatic enhanced cooperation. This part also discusses the meaning of the imperative of loyalty in this area and to what extent the proportionality principle could play a role here in future as better recognising the sensitive nature of criminal law cooperation.

Finally, part VI of the chapter provides some thoughts on the wider constitutional debate which underpins this area as initiated by the Laeken Declaration and taken further in the discussion on the Lisbon Treaty, by highlighting the bigger question of the need for broad flexible competence provisions. Specifically this part of the chapter seeks to bring us back to the discussion on the objectives of the EU and the issue of the future of the EU project more broadly. The chapter concludes by drawing together the findings of the chapter.

C. The Development of EU Precautionary Criminalisation and the Fight against Money Laundering

Chapter five sets out to analyse the EU’s security agenda, which plays an increasingly significant role in the EU’s policy within the AFSJ. More particularly, the chapter aims to discuss it in the light of risk regulation and the effectiveness principle. The intention is to investigate what happens in practice in the intersection between national criminal law and EU measures and two case studies are
discussed. Chapter five deals specifically with EU financial crimes and the EU suppression of money laundering. The Third Money Laundering Directive\textsuperscript{11} introduces a risk-based approach as well as the inclusion of the financing of terrorism within its scope. This poses numerous challenges not least because money laundering and the financing of terrorism, although sometimes related, do not necessarily show the same (criminological) pattern. It will be shown that ‘risk’ in EU law is not necessarily the same as ‘risk’ in criminal law despite the EU’s heavy reliance on the concept. The Third Money Laundering Directive introduces a risk-based approach to suspicious transactions but this book examines ‘risk’ as a much wider concept connected to the question of paternalism and whether the EU should be involved in these issues at all. In particular, this part of the chapter tries to demonstrate that the driving notions behind the EU’s agenda in this area are risk and security coupled with effectiveness concerns. It is argued that the EU’s approach here has led – and could lead – to precautionary criminalisation at the EU level. Such a development is a dangerous trend as it seems to push criminal law in the direction of harsher law. Thereafter, this chapter sets out to briefly look at the (repealed) Counterfeiting and Piracy Directive\textsuperscript{12} as an example of an early aspiration of creating a EU supranational criminal law. In doing so the purpose is to illuminate any difficulties from the perspective of national criminal law and the question of criminal law liability for legal persons. This chapter also discusses the notion of a protective regime at the EU level by not only linking the chapter back to the debate on Article 114 TFEU and the justification for harmonisation on the basis of ‘confidence in the market’ but also confronting it with the notion of paternalistic legislation in criminal law.

Finally, chapter six looks more closely at the implementation of the Third Money Laundering Directive in the UK and Sweden and what challenges it poses in practice.

D. The Lisbon Treaty and Criminal Law: Old Problems and New Challenges

In chapter seven the book explores to what extent the Lisbon Treaty currently provides for a sufficient structure for EU criminal law. Although the Lisbon Treaty has greatly improved the situation by granting competences and providing for the adoption of legal safeguards for the individual, it does not mean that the framework drawn up by the Lisbon Treaty constitutes the ideal solution to EU criminal law. Therefore, this chapter discusses the Lisbon Treaty from the perspective of EU criminal law and asks if it offers anything new. The answer is both yes and no. The Lisbon Treaty draws attention to the EU’s legal values and


\textsuperscript{12} Proposal for a Directive (COM (2006) 168 final, on criminal measures aimed at ensuring the enforcement of intellectual property rights. Later withdrawn by the Commission, see OJ C252, 18 September 2010.
officially promotes the Charter of Fundamental Rights as a legal source of interpretation as well as ensuring the EU’s future accession to the European Convention on Human Rights (ECHR). Moreover, the Lisbon Treaty provides for the possibility of approximation of legal safeguards as well as bringing the ‘emergency brake’ (initially invented by the Constitutional Treaty) back in. The emergency brake is important as it provides for the possibility of a constraint to be implemented if a criminal law legislative measure is considered to affect fundamental aspects of a Member State national criminal law system. This chapter also looks at the new role of the Court of Justice, as well as the new expedited procedure, and tentatively asks if the Court of Justice could (and should) become a criminal law court and the difficulties it faces in this judicial domain.

IV. FINAL REMARKS

This book tries to clarify the puzzling issue of the distribution of competences in the EU by focusing on criminal law and the notion of effectiveness as the key principle in this area. Whilst it is true that the Lisbon Treaty has largely solved the question of whether there is any competence in criminal law at the supranational level, by listing it as one of the EU’s objectives in the TFEU, such a Treaty reformation has not solved the larger issue of EU criminal law. For example, it remains unclear to what extent the EU could legislate in criminal law or to what degree such harmonisation could take place outside the *lex specialis* provisions in Title V of the TFEU. In addition, and as already noted above, a study of the impact of the effectiveness principle and how it has transferred criminal law at the EU level is of utmost importance. It illustrates the ambiguity of the Treaty framework for the competence monitoring much more broadly. Thus, it tells us about the future scope of the new Treaty articles on criminal law where ‘effectiveness’ still plays a key role.

However, the underlying constitutional debate permeating this whole field is the fact that although there is no need to finalise the European project, which is a process under constant dynamic flux, this is not the whole story. The point is rather that the criminal law is fundamentally ill-suited for clear-cut analogies with the internal market. The reason for this is that the criminal law handles a different kind of ‘freedom’ from that at the heart of the EU project, in that it can cause harm by depriving people of their liberty through sanctioned punishment. Another very important component, and as will be explored more fully below, is the function of the principle of legality in criminal law, which requires certainty and specific underlying qualities in the law in question. From the perspective of EU law, this touches on the rather provocative issue of the extent to which the EU should have any legislative competence in criminal law which creates the need for

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a strictly laid down competence in the name of legitimacy without bringing the EU to a halt. In other words, there appears to be a clash between the principle of legality in criminal law and the need to maintain the dynamic nature of EU law. This theme was considered at the general level in the Laeken Declaration\textsuperscript{14} and remains highly topical as regards the future interpretation of the new competence provisions as created by the Lisbon Treaty in this area.

It will become clear that the phenomenon of EU criminal law is highly complex. The very idea of it reveals the vulnerability of the credentials of EU action based on the principle of effectiveness and the respect for the attribution of powers, while at the same time it concerns a matter which is very different from, say, the labelling of tobacco products.\textsuperscript{15} As explained, the Lisbon Treaty has provided a whole new framework for the development of criminal law at the EU level in Title V of the TFEU. In spite of this, it merely draws up a skeleton for the development of criminal law at the EU level, leaving it largely unexplored. Clearly, the protection of the individual should constitute the main theme in the emergence of EU criminal law. As will be argued below, an accompanying rule of thumb should equally be the EU principles of subsidiarity and proportionality, long reflected in the \textit{ultima ratio} of criminal law. Nevertheless, EU legislative practice paints a different picture. Here the most appealing notion of forward thinking appears to assume that better EU regulation means more criminal law. Indeed, the field of EU criminal law has been the textbook example of creeping competence in action and offers a good constitutional test case. Accordingly, this book explores and guides the reader through different notions of ‘effectiveness’ in EU law, and the issues of EU legislative competence and ‘over-criminalisation’ by scrutinising an area which has become one of the most important issues in contemporary European integration discourse.

\textsuperscript{14} European Council at Laeken 2001.