



LIMITS TO EU POWERS

A case study on individual criminal sanctions for the enforcement of EU law

Jacob Öberg

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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This thesis has been submitted for language correction

THESIS SUMMARY

The question posed by this thesis is how limits can be constructed to the exercise of EU powers. While there are limits to the exercise of EU competences in the Treaties and in the Court of Justice's jurisprudence, it is argued that those limits suffer from conceptual and practical problems. In particular, the Court does not have appropriate criteria to examine whether the limits of the Treaties have been exceeded by the Union legislator.

The thesis uses one of the new, and controversial, competences that the Union has obtained, the power to impose criminal sanctions, as a case study to propose a mechanism by which legislative powers can be kept in check. This is an illuminating and relevant case study. Firstly, it nicely illustrates the limits to the exercise of EU competences. Secondly, legislative practice and political statements suggest that this competence will be used regularly in the future.

The thesis makes two proposals. First, by interpreting the scope of the EU's powers under the Treaties to impose criminal sanctions the thesis shows the limits to the exercise of EU competences. It demonstrates the scope of EU's competences by analyzing current and proposed criminal law measures. Secondly, noting that a construction of the limits to EU competences also needs to tackle the institutional challenges of judicial review, it develops an argument for a more intense and evidence-based judicial review. It constructs a procedural standard of legality which demands that the EU legislator shows that it has adequately reasoned its decisions and has taken into account relevant evidence. By testing the legality of discretely chosen criminal law measures on the basis of this standard, it is demonstrated how the Court can enforce the limits of the Treaties.

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CHAPTER 1- INTRODUCTION

I Research question

Prior to the Lisbon Treaty, EU law scholarship and the political debate was primarily pre-occupied with the existence of EU competences¹ and the division of powers between Member States and the EU.² 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 choices that countries could make in these areas were becoming increasingly tightly constrained by the consequences and requirements of removing borders. The fundamental problem lay in deciding the extent to which the EU could legislate and the extent to which the capacity of Member States to make and carry out policy autonomously should be respected.³

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 concern to protect national autonomy from encroachment of the EU in sensitive national matters is no longer the issue of the day. 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 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 for state integrity automatically made criminal law a matter of Member State competence.⁵ The Commission advanced a Community criminal law competence in criminal

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* (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 2009).

³ 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* (Edward Elgar 2008) 183, for a description of the concept.

⁵ 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);

matters on the basis that it was needed 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 recognizing 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 recognized, in two famous judgments, *Environmental Crimes*⁸ and *Ship-Source Pollution*⁹, that the Community had a competence to impose criminal sanctions in the field of environmental law and maritime safety 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 abandoned the pillar system and explicitly conferred a competence on the Union to impose criminal sanctions to enforce substantive Union policies.¹⁰ 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.¹¹

There was also a political debate that was equally concerned with the existence of competences and the division of competences. The general public perception among EU citizens and politicians prior to Lisbon was that the delimitation of competences between the

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) 74-78, 91-92.

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; Steve Peers, *EU Justice and Home Affairs Law* (OUP 2011) 769-771; Dougan, 'From the Velvet Glove to the Iron Fist' (n 5) 95-99. The idea that the effective enforcement of EU law would require criminal sanctions had been advanced earlier by scholars and Advocate Generals: 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.

⁷ See Martin Wasmeier and Nadine Thwaites, 'The "battle of the pillars": does the European Community have the power to approximate national criminal laws?' (2004) 29 *European Law Review* 613, 616; 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 Article 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 Article 80(2) EC.

¹⁰ 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.

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; Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' (n 10) 334, 338-339. See generally for this development of EU law: Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009); Loïc Azoulay, 'Introduction: the Question of Competence', in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014) 7.

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 Competences¹⁴, 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. More radical solutions, such as having a detailed definition of all Union competences, were also discussed in the negotiations. Working Group no V, however, considered it sufficient to enshrine the 'basic delimitation' of competence in each policy area, while keeping the precise and 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 Treaty¹⁶.

However, these solutions show that given the fundamental concern that the EU should not intrude on sensitive national policy fields, the focus on the existence of competences and a clear division of powers is misplaced. The question of whether the EU or Member States have retained competence in a specific policy field is not the most pertinent question. The more fundamental question after Lisbon is how the EU exercises its functional powers. This is what will determine whether Member States retain powers in specific policy fields. 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. 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 that might emerge as the

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; Weatherill (n 1) 2-3.

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.

¹⁵ *ibid* 2-3.

¹⁶ 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 different types of EU competences: exclusive competences, shared competences, coordinating competences and complementary competences, see Article 2(1)-2(3) and 2(5) TFEU.

¹⁷ See Weatherill, 'Competence creep and competence control' (n 1).

objectives of the Treaties were attained.¹⁸ However, the Convention failed to remove all possibility of competence creep as it did not limit the scope of these provisions. Admittedly, the EU does not, under the Lisbon Treaty, enjoy a competence to harmonize 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

While these reasons should be sufficient to convince the reader that the question of 'existence' of competence no longer is relevant, the sceptical observer may object by referring to the wording of Article 5 TEU. The Lisbon Treaty indeed invites us to analyse the 'existence' of a competence²⁰ and to distinguish this question from the question of how competences are 'exercised'. Von Bogdandy and Bast have endorsed this idea and explained the distinction between 'existence' and 'exercise of powers'. Competence rules are abstract titles conferring the power to act. Their exercise is directed and delimited by legal norms that specifically provide formal, procedural and substantive requirements for the proper exercise of the particular competence, as well as by the general scheme relating to the lawful exercise of power, such as fundamental rights.²¹ Bast and Von Bogdandy's attempt to clarify in conceptual terms the difference between the existence and the exercise of competence is commendable. However, I am not sure whether this distinction has any significance in legal practice. This is because the principle of conferral, like the principle of proportionality and subsidiarity, is concerned with 'how' a competence is employed. If a measure is annulled because of 'lack of competence', this is not necessarily because the Union did not have competence to adopt the measure at all. It is more likely that the annulment is caused by the fact that the proposed measure did not fall within the scope of the designated legal basis. Admittedly, in the *Tobacco Advertising* judgment, the contested directive was annulled because of 'lack of competence'. However, the Court never held that the Union lacked competence whatsoever to adopt the measure. The measure was annulled because the EU

¹⁸ See CONV 375/1/02 (n14) 14-15; CONV 47/02 (n 12) 10-11, 15; Weatherill, 'Competence creep and competence control' (n 1) 23-24.

¹⁹ 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.

²⁰ See Article 5 of Consolidated Version of the Treaty on the European Union [2010] OJ C 83/13 (TEU): '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.' Article 263 (2) TFEU states that the Court shall have jurisdiction to hear cases 'on grounds of lack of competence'.

²¹ See Von Bogdandy and Bast (n 2) 283, 287.

‘exercised’ its powers incorrectly and because the measure fell outside the designated legal bases for the measure.²²

Having shown, by numerous 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 competences are ‘exercised’, I now turn to the relevance and justification for the research question. We can then state the research question which is to examine *how limits can be constructed to the exercise of EU powers*.

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

The Treaties and the Court’s case-law 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 it by the Member States in the Treaties to attain the objectives set out therein.’²³ In addition to the principle of conferral, there is, as mentioned above, the subsidiarity principle and the proportionality principle.²⁴ The Lisbon Treaty has furthermore, by providing for a special review procedure for national parliaments of EU legislation²⁵, by adopting a specific protocol on subsidiarity and proportionality²⁶ and by adopting a new provision for the protection of the constitutional identity of Member States²⁷, made an effort to construct new limits to the exercise of EU powers.²⁸ It is further well-known that the Court in its jurisprudence has limited the EU’s power to regulate the internal market by requiring the EU legislator to show that measures

²² See Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, paras 107, 115-116.

²³ In addition to Article 5(2) 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: Declaration no. 18 in Relation to the Delimitation of Competences; Declaration no. 24 Concerning the Legal Personality of the European Union; Declaration no. 42 on Article 352 of the Treaty on the Functioning of the European Union; Article 51 of the Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

²⁴ Article 5 (3)-(4) TEU provides that: ‘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. ... 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.’

²⁵ See Protocol (No 1) On the Role of National Parliaments in the European Union OJ [2010] C 83/203 (‘Protocol no 1’).

²⁶ See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality OJ [2010] C 83/206 (‘Protocol no 2’).

²⁷ See Article 4(2) TEU.

²⁸ See Azoulai (n 11) 10-11.

pursued under Article 114 TFEU genuinely have as their objective the removal of obstacles to trade or ‘appreciable’ distortions to competition.²⁹ The Court has also repeatedly held that the question of competences is not a political choice. The choice of the legal basis for a measure may not depend simply on an institution’s belief as to the objective pursued but must be based on objective factors which are amenable to judicial review.³⁰

Given all those limits, it might seem legitimate to question the need of embarking on an examination of how limits can be constructed to the exercise of competence. The point, as hinted above, of this study is that there are problem with those limits. First, it seems that that the theoretical limits to EU competences do not coincide with the practice. Already in in the negotiations that lead 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 are not taken seriously by the EU institutions, which allow political reason take precedence over observance of the rules on the exercise of competence in the Treaties.³¹ These perceptions have been detrimental to the legitimacy of the Union in the eyes of its citizens and in the eyes of national constitutional courts.³²

Secondly, there is conceptual vagueness as to the content of the limits to the exercise of EU competences. 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 policies 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.³³ Thirdly, there are problems related to the structure of the EU legal

²⁹ See Case C-376/98 *Tobacco Advertising* (n 22), paras 83-84, 106-107.

³⁰ See Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-02867, para 10.

³¹ See Joseph H H Weiler, ‘The Transformation of Europe’ (1991) 100 *The Yale Law Journal* 2403, 2431-2453; Schütze (n 11) 134-138; Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012) 66-76; Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 *Common Market Law Review* 617, 654-655; Roman Herzog and Lüder Gerken ‘Stoppt den Europäischen Gerichtshof’, *Frankfurter Allgemeine Zeitung* (8 September 2008) <http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf> Accessed 23 April 2014; Editorial Comments ‘The Court of Justice in the limelight – again’ in (2008) 45 *Common Market Law Review* 1571; 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* (OUP 2012) 95.

³² See CONV 47/02 (n 12) 3-5, 16; Joseph H H Weiler, ‘The European Union Belongs to its Citizens: Three Immodest Proposals’ (1997) 22 *European Law Review* 150, 155; Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2013) *European Law Journal*, 4. Doi: 10.1111/eulj.12079.

³³ See Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (n 32) 6.

order. Despite the existence of the principle of conferral, the EU institutions are not well-placed to effectively enforce provisions relating to the distribution of competences. This is because the EU faces structural constraints that impede it from effectively sanctioning the vertical division of powers.³⁴ These constraints have to do with the idea of integration. Indeed, this concept supports the view that the EU is granted new powers to accomplish its objective of integration³⁵ and that the EU political institutions and the Court of Justice give a wide interpretation of the EU's legislative powers.

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. It has been maintained that the principal place for addressing the problems of 'competence creep' should lie in the institutional culture of the EU, nourished by input from national political cultures and a stronger political monitoring of competences.³⁶ The current Treaty system of competence monitoring is also founded on the assumption of political control. The task of determining whether the Treaties confer on the Union competence to act in a specific case, and to what extent the subsidiarity principle is being complied with, rests with the EU political institutions.³⁷ It is however questionable whether the political limits of the Treaties provide for sufficient safeguards of federalism. Self-interest and perverse incentives lead the EU political institutions to expand EU competences to the detriment of state powers and implies that they cannot be trusted to fulfil their review function in a satisfactory manner. The history of EU law shows that leaving the issues of the limits of EU competences to the political institutions is a hazardous policy.³⁸ The inadequacies of political control of competences have been most tellingly demonstrated by the use of Article 352 TFEU. 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 Article 352 TFEU. 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

³⁴ See below chapter 2- section II (B) for a development of this idea.

³⁵ See François-Xavier Millet, 'The Respect for Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014), 255-259.

³⁶ 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, 854-860.

³⁷ See CONV 47/02 (n 12) 10, 18.

³⁸ See Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (n 1) 324-25; Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 31) 66; Serena Rossi (n 31) 95-96; Dorota Leczykiewicz 'Constitutional Justice' and Judicial Review of EU Legislative Acts' Oxford Legal Studies Research Paper No. 95/2013, 4, 13. (November 17, 2013) <<http://ssrn.com/abstract=2355961>>. Accessed 9 May 2014.

could justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states.³⁹ Schütze has similarly observed that the Community decided to pursue the so-called ‘flanking policies’ on the foundations of Article 352 TFEU 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 States, such a competence would be devoid of internal boundaries since all harmonization diminishes legislative disparities and increases the legal proximity between the Member States. The expansive interpretation of the scope of Article 352 TFEU thus suggested a competence for the Union under this provision to create new competences.⁴⁰ The application of subsidiarity and proportionality also reveals 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 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.⁴¹ The legislative practice of subsidiarity at the EU political institutions is illustrative. The Commission is seldom able to offer examples of when subsidiarity lead to a decision not to advance a proposal. The Council is 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. This institutional climate is capable of generating a proliferation of rules adversely impacting on the expression of local autonomy. None of the EU institutions are structured to ensure that political decisions are made at the lowest level of government possible.⁴²

Despite this scepticism against political control of competences, it must be recognized that the Convention leading up to Lisbon engaged in a specific effort to strengthen political safeguards. It suggested that monitoring of the exercise of EU competences should be intensified by strengthening control by national parliaments through an early warning

³⁹ See Weiler, ‘The Transformation of Europe’ (n 31) 2444-46.

⁴⁰ See Schütze (n 11) 135, 137, 155;

⁴¹ See Matthias Kumm, ‘Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ 12 (2006) *European Law Journal* 503, 528; Weatherill, ‘Better Competence Monitoring’ (n 19) 26- 28.

⁴² See Weatherill, ‘Better Competence Monitoring’ (n19) 26; George A Bermann ‘Taking Subsidiarity Seriously’ (1994) 94 *Columbia Law Review* 332, 395-400.

mechanism.⁴³ 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 2⁴⁴ (EWS) which allows national parliaments to review legislation on the basis of the principle of subsidiarity.⁴⁵ It is however questionable whether the EWS and the reasoned opinion procedure are solutions capable of fully addressing concerns of competence creep. The first problem with 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 and 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.⁴⁶ 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'⁴⁷ and proportionality. The third point is that national parliaments lack the ability to challenge Union legislation directly under Article 263 TFEU.⁴⁸ In sum, it does not appear that there are sufficiently strong political limits in the Treaties on the exercise of EU powers.

III Main arguments of the thesis

The argument of the thesis is divided in two parts. First, building on the existing substantive and procedural limits to the exercise of EU competences and on the problems associated with those limits, the thesis suggests that we need to reconceptualise the existing limits if they are to act as checks on the exercise of EU legislative powers. Limits are, as demonstrated in Part II and chapters 4-6 of the thesis, constructed by interpreting the legal bases and principles restraining the exercise of EU competences according to conventional canons of interpretation of EU law.⁴⁹ The second 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 EU Courts. For this reason, I devote Part 1 and chapters 2-3 of the

⁴³ See CONV 47/02 (n12), 3-5; European Convention, CONV 353/02, 'Final report of Working Group IV on the role of national parliaments', Brussels, 22 October 2002, 10.

⁴⁴ See Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality (n 26).

⁴⁵ 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 1) 33-43, 54;

⁴⁶ See Weatherill, 'The limits of legislative harmonisation' (n 36) 855-860.

⁴⁷ See Article 263(2) TFEU.

⁴⁸ See Fabbrini and Granat (n 45) 120-123; Schütze (n 11) 134-156; Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 31) 119.

⁴⁹ See Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 03415, paras 18-20.

thesis to tackle the practical institutional problems of how the exercise of EU powers can be challenged before the Court. This argument is outlined in the next section.

A Problems of competence creep should be addressed by more intense judicial review

The thesis suggests that the main responsibility of providing checks against the exercise of EU powers lies with the EU judiciary. If the Court is unable to fulfil this function, the rules restraining excessive EU harmonization, although nicely phrased, are emptied of practical meaning.⁵⁰ I construct a comprehensive argument for how judicial enforcement of the limits of the Treaties could be improved. This argument is divided in four parts. In the first stage, I argue that the Court's current standards and intensity of review is insufficient for attaining the goal of serious competence control. In the second, I question whether the institutional reasons advanced for a lenient form of review are tenable. Admittedly, the Court suffers from institutional imperfections in the shape of a lack of legitimacy and competence.⁵¹ I however challenge the view, which is the dominant one in the literature⁵² that those imperfections require the Court to defer to the EU legislator.⁵³ In the third stage, I develop a tool, procedural review, which is capable of enhancing competence control.⁵⁴ I try to build a comprehensive framework for the appropriateness of procedural review. I argue that a procedural enquiry and the proposed legality standard can be applied generally to the Court's review of the exercise of EU legislative powers. My solutions on overcoming institutional problems for judicial review are based on the argument that the Court must have at its disposal an objective standard of legality under which it can review EU legislation. The proposed legality benchmark, derived from the Court's ruling in *Spain v Council*⁵⁵, is that the Court must ask the EU legislator to provide for 'adequate reasoning' and show that it has taken into account 'relevant circumstances'.⁵⁶ This test is then applied to discrete examples of

⁵⁰ See Von Bogdandy and Bast (n 2) 300-301.

⁵¹ See Miguel Maduro, *We, the Court- The European Court of Justice and the European Economic Constitution* (Hart 1998); A G Toth 'Is Subsidiarity justiciable?' (1994) 19 *European Law Review* 269; Gráinne De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105; Craig, *EU Administrative Law* (n 19).

⁵² See Craig, *EU Administrative Law* (n 19) 592-593, 600-601; Weatherill, 'The limits of legislative harmonisation' (n 36) 843, 848, 850; Janneke H Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', (2011) 17 *European Law Journal* 80, 86

⁵³ See below chapter 3- section II.

⁵⁴ See below chapter 3- section III.

⁵⁵ See Case C- 310/04 *Spain v Council* [2006] ECR I-07285, paras 122-123.

⁵⁶ See below chapter 3- section IV.

EU criminal law legislation to show how the Court can monitor the exercise of Union competences.⁵⁷

B Rethinking the limits to the exercise of EU competences

I will also briefly map out the tentative proposals for how the limits of the Treaties can be reconceptualised by reference to legislative initiatives that provide for the imposition of criminal sanctions. First, I elaborate two important substantive limits to EU competences. 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. I provide a comprehensive interpretation of the new competence in Article 83(2) TFEU and of the EU’s general criminal law competence. It is argued 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 This argument is illustrated by the case studies of the Environmental Crimes Directive⁵⁹ and the Market Abuse Crimes Directive.⁶⁰ The other important substantive limit to the exercise of EU powers is the need for the EU legislator to show that internal market legislation addresses a ‘market failure’.⁶¹ I maintain that subsidiarity and the conditions in Article 114 TFEU require that EU harmonization can only take place if the EU legislator is able to demonstrate the existence of a market failure and that those failures are of such a nature that they require EU action.⁶² This claim is exemplified by through an examination of the Intellectual Crimes Property Proposal⁶³ and the Market Abuse Crimes Directive.⁶⁴

Secondly, I elaborate two procedural limits to EU competences. The first one is the ‘harmonization’ requirement in Article 83(2) TFEU. I suggest that this entails that the

⁵⁷ See below chapter 4- section I (A); chapter 4- section II (A); chapter 5- section I (C); chapter 6- section III.

⁵⁸ See below chapter 4- section I (A); chapter 5- section I (A-B).

⁵⁹ See below chapter 4- section I (A).

⁶⁰ See below chapter 5- section I (C).

⁶¹ ‘Market failure/market dysfunctions’ can generally be defined as ‘deviations from perfect markets due to some element of the functioning of the market structure’; See World Trade Organization (WTO) Secretariat, ‘World Trade Report 2004- Exploring the linkage between the domestic policy environment and international trade’ Chapter 3, 150-151. <http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr04_2c_e.pdf>. Accessed 24 April 2014. Market failures include for example protectionist trade barriers, distortions to competition, regulatory costs and inefficiencies arising from multiple regimes and the externalities arising from negative effects occurring in one state as a result of an activity that is regulated or not regulated in another Member State, see Niamh Moloney, *EC Securities Regulation* (2nd edn, OUP 2008) 27.

⁶² See below chapter 4- section II (A); chapter 6- section I (B).

⁶³ See below chapter 4- section II (A) .

⁶⁴ See below chapter 6- section III.

criminal law competence in Article 83(2) TFEU can only be triggered if the EU legislator prior to the criminal law measure had adopted substantive harmonization 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 two fields of EU policy; EU Competition Law and EU Market Abuse rules.⁶⁵ The other procedural limit to the exercise of EU competences is the requirement to act on the correct legal basis. I illustrate this limit by looking at the debate on the correct legal basis for criminal law measures after Lisbon. I argue that the nature of Article 83(2) TFEU suggests that this 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 areas such as competition law, which are excluded from harmonization under this provision and in relation to criminal law measures, which by providing for decriminalization in the form of regulations fall outside the textual confines of Article 83(2) TFEU, other Treaty articles such as Article 114 and Article 352 TFEU could be used.⁶⁶

IV Case study

Individual criminal sanctions for the enforcement of EU law

Because the research question is very wide, the scope of the enquiry has been restricted to the EU's competence to enforce its policies through criminal sanctions, i.e. 'regulatory criminal law'. The topic of the thesis falls within the confines of EU Criminal Law,⁶⁷ which is a broad field covering a multi-layered patchwork of legislation and case law in which both European and national courts and European and national legislatures play a role.⁶⁸ EU Criminal Law as a concept covers all instances where EU has normative influence on either substantive criminal law/criminal procedure or on the judicial cooperation between the Member States.⁶⁹

⁶⁵ See below chapter 5- section II.

⁶⁶ See below chapter 5- section III.

⁶⁷ While there may be some terminological difficulties with the concept of 'EU criminal law' (see Christopher Harding, 'review of V Mitsilegas, *EU Criminal Law*', (2010) 35 *European Law Review* 301), it should be underlined that this concept differs from 'European criminal law'. 'European criminal law' not only concerns the impact of EU law on national criminal laws but also the legal activities of the Council of Europe and other European organizations, flanking the European Union; see Geert Corstens and Jean Pradel, *European Criminal Law* (Kluwer Law International 2002) 2-3; Christopher Harding and Joanna Banach-Gutierrez, 'The Emergent EU Criminal Policy: Identifying the Species' (2012) 37 *European Law Review* 758, 759.

⁶⁸ See André Klip, *European Criminal Law* (Intersentia 2012) 1.

⁶⁹ See Klip (n 68) 2; Helmut Satzger, *European and International Criminal Law* (Beck/Hart 2012) 43-44.

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.⁷⁰

To understand the notion of EU regulatory criminal law it is easiest to have a brief look at Article 83 TFEU. This is the main provision that governs the EU's substantive criminal law competence to harmonize 'substantive criminal laws' in relation to offences and sanctions.⁷¹ This provision has formalized the general national division between 'core' and 'regulatory criminal law'. Article 83(1) TFEU deals first with 'core' criminal law. These are rules which are held to be ends in themselves and not objectives to achieve further political objectives. This provision lists 10 offences⁷² 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 criminalization because of the general harm and damage incurred by such offences.⁷³ Then there is regulatory criminal law in Article 83(2) TFEU. Regulatory criminal law 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.⁷⁴ EU regulatory criminal law is defined pursuant to Article 83(2) 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'.⁷⁵

The field of EU regulatory criminal law has been chosen for two reasons. First, a study of this policy area, constituting a general field of EU policy⁷⁶ illustrates the limits to the exercise of EU competences. The harmonization of EU regulatory criminal law, like other important EU

⁷⁰ See Harding and Gutierrez (n 67) 761; Herlin Karnell, *Constitutional Dimension of European Criminal Law* (n 31) 3.

⁷¹ See Petter Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part I* (Jure 2013)19-20.

⁷² ...'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'.

⁷³ See Asp (n 71) 85; Fletcher, Gilmore and Lööf (n 4) 183.

⁷⁴ See Commission, '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/2, paragraph 7; 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.

⁷⁵ See 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.

⁷⁶ See Articles 3(2) and Article 67 TFEU.

policies, has been proposed by scholars and the EU legislator under the functional power of Article 114 TFEU.⁷⁷ 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. The EU has already adopted four regulatory criminal law measures, the Environmental Crimes Directive, the Ship-Source Pollution Crimes Directive⁷⁸ and the Employer Sanctions Directive,⁷⁹ the Market Abuse Crimes Directive,⁸⁰ and submitted another proposal, the Intellectual Property Crimes Proposal,⁸¹ which was subsequently rejected.⁸² It is clear from the legislative practice and the Commission's Communication in 2011⁸³ that EU regulatory criminal law will remain a priority area for the EU legislator.

It will become apparent from the discussion in the thesis that there is another limitation to the scope of my research. This is the fact that I only deal with individual⁸⁴ criminal sanctions in a 'strict' sense. This is not obvious from the concept of EU regulatory criminal law since this concept sometimes encompasses administrative sanctions/criminal sanctions in a broad sense. For example, the fines under competition law in Regulation 1/2003 would most likely fall within the definition of a 'criminal charge' according to Article 6 of the European Convention of Human Rights.⁸⁵ This means that specific criminal law safeguards must be applied when such competition law fines are imposed.⁸⁶ However, when it comes to the

⁷⁷ 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. For scholarly support for the use of Article 114 TFEU for criminalization 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 2003), 456-57.

⁷⁸ 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.

⁷⁹ 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.

⁸⁰ 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.

⁸¹ See above n 77 for full reference to this proposal.

⁸² See Withdrawal of Obsolete Commission Proposals, 2010/C 252/04, OJ 252/7, 9.

⁸³ See COM 2011/573 (n 74) 2, 5-6.

⁸⁴ Whilst several directives in the field of EU Criminal Law contain provision for criminal penalties for firms, it is more appropriate to focus on individual penalties. This is because discussions on the effectiveness of imprisonment and the fundamental rights implications of criminal sanctions only make sense within the framework of individual sanctions.

⁸⁵ Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14', 4 November 1950, ETS 5.

⁸⁶ See Asp (n 71).

question of this thesis, such administrative fines are not considered to be criminal in nature.⁸⁷ My definition of criminal sanctions in EU law is that they must communicate moral stigma, have a punitive purpose, be imposed after criminal procedures and finally entail intrusive and severe consequences for individuals, for example liberty deprivation and a criminal record.⁸⁸ This basically implies that I will only look imprisonment and other sanctions⁸⁹ that can be replaced by imprisonment sanctions if they are not complied with.⁹⁰ The main focus in the discussion of specific EU legislative measures⁹¹ will be on imprisonment sanctions. This focus can be explained on two grounds. First, imprisonment sanctions reflect particular social disapproval and are in that respect of a qualitatively different nature as compared with other punishments such as administrative sanctions.⁹² It makes sense to focus on such sanctions from the point of view of deterrence and dissuasion. It is arguably the imposition of imprisonment sanctions, in contrast to fines and other non-criminal sanctions that makes a difference in the effectiveness of the enforcement system.⁹³ Imprisonment sanctions are arguably the most important and intrusive sanction that can be imposed for regulatory offences because of their harsh consequences and the moral condemnation they entail.⁹⁴ If the criminal sanctions imposed by Member States are to comply with the requirement of being ‘proportionate, dissuasive and effective’⁹⁵, it is often necessary for Member States to impose ‘imprisonment sentences’ for the enforcement of the relevant EU policies.⁹⁶ Secondly, the EU legislator’s general argument for criminalization of the enforcement of EU policies can only be understood in terms of the envisaged sanction for breaches of EU law. Harmonization of EU criminal law has often been limited to rationalising the use of

⁸⁷ 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 (n71) 60-64.

⁸⁸ See Asp (n 71) 64-68.

⁸⁹ Criminal fines, conditional sentences, community service orders and probation orders.

⁹⁰ See Satzger (n 69) 51.

⁹¹ See below chapter 4- section I (A); chapter 5- section I (C).

⁹² See Case C-440/05 *Commission v Council* (n 6), Opinion of AG Mazak, para 67.

⁹³ See Wouter PJ Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117, 138-148.

⁹⁴ Dan M Kahan, ‘What do alternative sanctions mean?’ (1996) 63 *University of Chicago Law Review* 593, 621- 24, 645, 649 , 652 ; 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, 266-267; John C Coffee JR, ‘Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions’ (1980) 17 *American Criminal Law Review* 419, 436-439, 449, 462, 468-469.

⁹⁵ This is the standard formula used in recent EU criminal law directives. The formula can be derived from the Court of Justice’s case-law: Case 68/88 *Commission v Greece* [1989] ECR 2965, para. 24.

⁹⁶ See Peter Whelan, ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’ (2007) 4 *Competition Law Review* 7, for the case for imprisonment sentences for EU competition law infringements. See also Faure (n 94), 266, for an argument why imprisonment sentences, instead of fines, may be needed for the enforcement of EU environmental laws.

imprisonment at the EU level by ensuring that severe criminality faces tough sanctions in the whole of Europe.⁹⁷ It is clear that those arguments are based on the presupposition that imprisonment sanctions are needed for the effective and uniform application of EU law.⁹⁸

V Structure of thesis

A Scope of research

The case study of EU regulatory criminal law has shaped the scope of the research. The thesis rethinks 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 103 TFEU and Article 192 TFEU, by re-examining the notorious functional provision of Article 114 TFEU and Article 352 TFEU and finally through a reconsideration of the subsidiarity principle. The reason for choosing Article 114 and 192 TFEU is related to the fact that those legal bases are two of the four legal bases⁹⁹ which were used for EU regulatory criminal law measures before Lisbon Treaty.¹⁰⁰ A further reason for choosing Article 114 TFEU is that an analysis of this provision makes it possible to revisit some of the perennial constitutional questions of the limits to EU harmonization.¹⁰¹ Article 83(2) TFEU is chosen because it is the new legal basis specifically envisaged for criminal law under the Lisbon Treaty and because this is the legal basis for the new Market Abuse Crimes Directive. Articles 103 and 352 TFEU were chosen because there have been proposals in the literature that these legal bases could be used for criminalization.¹⁰² Subsidiarity was chosen because this principle is, after the changes made in the Lisbon Treaty, potentially an important check against excessive EU harmonization.¹⁰³

⁹⁷ See 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)100; Commission, '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 ('Market Abuse Crimes Proposal') 5; 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, 6; COM 2006/168 (n 77) 3.

⁹⁸ See e.g. COM 2011/654 (n97), 2-3; COM 2007/ 51 (n97), 2-3; COM 2006/168 (n 77), recital 7.

⁹⁹ See also the Ship-Source Pollution Directive (n 78) which was adopted on the basis of 80 (2) EC (100(2) TFEU) and the Employers Sanctions Directive (n 79) which was adopted on the basis of Article 63(3) (B) EC (79 TFEU).

¹⁰⁰ See Dougan 'From the Velvet Glove to the Iron Fist' (n 5) 91-113.

¹⁰¹ See Schütze (n 11) 144-156; Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 31) 87-108.

¹⁰² Wils (n 93); Whelan (n 96).

¹⁰³ See Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law after Lisbon* (OUP 2012)

It is therefore appropriate to examine whether this principle is apt to restrain the exercise of the EU's criminal law competence.

Four different areas of Union regulatory criminal law are considered. One is EU competition law since it has been suggested that EU anti-trust enforcement needs criminal sanctions.¹⁰⁴ Although no action has been proposed at Union level for the imposition of criminal sanctions for breach of EU Competition rules such a proposal could be possible, given the Commission's interpretation of the *Environmental Crimes* judgment, the new legal basis in 83(2) TFEU and given the fact that competition policy is a priority Union policy.¹⁰⁵ Another field of law that will be examined is EU financial regulation. As a case study, it is analysed whether the Commission is correct in adopting the new Market Abuse Crimes Directive under Article 83(2) TFEU.¹⁰⁶ The thesis also discusses criminal sanctions in the field of environmental law. The choice of this area is related to the judgments of the Court, which were concerned with environmental law, and the fact that the Union legislator has already enacted legislation, on the basis of Article 192 TFEU imposing criminal sanctions for infringement of EU environmental rules.¹⁰⁷ Finally, I consider criminal sanctions in the field of intellectual property infringements. I choose this case study because the EU legislator had already proposed criminal law legislation in this field of law.¹⁰⁸

B Chapter synopsis

The thesis is divided in two parts and 7 chapters. Part I is a general part examining the problems of judicial review in setting limits to the exercise of EU powers. This part also builds a framework of legality to be used when reviewing discrete pieces of EU legislation. Part II then applies this framework and illustrates the limits of EU competences by analysing specific pieces of legislation and by examining the scope of the EU's competence to impose criminalization measures under different legal bases of the Treaties.

The first part of thesis (chapters 2-3) deals with the general debate on the nature of the competence problems, grounds of judicial review and the debate on judicial review. In order to construct limits to the exercise of EU competences, chapter 2 considers whether there are

¹⁰⁴ See above n 93, n 96, n 103, for references to authors advocating criminalization of EU competition law.

¹⁰⁵ See Anthony Dawes and Orla Lynskey, 'The Ever-longer Arm of EC Law: The Extension of Community Competence Into the Field of Criminal Law' (2008) 45 Common Market Law Review 131, 151.

¹⁰⁶ See Market Abuse Crimes Directive (n80).

¹⁰⁷ See 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.

¹⁰⁸ See COM 2006/168 (n 77).

any grounds on which the exercise of EU competences could be challenged. The chapter considers three grounds for judicial review; lack of competences, subsidiarity and proportionality. It discusses the theoretical problems of the existing limits to EU competences and evaluates whether those limits are sufficient safeguards of federalism. The chapter particularly examines whether the limits imposed by the Court's case law are apt to act as checks on the exercise of EU powers. This entails a conceptual discussion of whether certain limits are predestined to be unsuccessful in litigation. Previous scholarly contributions criticising the conceptual basis for limiting the exercise of EU competences are also discussed for and appraised. The chapter finally evaluates, on the basis of the literature review and the Court's case-law, which grounds for judicial review are capable of challenging the exercise of EU competences before the Court.

Having established the grounds for judicial review on which EU legislation can be challenged, the thesis proceeds in chapter 3 to examine how judicial enforcement of those grounds can be improved. The chapter also tries to develop a framework for reviewing EU legislation. It analyses not only conceptual problems with existing grounds of judicial review but also institutional factors that have militated against serious judicial review. In particular, it is examined whether the institutional reasons advanced for justifying the Court's current approach to review of broad EU policy measures are defensible. The chapter also discusses how to improve the Court's weak existing role in competence monitoring. A conceptual tool, 'procedural review' is elaborated to enhance judicial enforcement of the limits of the Treaties. The final part of the chapter suggests, on the basis of the procedural review framework, a standard of review and test for legality for review of EU legislation.

Having tackled some of the institutional challenges for enhancing judicial enforcement of competences, Part II of the thesis applies the legality framework developed in chapters 2 and 3 by discussing specific limits to the exercise of Union competences. Chapter 4 considers the limits to the EU's dormant criminal law competence. The first part examines whether the sectorial bases of the Treaties, Article 103 TFEU and Article 192 TFEU, confer, on the basis of the Court's case-law in the *Environmental Crimes* judgment, a power on the Union to impose criminal laws. It is firstly discussed 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. There is then an examination of whether the Environmental Crime Directive conforms to the 'essentiality' condition. Secondly, the scope of the EU's sectorial competences under Article 103 TFEU is considered. It is discussed whether the 'effectiveness' rationale can be

employed to justify criminalization of EU competition law. The second section of the chapter analyses the scope of the functional provisions of the Treaties, Article 114 and Article 352 TFEU, to criminalize breaches of existing EU rules. In terms of Article 114, both conceptual and practical problems of competence review are tackled. First, it is discussed whether there is any substantive constraint for the exercise of powers under this provision. Secondly, it is analysed whether there is any way to improve judicial review of the exercise of EU competences under this provision. The limits of Article 114 TFEU are illustrated by means of a case study of the Intellectual Property Crimes Proposal. The chapter finally examines whether there is any limit on enacting EU criminal law legislation under Article 352 TFEU.

Chapter 5 is exclusively focussed on the new legal basis for criminal sanctions in Article 83(2) TFEU. The chapter considers firstly the substantive conditions of Article 83(2) TFEU, i.e. the meaning of the ‘essentiality’ condition, the scope of judicial review under the provision and the meaning of ‘effective implementation’ of EU law. Secondly, the procedural conditions of Article 83(2) TFEU are examined. In particular, it is discussed whether the ‘harmonization’ requirement in this provision can act as a check on EU criminalization. Finally, it is examined whether the nature of Article 83(2) TFEU can act as a restraint for EU criminalization under other legal bases of the Treaties conferring criminal law competence to the EU.

Chapter 6 considers the principle of subsidiarity as a principle limiting the exercise of EU competences. The first part of the chapter examines how a re-construction of the subsidiarity principle can help to challenge the basis for excessive EU harmonization. Secondly, it is discussed how judicial review of subsidiarity could be improved. Recognising that judicial enforcement of subsidiarity has so far been unsatisfying, it is examined whether procedural review offers a solution to the problem of judicial review of subsidiarity. There is a specific case study of whether the Market Abuse Crimes Directive conforms to the subsidiarity criterion. Chapter 7 contains the conclusions of the thesis and an assessment of the lessons we can draw from the thesis for the EU law on competences.

PART I- A FRAMEWORK FOR LEGALITY REVIEW

CHAPTER 2- GROUNDS FOR JUDICIAL REVIEW

Introduction

As indicated in the introductory chapter,¹ it has been generally very difficult to identify conceptual means of delimiting the scope of EU powers. The principle of conferral and the principles of subsidiarity and proportionality in Article 5 TEU have proved inadequate as safeguards against the expansion of EU powers. This expansion has taken place by a broad and teleological interpretation by the EU political institutions of existing Treaty provisions such as Article 114 and Article 352 TFEU, tacitly supported by the Court.² Although the general critique against the conceptual basis for challenging the exercise of EU competences is partly valid, I argue in this chapter that there is still hope for credible competence review. We can overcome the conceptual criticism if existing limits to EU law are reconceptualised in a way that provides for more exact standards.

In terms of structure and arguments, the chapter first introduces the different heads of review relevant for the enquiry. First, there is an analysis of ‘lack of competence’ which provides an account and evaluation of the Court’s current approach to review in competence litigation. Then there is a discussion of whether this limit is a sufficient check on the exercise of EU competences. I argue that ‘lack of competences’ is a meaningful ground of review. Despite a questionable judicial record, there are limits in the Court’s case-law and recent evolutions of EU law suggest that the criticism against this head of review can be countered. The second part of the chapter considers proportionality. Having evaluated the case-law and the literature, there is a discussion of whether this principle is destined to be unsuccessful in judicial litigation. Secondly, it is argued that proportionality is not a credible principle to limit the

¹ See above chapter 1-section I for a description of the practical and conceptual problems of restraining the expansion of EU competences.

² See Stephen Weatherill, ‘Better Competence Monitoring’ (2005) 30 *European Law Review* 23, 24-25; Paul Craig, ‘Competence: Clarity, Conferral, Containment and Consideration’ (2004) 29 *European Law Review* 323, 324; 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* (OUP 2012) 103.

exercise of EU competences. This is demonstrated by the weak judicial record on the matter and by the fact that there is no conceptual basis for serious proportionality review in competence cases. The final part of the chapter accounts for subsidiarity. It considers whether the Court's case-law on subsidiarity has provided any limit to the exercise of EU competences. Based on this analysis and a discussion of the scholarly contributions on subsidiarity, the chapter evaluates whether subsidiarity is capable of challenging the exercise of EU competences before the Court. It is argued that subsidiarity, whilst witnessing little attention in the case law and being condemned as being essentially political in nature, is a head of review capable of challenging the exercise of EU competences. By rethinking subsidiarity as a principle challenging the broad internal market justification for EU harmonization, it is argued that the principle is capable of challenging the exercise of EU competences.

I HEADS OF REVIEW IN COMPETENCE LITIGATION- THEORY AND JUDICIAL AND LEGISLATIVE PRACTICE

Pursuant to Article 263 TFEU there are four grounds for annulment of Union acts: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application and misuse of powers.³ This section, however, only accounts for three heads of review, 'lack of competence', 'subsidiarity' and 'proportionality'. The reason for limiting the enquiry to these three grounds is that these heads of review are the most important for understanding the division of powers between the Union and its Member States. Consequently, I will not discuss other grounds of review falling under Article 263 TFEU and the general heads of review⁴ used when addressing an 'infringement of the Treaties or of any rule of law relating to their application' such as: i) fundamental rights, ii) legitimate expectations, iii) transparency, iv) the precautionary principle, v) essential procedural requirements, vi) misuse of power, vii) legal certainty, viii)

³ Article 263 TFEU (1) - (2) provides that: 'The Court of Justice of the European Union shall review the legality of legislative acts...intended to produce legal effects *vis-à-vis* third parties...It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission 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...'

⁴ See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn, CUP 2010) 401-402 and Paul Craig and Gráinne De Búrca, *EU Law- Text, Cases, and Materials* (5th edn, OUP 2011) 519-556, for an account of these grounds of review.

non-discrimination, ix) the obligation to respect the national identities of the Member States.⁵ Why are the enumerated heads of review less important in a thesis on EU competences? Generally, because the enumerated grounds of review are not principles employed or intended to delineate the powers between the Member States and the EU.⁶ While the Court's approach to proportionality, subsidiarity and lack of competences have a large influence for shaping the actual division of competences between the EU and its Member States, this is not the case for the Court's approach to general principles, essential procedural requirements, fundamental rights or misuse of powers.⁷

I furthermore argue that the most important head of legal review is 'lack of competence'. The reason for this is that the Court's approach to this head of review has constitutional implications for the Union legal order. First, disputes on the correct legal basis have to a great extent shaped the order of competences. Secondly, the choice of legal basis defines the applicable standards for testing the legality of a Union act.⁸ For these reasons, it is important to examine 'lack of competence' in detail.

II Lack of competence

A Theory and judicial review

It is well-known that one of the characteristic features of the European Union is that it exercises public authority i.e. it has a legal capacity to unilaterally determine and shape natural persons', legal persons' and Member States' legal or factual situation. This authority is enshrined and defined in the Treaties. We know however from the above that while the EU has broad powers, its powers are, pursuant to Article 5(2) TEU, limited by the competences conferred upon it by the Treaties and the objectives of the Treaties. Article 5(2) TEU implies

⁵ See Thomas Horsley, 'Reflections on the Role of the Court of Justice as the Motor of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 *Common Market Law Review* 931, 949; European Convention, CONV 375/1/02, 'Final Report of Working Group V on Complementary Competencies', Brussels, 4 November 2002, 11-12.

⁶ However, for a divergent opinion see: Koen Lenaerts and José A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629.

⁷ See Alan Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 *Common Market Law Review* 355, 356.

⁸ See Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713, para 5; Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759, paras 23-36; Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009) 132-156; Armin Von Bogdandy and Jürgen Von Bast, 'The Federal Order of Competences' in Armin Von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law* (Hart 2009) 279, 301.

that the Union lacks power to create new substantive competences or new Treaty objectives.⁹ Therefore it is always necessary to tie a Union measure to a legal basis in order ensure that the objective pursued can validly be pursued under that provision. If the Union act at issue does not fall within the scope of a legal basis or pursues an objective that is not recognized as a Union objective, the legal act can be declared invalid by the Court.¹⁰ The requirement of a legal basis demands that the choice of the legal basis may only be founded on objective elements subject to judicial review. The limits of the powers conferred by a specific provision of the Treaty must thus be inferred from an interpretation of the wording of the provision in question analysed in the light of its purpose and placed in the scheme of the Treaty.¹¹

But is the principle of conferral in Article 5(2) TEU a limitation prone to work before the Court? Dashwood answers this question in the affirmative and suggests that the principle of conferral is one of the core principles in delimiting the exercise of Union competences. He explains that competences of the Union are conferred by particular provisions, legal bases which only authorize action by one or several designated institutions in a determined policy area or in pursuance of a determined objective, and no other. The technique of specific attribution remains the most successful method of setting identifiable limits to the competences of the EU.¹² Recent Treaty revisions have also strengthened the principle.¹³ Although in the original Treaties legislative competence was generally conferred upon the Union on the basis of objectives to be attained and the means of attaining them, i.e. the functional method,¹⁴ successive revisions of the Treaties have replaced this method by a substantive allocation of competence consisting of defining the precise actions to be taken by the Union.¹⁵

⁹ See Case C-155/07 *Parliament v Council (European Investment Bank)* [2008] ECR I-8103, para 34; Alan Dashwood, 'The limits of European Community Powers' (1996) 21 *European Law Review* 113, 115.

¹⁰ See Articles 263 and 264 TFEU.

¹¹ See Joined Cases 188-190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545, para. 6.

¹² See Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (n 7) 357-358, 361.

¹³ See above chapter 1, n 23, for an enumeration of references in the Treaties and the accompanying protocols and declarations to the principle of conferral.

¹⁴ See Serena Rossi (n 2) 86.

¹⁵ See Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (n 7) 380; 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, 6.

Despite these theoretical predictions of the potential of the principle of conferral, the judicial record suggests¹⁶ that the principle of conferral has not acted as a check to the exercise of EU competences before the Court.

There are only two cases in the history of competence litigation, *Opinion 2/94*¹⁷ and *Tobacco Advertising*,¹⁸ where the Court annulled a whole piece of legislation or envisaged agreement for the ‘lack of competence’.¹⁹ Because these cases are potentially important for identifying the genuine limits to the exercise of Union powers, a brief recapitulation of them seems appropriate.

The first case where an envisaged Union measure was considered to fall outside the Union’s competence was the famous *Opinion 2/94*. Here the Court considered that accession by the Union to the European Convention on Human Rights fell outside the scope of Article 352 TFEU since that provision 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 and the activities of the Union. More specifically, it could not be used as a basis for the adoption of provisions whose effect would amount to a Treaty amendment without following the procedures for Treaty revision. 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 integration of all 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 would therefore be such as to go beyond

¹⁶ See above chapter 1- section II for a brief account of the Court’s problem of restraining the exercise of EU competences.

¹⁷ See *Opinion 2/94, Accession of the Community to the European Human Rights Convention* (n 8).

¹⁸ See Case C-376/98 *Germany v European Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

¹⁹ See for partial annulment of the Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ 1993 L 307/18 (‘Working Time Directive’): Case C-84/94 *United Kingdom v Council* [1996] I-05755. The Court annulled the second sentence of Article 5 of the Working Time Directive (Case C-84/94 *United Kingdom v Council*, para 37). See also 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. The contested regulation in *Kadi* (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 2002 L 139/9) was only annulled in so far as it concerned *Kadi* and *Al Barakaat* (Joined Cases C-402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, paras 372-376).

the scope of Article 352 TFEU. It could be brought about only by way of Treaty amendment.²⁰

The second case, where Union was found to have acted outside its competence was the *Tobacco Advertising* judgment which concerned an action for annulment of a Tobacco Advertising Directive.²¹ In this case the German Government challenged the validity of the Directive *inter alia* on the ground that it was adopted on the incorrect legal basis. The Court held 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 would also be incompatible with the principle of conferral. A mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom was not sufficient to justify the choice of Article 114 as a legal base. If such evidence was sufficient to justify compliance with Article 114 TFEU 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.²² On the basis of these propositions, the Court proceeded to annul the Tobacco Advertising Directive. According to the Court, the prohibitions on tobacco advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas, did not in any way help to facilitate trade in the products concerned. Nor were those prohibitions were liable to remove ‘appreciable distortions’ to competition.²³

It has been argued that the Court’s approach in *Tobacco Advertising* and *Opinion 2/94* is compelling evidence of the Court’s ability to police the limits of the Treaties. Von Bogdandy and Bast submit that the Court has become increasingly self-confident with regard to the Council. They claim that the Court, by its decision in *Tobacco Advertising*, confirmed that it is able to assert itself as the highest constitutional court willing to act as an honest broker between the EU and its Member States. According to von Bogdandy and Bast the Court has in this ruling delimited the problematic breadth of Article 114 TFEU as a blanket clause for

²⁰ See Opinion 2/94, *Accession of the Community to the European Human Rights Convention* (n 8), paras 30, 35-36.

²¹ 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.

²² See Case C-376/98 *Tobacco Advertising* (n 18), paras 83-84.

²³ *ibid*, paras 99-105, 109-116.

the regulation of the economy.²⁴ In a similar vein, Dashwood has concluded that *Opinion 2/94* imposed a serious limitation to the use of Article 352 TFEU. The principle of conferral was not treated in this case by the Court as a rhetorical flourish or a political statement but as expressing one of the general organising principles of the post-Maastricht constitution. The Court demonstrated that it takes the principle of conferral seriously by not allowing the political institutions to fall back on Article 352 TFEU as a legal basis of last resort where an action could be seen as furthering one or other of the Union's objectives. *Opinion 2/94* also shows that the principle of conferral places the onus of proof on the party asserting that a power exists or can be used in a certain way.²⁵

Although the observations of Von Bogdandy/Bast and Dashwood seem promising, I argue that they do not capture the reality of the legal landscape post-*Tobacco* and post-*Opinion 2/94*. First, it 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 in *Tobacco Advertising* and *Opinion 2/94*. Rather than being an honest broker, the Court appears to have diminished its role as a constitutional adjudicator by showing substantial deference to the Union legislator.²⁶

In *BAT*²⁷, concerned with the validity of a new tobacco advertising directive²⁸, the EU legislator had enacted a ban on the manufacture of cigarettes within the EU for export to non-Member countries. The export ban could hardly be said to fall within the confines of Article 114 TFEU. This ban was not 'likely' to remove 'obstacles to trade' or 'appreciable distortions to competition', which were the limits imposed by the earlier *Tobacco Advertising* judgment. The Court even recognized that the prohibition did not aim to improve directly the conditions for the functioning of the internal market. Even if a Union measure can be addressed to future trade obstacles which are 'likely' to arise under Article 114 TFEU according to the *Tobacco Advertising* judgment²⁹, the risk for unlawful trade in cigarettes and

²⁴ See Von Bogdandy and Bast (n 8) 286, 301.

²⁵ See 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; 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) 218-219.

²⁶ 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, 850; Derrick Wyatt, 'Community Competence to Regulate the Internal Market', in Michael Dougan and Samantha Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009) 93, 135-136.

²⁷ See Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453.

²⁸ Article 3(2) of 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.

²⁹ See Case C-376/98 *Tobacco Advertising* (n 18), para 86.

fraudulent practices was in this case too remote and uncertain to constitute a relevant justification. The evidence in the case rather pointed to the fact that it was not possible to evaluate with precision the volume of unlawful trade in cigarettes. It was furthermore clear that the circumvention of the provisions relating to the composition of the cigarettes was not the cause of unlawful trade.³⁰ The measure was, however, upheld by the Court as falling within the scope of Article 114 TFEU.

In *Swedish Match*, a case concerned with a challenge to a directive prohibiting the marketing and selling of ‘snuff’ products³¹, the Court accepted that the Union legislator had competence under Article 114 TFEU to adopt the ‘Snuff’ Directive. The Court found that there were national divergences in relation to the regulation of snuff products at the time of 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 Member States represents a relatively large part, those prohibitions of marketing contributed to a heterogeneous development of that market and were therefore such as to constitute obstacles to the free movement of goods.³² Nevertheless, there was no evidence that a prohibition against marketing ‘snuff’ products improved the trade for that product.³³ It rather seemed that the prohibition in the Snuff Directive instead of facilitating trade, which surely should be the main objective of a Directive adopted under Article 114 TFEU, completely banned trade in the product concerned.³⁴ In addition, there was not even a provision in the ‘Snuff’ Directive enabling the free movement of goods, contrasting this case to the contested directive in the *Tobacco Advertising* judgment.³⁵

*Alliance for Natural Health*³⁶ is another case demonstrating the Court’s weak enforcement of the limit that EU measures have a link to the internal market. This case concerned a challenge to the legality of a number of provisions in the Food Stuffs Directive³⁷ which had been

³⁰ See Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 27), paras 81-88; Wyatt, ‘Community Competence to Regulate the Internal Market’ (n 26) 122-127.

³¹ 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.

³² See Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras 35-40.

³³ See Case C-58/08 *Vodafone* [2010] ECR I-04999, Opinion of AG Maduro, para. 13.

³⁴ Which, however, seems to be acceptable according to the Court; see Case C-210/03 *Swedish Match* (n32), para 33.

³⁵ See Case C-376/98 *Tobacco Advertising* (n18), paras 101-105; Wyatt, ‘Community Competence to Regulate the Internal Market’ (n 26) 116-121.

³⁶ See joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-06451.

³⁷ 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.

adopted on the basis of Article 114 TFEU. The claimants in *Alliance for Natural Health* submitted that Article 114 TFEU was an inadequate legal basis for the prohibition on marketing food stuffs not complying with the Directive since this prohibition did not contribute to improving the conditions for the establishment and functioning of the internal market. The recitals of the Directive 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, prior to the adoption of the Directive, a number of cases were brought before the Court which related to situations in which traders had encountered obstacles when marketing in a Member State other than their State of establishment food supplements lawfully marketed in the latter State. Furthermore, the Explanatory Memorandum to the Directive stated that before the proposal was presented, the Commission services had received ‘a substantial number of complaints from economic operators’ on account of the differences between national rules. In those circumstances the Court accepted that reliance on Article 114 TFEU for the Directive was valid.³⁸

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. Those divergences would potentially have an adverse effect on the internal market in the future. The link to the internal market was hypothetical and pre-emptive. While divergent legislations in relation to the regulation of food supplements may give rise to obstacles to trade, this is a too weak a justification for harmonizing national laws. If *Tobacco Advertising* would have been properly enforced, then a simple mention 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.

BAT, Swedish Match and *Alliance for Natural Health* show that the Court has taken a questionable approach³⁹ to the requirement in *Tobacco Advertising* that a link to the internal

³⁸ See joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* (n36), paras 35-39, 41-43

³⁹ *Vodafone* also reinforces the impression that the Court has taken a lax approach to the scope of Article 114 TFEU. In this case, the Court found that the potential risk for Member State adopting divergent measures in the field of price control of the provision of roaming services could create an obstacle to trade and thus justified the choice of Article 114 TFEU. This was also a case where the Court accepted pre-emptive harmonization to combat potential obstacles to trade; see Case C-58/08 *Vodafone and Others* (n33), paras 38-47. This is questionable given the dicta in the *Tobacco Advertising* judgment that such obstacles must at least be ‘likely’ to occur; see Case C-376/98 *Tobacco Advertising* (n18), para 86.

market should be demonstrated. There is also evidence in the case-law that other legal limits to the functional competences have been proved unworkable in practice. Supposedly, the Court should enforce the limit that Union legislative acts can only pursue an internal market objective within the framework of Article 114 TFEU or the limit in Article 352 TFEU that only Union objectives can be pursued. A measure that only marginally pursues internal market goals, and is primarily aimed at some other goal exceeds the competence of the Union under Article 114 TFEU and should be annulled.⁴⁰ Furthermore, if the objective of a Union legislative act would fall outside the definition of ‘Union objectives’ as defined in the Treaties, e.g. an objectives relating to the field Common Foreign and Security Policy (CFSP) or a general objective of achieving peace in the European Union⁴¹, it would supposedly be invalid under Article 352 TFEU. The case-law nevertheless indicates that those limits would not be successful in restraining the exercise of Union competences.⁴²

The *Kadi* case provides a nice illustration of this observation. In this case, it was clear that the objective of the Regulation was a CFSP objective and not a Community objective. The Community did not at this stage have a competence to combat terrorism. The Community, however, had under Articles 60 and 301 EC a competence to authorise the adoption of sanctions against states. The issue in *Kadi* was that the Court not only recognised that the Community had the above mentioned competence but went even further and stated 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 (352 TFEU) could according to the Court bridge the gap between the pillars and provide for this objective.⁴³

Critically, 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’. A proper reading of Article 308 EC did not give room for including CFSP objectives as this provision cannot

⁴⁰ See Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2013) *European Law Journal*, 8. Doi: 10.1111/eulj.12079.

⁴¹ Declaration (no 41) on Article 352 TFEU states that it is ‘excluded that an action based on Article 352 TFEU... would only pursue objectives set out in Article 3(1) of the TEU...’ Article 3(1) TEU states that ‘The Union’s aim is to promote peace, its values and the well-being of its peoples’. Furthermore, pursuant to Article 24 TEU ‘... legislative acts may not be adopted in the area of the Common Foreign and Security Policy’.

⁴² See Schütze, *From Dual to Cooperative Federalism* (n 8) 136-139; Joseph H H Weiler, ‘The Transformation of Europe’ (1991) 100 *The Yale Law Journal* 2403, 2445-46; Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (OUP 2008) 116-120.

⁴³ See Joined Cases C-402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (n 19), paras 226-231, 235.

create new objectives but only provide the means to achieve the objectives of the Community. The Court's ruling also undermined its earlier finding that it was wrong to assume that Article 308 EC could allow, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures that concerned not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the CFSP.⁴⁴ 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. The Court's reasoning seems patently inconsistent. If all provisions of the Treaty intend to pursue the common market, even those that are directly related to the CFSP, everything that the EU does will logically pursue the common market and will fall within the scope of Article 308 EC.⁴⁵

Another potential limit that has proved inadequate in restraining the exercise of Union powers is the explicit prohibitions in the Treaties for the Union to harmonize certain policy fields such as public health.⁴⁶ *Tobacco Advertising II*⁴⁷, which was concerned with a new tobacco advertising directive⁴⁸, illustrates the argument. The important fact of the case is that the contested directive was primarily designed to deal with a public health problem, the increased use of cigarettes.⁴⁹ It is also clear from the Court's case-law that Article 114 TFEU cannot be used as a legal basis in order to circumvent the express prohibition in Article 169(5) TFEU for the EU to harmonize Member States laws and regulations in the field of public health.⁵⁰ These points were raised by Germany who contested the new tobacco advertising directive on this basis.⁵¹ The Court nevertheless held that the contested directive could be adopted on the basis of Article 114 TFEU. According to the Court, notwithstanding the existence of Article 169(5) TFEU, that provision did not imply that harmonizing measures adopted on the basis of other provisions of the Treaty could not have any impact on

⁴⁴ *ibid*, paras 198-203.

⁴⁵ See Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012) 72-76; 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 24 April 2014.

⁴⁶ See Article 169(5) TFEU. Similar prohibitions against EU harmonization apply for vocational training (Article 166 (4) TFEU) and culture (Article 167(5) TFEU). For an analysis of these constitutional prohibitions; see Robert Schütze, 'The European Community's Federal Order of Competences: A Retrospective Analysis', in Michael Dougan and Samantha Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 87-90.

⁴⁷ See Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

⁴⁸ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ 2003 L 152/ 16 ('the Third Tobacco Advertising Directive').

⁴⁹ See the Third Tobacco Advertising Directive, recitals 3, 6, 7 and 8.

⁵⁰ See Case C-376/98 *Tobacco Advertising* (n18), paras 76-79.

⁵¹ See Case C-380/03 *Germany v Parliament and Council* (n 47), para 90.

the protection of human health. Since the conditions for recourse to Article 114 TFEU were met in this instance, the contested directive could not be challenged on the basis that it pursued public health objectives.⁵²

Basically the reason provided by the Court in *Tobacco Advertising II* is that insofar as the internal market is served to any extent through the measure, the exclusion of competence in Article 169(5) TFEU does not work as a constitutional limit.⁵³ While internal market measures must primarily serve the purposes of free movement and undistorted competition, this need not be their ‘primary impact’.⁵⁴ This is however a questionable conclusion given the structure, aim and wording of this provision. It is quite obvious that the Member States’ express exclusion of a harmonization competence of public health in Article 169 (5) TFEU was intended to have some legal consequences. The practical effectiveness of that provision would be seriously jeopardized if the Court can so easily circumvent it by holding that this provision does not impede Union measures from having an effect on public health. In addition, it is argued that the contested directive in *Tobacco Advertising II* entailed much more than an ‘effect’ on public health. The direct consequence of the Third Tobacco Advertising Directive was strictly speaking harmonization since all Member States were required to harmonize their public health policies in relation to the marketing, sponsoring and advertising of tobacco products.⁵⁵ Given this and the fact that the interpretation of Article 169(5) TFEU raises complicated value judgments or empirical issues, it is remarkable that the Court did not enforce this provision. However instead of doing this, in *Tobacco Advertising II* the Court advanced arguments for circumventing this exclusion.⁵⁶

⁵² *ibid*, paras 39-40, 95-96.

⁵³ This is the view that was strongly defended by Advocate General Fennelly in the *Tobacco Advertising* judgment; see Case C-376/98 *Tobacco Advertising* (n18), Opinion of AG Fennelly, paras 58, 64-77.

⁵⁴ See Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (n 40) 10.

⁵⁵ See the Third Tobacco Advertising Directive (n 48), Articles 3-5.

⁵⁶ The Court’s existing approach is that the Union objective can have a subsidiary or ancillary role for the measure whose main content may be to pursue a policy falling outside the Union’s competences as long as the legislator can make a link to a Union objective or a Union policy (Case C-210/03 *Swedish Match* (n 32), para 31). I suggest that that the Court could quite easily revise this approach, and enforce constitutional saving clauses. One obvious way of doing this is to ask the simple question, consistent with the case-law on conflicting legal basis, of whether the measure predominantly pursues an internal market objective or a policy excluded from harmonization (Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-00593, paras 79-85). If the aim, the context and the content of the measure predominantly relate to the internal market it can pass under Article 114 TFEU. If not, it should not pass the test under Article 114 TFEU. Although the Court does not yet seem to have accepted such a test for determining the scope of the Union’s competence to intrude on retained powers, there are good reasons to adopt this test. First, such a test would provide an effective control to ensure that the Union legislator does not circumvent constitutional saving clauses by employing Article 114 TFEU for such measures (Case C-376/98 *Tobacco Advertising* (n 18), para 79). An express exclusion of harmonization in the Treaties of a specific policy such as public health is a strong argument against accepting the inclusion of this

Having shown how subsequent case-law, post-*Tobacco Advertising* and *Opinion 2/94* has diluted the limits of Article 114 and Article 352 TFEU, we still have to ask ourselves whether there are some conceptual problems with the limits imposed by the Court in *Tobacco Advertising* and *Opinion 2/94*. Perhaps the fact that the Court has not invalidated any legislation since the *Tobacco Advertising* judgment has more to do with the factual context of subsequent cases and more careful drafting of legislation⁵⁷, than inherent problems with the limits imposed by the Court?

In this regard, I suggest that the opposite conclusion is a more accurate reflection of reality. First, *BAT*, *Swedish Match*, *Alliance for Natural Health*, *Kadi* and *Tobacco Advertising II* were all cases where the Court should have, if it had enforced the limits imposed by *Tobacco Advertising* and *Opinion 2/94*, accepted the challenges as well-founded.⁵⁸ All the claimants in these cases argued coherently on the basis of the Court's own case-law that the measures did not fall within the competences of the Union, either because the measures showed no convincing link to the internal market, because they infringed the constitutional savings clause or because the pursued objectives, as non-Community objectives, could not arguably be pursued under the designated legal basis as demanded by *Opinion 2/94*. Presumably these were limits that would be enforced according to the *Tobacco Advertising* judgment. However, despite this all challenges were unsuccessful.⁵⁹

Secondly, I argue that while the limits in *Tobacco Advertising* and *Opinion 2/94* may have great appeal in theory, the Court's finding that the Union had transgressed the limits of its competences were strongly related to the specific circumstances of these cases. Rather than being hard cases where the Court boldly policed the limits of the powers of the Union to the detriment of the Union legislator, *Opinion 2/94* and *Tobacco Advertising* were clear-cut cases. The *Tobacco Advertising* judgment involved, as mentioned above, a directive which

policy by means of legislation on a general legal basis such as Article 114 TFEU and Article 352 TFEU. Secondly, there is no principled distinction between legal basis cases where the Union measure could be pursued under different Treaty frameworks, for example either a CFSP measure or an ordinary measure adopted under the TFEU, and legal basis cases where the Union legislator either can or cannot exercise a competence to adopt a particular measure under a specific provisions of the TFEU (Case C-301/06 *Ireland v Parliament and Council*, para 56). If there would be a distinction between these cases, it is that there are even stronger reasons for the Court to be suspicious of measures where the Union may not have *any* competence because the proposed measure falls within the Member States' reserved powers.

⁵⁶ See Case C-376/98 *Tobacco Advertising* (n 18), paras 99-101; Weatherill, 'The limits of legislative harmonisation' (n 26) 848.

⁵⁷ This is Weatherill's hypothesis; see 'The limits of legislative harmonisation' (n 26) 848-849.

⁵⁸ See Weatherill for a contrasting point of view; 'The limits of legislative harmonisation' (n 26) 849.

⁵⁹ Wyatt partly supports this point in relation to Article 114 TFEU; see 'Community Competence to Regulate the Internal Market' (n 26) 117-119, 121, 126-127. Tridimas equally affirms this point in relation to Article 352 TFEU; see 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (n 45) 7.

encompassed a prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and a prohibition of advertising spots in cinemas, prohibitions which had no effect on the internal market and cross-border trade. Further, as Member States had a right to lay down stricter requirements they deemed necessary to guarantee the health protection of individuals, the Directive did not ensure free movement of products that were in conformity with its provisions. Therefore, it was clear that the Directive fell outside the scope of Article 114 TFEU.⁶⁰

In terms of *Opinion 2/94*, the matter at hand was the envisaged accession to the ECHR, which was indeed an extraordinary measure. First, this measure had no genuine link to the ‘common market’ as required by Article 352 TFEU. The adoption of a catalogue of human rights provisions was not a measure necessary for the operation of the ‘common market’.⁶¹ More importantly the envisaged accession was and still is today a measure which would have serious institutional and constitutional implications for the Union, especially in terms of uniform application of Union law, the jurisdiction of the Court and the primacy of Union law. Such an important measure could only be agreed through the means of a Treaty revision, providing for specific powers for the Union to accede to the Convention.⁶²

The lessons from this discussion are quite straightforward. First, *Tobacco Advertising* and *Opinion 2/94* were two exceptions to the general approach of the Court of showing deference to the Union legislator when it reviews measures adopted under the broad flexibility provision in Article 114 and 352 TFEU.⁶³ However, they are best explained as instances where the legislator exceeded its limited powers by a very significant margin. Secondly, the Court seems to assume that the Union legislator had acted within the limits of its competence *vis-à-vis* the Member States.⁶⁴ These two observations lead to the tentative conclusion that the limits imposed by the Court have failed to provide for sufficient checks on the exercise of EU

⁶⁰ See Case C-376/98 *Tobacco Advertising* (n 18) paras. 99-101; Weatherill, ‘The limits of legislative harmonisation’ (n 26) 848.

⁶¹ See *Opinion 2/94 Accession of the Community to the European Human Rights Convention* (n 8), para 30; Dashwood, ‘Commentary’ (n 25) 25-27.

⁶² See Dashwood ‘Commentary’ (n 25) 24, 27. The legal problems of accession to the ECHR are nicely outlined by Jean Paul Jacqué; ‘The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 *Common Market Law Review* 995. That accession to the ECHR required a specific mandate and a Treaty revision is apparent from the Lisbon Treaty, where Article 6 (2) TEU provides that: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

⁶³ See Weatherill, ‘The limits of legislative harmonisation’ (n 26) 843; Wyatt, ‘Community Competence to Regulate the Internal Market’ (n 26) 93-94, 135-136.

⁶⁴ This conclusion is opposite to the one suggested by Dashwood, ‘Commentary’ (n 25) 22.

powers. In the light of this, we have to examine whether ‘lack of competences’ is still a meaningful ground of review.

B Is lack of competence a meaningful ground for judicial review?

In order to evaluate whether ‘lack of competence’ is pre-destined to be ineffective in litigation before the Court we must consider in more depth the reasons behind the Court’s deferential approach. It was already indicated in the introductory chapter that there are practical, contextual and political explanations for why the principle of conferral has not worked as a proper limit for the exercise of EU competences.⁶⁵

First, there are conceptual problems of the existing limits. The principle of conferral, restraining the EU’s competence to its objectives, is a case at point. Constitutional interpretation of EU competence norms is an exercise in ascertaining the objectives of the Union, taking into account the context of political power and the open-ended finality of European integration.⁶⁶ Appeals to objectives cannot work as a limit to EU competences since they do not provide the Court with hard legal criteria to resolve disputes. Furthermore, we should also take into account that the EU Treaties are a framework of principles and an ‘incomplete’ political ‘bargain’.⁶⁷ In addition, since the founding Treaties have defined the policies and objectives of the Union in a broad manner, they have provided grounds for an expansive interpretation by the Union legislator of the scope of the Union’s powers.⁶⁸ Several Treaty provisions are purposive powers, defined by the goal to be achieved in contrast to more precise sector-specific powers allocating a certain defined legislative field to the EU.⁶⁹ Several important legislative powers, such as the functional powers in Article 114 and Article 352 TFEU, have been framed in a fluid and imprecise manner. Since the limits imposed on the Union when exercising its functional competences, a link to ‘market making’ under

⁶⁵ See above chapter 1- section II for a description of this problem.

⁶⁶ See Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (n 40) 4.

⁶⁷ 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) 34. For the general argument of ‘interpretive openness’ in legal theory; see Timothy Endicott, ‘Law is Necessarily Vague’ (2001) 7 *Legal Theory* 379, 379-382. This is in contrast to the ‘one-right-answer thesis’; see Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 239-275.

⁶⁸ See Leon N Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963) 284, 290, 293; Weiler (n 42) 2444, 2459; Schütze, *From Dual to Cooperative Federalism* (n 8) 136-139; Serena Rossi (n 2) 90-93.

⁶⁹ See Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (n 40) 6.

Article 114 and a link to the Union's policies under Article 352 TFEU, lack precision the Court's policy of deference is understandable.⁷⁰

Secondly, the teleological imperative of further market and political integration and design of the EU legal order has placed constraints on the Court to effectively enforce the principle of conferral. If the Court engages in more strict scrutiny of the exercise of Union competences, it will have to involve itself in fundamental political and social questions. The choice the Court makes determines the powers of the Union and its Member States and may have a serious impact on the means of European integration.⁷¹ 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 and would impose significant costs reflected in inflexibility.⁷² The Court has instead supported expansive interpretations of the scope of Union competences in order to enhance the effectiveness of Union law.⁷³ The Court's 'purposive' approach to interpreting the scope of EU competences fits well with the objectives and the design of the EU legal order.⁷⁴ First, the Treaties list several objectives that the Union should achieve. Secondly, the design of EU legislative powers is very much directed towards political goals to be achieved functionally.⁷⁵ 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.⁷⁶ Competence provisions such as Article 114 TFEU, being the principal vehicle for the passage of harmonisation measures are central to the scheme of the Treaty and should consequently be given a broad interpretation to ensure the attainment of the internal market objectives.⁷⁷ The Court's broad interpretation of the exercise 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

⁷⁰ See Schütze, *From Dual to Cooperative Federalism* (n8) 135, 137; Stephen Weatherill, 'Competence creep and competence control' (2004) 23 *Yearbook of European Law* 1, 25, 27, 46, 49; Wyatt, 'Community Competence to Regulate the Internal Market' (n 26) 128-136; Lord Mackenzie Stuart, *The European Communities and the rule of law* (1977 Steven and Sons) 76-79.

⁷¹ See Schütze, *From Dual to Cooperative Federalism* (n 8) 265.

⁷² See Weiler (n42) 2471-72; Weatherill, 'Better Competence Monitoring' (n2) 30-31, 33.

⁷³ See Weiler (n42) 2447-48; Loïc Azoulay, 'Introduction: the Question of Competence' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014) 2, 5-6.

⁷⁴ See Weiler (n 42) 2433; Weatherill, 'Better Competence Monitoring' (n 2) 25-28; Robert Schütze, *European Constitutional Law* (CUP 2012) 154-156.

⁷⁵ See Serena Rossi (n 2) 86; Case C-84/94 *United Kingdom v Council* (n 19), para 15.

⁷⁶ 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; Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373, 379.

⁷⁷ See Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 *Common Market Law Review* 395, 410.

integration. They have done so by conferring additional competences to the Union, by providing the Union with new tasks and objectives to be achieved and by defining new policy areas where the Union shall take action.⁷⁸ In addition, as discussed above, the Convention rejected a competence model involving exhaustive lists of the areas in which the EU is competent to act, models of sector-specific competences or identification of political areas outside the competences of the EU. Furthermore, the deletion of Articles 114 and Article 352 TFEU as the principal problems of ‘competence creep’ was also intentionally vetoed by the Member States.⁷⁹ Political concerns that the EU has too much power, voiced by the German Lander as well as some Member States, and calls for restraint of the Union powers, seem to ignore somewhat what the Member States have actually agreed upon.⁸⁰

Whilst the picture painted above seems pessimistic, there are still reasons to believe that the Court is up to the task of reviewing the exercise of EU competences. First of all, we have to deal with the criticism that the limits, imposed by the Treaties and devised by the Court in *Tobacco Advertising* and *Opinion 2/94*, are insufficient. This criticism should be taken seriously. For this reason, I devote the whole part II of the thesis including chapter 4 and chapter 6 to reconceptualising and elaborating the existing limits to the exercise of EU competences.

Without going into detail of how those limits can be reconceptualised at the moment, I will tentatively suggest a couple of ideas to be developed later in the thesis. 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’⁸¹ or that compromise the ‘constitutional identity of the Union’.⁸² The Court must control whether the measure is likely to remove either obstacles to trade or ‘appreciable’ distortions to competition. These are the two justifications for harmonization and the measure must always have one of these as a primary objective.⁸³ But this is not sufficient. The measure must contribute to dealing with an actual or imminent problem in the creation or establishment of the internal market. The Court should, in cases of proposed harmonization measures, require the EU legislator to show that there is a market failure that

⁷⁸ See Craig, ‘Competence and Member State Autonomy’ (n 67) 11–34; Serena Rossi (n 2) 87.

⁷⁹ See above chapter 1- section I for an explanation of this point.

⁸⁰ See Paul Craig, *EU Administrative Law* (OUP 2012) 368.

⁸¹ See Wyatt, ‘Community Competence to Regulate the Internal Market’ (n 26) 136.

⁸² See *Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (n 8) paras 30, 35.

⁸³ See Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (n 40) 9.

is of such a nature that only the EU can remedy it.⁸⁴ Secondly, the Court needs to be provided with a solid basis of evidence and reasoning to perform this task. In order for the Court to obtain sufficient material and to be able to seriously review the exercise of EU competences, it should engage in procedural review.⁸⁵ This procedural enquiry should be implemented through a standard of legality asking the EU legislator to show that it has provided for adequate reasoning and taken into account all relevant evidence when adopting a piece of legislation. This legality standard, which should be applied to the review of all broad EU policy measures, empowers the Court to become a credible arbiter in competence disputes. If for example, it is claimed a measure for example promotes the internal market, the Court must scrutinize the reasons and evidence for this assertion. If the reasoning is inadequate and the evidence fails to demonstrate that the envisaged measure has any effect on the internal market or removes appreciable distortions of competition, the Court should proceed to annul the measure.⁸⁶

Thirdly, as demonstrated later in the thesis⁸⁷, the Court may subject its review to certain limits. The Court may, because of its fragile legitimacy and questionable competence, be disinclined to engage in intense review of whether the policy choices of the EU legislator are compatible with broad legislative powers such as Article 83(2) TFEU, Article 114 and Article 352 TFEU. The Court may however, in contrast, police strictly conventional legal issues such as whether the Union measure is adopted on the right legal basis⁸⁸, whether EU legislation constitutes a ‘harmonization’ measure for the purposes of Article 83(2) TFEU⁸⁹ or whether a specific measure falls within the EU’s exclusive or shared competence.⁹⁰ Those limits express, because of their nature and wording, hard legal criteria which the Court is well-equipped to monitor. In relation to such limits, the institutional reasons for deferential review⁹¹ are no longer valid because the Court’s competence and expertise is higher than the legislator’s in such cases.

⁸⁴ See below chapter 4- section II (A), and chapter 6- section I, for an elaboration of this argument.

⁸⁵ See below chapter 3- section III.

⁸⁶ See below chapter 3- section IV.

⁸⁷ See below chapter 5- section II-III for a comprehensive discussion of such procedural limitations.

⁸⁸ See Case C-176/03 *Commission v Council* [2005] ECR I-07879, paras 39-40; Case C-440/05, *Commission v Council* [2007] ECR I-09097 paras 53-54; Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-00593 para 56; Case C-270/12, *UK v European Parliament and Council* (Court of Justice, 22 January 2014) paras 97-117; Case C-43/12, *Commission v Parliament and Council* (Court of Justice, 6 May 2014).

⁸⁹ See Steve Peers, *EU Justice and Home Affairs Law* (OUP 2011) 775-776.

⁹⁰ See Opinion 1/94 *WTO Agreement* [1994] ECR I-05267; Case 22/70 *Commission v Council* [1971] ECR 263.

⁹¹ See Craig discussing these institutional considerations in: *EU Administrative Law* (n 80) 435.

Finally, we have to deal with the concern that the Court is not well-placed to review the exercise of EU competences. Whilst this is a compelling argument, there are two considerations to counter this argument. First, the evolution of the Union and the Treaties give 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 competences⁹² and the adoption of new protocols and the inclusion of new actors in the monitoring of EU competences demonstrate this point.⁹³ It seems that the Lisbon Treaty intends to submit both the attribution and the exercise of the EU competences to stricter control. This is shown by the attention dedicated to the principles of conferral, subsidiarity and proportionality. The Lisbon Treaty makes so many references to the principle of conferral⁹⁴ that it seems to have become almost an obsession.⁹⁵ The Lisbon Treaty furthermore gives 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’.⁹⁶ Secondly, there are additional considerations relating to the Court’s own legitimacy and the political context which may prompt the Court to enforce the limits of the Treaties more seriously after Lisbon. Kumm and Dougan suggest that the pressure from national courts will induce the Court to become a credible arbiter in competence disputes. The tortured ratification process which engulfed the Constitutional Treaty, and then almost derailed Lisbon itself, will embolden the national judges to police with greater confidence the legal limits governing Union power.⁹⁷ This is demonstrated by recent challenges from national constitutional courts which have expressed the view that they consider it their task to ensure that EU institutions do not amend the Treaties and enact legislation *ultra vires*. The most notable challenge came from the German Constitutional Court which in its Lisbon Judgment insisted that it had the right to intervene if there were indications that the Court of Justice was not fulfilling its task of controlling the exercise of EU competences according to the principle of conferral.⁹⁸ It thus seems that European national constitutional courts provide

⁹² See Azoulai (n 73) 10-12, on the increased emphasis on limits in the Lisbon Treaty.

⁹³ See above chapter 1- section II.

⁹⁴ See above chapter 1, n 23, for a list of such references.

⁹⁵ See Serena Rossi (n 2) 93-94.

⁹⁶ See Werner Vandendriessche, ‘Multi-Tiered Political Questions: The ECJ’s Mandate in Enforcing Subsidiarity’ (2012) 6 *Legisprudence* 321, 329-330, 344.

⁹⁷ 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) 112.

⁹⁸ See Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), paras 226, 231, 237-242.

an important check on the Court.⁹⁹ This point makes a great deal of sense. The Court cannot continue with a low-level review without endangering its own legitimacy. The increased emphasis on the limitation of competences, the recent conflicts on jurisdictional boundaries and the publicly voiced concern that the Court 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.¹⁰⁰

III Principle of proportionality

A Theory and judicial review

The principle of proportionality is a safeguard against the excessive use of legislative powers.¹⁰¹ It embodies a binding rule of primary law which the Union legislature has to comply with when it exercises its powers. The principle implies that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.¹⁰² Protocol no 2 attached to the Lisbon Treaty substantiates the principle of proportionality. It implies that ‘any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of... proportionality’ and 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 minimised and commensurate with the objective to be achieved’.¹⁰³ Despite recent codifications of the principle, it has been present since the early days of the Community as a general principle of law fleshed out in the case-law of the Court. Pursuant to the standard formula, proportionality implies that the Union legislator should consider whether the legislative measure is appropriate to reach the pursued objective¹⁰⁴ and if so, whether the legislative measure is indispensable for achieving the pursued objective (the ‘least restrictive measure’ test).¹⁰⁵

⁹⁹ See Mattias Kumm, ‘Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ 12 (2006) *European Law Journal* 503, 530.

¹⁰⁰ This thought is further developed below in chapter 3- section II.

¹⁰¹ See Takis Tridimas, *General Principles of EU Law* (2nd edn, OUP 2006) 136.

¹⁰² See Article 5(4) TEU.

¹⁰³ See Article 5 of Protocol (no 2) on the application of the principles of subsidiarity and proportionality.

¹⁰⁴ See Case 116/82 *Commission v Germany* [1986] ECR 2519, para 21.

¹⁰⁵ See Case 382/87 *Buet and others v Ministère public* [1989] ECR 1235, paras 11-17; Tridimas (n102) 139, 146.

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*).¹⁰⁶

But has proportionality worked before the EU Courts as a ground 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*, 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 on how the Court applies proportionality in cases concerned with broad EU policy measures.

The first case to be discussed is *Swedish Match* which, as we know from the first section of this chapter¹⁰⁷, concerned a challenge to the Snuff Directive prohibiting the marketing of ‘snuff’. In this case, the claimants did not only challenge the Directive on the basis of a ‘lack of competence’ but also on the basis of proportionality. They argued that a complete prohibition of ‘snuff’ was disproportionate since the Union legislature had failed to take into account relevant available scientific information when the prohibition was adopted.¹⁰⁸ This case is illuminating for two reasons. First, it presents the classic proportionality test that the Court applies when it reviews Union legislation. The Court stated, with regard to judicial review of proportionality, that the Union legislature must be allowed a broad discretion in the area of public health policies, which involves 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 which the Union is seeking to pursue can the legislative measure be invalidated.¹⁰⁹ This is the general test applied by the EU Courts in relation to proportionality review of broad EU policies.¹¹⁰ But *Swedish Match* also shows another feature of the Court’s application of proportionality. It demonstrates how the Court’s review is affected by the difficulty in assessing scientific evidence put forward for a legislative measure. When assessing the ‘suitability’ of the prohibition, the Court found that the preamble to the Snuff Directive showed that 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

¹⁰⁶ See Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras 123-130; Nicholas Emiliou, *The Principle of Proportionality in European Law- A Comparative Study* (Kluwer Law International 1996) 192-194

¹⁰⁷ See above section II (A) in the present chapter.

¹⁰⁸ See Case C-210/03 *Swedish Match* (n32), para 50.

¹⁰⁹ *ibid*, para 48.

¹¹⁰ See Craig, *EU Administrative Law* (n 80) 593-94.

the time of the adoption of the Directive allowed for neither the conclusion that 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 did consequently take 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 the protection of health.¹¹¹

Swedish Match shows that the least restrictive measure test is not easy to apply in practice. It is not surprising that the measure was considered proportionate given the overriding objective of protecting public health. There were no less restrictive 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. This case illustrates why proportionality, in cases where the Union legislator is faced with conflicting evidence and complex policy choices, is not likely to be a serious limit to the exercise of Union legislative competences.

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. Since there is an extensive discussion of this judgment in the next chapter,¹¹² I will only very briefly mention the facts and the Court’s reasoning here. *Spain v Council* was concerned with a challenge to a Council Regulation on a new cotton support scheme.¹¹³ Spain claimed that the Council Regulation was disproportionate because the Commission had failed to take into

¹¹¹ Case C-210/03 *Swedish Match* (n 32), paras 48-57.

¹¹² See below chapter 3- section IV.

¹¹³ 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’).

account relevant empirical evidence on the profitability of cotton grown under the new support scheme.¹¹⁴

In brief the Court accepted Spain's arguments and held that the Commission had not provided for relevant information because it failed in its determination of the specific aid to include direct labour costs and did not perform a socio-economic study on the effects of the reform on ginning undertakings. The Commission failed to show that it had exercised its discretion as it had not produced and presented clearly 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.¹¹⁵

Even though this case is, as argued below¹¹⁶, an excellent example of how the Court should pursue credible review, it cannot be interpreted as a strong example of application of the proportionality principle. First, this case must be distinguished from other proportionality cases regarding review of general legislative measures since the annulment did not endanger the pursuit of a general EU policy scheme. Whilst the regulation concerned common rules for direct support schemes under the common agricultural policy and for certain support schemes for farmers, 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.¹¹⁷ There were only three Member States which were directly concerned with the application of the support scheme for cotton: Portugal, Greece and Spain.¹¹⁸ Secondly, the effects of annulment were to be limited in time so the Union would have a chance to adopt a new regulation.¹¹⁹ 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 legislator's assessment of proportionality in challenges to general Union legislation.¹²⁰

¹¹⁴ See Case C-310/04 *Spain v Council* [2006] ECR I-07285, paras 87-95.

¹¹⁵ *ibid*, paras 116-118, 124-136.

¹¹⁶ See below chapter 3- section IV.

¹¹⁷ See Case C-310/04 *Spain v Council* (n 114), paras 3-13 for a description of the legislative history of the act and an account for the relevant rules of Regulation.

¹¹⁸ See Article 110c of the Regulation (n 113).

¹¹⁹ See Case C-310/04 *Spain v Council* (n 114), paras. 137-141.

¹²⁰ See Xavier Groussout, 'Judgment C-310/04' (2007) *Common Market Law Review* 761, 772-773, for support of this argument.

Another case demonstrating the problem of applying proportionality is the recent case of *Luxembourg v Parliament and Council*¹²¹, where Luxembourg requested the annulment of a directive on airport charges.¹²² Luxembourg submitted that the Directive 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 movements.¹²³ The Court identified that the ‘manifestly inappropriate’ test applied in the case since the Directive was concerned with air transport matters, which is a field where the EU legislature has a broad legislative discretion. On the basis of this test, the Court noted that before adopting the Directive, the Commission had carried out an impact assessment which had examined various options for calculating and regulating airport charges. Given the risk that airport managing bodies would find themselves in a dominant position *vis-à-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 occurring. That conclusion was also valid as regards airports located in Member States where no airport reached the threshold of 5 million passenger movements per year and which had the highest number of such movements. The Court then 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 did not however find that the charges were ‘manifestly inappropriate’ in relation to the benefits which would arise from the system. 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

¹²¹Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-03727.

¹²² 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’).

¹²³ See Case C-176/09 *Luxembourg v Parliament and Council* (n 121), para 64.

abandon an airport such as that of Luxembourg-Findel. In sum, there was no breach of the proportionality principle.¹²⁴

Luxembourg v Parliament and Council shows the difficulty of applying the ‘suitability’ and ‘necessity test’ in competence litigation. Given the objectives of the measure and the divergent interests governing the situation, it is difficult to re-examine the EU legislator’s position in relation to the appropriateness of the policy. First, it was clearly very difficult for the Union legislator to find a measure that ensured that airport managing bodies did not misuse their dominant position and did not infringe the freedom of the airport managing bodies unnecessarily. Secondly, the EU legislator also had to 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.¹²⁵ Given these objectives, it appears that the inclusion in the Directive of main airports that had less than 5 million in passenger movements per year was an appropriate measure.¹²⁶ Thirdly, the inclusion of those airports was not made in an arbitrary manner but was justified by the perceived risk of ensuring that airport management bodies did not abuse their privileged position. The claimants had simply failed to show that the measure was ‘manifestly inappropriate’ to the pursued objective.¹²⁷ 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. It was clear from the judgment that Luxembourg had not suggested any alternative measure which could achieve the pursued objective to the same extent.¹²⁸ Since the standard of proof in proportionality cases requires the applicant to show the presence of less restrictive measures, the Court could hardly have reached any conclusion other than that the common framework was ‘necessary’.¹²⁹ Since the Court is under no obligation to *ex officio* ascertain alternative less disproportionate measures, it cannot be condemned for having applied proportionality incorrectly.

While only three cases have been discussed here, the tentative argument suggests that proportionality is not a very powerful ground for challenging broad Union policy measures. This argument is reinforced by the Court’s rulings in other cases concerned with

¹²⁴ *ibid*, paras 62-72.

¹²⁵ *ibid*, paras 60-84.

¹²⁶ *ibid*, paras 41-51.

¹²⁷ *ibid*, paras 62, 65-66; Case C-176/09 *Luxembourg v Parliament and Council* (n 121), Opinion of AG Mengozzi, paras 101-103.

¹²⁸ Case C-176/09 *Luxembourg v Parliament and Council* (n 121), paras 98-104.

¹²⁹ See Craig, *EU Administrative Law* (n 80) 594-596.

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 policy¹³⁰, transport policy¹³¹, environmental policy¹³², social policy¹³³ and health protection.¹³⁴ The Court has clearly limited the intensity of judicial review of proportionality in relation to acts of a normative nature. Added to this it seems that the ‘manifestly inappropriate’ test has been applied in an even more cursory fashion in competence disputes.¹³⁵ Given these observations, we have to examine whether the Court’s current approach to proportionality is indicative of any conceptual or practical problems making this head of review unsuitable as a restraint on the exercise of Union powers.

B Evaluation- is proportionality a ground which can be used to seriously challenge EU measures before the Court?

Davies and Kumm have developed arguments for employing proportionality as the primary vehicle to restrain the exercise of competences. According to them, proportionality concerns the question of whether the loss of Member State autonomy and all disadvantages associated with it outweigh the benefits achieved by EU intervention. Given that the desire of Member States to preserve autonomy is legitimate, such an analysis is appropriate.¹³⁶ Kumm takes the basis of this argument from the Court’s existing jurisprudence on fundamental rights. He submits that it is no more difficult to weigh policies against each other than to weigh policies against individual rights. The highly open-ended empirical and normative assessment of Member State acts in the Court’s rights jurisprudence is not a qualitatively different enquiry from jurisdictional proportionality analysis.¹³⁷ Davies argues that the Court’s competence to engage in jurisdictional proportionality is demonstrated by the fact that the Court regularly assesses national measures in some detail to see whether they are justified by the Member State’s stated aim. Any desire to avoid balancing policies against each other must therefore

¹³⁰ See Case C-310/04 *Spain v Council* (n 114), paras 98-99.

¹³¹ See Joined Cases C-248-9/95 *SAM Schiffart and Stapf v Germany* [1997] ECR I-4475, paras 23- 24, 69.

¹³² See Case C-27 and C-122/00, *Omega Air and other joined cases* [2000] ECR I-2569, paras 63-64.

¹³³ See Case C-84/94 *United Kingdom v Council* (n19), para 58.

¹³⁴ See Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 27), para 123.

¹³⁵ See Grainne De Búrca, ‘The Principle of Proportionality and its Application in EC Law’ (1993) 13 *Yearbook of European Law* 105, 116, 125; Tridimas (n 101) 143; Craig, *EU Administrative Law* (n 80) 592.

¹³⁶ See Kumm (n 99) 522; Gareth Davies, ‘Subsidiarity: the wrong idea, in the wrong place, at the wrong time’ (2006) 43 *Common Market Law Review* 63, 81, 83.

¹³⁷ See Kumm (n 99) 521, 523-24, 528.

be seen as more political than principled. Given the above, and given that there is no other principle which can protect important areas of national autonomy falling victim to less important Union action, the Court should apply jurisdictional proportionality intensively.¹³⁸

Notwithstanding these arguments, proportionality does not seem, given the judicial track-record and the conceptual problems with the principle, to be a useful ground for delimiting the exercise of Union competences. There are several reasons for this. First, if one accepts the argument that *Spain v Council* was not concerned with annulment of a broad Union policy scheme, there is no judgment in the history of the Court's jurisprudence annulling a general Union measure on the basis of the proportionality principle. In my view, the case-law is an indication that it is either hard to construct a good proportionality argument or that Union courts are unwilling to engage in socio-political assessments of the necessity of Union measures.¹³⁹

Secondly, I concur with Craig's observation that proportionality is conceptually not well-placed to be applied in competence disputes. The mere fact that a Member State believes that the legislation on which it was outvoted in the Council involves too great an intrusion on its values does not mean that the measure infringed the proportionality principle. This is because a foundational feature of EU cooperation is premised on collective action in which Member States have to make compromises and because the Treaties already balance Member State and EU interests. The issue is whether the contested measure could objectively have been regarded as disproportionate because it involved too great an interference in the regulatory autonomy of Member States. If claimants need to establish that measures in fact interfered with the autonomy of Member States as a whole, the next question is of course how such intrusions are established. No hard criteria exist in this regard. Therefore, it will be very difficult to imagine how a single Member State, or even a minority of Member States, could argue that a measure objectively entailed too great an intrusion on Member State values.¹⁴⁰

Thirdly, it appears that there is no foundation in the case-law on proportionality for the Court to adopt a more intense review in cases where the EU legislator adopts general normative

¹³⁸ See Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (n136) 83; Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (n 7) 367-68.

¹³⁹ For support of this argument; see Weatherill (n 70)16-17, and Xavier Groussout and Sanja Bogojevic, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulay, *The Question of Competence in the European Union* (OUP 2014) 250. For contrasting opinions to my argument; see Kumm, (n 99) 522-24, 528-29; Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (n 136) 81-83.

¹⁴⁰ See Paul Craig 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72, 83; Groussout and Bogojevic (n 139) 249.

acts. It is clear that EU courts have good reasons to apply proportionality strictly in the case of the fundamental freedoms. These are cases where a breach of such a freedom has been found before we even get to proportionality, and the Member State then raises a defence based on the relevant Treaty article. The four freedoms are also central to the very idea of market integration that lies at the economic heart of the EU. It is therefore fitting that proportionality scrutiny should be intensive in such instances. In contrast, in cases concerning challenges to general Union legislative acts on the basis of proportionality, different considerations apply. In such cases, it is recognised that the EU political institutions make policy choices. The EU courts should not overturn these merely because they believe that a different way of doing things or a different balance could have been made. There are numerous and complex factors to be balanced and weighed by the EU legislature in the context of broad policy schemes. While on the face of it this argument seem to militate against judicial review in all situations where the Court is required to assess EU policy choices, it is more relevant in the context of proportionality. Proportionality is, more than other limits restraining the exercise of EU competences, concerned with the balancing of policy choices and the appropriateness of a certain policy. 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 the Court is well-equipped to adjudicate upon. For these reasons, it is also unlikely that the application of ‘procedural’ proportionality¹⁴¹ will lead to successful outcomes.¹⁴² 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.¹⁴³ Nor could the Court impose the *Spain v Council* standard of review of ‘relevant circumstances’ and ‘basic facts’¹⁴⁴ in cases of broad EU measures without facing the criticism that it would be intruding on the EU legislator’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 legislator in its application of the proportionality principle.¹⁴⁵

¹⁴¹ See Case C-310/04 *Spain v Council* (n 114), paras 122-136.

¹⁴² My argument contrasts to the predominant view of the literature; Groussout and Bogojevic (n 139) 245-251; Koen Lenaerts, ‘The European Court of Justice and Process-Oriented Review’ (2012) 31 *Yearbook of European Law* 3, 7-9, 15-16.

¹⁴³ See Kumm (n 99) 525, 528.

¹⁴⁴ See Case C-310/04 *Spain v Council* (n 114), paras 122-123.

¹⁴⁵ See Craig, *EU Administrative Law* (n 80) 592-593, 600-604, 629-30, 639.

Fourthly, if proportionality should work as a serious restraint on the exercise of Union competences, this presupposes that the national autonomy feature is integrated into the proportionality *stricto sensu* test. The Court only engages in this scrutiny when the applicant presents arguments specifically that address it specifically. The *onus* is therefore on the applicant to raise arguments that an incursion on Member State values is disproportionate *stricto sensu* in the 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.¹⁴⁶

In sum, it seems that that proportionality is not a ground apt for challenging Union measures before the Court. For this reason it will not be subject to a specific examination in this thesis.

IV Principle of subsidiarity

A Theory and judicial review

The principle of subsidiarity is a matter of whether regulations should be adopted at a centralized level or at a local level. There are three main arguments for moving decision-making power to local decision-making bodies. First, in some cases, it is more effective to regulate a policy on a lower level. 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, rather than a higher level. Secondly, subsidiarity is founded on the idea that legitimacy and democracy are promoted if regulation is primarily done on a local level. Those values will be enhanced since citizens will be more involved and provided with more opportunities to have a meaningful say in the political process in such a case. Thirdly, cultural and national identities are more protected by moving decision-making power to the lower level. Local decision-makers have better knowledge of the local culture, environment and the attitudes of the individuals/undertakings affected by the planned legislation.¹⁴⁷

¹⁴⁶ *ibid* 601-604; Alberto Alemanno, 'Regulatory Impact Assessment and European Courts: When Ex Ante Evaluation Meets Ex Post Judicial Control' (2011) 17 *European Public Law* 485, 498.

¹⁴⁷ Craig, 'Subsidiarity: A Political and Legal Analysis' (n 140) 73; Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law after Lisbon* (OUP 2012) 214, 224; Kumm (n 99) 518.

The principle of subsidiarity is now codified in Article 5(3) of the TEU.¹⁴⁸ 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 procedural dimension of subsidiarity, apparent from the Protocol, implies that the Union is compelled to follow certain procedures for enacting legislation. It also establishes that the Union has the burden of proof for compliance with subsidiarity as it must show through qualitative and, wherever possible, quantitative evidence that a Union objective can be better achieved at Union level.¹⁴⁹

Notwithstanding the legal support and ideological justifications for the principle, it appears that subsidiarity has played a very 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. Although this cannot be taken as conclusive evidence for the claim that the principle is not judicially enforceable it does indicate that there is some inherent problem with the Court's current approach to the review of subsidiarity.¹⁵⁰ The second part of the criticism is related to the fact that the Court's review does not extend to review of material subsidiarity.¹⁵¹ The Court does not apply the Edinburgh Guidelines,¹⁵² and consequently does not review whether the Union measure at stake had transnational aspects which could not be satisfactorily regulated by national measures, whether Member State measures would conflict with the requirements of the Treaty or significantly damage the interests of Member States or whether action at Union level would provide clear benefits compared with action at national level.¹⁵³ If the Union legislator found that Union action is more efficient or if the EU legislator asserts that the aim of the action, because of the

¹⁴⁸Subsidiarity entails pursuant to Article 5(3) TEU that '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.'

¹⁴⁹ See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Article 5.

¹⁵⁰ See Biondi (n 147) 213; Weatherill, 'The limits of legislative harmonisation' (n26) 844; Kumm (n 99) 525-26.

¹⁵¹ Case C-84/94 *United Kingdom v Council* (n19), para 23; Case C-103/01 *Commission v Germany* [2003] ECR I-05369, paras 46-47; Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, paras 56-58; AG Toth 'Is Subsidiarity justiciable?' (1994) 19 *European Law Review* 269, 282-285.

¹⁵² See the discussion of the Edinburgh guidelines below in chapter 6- section I (B).

¹⁵³ See Gráinne de Búrca 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 *Journal of Common Market Studies* 214, 225.

dimensions of the intended action or because of its cross-border nature, could better be achieved at Union level, the Court will not overturn these judgments.¹⁵⁴

Thirdly, procedural subsidiarity has not been enforced by the Court. It is clear from the Court's case-law that no discussion of subsidiarity is required to establish compliance with the principle. It is sufficient if the recitals of an EU measure affirm that the Union had considered the principle of subsidiarity.¹⁵⁵ It appears sufficient for the Union legislator 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.¹⁵⁶ Nor has the Court sought quantitative benefits of EU legislation but instead imposes a weak justificatory standard on the Union legislator.¹⁵⁷

It is almost an understatement to say that subsidiarity has been prudently used by the Court of Justice. The Court's message up to now is that it cannot or does not wish to enforce the subsidiarity principle. It is indeed difficult to imagine a case in which the Court could conclude that the Union legislature had breached the principle of subsidiarity based on the current approach. Subsidiarity is seemingly left to the political safeguards of federalism.¹⁵⁸ Given the weak judicial record, we must examine whether subsidiarity is predestined to be a weak principle in restraining the exercise of EU competences.

B Evaluation- is subsidiarity a ground apt to challenge the exercise of EU competences before the Court?

The problem of judicial review of subsidiarity has been related to the lack of firm justiciable limits, the complex guidelines in the Edinburgh protocol and the principle's inherent 'political' nature.¹⁵⁹

The first critique to subsidiarity explains the Court's weak approach to subsidiarity on a very fundamental basis. Proponents of this criticism submit that subsidiarity is in principle a

¹⁵⁴ See Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405, paras 26-27; 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.

¹⁵⁵ See Case C-233/94 *Germany v Parliament and Council* (n 154), paras 26-28; Antonio Estrella, *The EU Principle of Subsidiarity and Its Critique* (OUP 2002) 155-157.

¹⁵⁶ See C-84/94 *United Kingdom v Council* (n19), paras 74-77, 81; Case C-58/08 *Vodafone and Others* (n 33), para 77; Estrella (n155) 155; Grossout and Bogojevic (n 139) 245.

¹⁵⁷ See Schütze, *From Dual to Cooperative Federalism* (n 8) 255-256.

¹⁵⁸ *ibid* 254-55; Estrella (n 155) 139,145-147; Thomas Horsley, 'Subsidiarity and the Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 *Journal of Common Market Studies* 267, 269.

¹⁵⁹ See Estrella (n 155) 147, 165, 176; Gráinne De Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) *Harvard Jean Monnet Working Paper* no. 7/1999, 7; Kumm (n 99) 525.

‘political question’. This attack is central since it challenges the basis on which subsidiarity is founded. This argument suggests that the principle’s political-economic nature make it inappropriate for judicial enforcement.¹⁶⁰ The assessment of subsidiarity is too difficult for judges because the issue of whether or not decision-making powers is best exercised at a central or at national level is a question of political judgment with powerful arguments on both sides and whose correct response will depend on many factors outside the realm of legal reasoning.¹⁶¹ Subsidiarity is a principle that enriches the political debate, rather than a principle constituting the basis for effective judicial scrutiny. The application of the principle involves a considerable margin of discretion for the EU institutions and the monitoring of compliance with that principle should be of an essentially political nature.¹⁶²

The argument that the monitoring of subsidiarity is an essentially ‘political’ question is flawed by legal, principled and conceptual reasons. First, there is an explicit obligation on the Union courts to apply subsidiarity. Protocol no 2 specifically mandates the Court to review for compliance with subsidiarity.¹⁶³ A ‘political’ question doctrine¹⁶⁴ is contrary to Articles 5(3) TEU, 263 TFEU and Article 8 of Protocol no 2 which allow 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.¹⁶⁵ Second, there is an unacceptable ‘moral cost’ in allowing a potential legal violation of subsidiarity to go unsanctioned.¹⁶⁶ 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 law¹⁶⁷ and absolve the Court from its judicial duty to uphold the law pursuant to Article 19 TEU.¹⁶⁸ A political question doctrine would also fly in the face

¹⁶⁰ See European Convention, CONV 286/02, ‘Conclusions of the Working Group I on the Principle of Subsidiarity’, Brussels, 23 September 2002, 9

¹⁶¹ See Weatherill, ‘Competence creep and competence control’ (n 70) 16.

¹⁶² See Gil Carlos Rodriguez Iglesias, ‘The Court of Justice, Principles of EC Law, Court Reform and Constitutional Adjudication’ (2004) 15 *European Business Law Review* 1115, 1117-1118; 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; Toth (n 151) 282-283.

¹⁶³ See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Article 8.

¹⁶⁴ See on the political question doctrine generally: Fritz Scharpf, ‘Judicial Review and the Political Question: A Functional Analysis’ (1966) 75 *Yale Law Journal* 517.

¹⁶⁵ See Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and others* (n36), paras 104-107; Case -58/08 *Vodafone and Others* (n 33), paras 72-79; Case C-176/09 *Luxembourg v Parliament and Council* (n 121), paras 72-79.

¹⁶⁶ 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.

¹⁶⁷ See Joined Cases C-402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (n19), Opinion of AG Maduro, paras 34, 45.

¹⁶⁸ See Case C-376/98 *Tobacco Advertising* (n18), para 84, for the Court of Justices’ recognition of its duty under the Treaties to review the exercise of EU competences.

of the foundations of judicial review, which is the need to render public power accountable, which means that the Union legislator both complies with conditions laid down in the Treaties and with precepts of good governance thereby enhancing its legitimacy. The Court could not endorse unprincipled political decisions without violating its own legitimacy.¹⁶⁹

Having put aside the criticism on the principle's asserted 'political' nature; we now move on to discuss the most serious attack against subsidiarity. This challenge maintains that the legal content of subsidiarity is so weak that it makes judicial review of the principle impossible. The evidence for the inherent conceptual problems of subsidiarity comes from the fact that subsidiarity has not yet, as mentioned above, been used to strike down EU legislation. Craig has questioned the value of this evidence and suggested that the case-law does not provide sufficient support for the conclusion that subsidiarity is an inappropriate ground for judicial review. According to him, many of the cases would probably, on the facts, have been decided in favour of Union action even if the Court took subsidiarity more seriously and had examined the measure more in detail on such grounds. It is thus wrong to conclude that the result would have been different if judicial review had been more searching.¹⁷⁰

My interpretation of the case-law differs slightly from Craig's. I do believe that the weak response in the case-law for the principle is evidence of the weak legal contours of this principle that makes it difficult to assess by a judicial body. The key issue is how subsidiarity should be argued in order to be successful in mounting a challenge. This conceptual problem is best illustrated by considering the case of the exercise of the functional competences in the Treaties. 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. Whilst subsidiarity may give Member States a right to be used in the service of the Union, it does not give them regulatory powers or a right to veto EU legislation. His argument is demonstrated by the Court's case-law on the scope of Article 114 TFEU in relation to EU harmonization measures. In such cases a frequent challenge raised by Member States was that the EU harmonization measure regulated areas, such as public health, which were and still are primarily a Member State competence.¹⁷¹ The subsidiarity argument was for example that the public health objectives of the measure could have been just as well achieved by the Member States acting alone. However, defining the

¹⁶⁹ See Scharpf (n164); Paul Craig, 'Political Constitutionalism and Judicial Review' (2009), Oxford Legal Studies Research Paper No. 58/2009, 43. <<http://ssrn.com/abstract=1503505>>. Accessed 27 April.

¹⁷⁰ See Craig, 'Subsidiarity: A Political and Legal Analysis' (n 140) 81.

¹⁷¹ See Article 168 TFEU.

EU harmonization 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 or distortions of competition. Since Member States acting alone cannot harmonize, there is no subsidiarity criticism to be made. Once it is determined that an EU competence to determine common rules and pursue an objective through harmonization exists, the political decision to exercise that competence is immune from judicial interference. If the sole objective is to achieve uniformity in laws, it will always be necessary to provide for Union harmonization thus making subsidiarity a 'paper tiger'. The consequence of this argument, if taken to its logical implications, is that subsidiarity challenges will always fail.¹⁷²

Advocate General Maduro responded to this challenge and endeavoured in *Vodafone*, concerned with a Union regulation on price controls on roaming traffic, to show how a subsidiarity argument could be made in relation to an envisaged EU harmonization measure adopted under Article 114 TFEU. First, he denied that the intent of the legislator, as enshrined in the preamble, was decisive for the purposes of assessing compliance with the principle of subsidiarity. Compliance with subsidiarity requires that there should be a reasonable justification for the claim that there is a need for Union action. It would not be sufficient to highlight the possible benefits accruing from Union action. The justification must also involve a determination of the possible problems involved in leaving the matter to be addressed by the Member States. First, he noted that price differences exist in almost any domain among Member States and that such differences in prices may or may not entail competitive advantages for the economic operators of some Member States. Secondly, he observed that the market for roaming charges displayed no clear difference from the market for domestic calls in terms of price ceilings. Having made these observations and finding that not all competitive advantages could be labelled as distortions, he refuted the Commission's claim that there was a distortion of competition arising from different price controls at the retail level of roaming charges. Ultimately however, the Advocate General accepted that there was a need for Union action on the basis of the problem's 'transnational' nature. The cross-border nature of roaming made it a Union interest which should be protected by Union

¹⁷² See Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (n 136) 67-68, 73-75; Weatherill, 'Competence creep and competence control' (n 70) 15.

action in order to safeguard the achievement of the common market. This was because Member States could not be trusted to protect cross-border roaming.¹⁷³

Maduro's final argument summarizes the problem of demonstrating a claim for breach of subsidiarity. It seems unlikely that the Union would not be able to construct a link to the alleged cross-border nature of the issue or to the potential problems for the common market arising in the absence of harmonization.¹⁷⁴

Do these observations mean that subsidiarity is an unfit principle for the task of delimiting the exercise of Union powers? I would argue that there is still hope for subsidiarity as a ground capable of challenging the exercise of Union competences. I suggest two proposals; one for how subsidiarity should be reinforced in a substantive sense and one for how judicial enforcement of the principle can be improved

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 competence harmonization competence.¹⁷⁵ A proper subsidiarity argument must seek to deconstruct the internal market justification for EU harmonization. This is in contrast to current legislative practice which consists of a simple statement from the EU legislator that the EU is, due to divergences in Member States' legislation in relation to a given subject, more suited to achieving the objective of removing obstacles to trade or distortions of competition than Member States.¹⁷⁶ Such statements are mere assertions and not supported by any evidence. My proposal suggests that the EU legislator must show that there are either large economies of scale, 'appreciable' distortions of competition, genuine obstacles to trade or serious cross-border externalities to pass the subsidiarity test. Unless the Union is able to demonstrate that there is

¹⁷³ See Case C-58/08 *Vodafone and Others* (n33), Opinion of AG Maduro, paras. 30-31, 33-34.

¹⁷⁴ See Von Bogdandy and Bast (n 8) 292-294.

¹⁷⁵ See Case C-376/98 *Tobacco Advertising* (n 18) paras 84, 86-87, 106-107.

¹⁷⁶ 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; Commission's Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings', Brussels, 20.7.2010 COM(2010) 392 final, 11; 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; Commission, 'Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', Brussels, 18.5.2011 COM(2011) 275 final, 11.

an imminent or present market failure and that this failure is of such nature that only EU action can remedy it, the issue should be left to the Member States to regulate.¹⁷⁷

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 as review based on subsidiarity as it is in relation to an alleged lack of competence. The concern that the Court lacks legitimacy or competence to material subsidiarity can be rebutted through the employment of procedural review of subsidiarity.¹⁷⁸ The procedural enquiry should, as suggested in the next chapter, be implemented through a standard of legality asking the EU legislator to show that it has provided for ‘adequate reasoning’ and taken into account all ‘relevant circumstances’ relating to the subsidiarity question.¹⁷⁹ Despite the doubts raised against the added value of subsidiarity, there is still hope that subsidiarity can be used to successfully challenge the exercise of EU competences. The proposals for how the judicial application of subsidiarity can be improved are developed in Chapter 6.¹⁸⁰

V CONCLUSIONS

The main objective of the chapter was to analyse which heads of review are capable of restraining the exercise of Union competences. This chapter built on the introductory chapter and elaborated the problems discussed in that chapter of limiting the exercise of EU competences before the Court. This was done by examining the most relevant heads of review; ‘lack of competence’, ‘proportionality’ and ‘subsidiarity’.

A general theme of the chapter was that judicial review on the basis of a lack of competence, proportionality and subsidiarity has been feeble and has led to very few successful challenges. There were common explanations for this for all the principles considered. First, the principles intended to restrain the exercise of EU competences lack hard legal criteria. Appeals to the ‘Union objectives’ that are the foundations for the principle of conferral,

¹⁷⁷ See Edward T Swaine ‘Subsidiarity and Self-Interest: Federalism at the European Court of Justice’ (2000) 41 *Harvard International Law Journal* 1, 75; 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.

¹⁷⁸ See Kumm (n 99) 525, 528-30; Lenaerts, ‘The European Court of Justice and Process-Oriented Review’ (n 142), 4.

¹⁷⁹ See below chapter 3- section IV.

¹⁸⁰ See below chapter 6- section II.

subsidiarity and proportionality are not a useful way of limiting EU powers since objectives can be conceptualised on a very general basis. The problem with this limit is also a structural one. The teleological imperative of further integration has, instead of limiting the exercise of EU powers, provided the rationale for an expansion of EU powers. Since the structure of the EU legal order has these goals, it is not an easy task for the Court to impose strict judicial review on the exercise of EU powers. Secondly, the principles restraining the exercise of EU competences are worded in a very general manner. This problem is apparent with Article 114, with its limit to ‘market making’ and with Article 352 with its limit to ‘Union objective’. It is equally present in relation to the principles of subsidiarity and proportionality that are governed by criteria such as the ‘effectiveness’ of a proposed measure and whether EU action infringes ‘national autonomy’ (proportionality). As an example, the Court’s case-law shows that the limits in Article 114 TFEU and subsidiarity have been completely unable to restrain EU harmonization. It seems that as long as the EU’s objective is to harmonize, the Court has no ground to question the exercise of EU competences.

Despite all these concerns, the chapter found that ‘lack of competences’ and ‘subsidiarity’ were still useful grounds to challenge the exercise of EU competences. Nevertheless, both the conceptual and practical problems of judicial review have to be tackled to ensure that these limits are enforced. First, in substantive terms, the Court must re-assert the limits imposed by *Tobacco Advertising* and *Opinion 2/94* and disallow Union measures that are used as instruments of ‘general governance’ or that upset the constitutional identity of the Union. For EU harmonization measures, the solution for finding limits to Article 114 TFEU and limits to subsidiarity was similar. The proposal was to deconstruct the internal market link by asking the Court, in cases of proposed harmonization measures, to require the EU legislator show that there is an actual or imminent risk of market failure that is of such a nature that only the EU can remedy it.

Secondly, from the perspective of judicial review in relation to enforcing subsidiarity and the ground of ‘lack of competence’, the Court must move to apply those limits in a more procedural fashion. The evolution of EU law and the Treaties has reinforced the Court’s powers and legitimacy to review the exercise of EU competences on the basis of ‘lack of competence’ and ‘subsidiarity’. The best way for the Court to enforce a ‘lack of competence’ rule is to adopt a procedural enquiry asking for ‘relevant information’ and ‘adequate reasoning’. Such a benchmark of legality would enable the Court to review whether the exercise of EU competences conforms to the limits of the Treaties.

Although, it was argued that ‘lack of competence’ and subsidiarity were meaningful heads of review, the judgment on proportionality was more sceptical. Whilst it has been suggested in the literature that proportionality is more powerful than subsidiarity and can be employed to protect national autonomy, the chapter disagreed with those views. First, since proportionality claims can only be successful if a measure can be objectively considered to be too intrusive in relation to Member States’ regulatory autonomy, it would be difficult for Member States to successfully invoke proportionality before the Court. Secondly, there is no basis in the case-law on proportionality for the Court to adopt a review of a higher intensity in relation to Union legislation. Even if the Court applied ‘procedural’ proportionality, it is implausible that the application of the principle would be successful in competence litigation. It would be very difficult for the Court to apply the standard of ‘relevant circumstances’ and ‘basic facts’ used in *Spain v Council* in a case concerned with the annulment of a general EU policy scheme. Since this standard entails intense scrutiny the Court would risk facing severe criticism that it substituted its own policy choice for that of the EU legislator if it ventured on this path.

CHAPTER 3- ENHANCING JUDICIAL ENFORCEMENT OF THE LIMITS TO EU COMPETENCES REVIEW

I Introduction

The role of the Court of Justice in controlling the exercise of Union legislative powers is a long-standing topic in EU legal scholarship. There are two main critiques against the judicial enforcement of the limits contained in the Treaties. First, some contend, on the basis of the Court's past decisions, that it has taken a too accommodating approach to the EU legislator's broad interpretation of its legislative powers.¹ I endorsed this critique in the introduction and chapter 2, where it was observed that the Court has sanctioned the wide usage of Article 114 and Article 352 TFEU for instances of questionable EU harmonization. It was also explained in chapter 2 that, from a legal perspective, the Court's reluctance to enforce the limits of the Treaties and subsidiarity was related to the weak legal content of those limits and their vague wording. Due to the lack of hard legal criteria and the fact that the structure of the EU legal order strongly promotes the *telos* of further EU integration, it is not surprising that the Court has opted not to impose strict judicial review on the exercise of EU competences.²

The second attack against the Court's approach to judicial review is that the Court is institutionally ill-equipped to engage in proper substantive judicial review of the exercise of broad Treaty powers. Principled analysis of the kind required by the limits of the Treaties and by the subsidiarity principle is beyond the institutional capacities of the EU courts. The limits of the Treaties do not establish easy rules the application of which produce uncontentious conclusions. Instead the required analysis involves complex empirical and normative judgment of the effectiveness and appropriateness of different EU policies. It is questionable whether the Court has a comparative institutional advantage in second-guessing the EU legislator on these complex empirical and normative questions. If the Court would re-examine the effectiveness or appropriateness of EU policies, the Court would replace the

¹ See Derrick Wyatt, 'Community Competence to Regulate the Internal Market', in Michael Dougan and Samantha Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009) 130-136; 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), 339-346; Stephen Weatherill, 'Competence creep and competence control' (2004) 23 *Yearbook of European Law* 1, 25, 27, 46, 49.

² See above chapter 1- section II; chapter 2- section II (B); chapter 2-section IV (B).

legislative discretion of the EU political institutions with its own views and assume the role of the supreme legislature in the European Union.³

While these well-known observations give an understanding of the problems of the judicial review of EU legislation, it does not give insight into how competence review could be reinforced. Instead of simply explaining the Court's current approach, this chapter examines and suggests solutions on how to overcome the problems of judicial enforcement of the existing limits of the Treaties. The chapter builds on the lessons from the introductory chapter and chapter 2. Whilst the introductory chapter and chapter 2 pinpointed and tackled the conceptual, structural, political explanations for the Court's feeble approach to competence review, this chapter tackles the institutional challenges of judicial review.

The argument and structure of the chapter is as follows. The first part of the chapter considers the reasons for the Court's conventional approach to competence review. It considers and evaluates the practical and institutional justifications for the Court's deferential review of competences. It particularly examines how the broad and problematic structure and wording of the current limits of the Treaties have adversely influenced the Court's capacity to engage in judicial review. I maintain that although the remarks on the Court's institutional constraints are well founded, institutional arguments cannot be given a too broad interpretation as to disqualify the Court from the sphere of competence litigation. Contending that concerns for legitimacy, expertise or competence are not sufficiently compelling to defend the Court's general approach of deference, I elaborate an argument for more intense judicial review of the exercise of EU competence. The second part of the chapter considers how the Court's current approach to the judicial enforcement of the limits of the Treaties could be improved. It is argued comprehensively on the basis of the evolution of EU law, institutional considerations and concerns for transparency and legitimacy, that procedural review is an appropriate paradigm for the review of broad EU policies. Such a method strikes an appropriate balance between safeguarding the political prerogatives of the EU political institutions and the need to ensure that EU legislation conforms to the precepts of the Treaties.

³ See AG Toth 'Is Subsidiarity justiciable?' (1994) 19 *European Law Review* 269, 282-83; 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, 843, 849; Paul Craig, *EU Administrative Law* (OUP 2012) 592-593.

Arguing that procedural review is a means of improving judicial review, the final part of the chapter develops a standard of review on the basis of the Court's ruling in *Spain v Council* that the Court can apply to assess the legality of EU legislation. Having found that the Court's current standard of review in relation to the review of broad EU policies are inadequate to make competence review credible, I argue for a more demanding approach, asking the EU legislator to demonstrate that it has taken into account 'adequate reasoning' and 'relevant evidence'. This section also elaborates a test for legality to control whether the suggested standard of review has been met. The test of legality maintains that the EU legislator must provide, at least, one reason that offers an independent justification for why and how EU action conforms to the limits of the Treaties. Each of these reasons must be substantiated by adequate and 'sufficient evidence'.

II Institutional and practical reasons for the Court's deferential approach to review of the exercise of EU powers

Komesar, looking at the US context, has provided for a general argument that partly explains why the EU courts have been engaged with deferential review of the exercise of legislative powers. His approach is premised on the link between the relative institutional capacities of the courts and the legislator and the court's choice of standard of review.⁴ Although Komesar's analysis is based on the US constitution and the US political system, his framework can also be applied to the EU law context given its general sphere of application for constitutional analysis.⁵ This is confirmed by European legal scholarship that has underlined that institutional factors are relevant when determining the standard and intensity of judicial review performed by Court of Justice.⁶

Komesar's point of departure is that very few legislative decisions have any serious potential for judicial scrutiny. Courts often lack the necessary competence, expertise or information to intervene in a certain area of law. The court should defer to the legislature if it has

⁴ 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, 665, 668-690; Miguel Maduro, *We, the Court; The European Court of Justice and the European Economic Constitution* (Hart 1998) 116-126; Alison L Young, 'In Defence of Due Deference' (2009) 72 Modern Law Review 554, 577-579; Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (CUP 2012) 70-137.

⁵ See Komesar (n 4) 721.

⁶ See Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105; Alexander Fritzsche, 'Discretion, scope of judicial review and institutional balance in European law' (2010) 47 Common Market Law Review 361; Craig, *EU Administrative Law* (n 3) 469; Toth (n 3) 283-284.

considerable doubts about its capacity to arrive at correct determination of the facts because it lacks access to relevant information or expertise or otherwise doubts its ability to assess the quality of the legislative procedure or arrive at responsible decisions.⁷

The classical assumption of deference within the context of review of EU legislation is that the Court should defer to the Union legislative institutions in cases of normative uncertainty, in relation to social-political choices and factual complexity. This is because in such cases the Union Courts are operating at the border of judicial legitimacy derived from their authority, expertise and competence.⁸ Institutional concerns militate against the Court entering into strict review of Treaty conditions that require that some part of the assessment involves judgments of a more political or economic nature and that exceed the proper judicial function.⁹ Similar concerns invite the Court to be cautious when it reviews Treaty conditions that, because of their structure and wording, suggest implicitly or explicitly the EU legislator enjoys some discretion.¹⁰ If the Treaty denies the Court an operationally useful role in reviewing the exercise by the EU legislator of its competences, it would endanger its own legitimacy if it entered into serious review and encroached upon the EU legislator's discretion.¹¹

The condition of subsidiarity is a case at point for the general argument. Due to the principle's structure and the Court's institutional capacities, subsidiarity makes a perfect candidate for deferential judicial review. The construction of the principle ultimately forces the Court to engage in an assessment of the empirically complex political-economic question of whether there is a need for EU action.¹² It has been suggested that issues such as the complexity of the matter in terms of the value of protecting localism, the consequences of Union inaction, heavy reliance on the counter-factuals of Member State alternatives, and the underlying socio-economic determinants are matters of political judgment that the Union

⁷ See Komesar (n 4) 697; Daly (n 4) 72-89, 95-96; Fritz Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 *Yale Law Journal* 517, 567-573, 584, 587.

⁸ See Joanne Scott and Susan Sturm 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 *Columbia Journal of European Law* 565, 569; Daly(n 4) 10-12, 89-101; Patricia Popelier, 'Preliminary Comments on the role of Courts as Regulatory Watchdogs' (2012) 6 *Legisprudence* 257, 259, 267.

⁹ See Lord Mackenzie Stuart, 'Subsidiarity- A Busted Flush' in Deirdre Curtin and David O'Keefe (eds) *Constitutional adjudication in European Community and national law: essays for the Hon. Mr. Justice T.F. O'Higgins* (Butterworth 1992) 23; Craig, *EU Administrative Law* (n 3) 592-593; Fritzche (n 6) 361, 363, 368.

¹⁰ See Case C- 58/08, *Vodafone and Others* [2010] ECR I-04999, para 35; Case C-176/03, *Commission v Council* [2005] ECR I-07879, paras 48, 50.

¹¹ See Weatherill, 'The limits of legislative harmonisation' (n 3) 848; Antonio Estrella, *The EU Principle of Subsidiarity and Its Critique* (OUP 2002)139, 166.

¹² See Toth (n 3), 282-284; Werner Vandendriessche, 'Multi-Tiered Political Questions: The ECJ's Mandate in Enforcing Subsidiarity' (2012) 6 *Legisprudence* 321, 328.

legislative institutions are better equipped to evaluate.¹³ These predictions reflect the reality well. The Court's own perception of its institutional capacity and legitimacy permeates its approach to material subsidiarity in relation to the review of EU harmonization measures.¹⁴ The material subsidiarity question is, according to the Court, a matter of political choice. If the EU legislator considers that Member States do not have the capacity to achieve the objectives of the Directive and for this reason suggest harmonization, the Court must accept that choice.¹⁵ This perception has adversely affected the Court's enforcement of subsidiarity and entailed a review of the principle that lacks intensity.¹⁶

The conditions in Article 114 TFEU are another example demonstrating the general argument. As this provision does not give the Court a useful role in reviewing the exercise of EU competences, the Court has not considered it an option to engage in intense judicial review. The wording of the provision gives the EU legislator a power 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'. This provision suggests that the EU legislator has been conferred with a wide margin of discretion in how it pursues and with what means it executes the internal market objectives. The wording of Article 114 TFEU also indicate that a complex social, political assessment of what is necessary for achieving the objectives of the internal market is called for to ascertain compliance with those conditions. The Union legislator may be better suited to make that assessment than the Union Courts.¹⁷ This argument has been well-demonstrated by the Court's practice. The Court's marked reluctance to intervene in the EU legislator's sphere of discretion because of its perceived institutional flaws in relation to re-examining the policy choices of the EU legislator has pervaded the Court's jurisprudence. The Court has held that where there are obstacles to trade or a risk for obstacles to trade Article 114 TFEU authorizes the EU legislature to intervene by adopting 'appropriate measures'. Those appropriate measures may, depending on the circumstances, consist in requiring all Member

¹³ See George A Bermann 'Taking Subsidiarity Seriously' (1994) 94 Columbia Law Review 332, 337, 385-386, 391-394,400; Estrella (n 11) 139, 147, 165, 176.

¹⁴ See above chapter 2- section IV (A).

¹⁵ See Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* [2005] ECR I-06451, paras 104-107.

¹⁶ See Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405, paras 24-28; Case 377/98, Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-07079, paras 31-34; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 177-185; Case C- 58/08 *Vodafone and Others* (n 10), paras 72-80.

¹⁷ See Lord Mackenzie Stuart, *The European Communities and the rule of law* (1977 Steven and Sons) 41, 54; Weatherill, 'The limits of legislative harmonisation' (n 3) 843, 847- 849.

States to authorize the marketing of a product(s), authorize marketing of a product(s) under certain conditions or prohibit the marketing of a product.¹⁸ The Court has also stated that the authors of the Treaty intended to confer a freedom of choice to the Union legislator under Article 114 TFEU, depending on the general context and the specific circumstances of the matter to be harmonized, as regards the mode and method of approximation most appropriate for achieving the objectives of the internal market.¹⁹ In sum, according to the Court Article 114 TFEU gives the EU legislator discretion to adopt appropriate measures and discretion in relation to the mode and method of harmonization as long as the objective is to reinforce the internal market. In light of this, it is not difficult to see why the Court reviews EU legislation adopted under this provision in a deferential manner.²⁰ This approach from the Court has, as in the case of subsidiarity, resulted in an inadequate enforcement of Article 114 TFEU and a review of a low intensity.²¹

I mentioned above that a lack of competence and expertise has been an important reason for deference. As suggested by the discussion on subsidiarity and Article 114 TFEU, it is also clear that democratic legitimacy is often used as a rationale to justify deference to the legislator in review of the exercise of legislative competences.²² Waldron and Bellamy have generally argued that judicial review is contrary to the principles of democracy. Waldron has, on the basis of the assumption that the political system at issue is a ‘working democracy’²³, asserted that judicial review seriously undermines valued principles of representation and political equality in the final resolution of legal issues by privileging majority voting among a small number of unelected and unaccountable judges.²⁴ Legislators are instead accountable to their constituents, they have been elected by citizens based on the egalitarian principle of one person one vote and they are themselves bound to resolve their disputes by making decisions based on one person one vote and majority decision. The system of legislative elections is thus superior as a matter of democracy and democratic values to the limited basis of

¹⁸ See Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras 33-34.

¹⁹ See Case C-58/08 *Vodafone and Others* (n 10), para 35; Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771, para 43.

²⁰ *Vodafone and Netherlands v Parliament and Council* are other illustrating examples of the Court’s approach to Article 114 TFEU; see Case C-58/08 *Vodafone and Others* (n10), paras 38-49; Case C-377/98 *Netherlands v Parliament and Council* (n 16), paras 14-18, 20-22, 24-25, 27-29. See also the recent judgment: Case C-270/12 *United Kingdom v Parliament and Council* (Court of Justice, 22 January 2014), paras 102-103.

²¹ See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn, CUP 2010) 692.

²² See Daly (n 4) 101-115.

²³ See Jeremy Waldron, ‘The Core of the case against judicial review’ (2006) 115 *The Yale Law Review* 1346, 1359-69.

²⁴ *ibid* 1353.

democratic legitimacy for the judiciary.²⁵ Bellamy argues in a similar vein that courts are less legitimate than legislatures within working democracies for reasoning on policy choices. First, the need for courts to accommodate both existing law and to consider only those parties with legal standing in a particular case tends to make them less apt than legislatures to take into consideration all the moral and practical considerations relevant for collective decisions. Secondly, in contrast to the judicial process, a political procedure embodies an equal concern and respect for all individuals, since it treats citizens equally and provides them with sources of information enabling them to ensure that the full range of concerns is taken into account and appropriately weighed.²⁶ Gerards has developed this argument in the EU context and submitted that the EU courts' weak legitimacy often argues against strong judicial review. The primary responsibility for policy making should be placed with the EU political institutions. The political procedure is superior to judicial hearings because only the political process can ensure that important decisions are taken after a transparent process in which all stakeholders can effectively participate and in which real political debate is possible over the balance to be struck between conflicting interests. Litigation before the Union courts cannot effectively substitute such a process. For this reason, the Court should not substitute the policy preferences of the EU legislature with its own.²⁷

Having given a brief overview of the rationales for judicial deference in relation to review of EU legislation, we can contrast the mainstream views to alternative interpretations on this issue. First, I endorse the view in the literature that institutional arguments cannot justify the Court's current excessively deferential stance to the exercise of EU legislative powers. Although there may be, in certain instances, a justification for the Court to recognise the EU legislator's discretion in relation to the application of certain Treaty conditions, a claim for general deference cannot be upheld. Discretion to the EU legislator in the context of serious engagement with the empirical facts and their normative assessment within the framework review of some Treaty conditions of broad Treaty powers does not preclude meaningful review.²⁸ Whilst the Court very often refers to complex social and economic evaluations or a

²⁵ *ibid* 1387-90; Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 *Perspectives on Politics* 805, 808; Komesar (n 4) 662-663;

²⁶ See Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86, 91-92.

²⁷ See Janneke H Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80, 86; Popelier (n 8) 259.

²⁸ See Gráinne De Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper no. 7/1999, 29; Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009) 265; Weatherill, 'The limits of legislative harmonisation' (n 3) 863-864.

lack of expertise for justifying discretion, it seems that these references only serve as self-explanatory justification for limited judicial review. Those references do not address how those institutional factors are connected more specifically to the Court's ability to exercise their review powers in a specific case.²⁹

Secondly, infusing judicial review of EU legislation with greater force is one way of enhancing the accountability and legitimacy of the Court and the EU legislative procedure.³⁰ The Court was created with the aim of providing an arbitrator to mediate between the interests of the EU and the Member States on the assumption that the Court could be trusted to take on this responsibility in an unbiased way. The Court's current approach is however inadequate.³¹ The Court has limited its review powers over the Union's exercise of competences by classifying more and more issues as involving 'difficult social, technical and economic choices'.³² The Court's weak approach in competence cases has not only failed to promote a culture of justification but also devalued Member State rights whose observance the Court should ensure. In this way the Court has weakened the institution of judicial review and undermined its own legitimacy.³³ Credible judicial review is a critical pre-condition to the successful survival of the entire experiment of the European Union. If the Court continues with low level intensity review of the exercise of EU competences it might face criticism that it effectively fails in its task to ensure that the law of the Treaties are observed. Given the recent conflict between the policies of further EU integration versus the emphasis on stronger state rights, the Court needs to reinforce its role as an objective umpire in competence disputes. To do this it must change its current deferential approach and review the exercise of EU powers with more vigour than it currently does.³⁴

²⁹ See Fritzsche (n 6), 380-381.

³⁰ See above text to n 23-27 in the present chapter for the discussion on democratic legitimacy.

³¹ See Mattias Kumm, 'Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' 12 (2006) *European Law Journal* 503, 529; Editorial Comments, 'The Court of Justice in the limelight – again' (2008) 45 *Common Market Law Review* 1571; Roman Herzog and Lüder Gerken "Stoppt den Europäischen Gerichtshof", *Frankfurter Allgemeine Zeitung*, 8 September 2008) Herzog R and Gerken L, "Stoppt den Europäischen Gerichtshof", *Frankfurter Allgemeine Zeitung*, 8 September 2008. <http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf> Accessed 23 April 2014;

³² See above chapter 2-section III (A) for the discussion on proportionality and review of broad EU policies.

³³ See Dorota Leczykiewicz, "'Constitutional Justice' and Judicial Review of EU Legislative Acts' (2013) *Oxford Legal Studies Research Paper No. 95/2013*, 4, 8, 12-13. <<http://ssrn.com/abstract=2355961>>. Accessed 9 May 2014.

³⁴ See Craig, *EU Administrative Law* (n 3) 445, 496; Hjalte Rasmussen, *On law and policy in the European court of justice : a comparative study in judicial policymaking* (Martinus Nijhoff Publishers 1986) 409-418; Trevor C Hartley, 'The European Court, judicial objectivity and the constitution of the European Union' (1996) 112 *Law Quarterly Review* 95; Jeffrey Jovell, 'Administrative Justice and Standards of Substantive Judicial

Finally, I will challenge the claim that the undemocratic nature of judicial procedures militates against or excludes judicial review. Firstly, I tend to disagree with Gerard's assertion that the EU Courts, because of their lack of representativeness, should be submissive in review of policy choices. Even though courts are not as representative as traditional political institutions, the political process itself is often an 'imperfect' alternative.³⁵ Legislators are regularly vulnerable to political pressure of manifold kinds, both financial and political, implying that the legislature is not the safest vehicle for protecting the rights of Member States. If political pressures provide a distorted picture of the public will through a 'severe majority bias'³⁶ where the minority are disproportionately harmed, the political process may be worse than an insulated judicial process.³⁷ Political malfunction in terms of significant and systemic failure to represent the interests of a 'discrete' and 'insular' minority³⁸ or disregard or hostility to the rights of such minorities certainly justifies judicial intervention.³⁹

Secondly, in response to Waldron's and Bellamy's argument, it is argued that the political procedures in the European Union may be less legitimate than the procedure before the Court. As suggested by Craig, the present state of the political process, with the Union still suffering from a large democratic deficit partly undermines the classic challenge to the Court. First, none of the EU institutions can lay claim to a democratic mandate. Neither the Council nor the Commission is selected by or accountable to the electorate. Though the parliament is popularly elected, its powers are limited. Secondly, there are structural limits to the realization of input democracy in the EU. While democratic principles require that the voters

Review' in Anthony Arnall, Piet Eeckhout and P Takis Tridimas (eds), *Continuity and Change in EU Law* (OUP 2008) 186.

³⁵ Lever, (n 25) 808-815, has for example compellingly argued, in response to Bellamy's and Waldron's argument that elections do not provide for a superior alternative to judicial review. This is because elections are too blunt, infrequent, likely to be tainted by a history of subordination and typically raise too many issues for electoral consideration for them to provide a good means of holding legislators accountable for breaches of the constitution.

³⁶ See Komesar, (n 4) 675, for a definition of 'majoritarian bias'.

³⁷ See Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 25, 70; Alec Walen, 'Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism. A Review Essay on *Political Constitutionalism*, by Richard Bellamy,' (2009) 7 *International Journal of Constitutional Law* 7 329, 340, 343, 353-54; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 142, 154-55, 161.

³⁸ Discrete' and 'insular' convey the idea of a minority that exists apart from political decision-making and the idea that the members of the minority are isolated from the rest of the community in the sense that they do not share many interests with non-members that would enable them to build a series of coalitions to promote their interests. Typical examples of 'severe' majoritarian bias are explicit race discrimination of non-nationals, homosexuals and poor women since such instances of unfair treatment involve discrete, immutable and well-defined groups of people; see Komesar (n 4) 703-704, 706, 712, 715, 720.

³⁹ See Komesar (n 4) 682, 690, 693, 700; Waldron (n 23) 1403-1404; Maduro (n 4) 170-174.

can remove the party in power and replace it with another, this basic condition is not met in the EU. The fact that the people are represented through the European Parliament and the Member States in the Council means that it is not possible under existing arrangements for the EU citizens to directly vote out those in power and substitute them with a different party. This is because Member State representatives in the Council are not chosen in this manner. Since the EU legislators are not directly accountable to the electorate and none of the EU institutions can lay claim to a democratic mandate, one of Waldron's main assumptions on 'democratic institutions in a good working order'⁴⁰ is not met and the core case against judicial review cannot be sustained.⁴¹

Having made the case that broad deference is unwarranted in the context of a review of the exercise of EU powers and condemned the Court's current approach as inadequate, the chapter proceeds to consider how review could be strengthened. It is suggested in the following section that the Court should adopt a more evidence-based and procedural approach to judicial review to enforce the limits of the Treaties. Procedural review is proposed as the appropriate remedy for the institutional problems of judicial review identified above.

III Procedural review- sharpening the Court's deferential review of the exercise of EU powers

A Defining procedural review

Because of the numerous terms used in the literature such as 'evidence-based' judicial reflex⁴², 'pure' substantive review⁴³, 'semi-procedural' review⁴⁴, and 'pure' procedural review⁴⁵, this section starts with an account of my definition of procedural review. Procedural review is defined here as an approach to judicial review that compels the Court to consider whether the EU legislator's reasoning and evidence is sufficient to justify the exercise of

⁴⁰ See Waldron (n 23) 1361-62.

⁴¹ See Joseph HH Weiler, 'Eurocracy and distrust : some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities', (1986) 61 *Washington Law Review* 1103, 1116-17; Paul Craig, *The Lisbon Treaty: Law, politics and Treaty reform* (OUP 2011) 73-74; Mary L Volcansek, 'The European Court of Justice: Supranational Policy-Making', (1992) 15 *West European Politics* 109, 118 .

⁴² 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.

⁴³ See Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271, 279.

⁴⁴ *ibid* 279-282.

⁴⁵ *ibid* 280.

general legislative powers.⁴⁶ The Court's examination of the legislator's evidence and reasoning constitutes a part of the Court's determination of the legality of EU legislation.⁴⁷ Procedural review implies that the Court make an instrumental use of the evidence gathered during the decision-making process in order to verify the legality of EU acts. It implies that the Court monitors the official background documents to EU legislation such as impact assessments and explanatory memorandum to see whether such documents contain sufficient reasoning and evidence to assess the legality of EU legislation.⁴⁸

B Why is procedural review an appropriate tool for enhancing judicial review of EU legislation?

So far the academic discussion on procedural review has mostly centred on procedural review of subsidiarity.⁴⁹ There are, however, good arguments for making procedural review a general device for reviewing the limits of the Treaties.⁵⁰

First, procedural review is a serious response to institutional objections to the Court's capacity and legitimacy to enforce the limits of the Treaties. The Court always has a choice if it wishes to engage in a more intense judicial review. The Court could either engage in more intense substantive review or instead examine the evidential and procedural basis for the legislative measure. The reasons based on democratic legitimacy and institutional competence would make it difficult for the Court to move to more sustained substantive review. Those arguments suggest that substantive review illegitimately intrudes into the legislative sphere. Procedural review on the other hand provides that the reasons for limited judicial review that were identified above⁵¹ are not given too broad an interpretation, which would exclude judicial review of EU legislation from the constitutional sphere. Procedural review requires the EU legislature to convince the Court that the measure was indeed enacted on the basis of its superior expertise or democratic credentials. Such a mode of review

⁴⁶ See Case C- 310/04 *Spain v Council* [2006] ECR I-07285, paras 122-123.

⁴⁷ See Alemanno, 'evidence-based judicial reflex' (n42), 332; Bar-Siman-Tov (n 43) 272, 275, 279.

⁴⁸ See Bar-Siman-Tov (n 43) 275; Vandenbruwaene (n12) 343; Alemanno, 'evidence-based judicial reflex' (n 42) 334-335.

⁴⁹ See Philip Kiiver, *The Early Warning System for the Principle of Subsidiarity* (Routledge 2012); Bermann (n 13) 336; 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, 894; Xavier Groussout and Sanja Bogojevic, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulay, *The Question of Competence in the European Union* (OUP 2014) 252.

⁵⁰ See Craig, *EU Administrative Law* (n 3) 389-90; Scott and Sturm (n 8) 570-75.

⁵¹ See above section II in the present chapter.

empowers the Court to engage in a serious monitoring of the exercise of EU competences when the Court's institutional inadequacies impede it from assessing the substantive merits of the case.⁵² Procedural safeguards do not compel the EU Courts to substitute the EU legislator's choice. Rather they oblige the EU legislator to take the precepts of the Treaties seriously.⁵³ Accepting that the EU legislator's choice of policy may not be reviewable, it is argued that the question of whether the EU institution has backed up its legislative choices with adequate reasoning and evidence is an issue that the Court is well-equipped to examine.⁵⁴

Secondly, procedural review improves both the stringency of review and facilitates such review. Procedural requirements relating to the adequacy of the evidential basis for decision-making ensures the availability of sufficient information to permit the Court to engage in a meaningful substantive review of the measure. Since procedural review requires policymakers to conduct studies, perform cost-benefit analysis, conduct impact assessments and collect evidence, the Court will have at its disposal a useful critical mass of materials that will help it to determine the legality of a given act. The analyses in legislative background documents provide the EU Courts with a framework to assess the socioeconomic findings and reasoning underlying the exercise of EU competences. The Court can only perform its review function properly if it has appropriate material at its disposal to assess compliance with the rules of the Treaties.⁵⁵

Thirdly, evidence and justification-based judicial review is also supported by the literature on legitimacy. That literature converges around a series of principles: transparency; the rule of law and accountability.⁵⁶ Procedural review is suitable for implementing such principles. Evidence suggests that even post-Lisbon the EU suffers from a lack of transparency as regards allocation of responsibility. The EU's specific institutional structure, its complex multi-level forms of cooperation, the complicated and opaque EU decision-making procedure as well as the complexity of the typology of legal acts obscures appreciation of the vertical

⁵² See Popelier (n 8) 260, 264, 267-68, 270; Koen Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3, 15-16; Scott and Sturm (n 8) 575.

⁵³ See Groussout and Bogojevic (n 49) 251.

⁵⁴ See Bermann (n 13) 336; Craig, *EU Administrative Law* (n 3) 390.

⁵⁵ See Scott and Sturm (n 8) 582, 586, 588, 590; Mackenzie Stuart *The European Communities and the rule of law* (n 17) 42-43, 111; Alemanno, 'evidence-based judicial reflex' (n 42) 333-336, 338.

⁵⁶ See Scott and Sturm (n 8); Neil Walker and Gráinne De Búrca, 'Reconceiving Law and New Governance' (2007) 13 Columbia Journal of European Law 519, 533-34; Leczykiewicz (n 33) 2-3.

allocation of powers and with this the accountability for decisions.⁵⁷ A recent Eurobarometer survey in 2011 revealed that 42% of European citizens are not satisfied with the level of transparency in the EU administration, while only 9% are satisfied.⁵⁸ Procedural review can remedy this transparency deficit by requiring the EU institutions show that they were informed by an adequate factual foundation when they exercise their discretion.⁵⁹

Fourthly, a more evidence-based approach to judicial review is capable of promoting a broader culture of evidence and rationality in policymaking.⁶⁰ It induces the EU legislators to rely upon sufficient knowledge and to draw upon studies which address questions that require an answer before the EU legislator can credibly claim the proposed legislation conforms to the limits of the Treaties. It challenges fixed but unproven assumptions and force the EU institutions to consider whether Union action on a given issue is appropriate.⁶¹ A procedural enquiry has not only a disciplining effect on EU political institutions but it also helps foster an attitude of confidence among citizens and Member States towards those institutions, which in turn increases the legitimacy of the EU legislative procedure.⁶²

C The judicial record of procedural review

But is there evidence in the case-law that the Court has successfully applied procedural review to challenge the exercise of EU competences? My first point is that whilst there are signs in the case law that the Court has engaged in a more ‘process-based review’, we should be cautious in characterizing those efforts as a success in judicial practice. The Court did admittedly, as discussed above, in *Spain v Council*⁶³, lay down high informational requirements on the Union legislator. We know that the Court quashed the contested

⁵⁷ See Herwig CH Hofmann, Gerard C Rowe, and Alexander H Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 170-171; Adrienne Héritier, ‘Composite democracy in Europe: the role of transparency and access to information’ (2003) 10 *Journal of European Public Policy* 814, 821-22; Joseph HH Weiler, ‘The European Union belongs to its Citizens: Three Immodest Proposals’ (1997) 22 *European Law Review* 150, 151.

⁵⁸ See the The European Ombudsman, ‘Annual Report 2011’ (2011) 6 <<http://www.ombudsman.europa.eu/activities/annualreports.faces;jsessionid=F6FBB766080ACD3D801EBB25320137BE>>. Accessed 28 April 2014.

⁵⁹ See Joined cases C-154/04 and 155/04 *Alliance for Natural Health and Others* (n 15), para 133; *Kiiver* (n 49) 176.

⁶⁰ See Alemanno, ‘evidence-based judicial reflex’ (n 42) 338.

⁶¹ See Anne Meuwese, *Impact Assessment in EU law-making* (2008) 168-169. Doctoral dissertation of 6 February 2008 at the University of Leiden. <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/12589/Thesis.pdf?sequence=3>>. Accessed 28 April 2014.

⁶² See Scott and Sturm (n 8) 570-571, 583; Kumm, ‘The Idea of Socratic Contestation and the Right to Justification’ (n 37) 153, 163-164; Bar-Siman-Tov (n 43) 296.

⁶³ See Case C- 310/04 *Spain v Council* (n 46).

regulation on the new cotton support scheme⁶⁴ on the basis of the proportionality principle, because of the Commission's failure to take into account all relevant information pertaining to the situation and its failure to produce and present clearly the basic facts which had to be taken into account as the basis of the contested regulation.⁶⁵ There are, however, compelling indications in the case-law prior and subsequent to *Spain v Council* that the Court's threshold for compliance with motivational and informational requirements has been fixed at a regrettably low level. If we compare the Court's application of procedural review to my proposed definition, it seems that the Court's procedural enquiry is limited to considering whether the EU legislator has stated a justification and not whether this justification is plausible or coherent with the grounds for exercising the competence under the relevant competence-conferring provision. Neither does the Court examine, as required by my proposal, whether the reasoning advanced for exercising the competence is supported by any evidence.

We can take *Vodafone* as an example to illustrate these observations. In *Vodafone*, the claimants challenged the validity of the EU Roaming Regulation⁶⁶, adopted on the basis of Article 114 TFEU, on the grounds that Article 114 TFEU was not adequate and that the measure breached the proportionality principle.⁶⁷ The Court observed that the Regulation introduced a common approach so that users of terrestrial public mobile telephone networks do not pay excessive prices for Union-wide roaming services and so that mobile operators can operate within a single, coherent regulatory framework. As was clear from the explanatory memorandum, the level of retail charges for international roaming services was high at the time of adoption of that regulation. The relationship between costs and prices was not such as would prevail in fully competitive markets. The existing EU regulatory framework had not provided NRAs with sufficient tools to take effective action with regard to Union-wide roaming services and failed to ensure the smooth functioning of the internal market for those services. The Union legislature referred to the explanatory memorandum that pointed to the residual competence of the Member States to adopt consumer protection rules. Due to the Member States' residual competence it followed that the Union legislature was confronted with a situation in which it appeared likely that national measures would be

⁶⁴ For full reference to the regulation; see above chapter 2 n 113.

⁶⁵ Case C- 310/04 *Spain v Council* (n 46), paras 122-135

⁶⁶ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ 2007 L 171/32 ('Roaming Regulation').

⁶⁷ Case C-58/08 *Vodafone and Others* (n 10), para 29.

adopted to address the problem of the high level of retail charges for Union-wide roaming services. Such measures would have been likely, as indicated by the explanatory memorandum and the impact assessment, to lead to a divergent development of national laws. Accordingly, the EU legislature decided to act in order to forestall measures that would probably have been taken by the Member States based on their residual competence as regards consumer protection rules. The Court noted that a divergent development of national laws seeking to lower retail charges only, without affecting the level of costs for the wholesale provision of Union-wide roaming services, would have been liable to cause significant distortions of competition. Such a situation justified the Union legislature's seeking to protect the proper functioning of the internal market under Article 114 TFEU.⁶⁸

Lenaerts contends that the Court's procedural review in *Vodafone* is a positive development in the case-law of the Court on the sensitive issue of the vertical allocation of powers. The ruling demonstrates that the Court gives, by basing its reasoning on the IAR, important incentives to the EU legislator to investigate alternative mechanisms and policies seriously. He has drawn broader conclusions based on *Vodafone* and *Spain v Council* and argued that the Court has by those rulings begun to develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions. The Court's approach has not been to second-guess the appropriateness of the policy choices made by the EU legislator but rather to examine whether law-makers had done their work properly by following the procedural steps mandated by the Treaties when exercising their competence. Judicial deference in relation to 'substantive outcomes' has been counterbalanced by a strict 'process review'.⁶⁹ Groussout and Bogojevic have endorsed Lenaert's optimistic view on the implications of *Vodafone*. The judgment is revolutionary as it is the first preliminary ruling procedure in which the Court relies on an impact assessment when examining the alleged infringement of the principle of proportionality. The broader principle expressed by *Vodafone* is that the Court should not examine whether the policy choices made by the EU institutions were correct but analyse whether the EU institutions had shown that they had 'taken into account all relevant circumstances'.⁷⁰

⁶⁸ *ibid*, paras 38-49.

⁶⁹ See Lenaerts, 'The European Court of Justice and Process-Oriented Review' (n 52) 3-10.

⁷⁰ *ibid*, 7, 15; Groussout and Bogojevic (n 49), 246, 252; Alberto Alemanno, 'Regulatory Impact Assessment and European Courts: When Ex Ante Evaluation Meets Ex Post Judicial Control' (2011) 17 *European Public Law* 485, 499-503.

My view is that *Vodafone* was a step in the right direction. What is promising about the case is that the Court went beyond the preamble to control the legality of the measure. It was the first case in which the Court relied on the impact assessment and explanatory memorandum when examining the compatibility of an EU policy measure with the precepts of the Treaties. The Court referred to the impact assessments and explanatory memorandum in no less than 8 paragraphs and both in relation to its assessment of compatibility with Article 114 TFEU and in its proportionality assessment.⁷¹ Whilst I endorse this process-based review, I do not think that the Court went far enough in its legality review. First, I think the Court applied procedural review in a too deferential manner. Even though the Court in this case went beyond the Preamble to consider whether Union legislative action was justified with regard to Article 114 TFEU and the principle of proportionality, it did not question the legality of the Regulation on the basis of the explanatory memorandum and the impact assessment. Instead it employed the legislative background documents as mechanical justifications for the validity of the Roaming Regulation. They were simply employed to confirm the Commission's unproven assumption that unless the Union intervened, there was a risk that divergent national measures would be adopted to address Union-wide roaming services, which would in turn lead to a distortion of the EU-wide roaming market. As long as the impact assessments make a favourable finding, it seems that the Court will accept those reasons on their face value.⁷²

Secondly, I argue that the Court did not in *Vodafone* apply the demanding standard it had imposed in *Spain v Council* for the EU legislator to show that it had taken into account 'relevant circumstances'.⁷³ My view differs from Lenaerts, who claims that the Court in *Vodafone* applied the principle that the EU legislator must demonstrate that it had taken into consideration all the 'relevant interests at stake'.⁷⁴ Fundamentally, I do not, in contrast to Lenaert's view, believe that the EU legislator demonstrated that it had taken into account all relevant circumstances. The key problem with the Roaming Regulation was the justification for harmonization. The EU legislature relied on the risk that national measures to regulate charges for roaming would lead to divergent results, thus justifying Union-wide regulation of this issue. The important point here is that there were no such clear evidence that such measures had been taken or were about to be taken. I argue that pre-emptive harmonization to

⁷¹ See Case C-58/08, *Vodafone and Others* (n 10), paras 39, 43, 45, 55, 58, 59, 63, 65.

⁷² *ibid*, paras 43-45, 47; Groussout and Bogojevic (n 49) 247.

⁷³ See Case C-310/04 *Spain v Council* (n 46), para 122.

⁷⁴ See Lenaerts, 'The European Court of Justice and Process-Oriented Review' (n 52) 7.

avoid potential distortions to competition is not acceptable unless those distortions are ‘likely’ to occur.⁷⁵ Such pre-emptive harmonization must be justified with some proof that price control measures would lead to costs for operators of such a nature that they would qualify as competitive disadvantages and lead to distortions of competition. A close reading of the impact assessment and the explanatory memorandum did not provide any such evidence.⁷⁶ Even if such measures were imposed discriminatorily on operators only in Member States where price control regulation was adopted, it is far from clear that such measures would cause such a competitive disadvantage as to create ‘appreciable’ distortions to competition.⁷⁷ Given this, how could the Court have been sure that ‘relevant circumstances had been taken into account’ in relation to the risk of distortions to competition? If the Court would have followed my proposal and applied its *Spain v Council* standard, it would have reached the conclusion that the EU legislator had failed to show the likelihood of such distortions and consequently annulled the measure.

Secondly, the validity of EU legislation is not, according to the Court’s case-law, dependent on compliance with the underlying impact assessment, nor is there any requirement that deviation from impact assessments is explained. *Afton Chemical* is an illustration of the Court’s approach. In *Afton Chemical*, the claimants had argued that Article 1(8) of a directive on the specification of petrol, diesel and gas-oil⁷⁸ was invalid due to the fact that it limited the use of MMT⁷⁹ in fuel after 1 January 2011. The claimants submitted that the EU legislator had committed a manifest error of assessment and breached the proportionality principle when it adopted the provision. The claimant observed that there was no support for the imposition of those limits in the impact assessment preceding the adoption of the Directive, and that those limits are unworkable and arbitrary.⁸⁰ The Court stated that the impact

⁷⁵ See Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, paras 86, 107.

⁷⁶ See Roaming Regulation (n66), recital 8-9; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services’, Brussels, 12.7.2006, COM(2006) 382 final, 4; Commission, ‘Commission Staff Working Paper, Impact Assessment of Policy Options Relating to a Commission Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks Within the Community’, Brussels, 12.7.2006, SEC(2006) 925, 25.

⁷⁷ See Case C- 376/98 *Tobacco Advertising* (n 75), paras 109-114.

⁷⁸ See Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC [2009] OJ 2009 L 140/88.

⁷⁹ Methylcyclopentadienyl manganese tricarbonyl; see Directive 2009/30/EC (n 78), recital 35.

⁸⁰ See Case C-343/09 *Afton Chemical* [2010] I-07027, paras 9, 28.

assessment carried out by the Commission did not bind the Union legislators because the EU legislator was, under the ordinary decision procedure laid down by Article 294 TFEU, entitled to make amendments to that proposal.⁸¹ It also held, by referring to some studies and to the statements of the Parliament and the Council, that those institutions took into account the available scientific data during the legislative procedure in order to properly exercise their discretion. For this reason there was no manifest error of assessment.⁸² In relation to the proportionality assessment the Court also discarded the results of the impact assessment. The Court enquired as to whether, in exercising its discretion, the EU legislature attempted to achieve a degree of balance between, on the one hand, the protection of health, environmental protection and consumer protection and, on the other hand, the economic interests of traders. The Commission's impact assessment was *not* binding on either the Parliament or the Council in this regard. It was also clear from the evidence that, when the Directive was adopted, no public body or independent entity had undertaken a scientific assessment of the effects of MMT on health. It followed that the EU legislature was faced with serious doubts as to whether MMT was harmless for health and the environment. Even though it was impossible, on the basis of the scientific evidence, to determine the extent of the health risks associated with MMT, there was a likelihood of real harm to public health if the risk that such harms would materialize persists. Based on this the precautionary principle justified the adoption of restrictive measures without having to wait for the reality of those risks to be fully demonstrated.⁸³

Afton Chemical showed a feeble application of procedural review. The Court actually referred to the test in *Spain v Council* and that the EU legislator had to show that it had taken into account relevant circumstances when it exercised its discretion.⁸⁴ However, if it had applied the *Spain v Council* standard properly, the Court should have annulled the measure. First, the statements from the EU institutions that claimed that it had taken into account sufficient information were dubious. Those institutions asserted that they had taken into account studies on the health risks of MMT demonstrating that the use of MMT is damaging to human health and to the proper functioning of emissions control systems.⁸⁵ This, however, appeared to be a post-construction for defending the setting of the limits. The real issue here is whether the Directive, the Proposal or the Impact Assessment contained references to the

⁸¹ *ibid*, paras 30, 57.

⁸² *ibid*, paras 36-42.

⁸³ *ibid*, paras 56-62.

⁸⁴ *ibid*, para 34.

⁸⁵ *ibid*, paras 35-37.

studies referred to by the EU legislator. One of the recitals stated that many vehicle manufacturers advise against the use of fuel containing metallic additives and that the use of such fuels may invalidate vehicle warranties.⁸⁶

But is this adequate evidence to show that the EU legislator has taken into account all ‘relevant circumstances’ when setting the limits to MMT? I do not believe it is. The problem was, as was explained in the Proposal to the Directive, that there was a clear divergence of opinion between different sectors, notably between the vehicle manufacturing industry and the oil industry in relation to the risks of metallic additives, the impact of metallic additives on emission control systems and the ethanol and vapour pressure limits, and the risks of damage to vehicle exhaust control systems. Nor was there any agreed test method for verifying whether metallic additives cause damage.⁸⁷ Because of this, the Impact Assessment concluded that no sufficiently compelling evidence has been provided for either a generalized ban on metallic additives, or a ban of a specific product.⁸⁸ Consequently, the original Commission proposal had no limit to MMT.⁸⁹ Given this, it is striking that such limits were imposed in the final directive without any clear scientific basis for this limit or any explanation for why it had been included in the Directive but not in the original proposal or in the impact assessment.⁹⁰ Even if the EU legislator cannot be precluded from amending a proposal, if it does so it should draft a new impact assessment on the proposed amendment⁹¹ or disclose in the final proposal the evidence it relied upon for amending the original proposal. In order to conform to the test set by *Spain v Council*, the EU legislator should have inserted references directly in Directive 2009/30/EC or in the proposal to those studies that it

⁸⁶ See Directive 2009/30/EC (n 78), recital 35.

⁸⁷ See Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and the introduction of a mechanism to monitor and reduce greenhouse gas emissions from the use of road transport fuels and amending Council Directive 1999/32/EC, as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC’, Brussels, 31.1.2007, COM(2007) 18 final (‘COM 2007/18’), 5; Commission, ‘Commission Staff Working Document, Impact Assessment of a Proposal for a Directive of the European Parliament and of the Council modifying Directive 98/70/EC relating to the quality of petrol and diesel fuels’, Brussels, 31.1.2007, SEC(2007)55 , 68-73.

⁸⁸ See SEC 2007/55 (n 87), 73.

⁸⁹ See COM 2007/18 (n 87), Article 8(a).

⁹⁰ Whilst it is clear that the limit was imposed after the first reading of the European Parliament, this resolution lacks any references to what studies or evidence made the EP suggest such a limit: see European Parliament, ‘Position of the European Parliament adopted at first reading on 17 December 2008 with a view to the adoption of Directive 2009/.../EC of the European Parliament and of the Council amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC, as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC’, EP-PE_TC1-COD(2007)0019, 17.12.2008, 18, 55.

⁹¹ See Interinstitutional agreement on better law-making, [2003] OJ C 321/01, point 30; Alemanno, ‘Regulatory Impact Assessments and European Courts’ (n70)503.

subsequently in the hearing claimed to have taken into account. Given the absence of any official references in the proposal to Directive 2009/30/EC and the directive itself to the studies invoked in litigation, it is hard to understand how the Court could maintain that the EU institutions had taken sufficient information into account during the legislative procedure when exercising its discretion.⁹² Had the Court applied the standard of legality of ‘adequate reasoning’ and ‘relevant circumstances that I propose below’⁹³, it would have annulled the measure.⁹⁴

Thirdly, it has already been mentioned that the Court does not enforce procedural subsidiarity.⁹⁵ In *Germany v Council*, Germany challenged the validity of the Deposit Guarantee Directive. The basis for Germany’s claim was that the EU legislator had infringed the obligations to state reasons by not indicating how the Directive complied with the principle of subsidiarity.⁹⁶ The Court rejected Germany’s claim by referring to the recitals to the Directive that, according to the Court, showed that the EU legislator had given consideration to the principle of subsidiarity. First, the Court referred to the second recital to the Directive that demonstrated that the EU political institutions was concerned regarding the situation that might arise if deposits in a credit institution that has branches in other Member States would become unavailable. For this reason it was indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Union. This recital showed why in the view of the EU legislator, its goal could, because of the dimensions of the intended action, be best achieved at Union level. Secondly, the Court mentioned the fifth recital where the EU legislator had observed that the action taken by the Member States in response to the Commission’s Recommendation had not fully achieved the desired result. The EU legislator therefore found that its goal could not be achieved sufficiently by the Member States. In view of this, the Court held that the EU legislator had satisfactorily explained why they considered that their action was in conformity with the principle of subsidiarity. For this reason they also complied with the obligation to state reasons. It concluded by stating that an express reference to subsidiarity could not be required for

⁹² See Case C-343/09, *Afton Chemical* (n 80) para 42.

⁹³ See chapter 3- section IV.

⁹⁴ The Court’s ruling in *Afton Chemical* was, however, consistent with the Court’s ruling *Spain v Council* where the Court held that the ‘essential procedural requirements’ the infringement of which may result in annulment of a Union act do not include the requirement to undertake an impact assessment; see Case C-342/03 *Spain v Council* [2005] ECR I-01975, paras 18-20, 30, 60.

⁹⁵ See *Estrella* (n 11) 155-157; *Schütze* (n 28) 255-256.

⁹⁶ See Case C- 233/94 *Germany v Parliament and Council* (n16), paras 22-24.

compliance with the obligation to state reasons.⁹⁷ My approach to procedural review would have questioned the legality of the Deposit Guarantee Directive. The legality standard of ‘adequate reasoning’ and ‘relevant circumstances’ requires, at a minimum, that the EU legislator explain expressly how a measure conforms to a legal principle. Given that the EU legislator did not do this in the Deposit Guarantee Directive, the Directive would have fallen foul of the proposed legality standard.⁹⁸

D Why is the timing right to employ procedural review?

While the Court so far has been reluctant to employ ‘procedural’ review in the way I suggest below, the evolution of EU law provides the Court with a strong incentive to engage in a more demanding and evidence-based judicial review after Lisbon Treaty.⁹⁹ First, more rigorous process-based review is facilitated through the new subsidiarity mechanism which confers a right for national parliaments¹⁰⁰ to review Union legislation on the basis of subsidiarity, a right to object to such legislation and ultimately halt the Union legislative procedure.¹⁰¹ The Lisbon Treaty has intentionally broadened the scope for intense procedural review of the exercise of EU competence by potentially providing the Court a wealth of material and arguments on subsidiarity to adjudicate upon. This material encompasses the reasoned opinions submitted by the national Parliaments detailing the substantive objections, and the reasoned decision of the Commission which refutes their objections.¹⁰² Because of the range and wealth of material, the Court will be in a better position to assess whether or not the EU institutions have fulfilled the requirements for exercising the competence if asked to do so in the context of annulment proceedings. It would also enable the Court to adopt more demanding procedural tests for legality requiring the EU political institutions to provide

⁹⁷ *ibid*, paras 26-28.

⁹⁸ This reasoning is developed in chapter 6- section II.

⁹⁹ See Meuwese (n 61), 271-72; Andrea Biondi, ‘Subsidiarity in the Courtroom’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 226-227; Paul Craig, ‘The ECJ and Ultra vires action: a conceptual analysis’ (2011) 48 *Common Market Law Review* 395, 427.

¹⁰⁰ See Articles 69, 352(2) TFEU; Protocol (No 1) on the role of national parliaments in the European Union, Articles 1-4 .

¹⁰¹ See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Articles 6, 7(3) and 8; 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 Policy* 1; 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, 117-118; Schütze (n28) 258-259; Groussout and Bogojevic (n 49) 240-241.

¹⁰² See Alan Dashwood, ‘The Relationship Between the Member States and the European Union/European Community’ (2004) 41 *Common Market Law Review* 355, 369; Alemanno, ‘Regulatory Impact Assessments and European Courts’ (n 70) 499.

a more substantial record that reflects their engagement with subsidiarity concerns and legal bases question.¹⁰³ In case the objections of numerous national parliaments are dismissed by the Commission, or the other EU institutions, with little reasoning, the Court might be inclined to find the legislative action did not conform to the Treaties. In this way, the Court could shift the burden of proof, meaning that the EU political institutions would need to show something similar to a manifest error of appraisal in the objections from national parliaments in order to be able to proceed with the proposal. Whether the Commission maintains or amends a draft legislative act in response to the national parliaments' objections, a 'yellow card' would provide a workable mechanism for judicial scrutiny of compliance with the principle of subsidiarity.¹⁰⁴

Secondly, the potential for procedural review has also been reinforced because of the increased use of impact assessments as basis for Union legislation.¹⁰⁵ Substantial benefit could be gained from the application of the impact assessment as an instrument of evaluation to enhance the Court's control of the limits of the Treaties. Such impact assessments include a specific section devoted to verification of the Union's right of action in terms of legal basis and subsidiarity¹⁰⁶ and can therefore provide evidence of compliance with the limits provided by the Treaties and can act as a benchmark for legality of Union measures.¹⁰⁷ Fact finding through impact assessments may serve as a framework for the Court to assess the rationality of the EU legislator's trade off of different interests and examine the validity of the EU legislator's socio-economic findings.¹⁰⁸ The very fact that there is a framework within which these issues are considered facilitates judicial scrutiny as to the adequacy of the reasoning and the evidence. The impact assessment's check of the Union's right of action under Article 5 TEU is likely to intensify the Court's current review of EU legislation. If the Court were to use evidence in the impact assessments in establishing whether an action conforms to the Treaties, this would decrease the present difficulty of enforcing the limits of

¹⁰³ See Vandebrouwaene (n 12) 345; Kumm, 'Constitutionalizing Subsidiarity in Integrated Markets' (n 31) 529-530; Alemanno, 'Regulatory Impact Assessments and European Courts' (n 70) 498.

¹⁰⁴ See Groussout and Bogojevic (n 49) 241.

¹⁰⁵ See Andrea Renda, *Impact Assessments in the EU: The State of the Art And the Art of the State* (CEPS 2006); Meuwese (n 61).

¹⁰⁶ Commission is for example under an obligation to justify subsidiarity and proportionality in the impact assessment through a 'Necessity' and 'Added Value' test (Commission, 'Impact Assessment Guidelines' 15 January 2009, SEC (2009) 92, 21-22).

¹⁰⁷ See Craig, 'The ECJ and Ultra vires action' (n 99) 427.

¹⁰⁸ See Christoph Ritzer, Mark Ruttloff and Karin Linhart, 'How to Sharpen a Dull Sword - The Principle of Subsidiarity and its Control' (2006) 7 *German Law Journal* 733, 736; Nicholas W Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 *European Law Journal* 308, 313; Alemanno, 'Regulatory Impact Assessments and European Courts' (n 70) 499.

the Treaties. A lack of an impact assessment or deviation from an impact assessment will give the Court reasons to view the adopted measure with suspicion. The Court may even annul the measure if there are no proper reasons given for why the final proposal deviates from the measure.¹⁰⁹ In the end, the impact assessments' check on legal basis and subsidiarity has the potential of reinforcing the enforceability of the limits of the Treaties and in doing so also raise the low rates of successful competence challenges.¹¹⁰

Having suggested procedural review as an appropriate solution to the problem of competence review and argued that the Court's current approach to procedural review is inadequate to review broad EU measures, the next section develops, on the basis of the procedural review framework presented in this section, a more concrete benchmark which the Court should use to review the legality of EU legislation.

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

A Spain v Council- providing the fruits for an appropriate standard for judicial review

In order to find a benchmark for legality of EU legislation, it is appropriate to give an example from the Court's case law that illustrates both a proper standard and intensity of review. *Spain v Council* will be used as an instance of a suitable benchmark for judicial review. From the description already provided we know that this case was concerned with a challenge to the Council Regulation on new support schemes and that Spain had challenged this measure 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. Given this brief recollection of the facts we can now focus on the reasoning of the Court and the standard and the intensity it used when reviewing the measure.

The Court underlined, as regards judicial review of the principle of proportionality, the wide discretion enjoyed by the Union legislature in the field of the Common Agricultural Policy (CAP). Given this discretion, the legality of a measure adopted in the CAP can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent

¹⁰⁹ See Case C-310/04 *Spain v Council* (n 46), paras 122-135; Alemanno, 'Regulatory Impact Assessments and European Courts' (n 70) 492- 502; Craig, 'The ECJ and Ultra vires action' (n 99) 427.

¹¹⁰ See Groussout and Bogojevic (n 49) 243-44.

institution is seeking to pursue and if the authority has manifestly exceeded the limits of its discretion. The main question for the Court was 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.¹¹¹ Up to this point, the Court simply followed its standard case-law on review of proportionality within the sphere of broad EU policies. However, the Court dramatically changed this course of reasoning in paragraph 122 and 123 by imposing a new standard of review and burden of proof on the EU legislator. Those paragraphs were crucial for the outcome and the general implications of the judgment and are therefore quoted *in extenso*:

‘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.’¹¹²

Based on this standard of review and this burden of proof, 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, which was the basis for determining the amount of the specific aid for cotton.¹¹³ Spain submitted evidence, which was not contradicted by the Union institutions, showing how labour costs could be calculated, that they were significant and that taking them into account created serious doubts as to the profitability of cotton growing under the new support scheme.¹¹⁴ 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 were not examined. The Court recognised that cotton production is not economically possible without the presence in the vicinity of the

¹¹¹ See Case C-310/04 *Spain v Council* (n 46), paras 96-99, 104-105.

¹¹² *ibid*, paras 120-123. I added emphasis to underline the Court’s standard of review and standard of proof.

¹¹³ *ibid*, para 103.

¹¹⁴ *ibid*, paras 124-125.

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. The potential effects of the reform on the economic viability of the ginning undertakings constituted a basic factor to be taken into account when assessing the profitability of cotton growing.¹¹⁵ Given that the Commission had been unable to show that it actually exercised its discretion when adopting the new support scheme by not taking into consideration of all the relevant circumstances of the case, the Court concluded that there was a breach of the principle of proportionality.¹¹⁶

B Analysis- why does this ruling provide a good source for a general standard of review and test for legality?

Commentators have argued that *Spain v Council* marks a clear evolution towards greater intensity in the judicial review of facts and in the application of procedural proportionality. It has also been suggested that the standard of legality proposed by this case fits well into the Court's earlier jurisprudence in the field of judicial review of administrative decisions.¹¹⁷ While I think *Spain v Council* was an important judgment of principle, I do not think that this case is sufficient evidence of a transformation from a deferential review of facts to an intense review of facts in relation judicial review of EU legislation.¹¹⁸ First, there are no cases of review of general EU policy measures, post-*Spain v Council*, which have followed the intensity of review suggested by that judgment. Nor has there been any clear basis in the Court's previous case law prior to *Spain v Council* under which the Court's propositions in that judgment could be grounded. Secondly, although the factual review in *Spain v Council* was reminiscent of the strict factual review in *Tetra Laval* and *Pfizer*, the last-mentioned judgments must be distinguished from *Spain v Council*. The Court's extremely searching enquiry in *Pfizer*¹¹⁹ and *Tetra Laval*¹²⁰, although like *Spain v Council* phrased in terms of 'manifest error' and 'manifestly inappropriate', was prompted by the fact that both *Pfizer* and *Tetra Laval* were in principle related to individual decisions. Such decisions are generally

¹¹⁵ *ibid*, paras 131-132.

¹¹⁶ *ibid*, paras 133-135.

¹¹⁷ See Xavier Groussout, 'Judgment C-310/04, Kingdom of Spain v Council of the European Union' (2007) 44 Common Market Law Review 761, 777-79; Alemanno, 'Regulatory Impact Assessments and European Courts' (n 70) 501.

¹¹⁸ See Meuwese (n 61) 175.

¹¹⁹ See Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-03305, paras 166-170.

¹²⁰ See Case T- 5/02 *Tetra Laval v Commission* [2002] ECR II-04381, paras 119, 140-141, 197-199, 224, 283, 308, 335-336; Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-00987, paras 38-39.

subject to a highly intense review by the EU Courts.¹²¹ While the regulation¹²² in *Pfizer* was formally of a general nature, its effect had the nature of a decision and was thus an act of ‘direct’ and ‘individual’ concern to Pfizer’.¹²³ By withdrawing Pfizer’s authorisation to market virginiamycin it directly concerned Pfizer. Furthermore, as Pfizer was the only company having an authorization to market that feeding stuff and was differentiated from all other traders concerned by the regulation by a series of factors relating to the circumstances under which the contested regulation was adopted, it was individually concerned.¹²⁴ *Tetra Laval* on the other hand was concerned with a Commission decision prohibiting a prospective merger. The fact that this decision immediately affected the rights of Tetra Laval required a full judicial review of the Commission’s decision both in relation to law and facts.¹²⁵ Given the distinction in the EU Courts’ case law between the nature of review in situations involving administrative decisions and general legislative provisions, it appears that *Spain v Council* was an exception to the rule that general EU legislation is subject to low intensity review.

Notwithstanding this, I argue that the benchmark suggested by *Spain v Council* provides an excellent yardstick for showing what the Court should be doing to ensure that review of EU legislation becomes credible. While the Court’s primary standard of review in *Spain v Council* was framed in terms of ‘manifestly inappropriate’¹²⁶, its nuanced reformulation of that standard in paragraph 122 to a benchmark of taking into account all ‘relevant circumstances’, its penetrating intensity and the burden of proof it imposed, demonstrated how review could be performed by the Court. First, the Court’s standard of review was not only a successful way of controlling the exercise of EU competences but also an appropriate ‘middle-way’ solution between complete surrender to the EU legislator in cases of review of policy issues and comprehensive review of facts.¹²⁷ The Court’s standard of review allowing it to control the factual situation in *Spain v Council* is an appropriate tool of adjudication in areas of broad EU policies. While it did not mean that the Court would substitute the assessment of the legislatures underpinning the contested regulation, it did mean that the

¹²¹ See Craig, *EU Administrative Law* (n 3) 416-424, 427-430.

¹²² Council Regulation (EC) No 2821/98 of 17 December 1998 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/524/EEC concerning additives in feeding stuffs [1998] OJ 1998 L 351/ 4.

¹²³ See Article 263(3) TFEU.

¹²⁴ See Case T-13/99 *Pfizer Animal Health v Council* (n119) paras 42, 81-87, 89-106, 171-172.

¹²⁵ See Case T-5/02 *Tetra Laval v Commission*, (n120) paras 89-90; Craig, *EU Administrative Law* (n 3) 438-39.

¹²⁶ See Case C-310/04 *Spain v Council* (n 46), paras 97-98.

¹²⁷ See Groussout (n 117) 761; Toth (n 3) 283.

Court required the objectives of the legislation to be clearly set out and substantiated in order for the legislative act to be held valid.¹²⁸

Secondly, the Court's burden of proof requiring the EU institutions to show that it had exercised its discretion contributed in making the standard of review credible. This was a reversal of the burden of proof since it 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 to the objective pursued.¹²⁹ Finally, it is clear that the intensity of the Court's review was appropriate to implement the legality standard. The strict intensity of review entailed that the Court did not simply accept the assertions made by the Commission on the relevance of specific factors. Instead, it examined independently whether the Commission had taken into account 'relevant information' and stated the 'basic facts upon which its discretion' depended. Since the EU legislator, upon serious judicial scrutiny, had failed to meet its burden of proof, the Court found a breach of the proportionality principle.¹³⁰

C Spain v Council expresses a general standard of review

If we generalize the Court's propositions from *Spain v Council*, I contend that this case suggests a standard of legality both in relation to reasoning and evidence. The benchmark is *whether the EU legislator provided for 'adequate reasoning' and whether it took into account 'relevant circumstances' when it exercised its legislative competence.*¹³¹

Even though the reasoning requirement in the proposed benchmark did not follow explicitly from *Spain v Council*, it was implicit in the judgment. The critical adjective of the judgment is 'relevant' in paragraph 122. This term is not only about whether information has been stated but it connotes a requirement in relation to the quality of the reasoning. That *Spain v Council* entailed a general requirement for the EU legislator to provide for 'adequate

¹²⁸ See Groussout and Bogojevic (n 49) 247-48.

¹²⁹ See Case 331/88, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others* [1990] ECR I-04023, para 14; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 16) paras 123, 130, 140; Craig, *EU Administrative Law* (n 3)594.

¹³⁰ See Case C- 310/04 *Spain v Council* (n 46), paras 110, 113-119, 131, 132-133.

¹³¹ Meuwese, (n 61) 174, cautiously supporting that *Spain v Council* give expression for a general standard of legality. See also further support for this principle in Case C-343/09 *Afton Chemical* (n 80), Opinion of AG Kokott, para 29: 'In cases where they have a wide discretion, Community bodies must examine carefully and impartially all the relevant aspects of the individual case. 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.'

reasoning’ became apparent from different parts of the judgment. First, the reasoning requirement was implicit in the Court’s examination of whether ‘relevant’ information had been taken into account. As stated above, the Court was particularly critical of the fact that the Commission had not included labour costs and that it had failed to perform a socio-impact study.¹³² This gave the Court reason to hold that the EU legislator had not taken into account ‘relevant information’ and had therefore breached the proportionality principle. The invalidation of the measure was however also based on the fact that the Commission had been unable to explain convincingly why an impact study was not necessary and why labour costs were not included in the assessment of profitability. The Commission’s failure to explain why such information was not needed for making a calculation on profitability was even more striking given the evidence of studies in other fields, the evidence submitted by the parties and the critical views of the other EU institutions on the legislative proposal.¹³³

That the standard of legality contained a requirement of ‘adequate reasoning’ was also evident from the Court’s discussion of the factors to be taken into account in the profitability assessment. The Council argued that any study of the future profitability of cotton growing account should also take into account the income deriving from the single payment equivalent to 65% of the existing aid in that sector. Since the sum of the coupled and decoupled aid under the new cotton support scheme was equivalent to the total amount of the indirect aid granted under the previous support scheme, the future profitability of cotton growing could not be doubted. The reform of aid for cotton was based on its budgetary neutrality. The Court considered itself competent to decide on the relevance of those arguments and held that they were inadequate to justify the profitability assessment. In the case of a comparative study of the profitability of alternative crops, the single payment *should not be taken into account*, as it is granted independently of the crop chosen, even if the farmer decides not to produce anything. The budgetary neutrality of the reform is of no *relevance* in itself for assessing whether in the future farmers will abandon cotton growing and to replace it with other crops.¹³⁴

The standard of ‘relevant circumstances’ also entails a requirement with regard to the quality of the evidence. The evidence requirement is nicely illustrated by the Court’s ruling. The

¹³² See Case C-310/04 *Spain v Council* (n 46), paras 105-111, 116-118, 126-127, 131.

¹³³ *ibid*, paras 124-128, 129, 131; Case C-310/04 *Spain v Council* (n 46) Opinion of AG Sharpston, paras 83-86, 88- 90, 93-95.

¹³⁴ See Case C-310/04 *Spain v Council* (n 46), paras 108-111. I added emphasis to show that the Court examined the quality of the reasoning.

Court considered itself competent to decide what constituted ‘relevant’ information for deciding upon the amount of aid and what ‘relevant information’ was missing in the Regulation.¹³⁵ The Court held that fixed labour costs should have been included in the profitability assessment because their inclusion would have created serious doubts as to the profitability of cotton growing under the new support scheme.¹³⁶ The Court also considered that the potential effect of the reform of the cotton support scheme on the economic situation of the undertakings active in the ginning industry was ‘relevant information’ without which the Commission could not exercise its discretion. Because the EU legislator had failed to take into account these specific circumstances, it also failed to meet the proposed evidence requirement of taking into account ‘relevant information’.¹³⁷

D Test for legality

The enquiry that follows from the benchmark entails a two-step examination of legality of EU measures. First, it implies that the Court 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 legislator in preparatory documents such as explanatory memorandums and impact assessments, consultation documents, documents from other EU institutions (‘legislative background documents’) are pertinent for assessing compliance with the relevant legal principle of the Treaties. Taking into account ‘relevant’ circumstances means the Court should examine whether the proposed justification makes sense given the legal conditions for exercising the competence. If the proposed reasons have no credible relationship to the underlying legal criteria, the reasoning is inadequate. One example is if the EU legislator used an argument based on distortions of competition to justify the ‘essentiality’ of criminal sanctions under Article 83(2) TFEU.¹³⁸ Since the question of ‘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 into this assessment.¹³⁹ Such considerations are, under the *Spain v Council* formula, not ‘relevant

¹³⁵ *ibid*, paras 126, 130-132.

¹³⁶ *ibid*, paras 112-118, 124-125; Case C-310/04 *Spain v Council*, Opinion of AG Sharpston, para 100.

¹³⁷ See Case C-310/04 *Spain v Council* (n 46), paras 128-132; Case C-310/04 *Spain v Council*, Opinion of AG Sharpston, paras 94-96.

¹³⁸ 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, 3, 5, recital 7.

¹³⁹ See below chapter 5- section I (B).

factors'.¹⁴⁰ Secondly, the Court should consider whether the evidence in the legislative background documents is 'adequate' for substantiating the exercise of the legislative competence.¹⁴¹ The evidence needs to be of such a nature that it supports the EU legislator's claim of having exercised its competences consistent with the rules of the Treaties. If the EU legislator 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.¹⁴² This test means the Court also may consider annulment when relevant material is missing in the accompanying legislative background documents.¹⁴³

This general test is still somewhat too vague to actually assess the legality of legislation. I will try here to be even more specific. In relation to the 'reasoning' requirement the Court should only monitor whether the reasons put forward by the Commission are defensible in theory. In order to conform to the reasoning requirement at least one justification must have been offered, which is by itself sufficiently compelling *in abstracto* to justify compliance with the relevant condition. If the relevant competence norm or legal principle requires that more than *one* condition is conformed to, the EU legislator must offer an appropriate justification for *each* of the relevant conditions. The reference point for whether the reasons presented are justified *in abstracto* is the substantive justification for the exercise of EU competences, as has been developed and recognised by the general scientific literature on EU law or criminal law and the Court's case-law. The standard of adequate reasoning does not require any references to sources or evidence to support the reasoning. If the EU legislator's arguments are accepted by the literature or have a basis in the Court's case-law they are also 'adequate' for our purposes.¹⁴⁴ Nor does the criterion ask whether the EU legislator offered

¹⁴⁰ See Mackenzie Stuart, *The European Communities and the rule of law* (n 17) 66.

¹⁴¹ See Case C-12/03 P *Commission v Tetra Laval* (n 120), para 39; 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, 'Kadi II'), paras 118-119, 124;

Alemanno, 'Regulatory Impact Assessments and European Courts' (n 70) 498.

¹⁴² See below chapter 4- section I (A); chapter 5- section I (B).

¹⁴³ See Alemanno, 'evidence-based judicial reflex' (n 42) 333-335, 338; Bar-Siman-Tov (n 43) 280, 296.

¹⁴⁴ See, however, joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n141) para 119: 'The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person ... Courts of the European Union are to ensure that that decision, which affects that person individually is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision with the consequence that judicial review *cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on*, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support

the best or most comprehensive reasoning for defending compliance with the precepts of the Treaties. The only question here is whether the reasoning is ‘adequate’ to support the claim for compliance with the underlying Treaty condition or principle.

The test of ‘adequate reasoning’ also checks whether the conclusion can be properly arrived at on the basis of the submitted reasons. The Court must consider whether the reasoning is capable of substantiating the legislative choices.¹⁴⁵ Furthermore, this test requires as a minimum that the reasons offered in the preamble or in the legislative background documents must be expressly linked to the conditions of the legal basis or principle of subsidiarity whose observance they should justify.¹⁴⁶ This means that the legal basis has to be mentioned by every piece of legislation as a condition of its validity. This is quite logical since the legal basis indicates not only the procedure but the competence and gives the Court the standard to assess whether the EU has indeed a competence to adopt the envisaged measure.¹⁴⁷ Unless the Union legislator conforms to this requirement, there is no way to monitor compliance with the limits of the Treaties.¹⁴⁸

Only in the second stage is it considered whether the reasons are backed up with ‘relevant’ evidence. For this there must be a clear standard. In order to pass the evidence requirement, the EU legislator needs to first show that one of the reasons, which in itself justified the EU legislator’s compliance with the relevant conditions in the legal basis or the relevant EU rule, is supported by sufficient and relevant evidence.¹⁴⁹ If there are several conditions in the relevant legal basis or in the relevant legal principle, the EU legislator must demonstrate the compliance of *each* condition with relevant evidence. From this it follows that it is insufficient for the EU legislator to make simple assertions to justify compliance with the conditions and rules of the Treaties. There must be ‘relevant’ evidence to support such

that decision, is substantiated.’ I added emphasis to underline that the *Kadi II* standard did not consider abstract reasoning as sufficient.

¹⁴⁵ See Case C-12/03 P *Commission v Tetra Laval* (n 120), para 39.

¹⁴⁶ See e.g. Case C-233/94 *Germany v Council* (n 16), paras 26-28, where the Court wrongly concluded that the EU legislator 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, ‘Deposit Guarantee Directive’).

¹⁴⁷ See Case C-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.

¹⁴⁸ See Shapiro (n 147) 218-220.

¹⁴⁹ See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n141), paras 119 and 124, 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* (n120), 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.’

claims. This standard entails requirements both in relation to the quantity and 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 theoretical defensible claim consists of a reference to only one study or one scholarly article, this would probably be insufficient. Secondly, the evidence needs to be of a reliable nature in order to pass the test. Insignificant evidence or evidence of low credibility cannot be used to support a statement. This means that the evidence needs to be in the nature of statistical studies, policy studies or scientific articles which provide more serious support for an argument. The evidence for a statement for example on the effects of criminalization (Article 83(2) TFEU) or a statement of the effects of national divergence on the internal market (Article 114 TFEU/subsidiarity) cannot therefore be supported by only hearsay evidence but must be supported by either relevant literature or relevant scientific studies.¹⁵⁰

Why then did I choose this threshold? Firstly, since it is a predictable and objective test. The finding of ‘inadequate reasoning’ and ‘irrelevant’ evidence must be dependent upon some criterion for assessing whether the EU legislator has met this standard. 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.¹⁵¹ The reference point here is whether one of the reasons relied upon in a legislative proposal constitutes in itself sufficient basis to support that decision and is substantiated by sufficient evidence.¹⁵² Secondly, I chose this threshold for reasons of transparency. Since the proposed test provides for clear guidelines and requires reasons and evidence to always be fully given for the exercise of competences so they can be tested before the Court, it is more likely that the Court will be able to fulfil its task of monitoring that the law of the Treaties are observed.¹⁵³ It is simply very hard to identify for the Court whether a measure conforms to the conditions of the Treaties unless the EU legislator gives proper reasons for its conclusions and substantiate them with evidence.¹⁵⁴ Since at least one of the justifications advanced by the legislature must be supported by solid evidence, the risk that EU legislation is adopted on the basis of

¹⁵⁰ See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n 141) paras 151-162 for the application of the evidence standard. What the Court does is basically to monitor whether any of the relevant reasons submitted, which in theory can support the decision in themselves, is supported by sufficient evidence (para 162). This is, in principle, the same method that I am asking the Court to apply in cases of review of EU legislation.

¹⁵¹ See Craig, *EU Administrative Law* (n 3) 434-36.

¹⁵² See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n141), para 119.

¹⁵³ See Mackenzie Stuart, *The European Communities and the rule of law* (n 17) 41-42, 124.

¹⁵⁴ See Shapiro (n 147), 218-220.

fictive justifications, which have not been scrutinized in relation to the underlying facts needed to assess their credibility, is avoided.¹⁵⁵

One of the main criticisms against this test of legality is probably that the proposed requirement on the EU legislator of offering ‘one cogent reason supported with sufficient evidence’ is borrowed from the Court’s case law on fundamental rights¹⁵⁶ and that the concerns underlying this standard of review may not be applicable in the field of common policies. In the context of fundamental rights, the strict interpretation of ‘manifest error’ has been driven by on the one hand the continuing limitations on the review of the Security Council resolutions that form the basis for EU regulations freezing assets of particular individuals and on other hand that those decisions have substantive negative effects for individuals.¹⁵⁷ In relation to the review of common policies, other considerations are relevant. It might be argued that factual scrutiny in the context of broad EU common policies should continue to be very deferential because, for example, the facts have been found by the legislature, they are based on complex economic projections, the facts cannot be distinguished from the discretionary policy choices that the EU legislator undertakes and because the EU legislature has to reconcile divergent interests when making such policies.¹⁵⁸

This criticism can be countered. Firstly, in relation to the criticism of the analogy between review of administrative decisions and review of broad common policies, we have to make a distinction between the test for legality and the ‘intensity’ of the Court’s review of legislation. Admittedly, it is true that review of legislation cannot be as searching, for institutional reasons, as review of administrative decisions.¹⁵⁹ However, I am not asking the Court to apply the proposed threshold in an intrusive manner and review with the same intensity EU legislation as it does administrative decisions. It is only claimed that the test for legality, i.e. whether the EU legislator offered at least one compelling rationale for exercising

¹⁵⁵ See Kumm ‘The Idea of Socratic Contestation and the Right to Justification’ (n 37) 140, 141, 143-144, 153-57; Moshe Cohen –Eliya and Iddo Parat, *Proportionality and Constitutional Culture* (CUP 2013) 115, 126; Scott and Sturm (n 8) 582-83.

¹⁵⁶ See Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n 141), paras 119, 121, 122, 130; Case T-392/11 *Iran Transfo v Council* (Court of First Instance, 16 May 2013) paras 34, 44; Case C-550/09 *E and F* [2010] ECR I-06213, para 57; Case C-300/11 *ZZ* (Court of Justice, 4 June 2013) paras 53, 59 and 60; Joined cases C-539/10 P and C-550/10 P *Al-Aqsa v Council and Netherlands v Al-Aqsa* (Court of Justice, 15 November 2012), para 68.

¹⁵⁷ See Craig, *EU Administrative Law* (n 3) 438; Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and others v Kadi* (n 141), paras 132-133.

¹⁵⁸ See Craig, *EU Administrative Law* (n 3) 437.

¹⁵⁹ *ibid* 434-38.

this competence and whether that reason was supported with ‘sufficient’ and ‘relevant’ evidence, should be analogous to the one adopted for review of administrative decisions.

This being so, it is certainly a legitimate concern that the proposed test for review may intrude on the EU legislator’s discretion and entail substitution of judgment. If the Court would apply the test as I propose, it would venture into the limits of its ‘authority’ and ‘legitimacy’ as derived from the Treaties.¹⁶⁰ Whether this criticism can be sustained depends on ‘how’ the test, if it ever finds its way into the Court’s jurisprudence, is applied by the Court. If the Court applies the proposed test with the same intensity as it has done in fundamental rights cases and substantively re-examines the EU legislator’s social and political choices¹⁶¹ this would entail an encroachment on the EU legislator’s authority. Then, the Court should face criticism. I maintain however that the proposed threshold for legality will not result in substitution of the EU legislator’s social and political choices. The test is, as mentioned above, that one of the reasons, which in itself is sufficient basis for exercising the competence, is substantiated by sufficient evidence. This threshold does not ask the Court to enter into a substantive review of whether the Union policy was the best or most appropriate policy choice.¹⁶² If the Court is able to follow the structure of the test and the guidelines provided below on how to assess evidence and reasoning, the fundamental concern that the test would entail encroachment on the EU legislator’s discretion will be undermined. If the EU legislator has submitted sufficient evidence to support the rationale behind the exercise of competence, the EU Court has no further role.¹⁶³

In my proposal the Court’s enquiry is limited to the decision’s legality, which in this context means conformity with the proposed standard of ‘adequate reasoning’ within which the legislative action was permissible and the existence of ‘relevant circumstances’ which allowed the EU legislator to take the action. If this test allows for two or more solutions, and where the EU institutions have chosen one which conforms to that standard, it is beyond the Court’s legitimacy and competence to over-rule that choice.¹⁶⁴ Nor does the proposed test suggest an extensive review of facts or complex empirical-political analysis of the

¹⁶⁰ Scott and Sturm, (n 8) 569, describe the Court’s problem as one of pursuing a judicial enquiry in ‘areas of normative uncertainty and factual complexity’.

¹⁶¹ See Toth (n 3) 283-284, for an argument on how the application of subsidiarity may result in substitution of judgment.

¹⁶² See Kumm ‘Constitutionalizing Subsidiarity in Integrated Markets’ (n 31) 529, 525; Shapiro (n 147), 184-189.

¹⁶³ See Craig, *EU Administrative Law* (n 3) 433-34.

¹⁶⁴ See Scott and Sturm (n 8) 590-591; Mackenzie Stuart, *The European Communities and the rule of law* (n 17) 11-13, 24, 42, 46-47, 54-55, 64-67.

effectiveness of policies. The duty to base laws upon evidence and reasoning does not affect political responsibility. The EU legislature still enjoys a certain amount of discretion when exercising its legislative powers.¹⁶⁵ The proposed test does not ask the Court to assume the responsibility for making substantive value and policy decisions. The benchmark only requires the Court to evaluate the EU institutions' justifications as to why a given piece of legislation satisfies the proposed legal basis for the measure and only strike down instances of EU legislation whose justification is not plausible given the available evidence.¹⁶⁶

Secondly, whilst an evidence criterion in cases of competence review has not yet been fully embraced by the scholarship or the Court, there are implicit foundations in the Court's case-law to construct such a general evidence requirement. As we saw above, there was clearly a requirement imposed in *Spain v Council*, that compliance with the proportionality principle needed to be defended by specific figures and evidence.¹⁶⁷ More importantly, I think it is clear that the *Tobacco Advertising* judgment also indicates an evidence criterion for the EU legislature to fulfil when they legislate under Article 114 TFEU. First according to the Court it is not sufficient to show 'mere findings of disparities' or 'abstract risks' of obstacles or distortions of competition. We can thus assume that the EU legislator must show that disparities give rise to real obstacles or that the risk of such obstacles must not be hypothetical.¹⁶⁸ Secondly, as we understand the judgment the risk for obstacles must be concrete in the sense that it must even be 'likely' that they will arise.¹⁶⁹ Thirdly, the EU legislator must show that the distortions of competition which the measure purports to eliminate are 'appreciable'. It is obvious that national laws differ in relation to how activities are regulated and that this may impact on the conditions of competition for the undertakings concerned. The EU legislature may however not legislate on the bases of small or insignificant distortions of competition. The EU needs to show evidence that distortions are 'appreciable' and it is clear that 'small' distortions of competition are not sufficient evidence.¹⁷⁰ Given the foundations for an evidence criterion in *Tobacco Advertising* and in *Spain v Council*, it would not be such a bold move for the Court to apply the proposed test for

¹⁶⁵ Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (n37) 160-163; Loïc Azoulay, 'The Judge and the Community's Administrative Governance' Christian Joerges and Renaud Dehousse, *Good Governance in Europe's Integrated Market* (OUP 2002) 113; Mackenzie Stuart, *The European Communities and the rule of law* (n 17) 54-55, 102.

¹⁶⁶ See Mackenzie Stuart, *The European Communities and the rule of law* (n 17) 110; Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (n37) 169-170; Walen (n 37) 336, 338, 349, 352-53.

¹⁶⁷ See above section IV (B)-(C) in the present chapter.

¹⁶⁸ See Case C-376/98 *Tobacco Advertising* (n 75) para 84.

¹⁶⁹ *ibid*, paras 86, 98-99.

¹⁷⁰ *ibid*, paras 106-107.

legality. I would simply ask the Court to move further, on the basis of those two rulings, and employ the existing threshold of legality in *Kadi II* of one convincing justification sustained with sufficient evidence for general use in review of the legality of broad EU policy measures.

E The relationship of the test of legality to the Court's current approach

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 current approach to review of EU legislation. The Court's current case law does not impose serious informational demands on the Union legislator. The Court has never in its previous jurisprudence imposed any requirement to submit evidence for compliance with certain requirements 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, effects or problems.¹⁷¹ In fact, it seems that the Court, instead of standing outside the legislative procedure, endeavours to support the EU legislator's case by refraining from seriously looking for any evidence and reasoning that can justify compliance with the precepts of the Treaties.¹⁷²

Contrary to the Court's approach in *Germany v Council*¹⁷³ and *Swedish Match*¹⁷⁴, the suggested standard and test for legality does not accept mere reference to preambles as 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*¹⁷⁵ and *Alliance Health*¹⁷⁶, whether the evidence is 'relevant' and fits with the rationale for exercising the competence. While this does not mean that a proper impact assessment is a requirement for legality, it implies, as

¹⁷¹ See Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 16) paras 68-73, 84-87, 124, 134-135; Case C-210/03 *Swedish Match* (n 18), para 37; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573 paras 46-48, 62, 66, 85-86; Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-00593, paras 66-70, 83.

¹⁷² See Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-02867, paras 22-24; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 16), paras 124, 181-184; Case C-210/03 *Swedish Match* (n 18), paras 36-41; Case C-301/06 *Ireland v Parliament and Council* (n 171), paras 66-72; Case C-58/08 *Vodafone and Others* (n 10), paras 76-79.

¹⁷³ See Case C-233/94 *Germany v Parliament and Council* (n 16) paras 26-28.

¹⁷⁴ See Case C-210/03 *Swedish Match* (n 18), paras 36-41.

¹⁷⁵ See Case C-58/08 *Vodafone and Others* (n 10) paras 38-47.

¹⁷⁶ See Joined cases C-154/04 and 155/04 *Alliance for Natural Health and Others* (n 15), paras 35-40, 105-107.

suggested above, that the EU legislator must refer to empirical evidence, whether that be a scientific study, scholarly articles or statistics, to support the measure.¹⁷⁷ Although the proposed test does not suggest that judicial review should be as fact-searching as the intensity employed by the Court in *Tetra Laval* or *Kadi II*, it entails that the Court must autonomously determine whether the legislator has demonstrated the legality of the measure.¹⁷⁸ Instead of simply clearing the Union legislator by noting that he has not crossed the barrier of ‘manifestly inappropriate’, the standard forces the EU legislator to support his conclusions by adequate evidence. 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 has been provided before exonerating the EU legislator.¹⁷⁹

Having explained, defended and developed a standard for review and test for legality, the following chapters 4-6 will show how this standard and test can be applied in practice by a review of discrete examples of EU criminal law legislation and demonstrate how it can impose limits on the exercise of EU powers.

V CONCLUSIONS OF CHAPTER

While the previous chapters identified and analysed the conceptual, structural and political problems of monitoring the exercise of EU competences, this chapter examined the problems of judicial enforcement of the limits of the Treaties. It also constructed a framework for assessing the legality of EU legislation to be used throughout the thesis in cases of review of specific pieces of EU legislation.

The chapter began by situating the debate of judicial review properly in its context and identifying the need for a fresh approach to the topic. Two general concerns have been voiced against the Court’s approach to review of broad EU policy measures. First, it has been generally suggested that the Court has taken an accommodating approach to the Union institutions’ expansive interpretation of the Treaties’ provisions. Secondly, commentators have identified the Court’s institutional constraints as obstacles to engage in judicial review of EU legislation. Whilst these concerns are valid, the scholarship has not yet offered any

¹⁷⁷ See Alemanno, ‘Regulatory Impact Assessments and European Courts’ (n70) 501; Groussout (n 117) 785; Meuwese (n 61) 175, 271-72.

¹⁷⁸ See Young (n4) 562; Craig, *EU Administrative Law* (n 3) 438-439.

¹⁷⁹ See Weatherill, ‘The limits of legislative harmonisation’ (n 3) 859; Renda (n 105) 2; Jovell (n 34) 186.

comprehensive proposals of how to deal with the Court's current unsatisfying approach to judicial review of EU legislation. This chapter took a constructive approach and showed how judicial review of EU legislation could be improved and intensified whilst taking into account the institutional constraints faced by the Court.

I considered three themes in the chapter. First, I considered the rationales for deferential judicial review. Admittedly, it is clear that reasons for deference are often well maintained with reference to the Court's limited institutional legitimacy and competence. Such reasons are often present in relation to the Court's review of the exercise of broad Treaty powers because such powers often entail an assessment of questions of an empirical and political nature that lie outside the borders of judicial enquiry. This argument has been endorsed by the dominant view in the literature that has defended the Court's deferential approach to the review of EU legislation with reference to arguments of democratic legitimacy and institutional competence. However, it was shown in the chapter that on closer inspection such reasons cannot be given too broad an interpretation such as to disqualify the Court from the area of competence review. Since it is not possible to generally demonstrate that the Court suffers from more serious institutional flaws than the EU legislator, judicial review should not, as a default position, be of a markedly deferential nature.

The second theme of the chapter was identifying potential solutions to the institutional problem of judicial review. I argued that procedural review should be the main focus for judicial review of EU legislation. I defined such a review as an approach to judicial review which compels the Court to consider whether the EU legislator's reasoning and evidence is adequate to defend the exercise of its legislative powers. Procedural review is an attractive choice for a number of reasons. First, it facilitates the Court's task since it provides the Court with sufficient information and adequate reasoning from the legislative institutions. The Court thus becomes empowered to review whether the EU legislator has exercised its discretion in conformity with the Treaties. Secondly, since such a review is not focussed on the appropriateness of legislation it does not intrude on the EU legislator's sphere of discretion. For this reason, the Court is well-equipped to fulfil such a task. Thirdly, the value of transparency is likely to be improved by means of procedural review.

The third general theme of the chapter was to consider a proper standard of review and test for judicial intervention. I argued that the current standards of review, phrased in terms of 'manifest error' have not provided the Court with the tools to engage in a more intense

scrutiny of the exercise of EU powers. Because of the inadequacy of the current standard of 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 took the Court's judgment in *Spain v Council* as the source for an appropriate benchmark for review of EU legislation. The standard distilled from this case is whether the EU institutions took into account all 'relevant circumstances' and whether the EU legislator provided for 'adequate reasoning' to support its legislative choices.

PART II- LIMITS TO THE EXERCISE OF UNION COMPETENCES

CHAPTER 4- LIMITS TO THE UNION'S GENERAL CRIMINAL LAW COMPETENCE

Introduction

This chapter considers the limits of the Union's competence to adopt EU criminal law under the sectorial and functional legal bases of the Treaty. The analysis is based on the general findings in chapter 2 on how limits to the exercise of EU competences can be theoretically reconstructed. I construct limits through an analysis of how the legislative powers of the Treaties should be interpreted. This chapter also builds on chapter 3 by applying the test for legality developed in that chapter in reviewing two pieces of EU criminal law legislation.

This chapter takes stock on the debates in the literature and of the EU institutions following the Court's judgments in *Environmental Crimes* and *Ship-Source Pollution*. As noted in the introductory chapter, prior to the Lisbon Treaty the Union lacked an express competence to enforce its policies by means of criminal law. We also know that 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 judgments of the Court. In these judgments the Court held that the EU had a power to impose criminal sanctions if this was necessary for the effective enforcement of EU environmental policies.¹ The dominant view in the literature is that the Court's rulings in *Environmental Crimes* and the *Ship-Source Pollution* express a general criminal law competence.² The Court's rulings could thus be used to defend the exercise of a criminal law competence to

¹ See Case C-176/03 *Commission v Council (Environmental Crimes)* [2005] ECR I-07879, para 48; Case C-440/05 *Commission v Council (Ship-Source Pollution)* [2007] ECR I-09097, para 69.

² See Steve Peers, 'The Community's Criminal Law Competence: The Plot Thickens' (2008) 33 *European Law Review* 399, 406-407; Peter Whelan, 'Contemplating the Future: Personal Criminal Sanctions for Infringement of EC Competition Law' (2008) 19 *King's Law Journal* 364, 371; Christa Tobler, 'Case C-176/03, *Commission v Council*' (2006) 43 *Common Market Law Review* 835, 852-53.

enforce all existing EU policies under the Treaties. That competence could be exercised under most legal bases of the Treaties.³ If competence to criminalize 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.⁴ This view was defended on the basis of the Court's ruling that was arguably framed on an effectiveness rationale.⁵ Based on this broad understanding of the judgments, the EU legislator adopted two directives, the Ship-Source Pollution Crime Directive⁶ on the basis of Article 100(2) TFEU and the Environmental Crimes Directive⁷ on the basis of Article 192 TFEU and proposed another one on the criminalization of intellectual property rules⁸ to be adopted under Article 114 TFEU. The general understanding was that this implied criminal law competences had no serious limitations. The choice to impose criminal sanctions was not a legal question but a political one to be decided by the EU institutions. As long as a criminal sanction was needed to enforce an existing EU policy, the EU legislator could use this competence.⁹ Whilst I agree that there is an inherent general criminal law competence to be found in the Treaties, I challenge the view that this competence has no limitations. I contend that the competence question is of a much more complex character. Instead of simply accepting that the exercise of this competence is a political choice, I argue that the EU legislator must prove that the conditions for the exercise of its general criminal law competence are satisfied.¹⁰

The structure of the chapter and the arguments are as follows. The first part of the Chapter considers the scope of the sectorial powers in Article 103 TFEU and Article 192 TFEU in imposing criminal laws. This discussion takes as a departure point the Court's *Environmental*

³ See Commission, '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 ('COM 2005/583'), 3, points 6-10.

⁴ See Wouter PJ Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117, 157; Whelan (n 2) 369; 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) 103-104.

⁵ See Dougan (n 4) 103-104; Case C-440/05 *Commission v Council* (n 1), Opinion of AG Mazak, paras 89-102; Tobler (n 2) 852-53.

⁶ 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.

⁷ 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 ('Environmental Crimes Directive').

⁸ 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 ('Intellectual Property Crimes Proposal').

⁹ See Dougan (n 4) 101-102.

¹⁰ See Whelan (n 2) 369.

Crimes judgment and considers whether this ruling expresses a general criminal law power. I argue that the EU has a general criminal law power to enforce its policies when this is ‘essential’ for the effective implementation of EU policies. Since both the judgments articulated the competence on the basis of the ‘essentiality’ criterion and on the basis of the effectiveness criterion, the competence must be understood to be of a general nature. Having concluded that such a power exists, it is then examined whether there are any limitations to this power. To exercise the EU’s general criminal law competence, two conditions must be fulfilled. Primarily, the EU needs to show that criminal laws can contribute to, by achieving higher compliance with the underlying EU rules, the implementation of a specific EU policy. If that is the case, the EU legislator must show that other alternative sanctions are not as effective as criminal law in the implementation of that policy. To show the application of the limitations to the EU’s general criminal law competence I examine whether the Union legislator correctly exercised its competence to adopt the Environmental Crimes Directive.¹¹ The chapter then considers whether the principles expressed in the *Environmental Crimes* judgment also can be invoked to confer a competence for the Union under Article 103 TFEU to enact criminal law measures in the field of competition law.

The second part of the chapter considers whether a general criminal law competence can be exercised under the general provisions on harmonization, i.e. Article 114 TFEU and Article 352 TFEU. In particular, it is analysed whether the need to remove obstacles to trade and distortions to competition, which justify harmonization under Article 114 TFEU, can be invoked to justify criminalization. It is maintained that in order for the EU legislator to employ its inherent criminal law competence under Article 114 TFEU, it must demonstrate that criminal laws contribute to reducing or removing a market dysfunction. If criminal laws do not help to address imminent or current obstacles to trade or distortions to competition, the EU cannot exercise the competence under that provision. The limits of Article 114 TFEU are illustrated by an enquiry into the Intellectual Property Crimes Proposal. Finally, I consider whether there is any limitation to the exercise of a criminal law competence under Article 352 TFEU. I contend that it is very difficult to prevent the exercise of a criminal law competence under this provision. The only possibility of restraining the exercise of such a competence under Article 352 TFEU is to claim that there exists another more specific legal basis that blocks the use of that provision.

¹¹ See n 7 for complete reference to this directive.

I LIMITS TO THE EXERCISE OF SECTORIAL COMPETENCES- ARTICLE 103 AND ARTICLE 192 TFEU

A The limits’ to the Union’s competence to adopt criminal laws under Article 192 TFEU

Account of the Environmental Crimes and the Ship-Source Pollution judgments

The first part of this subsection considers the scope of the EU’s criminal law competence as it has been derived from the Court’s rulings in *Environmental Crimes* and *Ship-Source Pollution*. In order to examine this question, it is appropriate to commence by giving a fuller account of the facts of the *Environmental Crimes* judgment. In this case the Council had enacted a framework decision on criminal law measures to protect the environment on the basis of the provisions of the (pre-lisbon) Treaty on European Union.¹² The Council was concerned at the increasing scale and frequent cross-border effects of environmental offences and considered that such offences posed a serious threat to the environment. Since this was a problem jointly faced by Member States they should take concerted action to protect the environment under criminal law.¹³ The Framework Decision set forth a number of environmental offences that Member States were required to enforce by criminal penalties.¹⁴ 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).¹⁵

The Court held firstly that it had to examine whether the criminal law provisions of the Framework Decision should have been adopted under Article 175 EC and thus impinged on the Community’s powers.¹⁶ The Court opined thereafter 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. As regards the aim of the Framework

¹² See Article 31 and 34(2) of the Consolidated Version of the Treaty on European Union [2002] OJ C 325/5 (‘TEU’ ‘EU Treaty’) and Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law [2003] OJ 2003 L 29/55(‘Framework Decision’).

¹³ See Framework Decision, recitals 1-3.

¹⁴ See Framework Decision, Articles 2, 3, 5.

¹⁵ See Case C-176/03, *Commission v Council* (n 1), para. 21.

¹⁶ *ibid*, paras 40-41.

Decision, the Court found that it was clear both from its title and the recitals that its objective was the protection of the environment. As to the content, the Court noted that the Framework Decision established a list of particularly serious environmental offences, in respect of which the Member States had to impose criminal penalties. The Court admitted that the provisions of the Framework Decision entailed partial harmonization of the criminal laws of the Member States. Recognising this, the Court referred to its earlier case-law and confirmed that as a general rule neither criminal law nor criminal procedure was a Community competence.¹⁷

Nevertheless, in the next paragraph of the judgment the Court radically altered its established case-law and recognised a Community criminal law competence. Since the Court's proposition is crucial for the rest of the chapter I will quote it *in extenso*:

*'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.'*¹⁸

Based on this proposition, the Court went on to annul the Framework Decision. The Court underlined that the Council had not disputed 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 they 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.¹⁹

The Court's judgment was one of the most remarkable judgments delivered during the last decade. The finding of a Community criminal law competence was striking, particularly

¹⁷ *ibid*, paras 46- 47.

¹⁸ *ibid*, para 48.

¹⁹ *ibid*, paras 49-53.

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 judgment in the *Environmental Crimes* a new inter-institutional battle was triggered. On 23 November 2005 the Commission decided to challenge a Council framework decision²⁰ on criminal law measures in the enforcement of ship-source pollution, i.e. the *Ship-Source Pollution* judgment. The Framework Decision required the Member States to provide for criminal sanctions in order to combat ship-source pollution caused with intent or by serious negligence.²¹ The litigation provided a good opportunity for the Court to clarify its previous ruling in *Environmental Crimes*.

The Court held that since requirements relating to environmental protection must be integrated into the definition and implementation of Community policies and activities, such protection must be regarded as an objective which also forms part of the common transport policy. The Community legislature could therefore promote environmental protection on the basis of Article 80(2) EC. The Court then applied the 'objective legal basis test' and found that both the content and the predominant purpose of the Framework Decision were to ensure maritime safety and environmental protection.²² The Court then repeated the above cited formula from the *Environmental Crimes* judgment and opined that when the application of effective, proportionate and dissuasive 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 firstly 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. Secondly, it found that the Council had taken view that criminal penalties were necessary to ensure compliance with the Community rules on maritime safety. The provisions of the Framework Decision should therefore have been adopted on the basis of Article 80(2) EC. The Court clarified that 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.²³

²⁰ See 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 ('the Framework Decision')

²¹ *ibid*, Articles 2 and 4.

²² See Case 440/05, *Commission v Council* (n1), paras 59-65.

²³ *ibid*, paras 66-70, 74.

Do the Environmental Crimes judgment and the Ship-Source Pollution judgment express a general criminal law competence?

Opinion has been divided on the issue of the scope of the EU's criminal law competence as expressed by the Court's judgments.²⁴ A narrow interpretation of the Court's judgment in *Environmental Crimes* has been proposed. It has been observed that the *Environmental Crimes* judgment was phrased in relatively cautious terms. The existence of an implied criminal competence was intimately connected to the pursuit of an 'essential' Community objective, environmental policy. This interpretation suggests 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.²⁵

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. First, the judicial procedure before the Court implies that the Court only needs to respond to the questions which have been formulated by the claimants. In *Environmental Crimes* and the *Ship Source-Pollution* judgment, the Court was only compelled to answer the questions that enabled it to resolve the dispute and was under no obligation to elaborate a principle of more far-reaching consequences.²⁶ Furthermore, in light of the structure of the Treaties it is difficult to accept the claim that the ruling was limited to environmental protection. After all, 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 (Article 11 TEU)^{27, 28}. Instead of a narrow

²⁴ See Valsamis Mitsilegas, *EU Criminal Law* (Hart 2009) 73- 75.

²⁵ This was the favoured interpretation by 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; See the statements of Judge Puissochet in Sénat, Réunion de la délégation pour l'Union européenne du mercredi 22 février 2006, Institutions européennes, La Cour de justice des Communautés européennes, Audition de M. Philippe Léger, avocat général, et de M. Jean-Pierre Puissochet, juge à la Cour de Justice des Communautés européennes: 'mon sentiment est que **l'arrêt est strictement cantonné à la protection de l'environnement et se fonde expressément sur la spécificité de cette matière**' < http://www.senat.fr/europe/r22022006_1.html > Accessed 29 April 2014.

²⁶ See Whelan (n 2) 371.

²⁷ See Article 3(2) EC; 153(2) EC.

²⁸ See Dougan (n 4) 102-103.

interpretation of the judgment limiting the criminal law competence to the field of environmental policy, I contend that the reasoning followed by the Court in *Environmental Crimes* and the *Ship-Source Pollution* judgment 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'. Since the rationale for the EU's dormant²⁹ criminal law competence lies with the general principle of effectiveness underlying Union law, this competence must also apply in relation to any other EU policy. In addition to environmental protection the Court's reasoning can therefore be applied to all common EU policies (such as e.g. competition law, agriculture) and fundamental freedoms that involve binding legislation whose effective implementation can be deemed to require criminal penalties. The Court's approach is functional; the EU legislature may provide for measures of criminal law on the basis that they are necessary to ensure compliance with EU rules.³⁰

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.³¹ The EU legislator must establish a very strong case for criminal sanctions based on their effectiveness in enforcing the EU policy at issue. If the EU legislator 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.³² These are not abstract criteria accepting the exercise of a criminal law competence because of the perceived general effectiveness of criminal law in the enforcement of EU policies. The EU legislator must determine, when submitting proposals, whether this 'essentiality' criterion, is met on a case by case basis.³³

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.

²⁹ The expression 'dormant' comes from Dougan (n 4) 111.

³⁰ See Case C-440/05 *Commission v Council* (n 1), Opinion of AG Mazak, paras 97-99; COM 2005/583 (n 3) 3.

³¹ See Dougan (n 4) 101-102.

³² See Case C-440/05 *Commission v Council* (n1), Opinion of AG Mazak, para 102; COM 2005/583 (n 3) 3, 5.

³³ See COM 2005/583 (n 3) 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.³⁴ Having outlined the content of the Directive, we then consider the legality of the Directive on the basis of the test I suggested in chapter 3.³⁵ First, there is an examination of whether there is ‘adequate’ reasoning to justify resort to Article 192 TFEU. Secondly, there is an enquiry into whether the EU legislator has taken into account ‘relevant evidence’ showing that criminal laws are ‘essential’ for the effective implementation of Union environmental laws. Accepting the findings of chapter 2 on the conceptual problems of restraining EU powers, the examination shows how we can use my proposed test to construct limits to the exercise of a criminal law competence.

Is the Commission’s reasoning adequate to support the exercise of a dormant criminal law competence under Article 192 TFEU?

In its Proposal³⁶ the Commission first proposes the conditions under which the Union legislator can adopt the Directive. The Union’s criminal law competence is limited to what is necessary for the effective implementation of the Union’s environmental policy.³⁷ It is assumed in this context that ‘effective implementation’³⁸ is concerned with whether criminal laws contribute to achieving the objective of better protection of the environment throughout the Union.³⁹ How does criminal law contribute to the protection of the environment? And why is criminal law ‘essential’, i.e. more effective than other non-criminal sanctions? The Commission’s main argument is that criminal law is effective because it works as a deterrent

³⁴ See Environmental Crimes Directive (n 7), Articles 3 and 5.

³⁵ See below chapter 3- section IV (D).

³⁶ See 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’).

³⁷ *ibid* 2; 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, 24.

³⁸ See below for discussion of this concept in chapter 5- section I (A).

³⁹ See Michael G Faure, ‘The Implementation of the Environmental Crimes Directives in Europe’ (2011) Ninth International Conference on Environmental Compliance and Enforcement 2011, 366-67. <http://inece.org/conference/9/proceedings/41_Faure.pdf> Accessed on 29 April 2014.

for illegal activities. The Commission assumes that environmental crime is a typical white-collar crime where the offenders are rational calculators. Offences are carried out with the intention of making a profit, either from selling a product or from avoiding certain costs. Due to increased costs associated with complying with more stringent environmental legislation, there is a large and profitable market for environmental crime. Due to the nature of environmental offences, criminal law is the appropriate response. The deterrent effect of higher sanctions and a higher level of awareness of environmental crime increases compliance. In addition, the Commission suggests that the dual criminality requirement in international criminal law and differences in applicable sanctions that cause problems with regard to police and judicial cooperation would be remedied through a minimum set of common definitions of offences.⁴⁰

The Commission further argues that criminal laws have a greater deterrence value than other sanctions, and so are 'essential' for the enforcement of EU environmental policy. Existing Union and Member State measures are insufficient to ensure effective implementation of Union environmental policies. The Environmental Liability Directive (ELD)⁴¹ only requires the operator to bear the costs for the preventive and remedial actions actually taken pursuant to that directive. It does not aim at sanctioning the responsible operator.⁴² Criminal sanctions are more effective since they sanction a past illegal behaviour and prevent the repetition of the same illegal behaviour in the future.⁴³ Nor will individual administrative fines work since Member States set their sanctions at too low a level. As the huge profits offenders enjoy are not calculated in the fines applied to their offences, the low fines imposed on offenders are simply considered as an insignificant and acceptable cost of doing business, taking into account the market prices and the low risk of detection.⁴⁴ Secondly, the Commission appeals to criminal law's social stigma. The imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law. Criminal law has a stronger deterrent effect than other administrative sanctions because of the moral disapproval connected to a criminal penalty and the inclusion of convictions in criminal records.⁴⁵ Thirdly, the Commission

⁴⁰ See SEC (2007) 160 (n 37), 12, 23-24, 28, 30.

⁴¹ 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').

⁴² *ibid*, Article 8(1).

⁴³ See SEC (2007) 160 (n 37) 24.

⁴⁴ *ibid* 18, 35; Environmental Crimes Proposal (n 36) 2.

⁴⁵ See Environmental Crimes Proposal (n36) 2

considers that criminal law is more effective than other sanctions due to its strong enforcement mechanisms. Criminal proceedings enable use of more powerful methods and techniques of investigation than tools of administrative or civil law.⁴⁶

Is there ‘adequate reasoning’ in the proposal and the impact assessment to support the Directive? To test this we should, according to the test developed in chapter 3, only monitor whether the reasons put forward by the Commission are defensible in theory. The test is, as stated in chapter 3, that one of the reasons must constitute in itself sufficient basis to support the exercise of the competence. The reference point for whether the reasons presented are justified is the general criminological and criminal law literature on the effects of criminalization. Only, in the second stage is it considered whether the reasons are sustained with sufficient evidence.⁴⁷

Firstly, it must be admitted that the Commission’s deterrence argument is well-recognised in the literature. Commentators have repeatedly suggested that the threat of prison sanctions is effective in achieving compliance with environmental law provisions.⁴⁸ There is also evidence to support the assumption that environmental crimes are typical white-collar crimes committed by rational individuals suggesting that criminal law is effective in dealing with such offences.⁴⁹ Secondly, it is well-recognised in the literature that alternative sanctions are not normally as effective as criminal sanctions. Fines are less of a deterrent than criminal sanctions because individuals can be indemnified by the firm if they become subject to fines and because fines, in contrast to criminal sanctions such as imprisonment terms can be passed onto customers.⁵⁰ The Commission is also correct to assume that the civil liability regime

⁴⁶ See Environmental Crimes Directive (n 7), recital 4; Environmental Crimes Proposal (n 36) 2; SEC (2007) 160 (n 37) 18, 28.

⁴⁷ See chapter 3- section IV (D).

⁴⁸ See Neil Hawke, *Environmental Policy: Implementation and Enforcement* (Ashgate Publishing Limited 2002) 287; Raymond W Mushal, ‘Reflections upon American Environmental Enforcement Experience as it may Relate to Post- Hampton Developments in England and Wales’ (2007) 19 *Journal of Environmental Law* 201, 210-211; 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/docum/pdf/02544_environmental_crime_workshop.pdf>. Accessed 29 April 2014.

⁴⁹ See Michael Faure and Günter Heine, *Criminal Enforcement of Environmental Law in the European Union* (Kluwer Law International 2005) 58; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (CUP 2003) 223, 275-276; Ronald G Burns, Michael J Lynch and Paul Stretesky, *Environmental Law, Crime and Justice* (LFB Scholarly Publishing LLC 2008) 107.

⁵⁰ See James M Strock, ‘Environmental Criminal Enforcement Priorities for the 1990’s (1991) 59 *George Washington Law Review* 916, 922; 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,

established by the ELD has a weaker deterrent effect than criminal sanctions. This is firstly because the individuals responsible for the offence are unlikely to be punished by the firm and cannot therefore be deterred by a liability regime such as that contained in the ELD. In addition, such a regime is not likely to be effective since the current Union liability regime is directed against the operator who can dispense with liability claims by passing them onto consumers.⁵¹ It is also well established that criminal sanctions, particularly imprisonment, are more effective than other sanctions because of the public condemnation attached to criminal sanctions.⁵² Moreover, it is correct to predict that criminal laws generally will be more effective than administrative sanctions because of the more effective tools of investigation available in criminal proceedings.⁵³

However, some of the Commission's arguments miss the target. The argument regarding judicial cooperation is not entirely convincing. Harmonized criminal laws will not necessarily improve judicial co-operation in criminal matters. What is probably more important for effective judicial cooperation and judicial assistance than harmonized criminal laws is mutual trust. This entails that the criminal justice systems in every Member State respect human rights and provide rights of due process and fair trial to every Union citizen. It is doubtful however whether Member States and their citizens have such mutual trust. The fierce opposition to mutual recognition on the part of defense lawyers, human rights organizations and many criminal law scholars sends a clear message. Whilst harmonization of hard laws may increase contacts, help create common practices or remove the problems of the abolition of the double criminality requirement for the environmental offences at issue⁵⁴, it is not clear whether it will create trust.⁵⁵ In many cases harmonization will create conflicts and problems

London, Final Report, November 2006, 47<<http://www.berr.gov.uk/files/file44593.pdf>> Accessed 29 April 2014.

⁵¹ See ELD (n 41), Article 2(6); Robert W Adler and Charles Lord, 'Environmental Crimes: Raising the Stakes' (1991) 59 *George Washington Law Review* 781, 789-790; 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.

⁵² See Gobert and Punch (n 49) 220, 275. Dan M Kahan, 'What do alternative sanctions mean?' (1996) 63 *University of Chicago Law Review* 591, 593, 650.

⁵³ See Hayman and Brack (n 48) 24; Gobert (n 49) 222.

⁵⁴ Double criminality would not have been such a problem for environmental offences since there was already a mentioning of 'environmental crimes' in the Framework Decision on the European Arrest Warrant as one of the offences for which the double criminality requirement is abolished; see Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA [2002] OJ L 190/1, Article 2(2).

⁵⁵ See Valsamis Mitsilegas 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277, 1282, 1289, 1291, 1301-1302, 1306.

that are related to the underlying cultural and ideological differences.⁵⁶ The criticisms against the current low level of individual administrative fines in the Member States are not sufficiently compelling to dismiss fines generally as a sanctioning mechanism. If optimal fines are imposed, fines are likely to deter.⁵⁷ The same criticism could be made to the Commission's argument that the current ELD regime does not work. First, the ELD does not establish a proper civil liability regime against individuals breaching environmental rules. It has a limited personal scope as it is only directed against the operator. The ELD also has a narrow substantive scope as it only covers certain occupational activities and only requires the operator to bear the costs for remedial and preventive actions taken pursuant to the ELD.⁵⁸ For this reason, it will not deter potential infringers of EU environmental law effectively. If the EU legislator instead prescribed unlimited civil liability against individuals for infringements of EU environmental rules, such sanctions are likely to be very dissuasive.⁵⁹ It is unconvincing to adopt criminal sanctions merely because current ill-devised civil liability and fine regimes in the Member States and the Union have failed to produce effective outcomes.

Despite these shortcomings in the Commission's reasoning, it is sufficient to pass the standard for legality. This is because the Commission has put forward several arguments in the proposal which explain why criminal laws would be an 'effective' and 'essential' measure to enforce EU environmental laws. Those arguments are supported by the relevant literature and by empirical studies. It seems clear that the Commission's arguments on deterrence, the criminal law's social stigma and the benefits of criminal procedures are sufficient to defend why criminal law would, in theory, contribute to the enforcement of EU policies. Whilst the argument on judicial cooperation is not compelling, this failure is not sufficient to invalidate the Environmental Crimes Directive.⁶⁰ Even if that argument is not adequate, the proposal contained three separate arguments supporting the 'effectiveness' of

⁵⁶ See 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.

⁵⁷ See Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169, 161; Steven Shavell, *Foundations of Economic Analysis of Law* (Belknap Press of Harvard University Press 2004) 505-507.

⁵⁸ See ELD (n 41), Articles 5-7, 8.

⁵⁹ See for this argument within the context of insider trading: Mark A Spitz, 'Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain' (1989) 12 *Boston College International and Comparative Law Review* 265, 290, 297; Geraldine S Moohr, 'An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime' (2003) 55 *Florida Law Review* 937, 969.

⁶⁰ 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), paras 141-142.

criminal laws.⁶¹ It would have been sufficient to meet the adequacy standard if the EU legislator only had only referred to criminal law's deterrent nature. This is because this argument is an independent and sufficient justification for criminalization.

While the arguments on the insufficiency of national non-criminal sanctioning regimes are not convincing, those arguments do not exclude the legality of the Directive. The adequacy standard requires that the EU legislator explain why each of the alternative sanctions, or why non-criminal sanctions generally, are not as effective as criminal sanctions in the enforcement of EU environmental policies. The Commission has suggested one argument that is sufficiently compelling to defend the superiority of criminal sanctions over non-criminal sanctions. This is the assumption, well-defended in the literature, that the superior moral stigma of criminal laws makes it a more effective sanction than non-administrative sanctions. The Commission has also suggested that the stronger investigative tools of criminal procedure make criminalization a more effective option than administrative sanctions alone. Whilst this argument is not probably sufficiently strong in itself to ensure that the EU legislator passes the legality standard of 'adequate' reasoning, it reinforces the 'moral stigma' argument and strengthens the case for the adequacy of the reasoning in the proposal. The Commission has put forward relevant reasons both to sustain why criminal laws contribute to higher environmental protection and why alternative sanctions cannot do this job properly. Since this is what is required by the legality standard, the measure passes this part of the test. While the arguments are in theory adequate to sustain criminalization, we have to look whether they are backed up by relevant evidence.

Has the Commission taken into account 'relevant circumstances' which shows that criminal laws are 'effective' and 'essential' for the enforcement of Union environmental policies?

What then is the evidence for the effectiveness and 'essentiality' of criminal laws in the implementation of Union environmental policies?

I begin by determining what evidence the Commission invoked to defend its position. First, to maintain the claim of the criminal law's deterrence value, the Commission refers to international conventions that show that there is some common understanding that for serious

⁶¹ *ibid*, paras 143-149 for the Court's application of the standard of submitting one reasons constituting 'sufficient basis for supporting the decision'.

environmental crimes the use of criminal law is effective.⁶² 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.⁶³ Thirdly, the claim that the use of criminal laws and severe sanctions are a suitable tool for enforcement is substantiated by some evidence. The Commission refers to examples in Austria, Portugal and Finland, where in order to justify the use of effective investigation methods, such as technical surveillance, interception of mail and recording, interception and tracing of telecommunications, there needs to be a risk of committing of serious offences with high prison penalties.⁶⁴

The Commission has also submitted evidence to substantiate the claim that criminal law is 'essential', i.e. more effective than non-criminal sanctions.⁶⁵ In relation to the superiority of criminal laws over individual administrative fines, the Commission refers to evidence from the UK House of Commons. The report from the House of Commons suggests that low fines send the wrong message in trying to create a culture where environmental compliance is taken seriously by the industry. The report is focused on problems of compliance with environmental rules in the UK and suggests that companies often find it more economical to pay a fine than to properly address their environmental performance.⁶⁶ The claim that the general level of fines is too low in the Member States to be an effective deterrence for environmental infringements is supported by the same report from the House of Commons.⁶⁷ The current fines applied in the UK is merely a business cost since many businesses in the UK currently see the payment of fines as the cheaper option to full environmental compliance. Unless the profit margin of a large firm is seriously compromised by the imposition of optimal fines, then such companies are unlikely to take action to stop their illegal activity because of the threat of a fine.⁶⁸ The Commission then relies explicitly upon two studies; one by TRAFFIC Europe on the 'Implementation of Article 16 Council

⁶² 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 (n37), 35.

⁶³ See the article by Hayman and Brack (n 48) 5-15; SEC (2007) 160 (n37) 12-13, 24.

⁶⁴ See SEC (2007) 160 (n 37) 13-14.

⁶⁵ 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.

⁶⁶ 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.

⁶⁷ See SEC (2007) 160 (n 37) 22-23.

⁶⁸ See House of Commons' Environmental Audits Committee (n 65) 20- 22.

Regulation (EC) No. 338/97⁶⁹ and one study conducted by Huglo-Lepage & Associés ‘on criminal penalties in EU Member States’ environmental law’, to demonstrate the insufficiency of existing sanctions.⁷⁰ The TRAFFIC Europe report shows that some national sanctioning regimes are inadequate to deal with the problem of punishing wildlife offences.⁷¹ This is also supported by statements from Marceil Yeater from the CITES secretariat.⁷² The Huglo-Lepage study only shows that there are national divergences both in terms of the nature of penalties imposed, the existence of penalties for certain offences and level of penalties imposed.⁷³

We control the legality of the Environmental Crimes Directive based on the legality test proposed in chapter 3. In order to pass the evidence requirement, the EU legislator needs to first show that one of the reasons which in itself justified why EU criminalization is ‘effective’ for the enforcement of EU policies is supported by sufficient and relevant evidence (the ‘effectiveness’ criterion). The EU legislator 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).⁷⁴

Firstly, there is no reference to literature or studies supporting the claim that criminal laws provide for moral stigma or greater moral stigma than administrative sanctions. Such evidence exists⁷⁵ and it is regrettable that the Commission failed to refer to it. Secondly, it is unclear whether the international community’s recognition that criminal laws are appropriate

⁶⁹ See Garstecki (n 65).

⁷⁰ 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 11 May 2014.

⁷¹ For example, Portugal never considers wildlife trade offences, however severe, as crimes while all other Member States do, at least in particularly serious cases. Greece and Spain do not have any criminal penalties for the illegal shipment of waste. Polish law provides merely a maximum fine of 1293 euro for the offence of trade in endangered species; see Garstecki (n 65) 4-5, 18; SEC (2007) 160 (n 37) 14, 17- 18.

⁷² See Marceil Yeater, CITES Secretariat, ‘Beyond Seizure: Prosecuting CITES Offenders’, in Katalin Kecse-Nagy, Dorottya Papp, Caroline Raymakers, Attila Steiner and Stephanie Theile (eds) *Proceedings of the International Expert Workshop on the Enforcement of Wildlife Trade Controls in Central Eastern Europe (2004) 3-4 June 2004, Budapest, Hungary*, TRAFFIC Europe, Brussels, Belgium. <www.traffic.org/general/traffic_pub_trade7.pdf> Accessed 29 April 2014.

⁷³ Belgium is an example where the fines are high while the level of the imprisonment sanction can be considered as low, compared to other countries. This is in contrast to the United Kingdom, the Netherlands and Federal Republic of Germany where the fines are high and where the judge can sentence up to between 5 and 7 years of imprisonment. Maximum prison sentences range from 6 months to 6 years; see SEC (2007) 160 (n 37) 18; ‘Criminal penalties in EU member States’ environmental law’ (n 70) 407-410, 663-664 708, 828-830. Furthermore, there are differences in terms of the existence of certain penalties for some offences. While there are no criminal sanctions in some Member States such as Greece and Spain, there are no upper limits for fines in other Member States; see ‘Criminal penalties in EU member States’ environmental law’ (n 70) 354-55; 407-410; 542, 759, 828-29.

⁷⁴ See above chapter 3- section IV (D).

⁷⁵ See above n 52 in the present chapter for such evidence.

in the enforcement of environmental law is sufficient evidence to prove a general thesis of criminal law's effectiveness. Those conventions reveal a political conviction to use criminal sanctions to enforce environmental laws. This conviction is not however buttressed by any empirical evidence on the effectiveness of criminal laws. Thirdly, there is generally a lack of proof regarding the deterrent effects of criminal law for the enforcement of environmental laws. As with the case of moral stigma, while such evidence exists in the literature⁷⁶, the Commission did not refer to it. Fourthly, the evidence from the country examples does not prove the thesis that criminal laws are effective. They only demonstrate that severe prison sentences render criminal enforcement more effective. General criminalization of infringements of EU environmental laws will not necessarily lead to improved enforcement of EU environmental policies. The availability of investigation methods is a matter of the level of sanctions and not primarily a matter of whether the offence is criminalized. Whilst criminalization is probably a necessity for the presence of stronger enforcement instruments, those instruments are normally only available to enforcement authorities if the offence in question is subject to a severe custodial sentence. If the minimum sentence of the punishment for the offence is below, for example, 6 months, the enforcement authorities will most likely not be granted with robust powers such as surveillance, interception and recording.⁷⁷ In general, it seems that the Commission has failed to take into account relevant evidence. Whilst the Commission spent considerable effort to point out the insufficiency of existing national sanctioning regimes, there is no evidence 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. Although the EU legislator need not prove that non-criminal sanctions do not work on Union level, there should at least be references to evidence showing the general superiority of criminal sanctions over such sanctions.

Applying the above reasoning it would appear that Environmental Crimes Directive has failed to pass the legality test outlined in chapter 3⁷⁸ for two reasons. First, while the Commission proposed three reasons ('deterrence', 'social stigma' and 'strong enforcement') which in themselves 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

⁷⁶ See above n 48-51 in the present chapter for such evidence.

⁷⁷ See SEC (2007) 160 (n37)13- 14.

⁷⁸ See chapter 3- section IV (D).

superiority over non-criminal sanctions, neither of those reasons were buttressed by sufficient evidence to show how criminal laws are superior to non-criminal sanctions.

B Can Article 103 TFEU be used as a legal basis for introducing criminal sanctions in the field of EU competition law?

Introduction

This subsection builds further on the preceding section by analysing whether the EU's dormant criminal law competence, as derived from the *Environmental Crimes* judgment, can be exercised to criminalize infringements of EU competition law using the legal basis of Article 103 TFEU. The EU's competence to criminalise competition law enforcement has been, and will continue to be, a subject of debate. It has also been suggested that Article 103 TFEU would provide a sufficient legal basis for introducing criminal sanctions. Whelan has developed the argument most comprehensively. First, criminal Union antitrust sanctions are not expressly prohibited by the Treaties. Secondly, the Commission has broad legislative enforcement powers under Article 103 TFEU to establish 'the appropriate regulations or directives to give effect to the principles set out in [Article] 101', principles that underline the complete undesirability of hard-core cartels. Third, although Article 103 TFEU expressly mentions fines and period penalty payments as enforcement measures in the context of EU competition law, the use of 'in particular' provides scope for alternative non-financial enforcement options. Although the founding fathers of the Treaty may not have had the intention that competition rules would be enforced with criminal sanctions it would, with a functional and teleological interpretation of the Treaty, be possible to establish a Union power to introduce criminal sanctions on the basis of Article 103 TFEU.⁷⁹

On one level, this argument is appealing. I certainly agree with Whelan that a teleological interpretation of the Treaties favours the recognition of a criminal law competence for the EU under Article 103 TFEU. While there is no express criminal law competence, the lack of an express conferral of competence cannot be used to deny the exercise of the general criminal law competence for the Union. We know from the discussion above that the Union has a general dormant power to impose criminal sanctions if it is 'essential' for the 'effective

⁷⁹ See Whelan (n 2) 368-369. Further support for this line of argument comes from Wouter Wils (n 4) 157-158.

implementation of Union policies'. An evolutionary interpretation of the Treaties supports recognising such a criminal law competence under Article 103 TFEU. The Court's general approach to the interpretation of the Treaties is that every provision of Union law must be interpreted in the light of the provisions of Union law as a whole, regard being had to the objectives thereof and to its 'state of evolution' at the date on which the provision in question is to be applied.⁸⁰ If we take this approach it is reasonable to argue that the Member States, being aware of recent developments in transnational crime, would have seen a necessity of enforcing its competition rules through criminal sanctions.⁸¹ Although the principle of conferral prohibits the creation of new competences, it does not prohibit the exercise of competences that, although not expressed by the Treaties, are implied in the general legislative competences.⁸² A Union competence to approximate national criminal laws can be implied from the Union's general power to regulate human behaviour.⁸³

If we apply the above-mentioned test for exercising the EU's dormant criminal law competence, it is possible to maintain that criminal sanctions are both 'effective' and 'essential' for the achievement of the objective of safeguarding fair and undistorted competition.⁸⁴ The effectiveness of EU competition law enforcement has been an issue of concern for some time. Despite the problems of assessing the deterrence of criminal laws, it seems likely that criminal laws have a deterrent effect, at least in relation to the average compliant individual who pursues corporate gain and is free to make rational decisions based on reliable information regarding detection levels and conviction levels.⁸⁵ Furthermore, it has been seriously questioned whether the current system, based on administrative fines, has a sufficient deterrence value to assure compliance with the legal rules. Competition law

⁸⁰ See Case C-283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 20.

⁸¹ See Martin Wasmeier and Nadine Thwaites N, 'The "battle of the pillars": does the European Community have the power to approximate national criminal laws?' (2004) 29 *European Law Review* 613, 614.

⁸² See Case 22/70 *Commission v Council* [1971] ECR 263, paras 16, 28; Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759, paras 25-26.

⁸³ See Case C-240/90 *Germany v Commission* [1992] ECR I-05383, paras 11-13; Case C-240/90 *Germany v Commission*, Opinion of AG Jacobs, paras 9-12.

⁸⁴ See the preamble to the Treaty of the Functioning of the European Union; Article 3(6) TEU; Article 3(3) TEU; Article 3(1)(b) TFEU; Protocol (No 27) on the Internal Market and Competition.

⁸⁵ See Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels – Critical Studies of an International Regulatory Movement* (Hart 2011) 260; Andrew von Hirsch, Anthony E Bottoms, Elizabeth Burney and Per-Olov Wikström, 'Deterrent Sentencing as a Crime Prevention Strategy', in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart 2009) 60; Andreas P Reindl, 'How strong is the case for criminal sanctions in cartel cases' in Katalin J Cseres, Maarten Pieter Schinkel, Floris OW Vogelelaar (eds), *Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States* (Edward Elgar Publishing 2006) 117.

enforcement through measures other than criminal laws such as administrative fines, trading prohibitions and individual fines do not seem sufficient to ensure the effective enforcement of Union competition law. The corporate fine provided for under Regulation No. 1/2003 does not deter ‘rogue directors’. The prospect of facing an individual criminal sanction and public condemnation would appreciably reinforce the message of the unacceptable nature of price-fixing.⁸⁶ Given this, criminal sanctions may be the only way to ensure effective enforcement and compliance with Union competition rules.⁸⁷ The conditions for exercising the dormant criminal law competence requires nothing more than proof of the ‘essentiality’ of criminal laws for the effective implementation of Union law. If we accept the presupposition that criminal law is more effective than other sanctioning mechanisms in enforcing Union competition policies, it seems that the general conditions for exercising a criminal law competences under Article 103 TFEU are met.⁸⁸

Criminal laws may also be ‘essential’ for the objectives of EU antitrust enforcement. Antitrust enforcement pursues two objectives. The first one is prohibitive, i.e. to bring the infringement of the law to an end, and entails positive measures to ensure that that conduct ceases in the future. The second one is punitive, i.e. to punish the perpetrator of the illegal acts in question and also to deter him and others from future transgressions.⁸⁹ If these goals are related to the general goal of Union competition law, i.e. the public interest in safeguarding effective competition in the common market⁹⁰, it can be assumed that criminal laws will be beneficial for the implementation of those objectives. Given the above, it is clear that a teleological interpretation suggests that a criminal law competence can be exercised under Article 103 TFEU. However, when we turn to a textual and systematic interpretation of Article 103 TFEU, the case for a criminal law competence under Article 103 TFEU is substantially weakened.

Textual and systematic interpretation of Article 103 TFEU

⁸⁶ See Alan Riley, ‘The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?’ CEPS Special Report/January 2010, 23. <<http://www.ceps.eu/book/modernisation-eu-anti-cartel-enforcement-will-commission-grasp-opportunity>> Accessed 29 April 2014.

⁸⁷ See Wils (n 4) 138-48; Whelan (n 2) 364-368.

⁸⁸ See Whelan (n 2) 370-371; Case C-440/05 *Commission v Council* (n 1), Opinion of AG Mazak paras 90 and 92.

⁸⁹ Christopher Harding and Julian Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency* (OUP 2003) 229.

⁹⁰ See Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP 2006). That this is the overarching objective of Union competition law is however contested; see Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009).

A combined textual and systematic interpretation of Article 103 TFEU suggests that the general dormant criminal law competence cannot be exercised under these provisions. Whilst Article 103(2) (B) mention [administrative] fines⁹¹ and periodic penalty payments as means of sanctioning EU competition rules, this provision does not mention criminal sanctions. In fact, Article 103(2) (a) TFEU does not, as suggested by the dominant view in the literature⁹², constitute examples of the means of sanctions which are available for the Commission. The words ‘in particular’ do not refer to the means of sanctions but to the general purpose of ‘ensuring compliance with the prohibitions in Article 101(1) and Article 102’. It only means that regulations and directives in the field of competition law may have purposes other than those listed in Article 103 TFEU. The list of purposes is consequently only examples. Nevertheless, if the Commission decides to enforce the prohibitions in Article 101 and 102 TFEU by laying down regulations or directives they can only do so by providing for ‘fines and periodic penalty payments’.⁹³

At this stage it is apparent for the reader that a textual and systematic interpretation that argues against the exercise of a criminal law competence under Article 103 TFEU does not fit well with the above proposed teleological interpretation. Here we can recollect the lessons from chapter 2 on the political and pragmatic reasons for why it has been difficult for the Court to impose limits on the exercise of EU competences. The Court has certainly taken the position that a teleological interpretation of the Treaties fits well with the political objectives of further integration.⁹⁴ However, the Court and other observers are also aware that the *telos* of further EU integration cannot be taken too far⁹⁵ and interfere with the explicit wording of the Treaties. The claim for criminalization under Article 103 TFEU on the basis of effectiveness is justified only if it fits the textual framework of this provision.⁹⁶ On this point, it appears that the exercise of the general dormant criminal law competence under this provision stretches the principle of ‘effective implementation’ of Union policies too far.

⁹¹ That the fines mentioned in Article 103 (2) (B) are not of a criminal nature is clear from 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, Article 15(3).

⁹² See Whelan (n 2) 368; Wils (n 4) 157-158.

⁹³ See, however, Case 70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041, paras 16-31, where the Court did not consider that the fact that the parliament was not enumerated in Article 264 TFEU as conclusive for deciding on its right to bring action for annulment.

⁹⁴ See above chapter 2- section II (B) for an elaboration of this point.

⁹⁵ See Loïc Azoulay, ‘Introduction: the Question of Competence’ in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014), 10.

⁹⁶ See Trevor C Hartley, *The Constitutional Problems of the European Union* (Hart 1999) 48.

The existence of an implicit power, which constitutes a derogation from the principle of conferred powers, should be interpreted strictly. Such implicit powers should only be recognised in exceptional cases and in order to be so recognised, they must be necessary to ensure the practical effect of the provisions of the Treaty.⁹⁷ In contrast to the analysis in relation to Article 192 TFEU, the textual and systematic arguments raised above argue against the exercise of the dormant criminal law competence under Article 103 TFEU. The insertion of ‘fines and administrative sanctions’ in Article 103 TFEU, support the conclusion that the Member States had the intention of excluding criminal law as a sanctioning mechanism under this provision. It is difficult to imagine that the purpose of this provision could have been anything other than to regulate in an exclusive manner the range of sanctions available for the Union legislator under said provision. Moreover, the conclusion that the Union cannot exercise its dormant criminal law power under Article 103 TFEU is not contrary to the principle of effective implementation of Union policies. Article 103 TFEU would not lose its practical meaning if the Union did not employ its latent criminal law power.⁹⁸ This is because the Union already has a power under Article 103 (2) (B) to enforce the competition rules by means of fines and administrative sanctions. Thirdly, criminalization contrary to the text of Article 103 TFEU would be tantamount to an ‘amendment’ of the Treaties⁹⁹. This would undermine the formal conception of the rule of law and the principle of legal certainty to the detriment of the individual. This would finally be an infringement of the principle of good faith towards the Member States and the citizens of Europe.¹⁰⁰ In striking a balance between competing principles and also taking into account the formal structure of Article 103 TFEU, there is greater support for the conclusion that the dormant criminal law power cannot be exercised under Article 103 TFEU.

⁹⁷ See Case T-143/06 *MTZ Polyfilms v Council* [2009] ECR II-4133, para 47; Case T- 240/04 *France v Commission* [2007] ECR II-4035, para 37; Hartley (n 96) 38-39.

⁹⁸ This is one of the justifications for recognizing an implied legislative power; joined cases 281, 283-285, 287/85 *Germany and Others v Commission* [1987] ECR 3203, para 28: ‘it must be emphasized that where an article of the EEC Treatyconfers a specific task on the Commission it must be accepted, if that provision *is not to be rendered wholly ineffective*, that it confers on the Commission necessarily and per se the powers which are *indispensable* in order to carry out that task.’ I added emphasis to underline the justification for conferring an implied power on the Commission. See also Paul Craig and Gráinne De Búrca, *EU Law- Text, Cases, and Materials* (5th edn, OUP 2011)77.

⁹⁹ See Hartley (n 96) 50-51.

¹⁰⁰ *ibid*, 22-24, 43; Hjalte Rasmussen, *On law and policy in the European court of justice: a comparative study in judicial policymaking* (Martinus Nijhoff Publishers 1986)148-149, 409-415; Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (n 82) para 30.

II GENERAL LEGAL BASES WHICH CAN BE EMPLOYED TO EXERCISE A DORMANT CRIMINAL LAW COMPETENCE

This subsection considers the limitations to the exercise of a Union criminal law competence under the general legal bases, Article 114 and Article 352 TFEU. The analysis of these provisions is central for the thesis since commentators and EU institutions have argued that criminal law powers can be exercised under these legal bases and because of the fact that they are generally the most frequently used provisions for Union legislative harmonization.¹⁰¹

A Is there any limitations to the exercise of a Union criminal law competence under Article 114 TFEU?

Scope of Article 114 TFEU

Pursuant to the *Tobacco Advertising* judgment there are two justifications for harmonization under Article 114 TFEU. Harmonization may either have the object of removing differences between national legislations that hinder the freedom of movement or it may have the object and effect of removing disparities between national rules which are liable to distort conditions for competition.¹⁰² It was however concluded in chapter 2 that the Court, subsequent to the *Tobacco Advertising Case*, has given a broad interpretation of this provision allowing for measures that have a weak link to the internal market. The question here is whether the limitations imposed by *Tobacco Advertising*, the need to prove that EU measures contribute to remove obstacles to trade or removes ‘appreciable’ distortions to competitions, can act as a check on the exercise of Union criminal law competences under Article 114 TFEU.¹⁰³ We firstly analyse whether the recent case-law on Article 114 TFEU has offered any further understanding of those limitations.

¹⁰¹ See Whelan (n2) 369; Hanna G Sevenster, ‘Criminal Law and EC Law’ (1992) 29 Common Market Law Review 29, 67-68; Wils (n 4) 157-158.

¹⁰² See Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, paras 83-84, 106-107.

¹⁰³ See Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012) 87-108, on Article 114 TFEU and its potential for criminalization.

Does the Court's recent case-law provide any check against harmonization of criminal laws under Article 114 TFEU?

There is only one case, post-Tobacco, which is directly concerned with the appropriateness of using Article 114 TFEU to adopt criminal laws.¹⁰⁴ This case is *Ireland v Parliament and Council*. This case demonstrated that harmonization of national measures aiming to support law enforcement need have only a very weak link to the internal market in order to justify the exercise of the competence under Article 114 TFEU.¹⁰⁵ In this case, the Data Retention Directive¹⁰⁶ was challenged on the basis that it was adopted on the incorrect legal basis of Article 114 TFEU. The basis for this argument was that it was mainly concerned with the fight against crime and therefore should have been adopted on the basis of the (pre-Lisbon) Treaty on European Union. In light of the content of the directive, the Court held that it related predominantly to the functioning of the internal market. The provisions of the Data Retention Directive were limited to the activities of service providers and did not govern access to data or the use thereof by the police or judicial authorities of the Member States. This was clear from the fact that service providers were to retain only data that was generated or processed in the course of their commercial activities. The Court rejected the argument that the contested directive was predominantly concerned with the prosecution and fighting of crime. Even though a close study of the Data Retention Directive showed that the main objective of the data retention provisions was to combat crime, the Court held that the aim and the content of the measure in this case was, in contrast to the *PNR* case, predominantly directed to the activities of the service providers and therefore predominantly concerned with the functioning of the internal market. Since both the objective and content of the measure were related to the functioning of the internal market, the Court upheld the Data Retention Directive as falling within the EU's competence under Article 114 TFEU.¹⁰⁷

¹⁰⁴ Joined cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-04721 was also arguably concerned with whether Article 114 TFEU could be used indirectly to adopt provisions for the benefit of criminal law enforcement. In this case, the Court annulled the 'adequacy decision' because it did not fall within the scope of Directive 95/46 EC and thus outside Article 114 TFEU. However, the case is not important enough to warrant space in the thesis. First, it was not concerned with annulment of a large legislative scheme. Secondly, the Court did not expound on the substantive limits of Article 114 TFEU. It merely stated that since the directive contained provisions on collection of data for public security purposes it fell outside the Data Protection Directive (Joined cases C-317/04 and C-318/04 *Parliament v Council*, paras 54-60, 67-70).

¹⁰⁵ See Ester Herlin-Karnell 'Is There More to it than the Fight Against 'Dirty Money'? Article 95 EC and the Criminal Law' (2008) 19 *European Business Law Review* 557, 567.

¹⁰⁶ 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.

¹⁰⁷ See Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-00593, paras 68-93

A more sober reading of the case questions the Court's acceptance of the argument that the measure was predominantly concerned with the internal market. It was quite obvious from a study of the Data Retention Directive, the preambles and its history that the directive had one central purpose: the investigation, detection and prosecution of serious crime. It was not intended mainly to address defects in the internal market. Recitals 5-11, 25 and Article 1 of the directive all mentioned the fight against serious crime and terrorism as the main reason for the adoption of the Data Retention Directive. For these reasons it would have been more appropriate to adopt it on the basis of the provisions in Title VI of the (pre-Lisbon) Treaty on European Union. The market element in the Data Retention Directive was also fragile since a mere reference to service providers was sufficient to establish an economic link. Prevention in terms of future disparities leads to a very low threshold for justifying EU action. It is also hard to see why the objective of preventing serious organized crime could become an objective of the Community under Article 114 TFEU, when it was an objective of the third pillar. As argued by Herlin-Karnell after *Ireland v Parliament and Council* it does not seem to matter under Article 114 TFEU how much non-market purposes or non-first pillar purpose there is, as long as there is some market purpose and market effects.¹⁰⁸ This case seems to have strongly undermined the limits of the powers under Article 114 TFEU to impose criminal laws.

Having found that the limits imposed by recent case-law on Article 114 TFEU are not sufficient to restrain the exercise of Union competences, we turn to consider whether the objectives of the Treaties can act as a limit to the exercise of Union competences.

Can the objectives of the Treaties act as a limit to the exercise of Union criminal law competences under Article 114 TFEU?

In chapter 2 it was demonstrated that Article 5 TEU has had a limited influence on the Court's interpretation of Article 114 TFEU and worked as a weak restraint on the exercise of EU competences.¹⁰⁹ Herlin-Karnell has suggested that the paradoxical nature of competence allocation in the EU lies precisely in that it is limited by the principle of conferred powers yet these are very difficult to define. There is a tension between the message of Article 5(1) TEU, which requires the legality of EU action on the one hand, and the broad scope of Articles 2

¹⁰⁸ See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 103)104-105.

¹⁰⁹ See above chapter 2-section II (A).

and 3 TEU and 26 TFEU which state the goals of the EU, including the elimination of obstacles to trade on the other hand.¹¹⁰

Whilst it seems difficult at first sight to square the principle of conferral with the broad scope of the EU's objectives, a more comprehensive understanding of Article 5 relaxes the purported tension. This is because Article 5 TEU primarily limits the Union's action to its objectives. Admittedly, pure criminal law harmonisation of a certain offence that entails harmonization of general rules of criminal law requires a specific legal basis due to the fact that such harmonization could not be brought within the objective of the Treaties. However, Article 5 TEU does not impede the exercise of criminal law powers if the adopted EU measure is related to the pursuit of another Union objective such as the reinforcement of the internal market.¹¹¹ We saw above that Article 103 TFEU would not allow for criminalization of EU competition law because of the textual limitations of this provision. There are no such limitations in Article 114 TFEU. The principle of conferral cannot however restrain criminalization that furthers the objectives of the internal market. If the criminalization of market abuse rules and competition rules helps to remove distortions of competition and obstacles to trade arising from different sanctioning regimes, the choice of Article 114 TFEU for such measures is justified.¹¹²

Under the new Lisbon Treaty, it is even more untenable to suggest that the limitation of 'Union objectives' can restrain the exercise of a Union criminal law competences under Article 114 TFEU. This is because the objective of approximation of criminal law is an objective of the Treaties.¹¹³ The exercise of a dormant criminal law competence does not create a new objective, since the exercise of this competence is always conditional on it supporting an existing Union objective. This is so since the exercise of this competence requires that criminal law is only adopted to support the effective implementation of existing Union rules.¹¹⁴ In sum, the exercise of a criminal law power under Article 114 TFEU cannot be limited by reference to the argument that the measure does not pursue a Union objective.

Proposal for constructing limits which can act as a check on the exercise of EU legislative powers under Article 114 TFEU

¹¹⁰ See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 103) 90.

¹¹¹ See COM 2005/583 (n 3), point 11.

¹¹² See Sevenster (n 101) 53-59.

¹¹³ See Article 3(2) and Article 67 TFEU.

¹¹⁴ See Case C-176/03 *Commission v Council* (n 1), para 48; Dougan (n 4) 101-102.

While the case-law analysed in chapter 2 and in this chapter paints a slightly depressing picture of the potential of finding limits to the exercise of Union competences under Article 114 TFEU, it is argued that there is still hope to make competence review of this provision credible. I have two suggestions to construct limits to the exercise of the powers in Article 114 TFEU. First, from a substantive view, one can construct limits to this provision by challenging the basis of the oft-repeated internal market justification.

Herlin-Karnell has observed that a market element has to be present to activate the use of Article 114 TFEU. However, measuring this ‘market element’ is difficult since it boils down to a very abstract test. She also maintains that the market element has been shown to be weak in judicial and legislative practice. Actions from the EU legislator on the basis of confidence in the market are often based on speculation that is difficult to reconcile with the principle of conferred powers. She particularly queries whether criminal law fits into the EU pattern of market creation.¹¹⁵

Herlin-Karnell’s critique is justified. As seen in chapter 2, neither the EU legislator nor the Court has been able to concretise the market element and substantiate the limits of Article 114 TFEU. There is however a means of making the ‘market element’ in question concrete for the purposes of interpreting Article 114 TFEU.¹¹⁶ My main idea is that the EU should have a proper economic justification for criminal law harmonization under this provision. The justification for having an EU power to regulate the internal market comes down to the necessity of resolving market failures that Member States are not able to deal with themselves. It is hard to see any other legitimate justification for EU action. For this reason one could easily exclude several reasons for harmonization under Article 114 TFEU. A strict application of the market failure requirement as a justification for Article 114 TFEU excludes reasons based on ‘confidence in the market’¹¹⁷, expressive reasons or reasoning based on the ‘full effectiveness’ of EU law.¹¹⁸ The EU legislator needs to show the presence or imminent risk for market failure, arising from either obstacles to trade or distortions to competition, in order to regulate under Article 114 TFEU. This understanding of Article 114 TFEU can be

¹¹⁵ See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 103) 106-107.

¹¹⁶ I will make a short summary of my argument here which will be developed in length in chapter 6. My interpretation of Article 114 TFEU is identical to the interpretation proposed of subsidiarity, see below chapter 6- section I (B).

¹¹⁷ See Herlin- Karnell, *The Constitutional Dimension of European Criminal Law* (n103) 106-107, for a discussion of ‘confidence’ in the market.

¹¹⁸ See Mattias Kumm, ‘Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ 12 (2006) *European Law Journal* 503, 520 for support of this view.

defended on the basis of the Court's case-law and the economic rationales for harmonization.¹¹⁹ Although the limits imposed by *Tobacco Advertising* may have been diluted by subsequent cases, it is not too late for the Court to re-assert those limits to ensure credible competence review.¹²⁰ The Court should take the competence-restricting paragraphs of *Tobacco Advertising* and apply them to other pieces of legislation.¹²¹ If those limits are to have any serious meaning¹²², the Court needs to abandon or use less frequently the competence-expansive elements of that judgment. The Court must, for example, limit the application of the justification for pre-emptive harmonization¹²³ and limit the use of the rationale for harmonization of policy fields which, according to the Treaties, belong to the Member States' retained powers.¹²⁴

Building on the findings in chapter 3, the second proposal to construct limits to Article 114 TFEU is to have the Court develop yardsticks for legality. A means to deal with the Court's existing problems of reviewing the exercise of the competence under Article 114 TFEU is to implement the procedural standard outlined in chapter 3. The Court must apply the standard of review of 'adequate reasoning' and 'relevant circumstances' and the test for legality requiring that the proposed justification, which in itself offers a sufficient basis, is supported with sufficient evidence. The Court's monitoring of conformity with the standard of review is directly related to the substantive interpretation of Article 114 TFEU. In applying the first part of the standard of 'adequate reasoning' the Court should focus on the issue of whether the Commission's reasoning supports the conclusion that there is a market failure in the form of a barrier to trade or 'appreciable' distortions to competition.¹²⁵ The EU legislator must be able to offer at least one justification which in theory is sufficiently compelling to support the exercise of the EU's competence under Article 114 TFEU. Criminal law should not be held to contribute to market creation absent a compelling rationale for harmonization which is sustained by the EU law literature or the Court's case-law. If such a justification is wanting in

¹¹⁹ See below chapter 6- section I (B).

¹²⁰ See Case C- 376/98 *Tobacco Advertising* (n 102), paras 99, 108.

¹²¹ *ibid*, paras 79, 83-84, 99, 106-107.

¹²² 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, 831-843, and Derrick Wyatt, 'Community Competence to Regulate the Internal Market', in Michael Dougan and Samantha Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009) 110-136, have both questioned whether the limits of *Tobacco Advertising* are capable of restraining the exercise of EU competences.

¹²³ For support of this point; see Case C- 376/98 *Tobacco Advertising* (n 102), para 86; Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 103) 94-97.

¹²⁴ See Case C- 376/98 *Tobacco Advertising* (n 101), paras 78, 88.

¹²⁵ For support of this point; Paul Craig, *EU Administrative Law* (OUP 2012) 391-392.

the impact assessment or in the explanatory memorandum the Court should invalidate the legislation.¹²⁶

The first part of the test would however only impede EU legislation under Article 114 TFEU that is based on justifications having no credible relationship to the internal market. As is evidenced by the Court's case-law, this part of the test would not act as a restraint for many EU measures. The measures that were at stake in *Ireland v Parliament and Council*,¹²⁷ *Vodafone*¹²⁸ and *Kadi*¹²⁹ would probably all have passed this test. This is because the EU legislator in these cases had pointed to the recitals and stated that there was a distortion to competition justifying resort to Article 114 and Article 352 TFEU. However, such justifications would not in themselves be sufficient to pass the second part of the test, which demands that justifications are supported by evidence.

Weatherill has expressed scepticism with the idea that a request from the Court for more evidence for a legislative measure will help correct the inherent constitutional problems of limiting the use of Article 114 TFEU. If qualitative and quantitative indicators favouring EU action would be recited in a legislative act then, absent manifest miscalculation or illogicality, it is hard to see how a court could or should intervene.¹³⁰ His views are nevertheless overly sceptical since he downplays the important role of transparency and legitimacy in adopting a procedural review approach.¹³¹ I also believe that his view, in contrast to my argument, is based on the idea that any evidence would justify resort to Article 114 TFEU. As I suggested above in chapter 3, the evidence submitted need be of a certain quality and quantity to substantiate the rationales for exercising the competence.¹³² What is needed is a concrete investigation of what effects divergences in criminalization regimes have on the internal market.¹³³ If the EU legislator has in the preparatory documents produced sufficient evidence to show that a divergent enforcement regime creates obstacles to trade or distortions to competition, the second part of the test is fulfilled and the measure can be adopted under

¹²⁶ See Herlin-Karnell, *Constitutional Dimension of European Criminal Law* (n 103) 96, 108

¹²⁷ See Case C-301/06 *Ireland v Parliament and Council* (n107), paras 65-72, 80-85.

¹²⁸ See Case C-58/08 *Vodafone and Others* [2010] ECR I-04999, paras 38-47.

¹²⁹ See Case C-402/05, 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 225-231

¹³⁰ Weatherill, (n 122) 847, refers here to the subsidiarity criterion in Article 5 of Protocol (no 2) on the Application of the Principles of Subsidiarity and Proportionality. According to this provision it follows that: 'The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.'

¹³¹ See above chapter 3- section III (B), for the argument why procedural review is appropriate for reasons of legitimacy and transparency.

¹³² See chapter 3- section IV (D).

¹³³ See Herlin- Karnell, *Constitutional Dimension of European Criminal Law* (n 103) 96.

Article 114 TFEU. However, if the Commission's evidence only suggests that the measure has a remote effect on inter-state trade or does not contribute to remove 'appreciable distortions' to competition, it should not be possible to exercise the competence under Article 114 TFEU.¹³⁴ A mere finding of disparities between national criminalisation regimes or the abstract risk of obstacles or distortions of competition arising from different national sanctioning regimes are not sufficient to justify the use of Article 114 TFEU.¹³⁵ While Union intervention is appropriate in cases where decentralized law-making leads to extreme coordination failures, and inter-state competition completely fails, it is not appropriate if such failures cannot be established.¹³⁶ The evidence must demonstrate that disparities in criminal law legislation effectively restrict cross-border activity or create appreciable distortions to be sufficient to support the argument for exercising the competence under Article 114 TFEU.¹³⁷

In order to understand how the limits of Article 114 TFEU can be constructed we will in the end of this section discuss the Intellectual Property Crimes Proposal. Before entering into a practical assessment of that piece of legislation we should first consider *in abstracto* whether different or weak enforcement regimes constitute 'barriers to trade' or 'appreciable distortions' to competition.

Herlin-Karnell has observed that obstacles to trade can constitute a justification for harmonization of national criminal laws. She has expressed the concern that there is a risk that any diversity, such as the levels of punishment in the various Member States, could be argued as constituting barriers to trade. From the perspective of Article 114 TFEU, anything could be harmonized if it contributes to market creation. She takes the example of organized crime and enlargement as an example. Observing that organized crime is a problem for the EU and for new Member States she queries whether the enlargement of the EU would justify criminalization under Article 114 TFEU. If we accept the consequences of enlargement of the EU and the risk for divergent national approaches to organized crimes as future obstacles to trade, this is a very low threshold to be met when justifying legislative action in EU criminal law.¹³⁸

¹³⁴ See Case C-376/98 *Tobacco Advertising* (n 102), paras 99-101, 107, 109.

¹³⁵ *ibid*, para 84.

¹³⁶ See 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, 14, 16. <<http://www.cbr.cam.ac.uk/pdf/WP323.pdf>>. Accessed 30 April 2014.

¹³⁷ See Case C-376/98 *Tobacco Advertising* (n 102), paras 84, 95, 106-107.

¹³⁸ See Herlin- Karnell, *Constitutional Dimension of European Criminal Law* (n103) 94-96.

For two reasons, I do not think it is even plausible, as Herlin-Karnell suggests, that different or weak enforcement regimes in the Member States could constitute ‘barriers to trade’. First, there is, apart from Herlin-Karnell’s hypothetical examples, no evidence in the literature or the case-law that the criminal enforcement regime plays is a major consideration of traders or market participants when considering entering into cross-border trade.¹³⁹ The assumption must be that differences in criminalisation regimes or disparities in sentencing levels do not per se constitute barriers to trade which effectively restrict cross-border activities.¹⁴⁰ Secondly, there are no practical examples from legislative practice suggesting that criminal law harmonization can be justified on the basis that different sanctioning regimes constitute barriers to trade. Instead the Union legislator has used the risk for distortions of competition as rationales for criminal law harmonization.¹⁴¹ Also for this reason it makes a lot of sense to focus the analysis on this justification.

Can different enforcement regimes in theory constitute appreciable distortion to competition?

As suggested above, the first part of the legality test devised in chapter 3 suggests that the Union legislature must, firstly, give at least one justification which *in abstracto* that is sufficiently compelling to explain how different sanctioning regimes give rise to ‘appreciable’ distortions of competition. In theory, different criminal laws in the Member States enforcement regimes can constitute ‘appreciable’ distortions to competition. Sevenster has developed this argument in the most compelling way in the literature. She first recognises that one of the over-arching aims of the Union is to avoid distortion of competition as much as possible by creating equal conditions of competition for firms. Initial differences between Member States in the price of goods, for instance, would in this scenario be corrected by the market mechanism through parallel imports. She doubts however that market-solutions are the best ones. The Member State with the most lenient penal system would attract most production and establish a precedent. The cause of the failings in enforcement of Union law by Member States is the Member States’ fear of placing one’s own companies at a

¹³⁹ Sevenster, (n 101) 67-68, does not even mention explicitly that removing obstacles to trade should be used as a justification for the exercise of Union criminal law competence.

¹⁴⁰ See Case C-58/08 *Vodafone and Others* (n 128), Opinion of AG Maduro, paras 22-23.

¹⁴¹ See 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, 27, 52-57, 125, 165-169, 171-175; SEC 2007 (160) (n 37)19, 21, 24.

disadvantage. It is assumed that firms and individuals, in accordance with the Delaware effect, would take advantage of the fact that certain Member States have a lax enforcement or criminal sanctioning systems and relocate their business to that Member State.¹⁴² The Commission has cogently explained how differences in sanctioning regimes can create distortions to competition. It has maintained that firms situated in a Member State where, for example, infringements of Union competition rules or Union market abuse rules are penalised, find themselves at a competitive disadvantage in relation to firms situated in Member States which do not have a criminalisation regime for such offences. Firms, which have the possibility of profiting from cartel cooperation due to a lenient enforcement regime, will indirectly be in a better position than firms pursuing business in a state with a strong antitrust enforcement regime. In terms of financial regulations, it can be envisaged that if sanctions applied in different Member States for similar infringements are vary considerably, financial institutions could be tempted to engage in regulatory competition when deciding on their place of location.¹⁴³

Whereas the Union has a competence in the field of the internal market and the objective of legislative harmonization is to achieve a highly competitive social market economy¹⁴⁴ and ensure that competition is not distorted in the internal market, it is submitted that the latter Union objectives may not be attainable without criminal sanctions. If the Member States have decided that they wish for a strong and competitive internal market and confer the Union with legislative powers to this effect, they must necessarily accept that the Union enjoys such powers that enable it to effectively secure the achievement of that objective. There is consequently a justification for the exercise of such a competence under Article 114 TFEU.¹⁴⁵

However, there are some objections to the use of the distortion of competition rationale for criminal law harmonization under Article 114 TFEU. First, there is evidence in the literature suggesting that the existence of strong or weak enforcement regimes is a negligible competitive parameter, compared with several other and more important competitive parameters like wage costs, infrastructure, tax and duty rules, proximity to primary producer,

¹⁴² See Sevenster (n 101) 54-55; Herlin Karnell, *Constitutional Dimension of European Criminal Law* (n 103) 98.

¹⁴³ See 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, 10.

¹⁴⁴ See Article 3(3) TEU; Protocol (No 27) on the Internal Market and Competition.

¹⁴⁵ See René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 *Common Market Law Review* 85, 97-98.

well-developed industrial base, access to markets, etc.¹⁴⁶ Secondly, the evidence for distortions of competition in the form of envisaged or ‘safe havens’ scenarios are not entirely convincing. Evidence from different policy areas does not corroborate the claim that regulations are a major factor affecting firms’ choice of location. Given there is no evidence that there would be a European Delaware effect with weak environmental, market abuse or competition legislation where perpetrators would decide to engage in illegal dealings, the case for Union action based on ‘competitive spill-overs’ is not *per se* a strong one.¹⁴⁷

Despite these objections to harmonization, there is at least a plausible theoretical case for harmonization of EU criminal laws. The criticism raised above does not entirely undermine this case. The objections raised instead show that we cannot automatically assume that divergent criminal laws would lead to ‘appreciable’ distortions to competition. The second step of the legality test requires relevant and sufficient evidence to support the theoretical justification for harmonization. It is necessary that the Union legislator is able to demonstrate by such evidence that there exists distortions and that these distortions can only be remedied by Union action.¹⁴⁸

In order to show how limits to Article 114 TFEU can be created by means of the proposed legality test, the next section enters into a concrete discussion of the first and so far only legislative proposal adopted on this legal basis¹⁴⁹ that includes criminal law provisions, the Intellectual Property Crimes Proposal.¹⁵⁰

¹⁴⁶ See Thomas Elholm, ‘Does EU Criminal Cooperation Necessarily Mean Increased Repression?’ (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 191, 221; Nuotio (n 56) 92. See also David Vogel, ‘Trading up and governing across: transnational governance and environmental protection’ (1997) 4 Journal of European Public Policy 556, 558-560, for this argument in the context of environmental law and regulatory dynamics.

¹⁴⁷ See Claudio M Radaelli, ‘The Puzzle of Regulatory Competition’ (2004) 24 Journal of Public Policy 1, 8.

¹⁴⁸ See Wyatt (n 122) 129-130.

¹⁴⁹ Directive 2005/60/EC 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 [2005] OJ L 309/15, adopted on the basis of Article 114 TFEU, did not expressly provide for an obligation on Member States to impose criminal sanctions for the offences in the directive.

¹⁵⁰ See above n 8 in the present chapter for full reference to the Intellectual Property Crimes Proposal. The Intellectual Property Crimes Proposal is, however, not the first proposal on intellectual property crimes. Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, Brussels, 30.1.2003, COM (2003) 46 final, Article 20 provided that: ‘...Member States shall ensure that all serious infringements of an intellectual property right..... are treated as a criminal offence. An infringement is considered serious if it is intentional and committed for commercial purposes. 2. Where natural persons are concerned, Member States shall provide for criminal sanctions, including imprisonment.’ This proposal was however amended by the European Parliament which excluded the criminal law part from the final directive; see Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45. For further discussion of the story of the negotiations of Directive 2004/48/EC and the Intellectual Property Crimes

Application of the proposed legality test on the proposal for criminal sanctions in the field of intellectual property

The Intellectual Property Crimes Proposal lays down the criminal measures necessary to ensure the enforcement of intellectual property rights.¹⁵¹ The Proposal states that all intentional infringements of an intellectual property right on a commercial scale, and that attempting, aiding or abetting and inciting such infringements shall be treated as criminal offences.¹⁵² It further provides that offences referred to in the Proposal should be punishable by a maximum sentence of at least four years' imprisonment when committed under the aegis of a criminal organisation or where they carry a health or safety risk.¹⁵³ The Commission's argument for employing Article 114 TFEU as a legal basis for this measure is that the considerable disparities between the national systems of penalties, apart from hampering the proper functioning of the internal market, make it difficult to combat counterfeiting and piracy effectively and do not allow the holders of intellectual property rights to benefit from an equivalent level of protection throughout the Community.¹⁵⁴

To control the legality of the proposal I use the test proposed in chapter 3. We should only monitor whether the reasons put forward by the Commission are capable of being defended in theory. The reference point for whether the reasons presented are justified *in abstracto* is the substantive justifications for harmonization under Article 114 TFEU as they have been codified in the case-law of the Court.¹⁵⁵ The Commission should thus articulate and explain the imminent risk for obstacles to trade or 'appreciable' distortions of competition. Since the Commission, when suggesting this form of EU action, was under no obligation to elaborate an impact assessment I will only judge the legality of the measure on the basis of the

Proposal; see Johanna Gibson, 'The Directive Proposal on Criminal Sanctions' (2011), 1 January 2011, 3-6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1857174>. Accessed 30 April 2014. I do not discuss COM (2003) 46 final in further detail as this proposal was always on a pre-mature negotiation stage. Also, the Intellectual Property Crimes Proposal is more interesting since it was the direct consequence of the Court's ruling in the *Environmental Crimes* judgment; see Gibson, 6-8; Intellectual Property Crimes Proposal, 2.

¹⁵¹ See Intellectual Property Crimes Proposal (n 8), Article 1.

¹⁵² *ibid*, Article 3.

¹⁵³ *ibid*, Article 4.

¹⁵⁴ *ibid* 2-3.

¹⁵⁵ See above section II (A), text to n115-124, in the present chapter for an account of the legitimate justification for harmonization under Article 114 TFEU.

explanatory memorandum, the recitals and the text of the Proposal. The test of adequate reasoning neither requires any references to sources or evidence to support the reasoning. The only relevant matter at this stage is whether the reasons submitted in the Proposal can theoretically be used as justifications for legislation under Article 114 TFEU.¹⁵⁶

Even from a very broad interpretation of the scope of the Union's powers, it appears that the justification for pursuing this measure under Article 114 TFEU is both insufficient and unconvincing. The only legitimate reason in the Proposal for using Article 114 TFEU is that there are disparities between Member States' enforcement regimes in relation to intellectual property infringements. It was however established above that disparities alone cannot justify recourse to Article 114 TFEU.¹⁵⁷ In this regard, it is striking that there is no explanation in the Proposal why disparities in Member States' enforcement regimes in relation to intellectual property infringements would cause barriers to trade or distortions to competition.¹⁵⁸ In fact, the Commission does not even claim that the differences in sanctioning regimes would give rise to 'distortions of competition' or 'barriers to trade'. Nor does the Commission's reasoning explain why the approximation of penalties would contribute to the functioning of the internal market. Unless it is possible to ascertain why the Proposal contributes to the internal market, it is not possible to assess whether it falls within the limits of Article 114 TFEU. Nor does the need of intellectual property holders for equal protection throughout the Union explain how distortions of competition may arise. Although the Commission referred to the Court's ruling in the *Environmental Crimes* and to the 'essentiality' of criminal sanctions for the enforcement of national and Union intellectual property rules¹⁵⁹, this kind of justification has no relevance for Article 114 TFEU.¹⁶⁰ In order to be invoked as a legal basis Article 114 TFEU requires that a credible relationship to the internal market be established. It is clear however that, based on the reasoning in the proposal, there is no such relationship between the proposal and the legal basis of Article 114 TFEU. Since the Commission has not been able to offer at least one justification which in itself offers sufficient basis for exercising the competence, the measure fails the first limb of the legality test and must thus be held as falling outside the scope of Article 114 TFEU. If this assessment would later turn out to have

¹⁵⁶ See above chapter 3- section IV (D).

¹⁵⁷ See above section II (A), text to n 133-135, in the present chapter.

¹⁵⁸ See criticism of the proposal: Monika Ermert, 'EU IP Enforcement Directive Questioned On Procedure', *Intellectual Property Watch* (11 July 2006). < http://www.ip-watch.org/2006/07/11/eu-ip-enforcement-directive-questioned-on-procedure/?res=1024_ff&print=0>. Accessed 30 April 2014.

¹⁵⁹ See Intellectual Property Crimes Proposal (n 8) 1.

¹⁶⁰ See Gibson, (n 150) 247-263, for the criticism of the proposal.

been mistaken, I would then consider the second limb of the test and examine whether the evidence is ‘relevant’ for substantiating the justifications proposed by the EU legislator.¹⁶¹ Having looked at the limits to the exercise of the competence in Article 114 TFEU, we now turn to considering the limits to the exercise of the broad flexibility competence in Article 352 TFEU.

B Can Article 352 TFEU be used as a legal basis for introducing criminal sanctions to enforce EU policies?

The scope of the Article- identifying the potential limits

This section analyses whether there are any limitations that can impede the exercise of a dormant criminal law power under the broad flexibility provision, Article 352 TFEU. While Article 352 TFEU was slightly changed by the ratification of the Lisbon Treaty¹⁶² with the purpose of making competence creep more difficult¹⁶³, it still is a very powerful competence for the pursuit of harmonization. What then are the limits of this power? It is worth repeating¹⁶⁴ that, according to settled case law, Article 352 TFEU cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and by those provisions that define the tasks and the activities of the Union. Nor can Article 352 TFEU be used as a basis for the adoption of provisions whose effect would be tantamount to a Treaty amendment. Measures that have fundamental institutional implications for the Union and for the Member States and are of constitutional significance thus go beyond the scope of Article 352 TFEU.¹⁶⁵

¹⁶¹ As things are now, this measure has fortunately been repealed due to the Court’s judgment in Case C-440/05 *Commission v Council* (n 1), which prohibited the Union to prescribe the type and level of penalties and there is no new proposals yet on this subject; see Lassi Jyrkkiö, ‘Smooth Criminal Harmonisation: ACTA, EU and IPR Enforcement’, *Intellectual Property Watch* (Apr. 8, 2010), < <http://www.ip-watch.org/2010/04/08/smooth-criminal-harmonisation-acta-eu-and-ipr-enforcement/> > Accessed 30 April 2014. See, however, for a more optimistic approach to the proposal; Marius Schneider and Olivier Vrins, ‘The EU offensive against IP offences: should right-holders be offended?’ (2006) 1 *Journal of Intellectual Property Law & Practice* (2006) 173.

¹⁶² Article 352(1) TFEU now provides that: ‘If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.’

¹⁶³ See Weatherill (n 122) 855-57.

¹⁶⁴ The paragraphs from *Opinion 2/94* are also mentioned above in chapter 2- section II (A).

¹⁶⁵ See *Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (n82), paras 30, 35; *Joined Cases C-402 and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (n 129), para 224. Paragraph 30 of

Constitutional Courts have held that Article 352 TFEU cannot be interpreted as a procedural device to expand the Union's competence as this would be contrary to the very structure of Article 352 TFEU and the principle of conferral.¹⁶⁶ Commentators have also suggested that Article 352 TFEU stands in direct conflict with the principle of conferral.¹⁶⁷ It has been submitted that a view of Article 352 TFEU as an inherent expansion of power implies a disregard of the legitimate advantages of Treaty revisions and constitutional conversations which is the dominant feature of the Union's state of evolution. In order to preserve the legitimacy of the Union, an expansion of power shall take place primarily by means of Treaty amendment and not through illegitimate use of Article 352 TFEU.¹⁶⁸ It has also been suggested that the new prohibition on using Article 352 TFEU for the harmonization of policy fields that are considered retained Member States competences¹⁶⁹ would reduce competence creep through this provision.¹⁷⁰

The concerns raised in the previous paragraph require a few comments. First, the limit imposed by the Court in *Opinion 2/94*, i.e. the 'general framework of the Treaties', is not a serious constraint on the use of Article 352 TFEU, since the objectives of the Treaties and the policies of the Treaties can be conceptualised on a very general level.¹⁷¹ Prior to Lisbon the criterion for applying Article 308 EC was that the legislative measure shall be concerned with the 'common market' and the objectives of the EC Treaty for which legislative competence is not already provided. The link to the common market has been removed, and the 'framework of the policies defined in the Treaties' now constitutes the limit. This is an even broader notion than the common market and the wording itself does not suggest any outer limit to the exercise of Union competences. The 'policies defined in the Treaties' encompasses all Union

Opinion 2/94 has been codified in Declaration 42 to the Lisbon Treaty. See also Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009) 152-156, for a discussion of the limits imposed by Article 352 TFEU and *Opinion 2/94*.

¹⁶⁶ See Judgment of Czech Constitutional Court of 26 November 2008, *Treaty of Lisbon I*, Pl. ÚS 19/08 (2008), paras 148-153; Judgment of the German Federal Constitutional Court of 12 October 1993, *Manfred Brunner and Others v. The European Union Treaty*, Cases 2 BvR 2134/92 & 2159/92, paras 64, 70, 99; Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), paras 326-328.

¹⁶⁷ See Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2433-34, 2445, 2451-52; 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) 203.

¹⁶⁸ See Robert Schütze, 'Dynamic Integration – Article 308 and Legislation in the course of the Common Market: A review essay' (2003) 23 *Oxford Journal of Legal Studies* 333, 341-342.

¹⁶⁹ Pursuant to Article 352(3) TFEU it follows that: 'Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.'

¹⁷⁰ See 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* (OUP 2012) 103-105.

¹⁷¹ See Schütze, 'Dynamic Integration' (n 168) 337.

policies.¹⁷² The ‘framework of the policies defined in the Treaties’ cannot for example be considered to be an effective impediment to the exercise of Union criminal law powers. It is obvious that through Title V the Union has created a policy framework for the harmonisation of criminal law when this is necessary to achieve an Area of Freedom, Security and Justice.

For the same reason, nor does the criterion ‘the objectives of the Treaties’ work as a check on the exercise of a Union criminal law competence under Article 352 TFEU. First, it is not correct to claim that the use of implied powers for giving enforcement powers to the Union under Article 352 TFEU circumvents Article 5 TEU.¹⁷³ Secondly, it is not even necessary to use any creative interpretation of the Treaties to justify the conclusion that harmonization of criminal laws may be essential for the achievement of Union objectives. One of the Union’s objectives is to create an Area of Freedom, Security and Justice through measures to prevent and combat crime.¹⁷⁴ While Article 352 TFEU cannot be used to provide for new Treaty objectives,¹⁷⁵ it is clear that this is not a novel objective of the Treaties. It is equally clear that the condition in Article 352(3) TFEU that ‘measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation’ would not provide a limit to harmonization of EU criminal law. This is because harmonization of EU criminal law is envisaged by the Treaties.¹⁷⁶

Having dismissed the potential of most of the limits contained in Article 352 TFEU on the exercise of the power¹⁷⁷, there seems to remain only one serious limitation to the exercise of Union competences under Article 352 TFEU i.e. that it can only be used if no other power in the Treaty provides the Union with the competence to impose criminal sanctions.¹⁷⁸ We will consider this issue from a more general perspective in the next Chapter and discuss whether the nature of the new Article 83(2) TFEU is a *lex specialis* in relation other legal bases of the

¹⁷² See Craig, *EU Administrative Law* (n 125) 387.

¹⁷³ That the implied powers doctrine do not come into conflict with the principle of conferral is well-established case-law: see Case 22/70 *Commission v Council* (n 82) para 16; *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (n 82), paras 25-26.

¹⁷⁴ See Article 3(2) TFEU, 67 TFEU and Title V of the TFEU.

¹⁷⁵ See Konstadinides (n 167) 203; Schütze, *From Dual to Cooperative Federalism* (n 165) 153-54.

¹⁷⁶ See n 174 for reference to the provisions in the TFEU supporting this position.

¹⁷⁷ I will not discuss the limit in Article 352(2) TFEU since a discussion of this limit will add little to the discussion I had above in chapter 1- section II, on the role of national parliaments. The limit of 352(4) TFEU will also be left out of the discussion since it is not immediately relevant for our discussion; see Craig, *EU Administrative Law* (n 125) 388.

¹⁷⁸ See Craig, *EU Administrative Law* (n 125) 386-387; 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, 256-261.

Treaties thereby excluding criminal law measures from being adopted on the basis of Article 352 TFEU.

III CONCLUSIONS

In this chapter, it has been considered whether there are any limitations to the exercise of the sectorial and functional competence of the Union.

Four themes were subject to closer scrutiny. First, I considered the scope of the EU's criminal law competence as it is derived from the Court's judgments in *Environmental Crimes* and *Ship-Source Pollution*. I argued that these judgments express a general criminal law competence. Because the scope of the EU's criminal law competence in the Court's rulings was based on the 'effectiveness' principle and the condition that criminal sanctions must be 'essential' for the enforcement of EU policies, that competence could not reasonably be limited to environmental policy. Instead it must apply to all EU policies whose enforcement requires the use of criminal sanctions. The limits to this competence were then considered. I challenged the dominant view in the literature that has seen the question of whether criminal law is 'essential' for the enforcement of EU policies as a political question. I argued that there were two limits in relation to the EU's general criminal law competence. First, unless criminal laws are proven by criminological evidence as an 'effective' means for enforcing Union law, it is not possible to exercise said power. If, it is established that criminal laws contribute to the 'effective implementation of Union law', it is then necessary in the second stage to consider whether alternative sanctions contribute to an equal extent to the effective implementation of Union environmental law. The potential of those limits were demonstrated by a consideration of the legality of Directive 2008/99/EC on the basis of the standard of review and legality test proposed in chapter 3. The detailed examination of the Proposal showed that whilst the Commission had provided compelling theoretical justifications for its choice to criminalize and thus conformed to the first limb of the test of 'adequate' reasoning, those justifications were not however defended with 'sufficient' and 'relevant evidence'. This was particularly because there was no empirical evidence or studies referred to in the proposal showing how criminal laws were superior over 'administrative and financial sanctions'. Since the justifications, which in themselves offered a sufficient basis for exercising the competence, were not supported by relevant evidence, the proposal did not pass the second limb of the test and thus failed to conform to the limits of the EU's general criminal law competence.

The second theme of the chapter was the tension between the principle of ‘effectiveness’, as a trigger for the exercise of EU criminal law competence and the principle of conferral, as a principle limiting the exercise of EU competences. I illustrated this tension by considering the case for criminalization of infringements of EU competition rules under Article 103 TFEU. Based on the findings of chapter 2 on how to construct substantive limits to the exercise of EU powers, I argued that a proper interpretation of Article 103 TFEU requires a proper balance between teleological concerns and textual and systematic elements. I challenged the dominant view that a functional, teleological interpretation of Article 103 TFEU on its own could justify EU criminalization. Instead I maintained that an expansive functional interpretation could only be justified if such an interpretation fits the textual framework of the Treaties. The textual enumeration of ‘fines and administrative sanctions’ in Article 103 TFEU was conceptualised as an ‘exclusionary’ condition, implying that this enumeration excluded the use of sanctions other than ‘fines and administrative sanctions’. In contrast to the analysis in relation to Article 192 TFEU, the textual argument favoured the conclusion that the Union could not criminalize competition law infringements under Article 103 TFEU.

The third subject of the chapter was the limits to the internal market justification. I illustrated those limits by examining how criminalization contributes to the internal market. It was argued that there are two ways to construct limits to the power contained in Article 114 TFEU. Based on the findings in chapter 2 of the conceptual limits to Article 114 TFEU, I argued that EU harmonization in a substantive sense is only justified if it contributes to correct imminent or existing market failures. The only legitimate justifications under Article 114 TFEU are therefore that the measure either removes obstacles to trade or eliminate ‘appreciable’ distortions to competition. There are no other legitimate justifications for EU harmonization under this provision. The EU legislator could thus not use reasons of ‘effectiveness’ and ‘confidence in the market’ to legislate under this provision. This interpretation of Article 114 TFEU is well-supported by the Court’s case-law and by the economic rationales for harmonization. Secondly, from the perspective of judicial review, the Court could construct limits by adopting the standard of review and test for legality proposed in chapter 3. It was demonstrated by a review of the Intellectual Property Crimes Proposal how this legality standard could be used to construct limits to the exercise of the competence in Article 114 TFEU. The examination of the proposal showed that the EU legislator had failed to pass the test of providing at least one reason that was independently sufficiently compelling to justify the exercise of the power in Article 114 TFEU. This was because the

Commission had failed entirely to link its reasoning in the Proposal to the recognized justifications for EU harmonization: i) barriers to trade and ii) ‘appreciable’ distortions to competition. For this reason the proposal did not respect the limits of Article 114 TFEU.

The fourth task of the chapter was to consider the objectives of Union law as a limit to the exercise of EU competences. This theme was illustrated by an examination of Article 352 TFEU. The analysis showed that it was very difficult to construct limits to the scope of this power. I disagreed with the view in the literature and among constitutional courts that the objectives of the Treaties could limit the exercise of the power in this provision. First, it is apparent from the Court’s case-law that the use of implied powers for giving enforcement powers to the Union under Article 352 TFEU does not circumvent Article 5 TEU. Secondly, criminal law harmonization was already envisaged by the Treaties in Articles 3(2), 67 and 83 TFEU and by the construction of a policy framework of the Area of Freedom, Security and Justice. The only limit to harmonization under this provision is that Article 352 TFEU can only be used for harmonization if no other legal basis is available for the measure. This limit is reconstructed and discussed in chapter 5.

CHAPTER 5- LIMITS TO THE EXERCISE OF SPECIFIC UNION CRIMINAL LAW COMPETENCES AFTER LISBON TREATY- ARTICLE 83(2) TFEU

Introduction

We saw in the introduction and previous chapters that while for a long time concerns for state sovereignty and the sensitive nature of criminal law led national criminal law to fall outside the EU's sphere of powers, recent developments mean that the EU now has, on the basis of Article 83(2) TFEU and the Court's rulings in *Environmental Crimes* and *Ship-Source Pollution*, a potentially far-reaching competence to harmonize national criminal law.¹ Despite the fact that a competence to enforce substantive Union policies 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.² While it was commonly agreed amongst Member States that the Union needed the competence in Article 83(1) TFEU to combat particularly serious crime, in contrast, it has been argued that Article 83(2) TFEU is one of the most controversial provisions of the new Treaty. It is contested because, firstly, in contrast to the rulings of the Court, which were arguably limited to environmental policy³, the Union has been given a general power to impose criminal sanctions in the field of substantive Union policies.⁴ Secondly, since the Union has been given a power to adopt criminal sanctions that is in sharp contrast to the Court's judgments in *Environmental Crimes*⁵ and *Ship-Source Pollution*.⁶ Thirdly, because

¹ See above chapter 1- section I; chapter 4- section I (A).

² See 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) 334, 338-339; 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)100-106, 110-112.

³ See above chapter 4 n 25, for references to Member States and a judge of the Court of Justice having the view that the Court's ruling was limited to environmental policy. I contest this view above in chapter 4 section I (A), and argue that the EU's criminal law competence, derived from the Court's judgments is of a general nature and applies to all EU substantive policies.

⁴ See Steve Peers, *EU Justice and Home Affairs Law* (OUP 2011) 774; Paul Craig, *The Lisbon Treaty: Law, politics and Treaty reform* (OUP 2011) 365.

⁵ Case C-176/03 *Commission v Council (Environmental Crimes)* [2005] ECR I-07879.

⁶ Case C-440/05 *Commission v Council (Ship-Source Pollution)* [2007] ECR I-09097, para 70; See Peers, *EU Justice and Home Affairs Law* (n 4) 764.

some national courts have expressed their reservations in relation to an excessive use of the Union's new criminal law powers.⁷

This chapter considers the debates that have followed after the introduction of the new provision in Article 83(2) TFEU in the Lisbon Treaty. The central question in the literature and among the EU institutions has been how the competence in Article 83(2) TFEU should be exercised⁸ and it is this question that the chapter addresses. More particularly, it is examined if there are any legal limits to the scope of the Union's new competence under Article 83(2) TFEU. On the basis of the findings of chapter 2 on the conceptual limits to the exercise of EU competences, the present chapter suggests, on the basis of textual, policy-based and contextual reasons, innovative interpretations to the conditions in this provision. The chapter also shows, by means of enquiring into the legality of the Market Abuse Crimes Directive, how the standard of review and test for legality proposed in chapter 3 should be applied.

In order to articulate the core issue of this chapter, i.e. the scope of Article 83(2) TFEU, it is appropriate to begin the analysis with a close examination of the wording of the provision:

‘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...’

As can be seen there are three requirements which have to be satisfied for the adoption of a criminal law directive under this provision; two procedural and one substantive. These requirements are fundamental in the structure and in the outline of the arguments of this chapter. The first section of the chapter comprehensively analyses the substantial requirement that criminal sanctions shall be ‘essential’ for the ‘effective implementation of Union

⁷ See Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, be 5/08, 2 BvR 1010/08, BvR1022/08, BvR1259/08, BvR182/09 (2009), para 226; Dougan, ‘From the Velvet Glove to the Iron Fist’ (n2) 112-113.

⁸ See Herlin-Karnell, ‘EU Competence in Criminal Law after Lisbon’ (n2) 338-339, 346; Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 2) 100-102, 108-113; 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’) 6, 9-11.

policies'. First, there is an analysis of the requirement that criminal laws should only be used where it contributes to the 'effective implementation of Union policies'. There then follows an analysis of the substantive limitation that the Union legislator can only adopt criminal law if this is 'essential' for the 'effective implementation' of Union policies. I argue that the 'essentiality' criterion provides for one of the most important limits to the competence in Article 83(2) TFEU. It is argued that the 'essentiality' condition requires the EU legislator to show that criminal law is appropriate and more effective than other non-criminal sanctions in enforcing the specific EU policy at stake. The limits of the 'essentiality' requirement TFEU is illustrated by an examination of the novel Market Abuse Crimes Directive.⁹

The procedural requirements of Article 83(2) TFEU are discussed in the second section of the chapter. The first procedural requirement is that there must be previous harmonisation measures in the policy field which the Union legislator intends to criminalise. This requirement means that the criminal law competence in Article 83(2) TFEU could only be triggered if the EU legislator had adopted substantive harmonization measures by means of regulations and directives prior to the criminal law measure. Those previous harmonization measures would have to be adopted through the ordinary or special legislative procedure prescribed for in Article 294 TFEU. The argument is illustrated with case-studies of EU competition law and EU market abuse rules.

The second procedural requirement to consider is whether the nature of Article 83(2) TFEU could act as a restraint on EU criminal law legislation being adopted under other legal bases of the Treaties. I argue that Article 83(2) TFEU provides a *lex specialis* for criminal law measures falling within its scope. However, in areas such as competition law, for which harmonization is excluded under Article 83(2) TFEU, and in relation to criminal law measures that, by providing for decriminalization in the form of 'regulations', fall outside the scope of that provision, other Treaty articles such as Article 114 TFEU and Article 352 TFEU could be used.

Having explained the subject-matter of this chapter and explained the structure of the chapter, the analysis now considers the substantive conditions of Article 83(2) TFEU.

⁹ 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. This is the first directive adopted on the basis of Article 83(2) TFEU. It was published in the official journal on 12 June 2014 see Commission Press Release: 'Daily News – 12.06.2014' <<http://europa.eu/rapid/midday-express-12-06-2014.htm?locale=en>> Accessed 18 June 2014.

I SUBSTANTIVE LIMITATIONS ON THE EXERCISE OF UNION COMPETENCES UNDER ARTICLE 83(2)

A Effective implementation of a Union policy

Even though Article 83(2) TFEU presumes that criminal sanctions contribute to the ‘effective implementation’ of Union policies¹⁰ 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, that it has effects on economic, political and social life outside the law.¹¹ It therefore includes compliance, enforcement, impact and implementation. In addition to this, we have the concept of ‘effective enforcement’. This is a well-known concept in EU law and has been used to describe developments in the enforcement of EU law.¹² However since the focus of the analysis in Article 83(2) TFEU is not concerned with the ‘general effectiveness’ of law or its ‘effective enforcement’ but rather the ‘effectiveness of criminal law’ in relation to the enforcement of EU policies we should dig deeper for a more appropriate concept.¹³

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 sought to provide some substance in elaborating an understanding of when criminal sanctions are ‘effective’. She argued, within the context of ascertaining what the term ‘appropriate penalties’ means in relation to the publication of false company documents, that 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 for 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 rules laid down by Union law.¹⁴ Kokott’s reasoning on ‘dissuasiveness’ is analytically sound. It is firmly based within the classical deterrence discourse that suggests that the effectiveness of criminal penalties

¹⁰ See Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012) 57.

¹¹ See Francis Snyder ‘Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *Modern Law Review* 19, 19; Phedon Nicolaïdes, ‘The Problem of Effective Implementation of EU Rules: an Institutional Solution’ (2001) 36 *Intereconomics* 14, 16-17.

¹² See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 10) 44-53.

¹³ See Case C-440/05 *Commission v Council* (n 6), paras 68-69.

¹⁴ 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.

depends on the severity of the penalty.¹⁵ 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.¹⁶

This is arguably a correct definition of effectiveness in the field of criminal penalties. Furthermore, 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.¹⁷ This notion of 'effective implementation' is also similar to the concept that emanates from the Court's recent case-law. From the *Ship-Source Pollution* judgment it can be inferred 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.¹⁸

The definition proposed is therefore that 'effective implementation of Union policies' is *concerned with to what extent criminal laws can contribute to achieve the Union objectives in the policy area concerned and contribute to the enforcement of the underlying Union rules.*¹⁹ Criminal laws may contribute to the realization of the Union policy at issue by achieving, through deterrence²⁰, a high degree of compliance with the substantive EU rules. The first part of the Article 83(2) TFEU test is therefore that the Union legislator must prove that criminal sanctions contribute towards the realization of the Union objective in question. If not, the Union cannot exercise its competence under Article 83(2) TFEU. Having clarified the meaning of 'effective implementation' of Union policies we now turn to consider the second part of the test of Article 83(2) TFEU; the 'essentiality' condition.

¹⁵ 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.

¹⁶ See Case 326/88 *Hansen* [1990] ECR I-02911, Opinion of AG Van Gerven, para 8.

¹⁷ See COM 2011/ 573 (n 8) 9.

¹⁸ See Case C-440/05 *Commission v Council* (n 6) paras 68-69.

¹⁹ For further support of this interpretation: Michael G, Faure 'The Implementation of the Environmental Crimes Directives in Europe' (2011) Ninth International Conference on Environmental Compliance and Enforcement 2011. <http://inece.org/conference/9/proceedings/41_Faure.pdf> Accessed 30 April 2014; 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, 11.

²⁰ See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 10) 59.

B The ‘essentiality’ condition

This subsection considers the meaning of the ‘essentiality’ condition in Article 83(2) TFEU from a linguistic, systematic, contextual and functional perspective. What I propose in this section concerning the construction of and nature of judicial review of this condition in relation to Article 83(2) TFEU applies *a fortiori* to the interpretation and judicial enforcement of the ‘essentiality’ condition within the framework of the EU’s general criminal law competence.²¹

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.²² To take a very simple example, one can imagine a situation where 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.²³ If either of these legal principles is disregarded, the judgment is not valid. Consequently, it is ‘essential’ that both *res judicata* and *litispendens* are considered to make a valid decision. Does the normal linguistic legal usage of ‘essentiality’ fit with the different language versions of Article 83(2) TFEU?²⁴ If we first examine the Swedish language version of the Treaty, the expression ‘nödvändig’ is used, which translates as ‘necessary’. The use of the expression ‘absolut nødvendig’, which is employed in the Danish language version of the Treaty to describe the Union’s competence to resort to criminal sanctions, translates roughly as ‘absolutely necessary’ in the English language. The Italian language version of the Treaty, which use the term ‘indispensabile’, corresponds to the French language version of the Treaty, which employs ‘indispensable’ in relation to the Union’s competence to impose criminal sanctions. Both the Italian and the French version of the relevant condition seem to be identical to the English term ‘indispensable’. In the Spanish language version of the Treaty the word ‘imprescindible’, which translates roughly as ‘absolutely necessary’, is used to describe when the Union can resort to criminal penalties. In the German language version the word ‘unerlässlich’ is used to illustrate when the EU can use criminal sanctions, which translates as ‘indispensable’ in the English language.

²¹ See chapter 4- section I (A) for discussion of the conditions of the EU’s general criminal law competence.

²² 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’.

²³ 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.

²⁴ See Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415, paras 18-19.

Even if the linguistic comparison is limited to only seven language versions, it is possible to draw some tentative conclusions, particularly since the language versions of the most influential Member States have been analysed.²⁵ All the language versions analysed apart from the Swedish language version, which uses the term ‘necessary’, suggest that the relevant condition is ‘indispensable’ or ‘absolutely necessary’ as these terms are understood in the English language. 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’.²⁶ It is only when it is ‘absolutely necessary/indispensable’ for the effective implementation of a Union policy that the Union should resort to criminal sanctions.²⁷ The linguistic interpretation of the ‘essentiality’ condition therefore suggests that the Union legislator will have a substantial burden when making the case for criminal law harmonization under Article 83(2) TFEU.

The analysis continues with a systematic and principled construction of the ‘essentiality’ condition.

First, we should consider the relationship between the ‘effectiveness’ criterion discussed above and the ‘essentiality’ requirement. It transpires that the literature has generally merged these two criteria into the principle of ‘effectiveness’. The focus in the literature has been on the principle of ‘effectiveness’ as a rationale for the expansion of EU competences and not on the ‘essentiality’ condition as a limit to the exercise of EU competences.²⁸ Most notably Herlin-Karnell has claimed that Article 83(2) TFEU provides for an ambiguous, ill-defined and overly broad competence since the all-embracing ‘effectiveness’ criterion gives the Union a *carte blanche* to legislate. According to Herlin-Karnell ‘effectiveness’ cannot be a proper constitutional limit to criminalisation since it has a huge constitutional slipperiness to it; it is far too easy to assume that criminal law is effective in the enforcement of Union law. The ‘effectiveness’ concept fails to take into account other enforcement mechanisms under

²⁵ This selection of Member States is based on their absolute population and voting rights in the Council of the European Union. This approach is supported by the Court’s case-law; Case 55/87 *Moksel v BALM* [1988] ECR 3845, para 16; Case C-64/95 *Konservenfabrik Lubella v Hauptzollamt Cottbus* [1996] ECR I-5105, para 18. The selection of Sweden and Denmark is based on my language skills.

²⁶ That ‘indispensable’ has a nearly identical meaning as ‘essential’ is clear from Black’s law Dictionary (n 22) 546, 773.

²⁷ For support of this position: Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn, CUP 2010) 617; Petter Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Jure 2013)130.

²⁸ See Peers, *EU Justice and Home Affairs Law* (n 4) 762-766, 774-777; Dougan, ‘From the Velvet Glove to the Iron Fist’ (n2)108-113; Christa Tobler, ‘Case C-176/03, Commission v Council’ (2006) 43 *Common Market Law Review* 835, 847-49.

Union law and national law. This is regrettable since administrative penalties are often more effective than criminal penalties.²⁹

Herlin-Karnell's criticism is justified given the available criminological evidence.³⁰ However, even though it may generally be questioned whether criminal law is effective in the enforcement of Union law³¹, this criticism does not provide a proper understanding of the constitutional limits of Article 83(2) TFEU. First, we need to distinguish between the 'effectiveness' criterion and the 'essentiality' condition. The 'effectiveness' principle is a different rule than the 'essentiality' condition. Whilst the 'effectiveness' test is a simple one of establishing whether criminal laws contribute positively to the implementation of EU policies in some way, the 'essentiality' test examines whether criminal laws are more effective than non-criminal laws in enforcing the EU policy at issue in terms of dissuasion and achievement of the objectives of the EU policy at issue. I agree with Herlin-Karnell's concern that the 'effectiveness' criterion may not in itself be a restraint to the exercise of EU competences. However, I argue that the requirement that the Commission prove that criminal laws are 'essential' for the enforcement of EU policies is a check on EU criminal law harmonization under Article 83(2) TFEU. In order to exercise its competence under Article 83(2) TFEU, the Union must not only prove by criminological evidence that criminal sanctions are 'effective' for the implementation of Union policies but also demonstrate that other sanctions cannot achieve 'effective implementation' of a specific Union policy to the same extent.³²

Having defended the importance of the 'essentiality' condition the examination moves on to consider whether the strict linguistic interpretation of the 'essentiality' requirement proposed above fit with the Court's existing case-law. We know from chapter 2 that whilst the Court is prepared to review whether the Union's legislator has exceeded the limits of its competence,

²⁹ See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 10) 57-60, 65; Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' (n 2) 338-344.

³⁰ See Robert A Kagan and John T Scholz, 'The Criminology of the Corporation and Regulatory Enforcement Strategies' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff 1984) 71; John T Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior' (1995) 39 *American Journal of Political Science* 490, 508-509.

³¹ See Dougan, 'From the Velvet Glove to the Iron Fist' (n 2)101; Valsamis Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?' (2009) 34 *European Law Review* 523, 533, 536-537.

³² See Anthony Dawes and Orla Lynskey, 'The Ever-longer Arm of EC Law: The Extension of Community Competence Into the Field of Criminal Law' (2008) 45 *Common Market Law Review* 131, 144, 149; Asp (n 27) 131.

its overall practice demonstrates a deferential review of broad Union measures.³³ The Court has, as previously discussed in the present work³⁴, explicitly conferred a broad discretion to the EU legislative institutions in relation to the legislative choices made in the field of broad Union policies and adopted a ‘manifestly inappropriate’ test when examining the compatibility of general normative acts with the proportionality principle.³⁵ Based on the case-law on broad Union policies, the general normative character of criminal law directives and the difficult social-political choices involved, 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 intensity of 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.³⁶

Given the principles established by the Court in *Environmental Crimes* and *Ship-Source Pollution* are presumably of interpretative value for determining the scope the EU’s criminal law competence, these rulings should be taken into account in the analysis. In this respect, it is argued that the Court’s previous approach to judicial review in those cases was even more deferential than its current approach in competence and proportionality litigation. In the *Environmental Crimes* and the *Ship-Source Pollution* judgments, the Court merely accepted the Council’s assessment that criminal sanctions were ‘essential’ in those cases for the effective implementation of Union environmental law.³⁷ Under the Court’s judgments, it seems to be sufficient that the Union institutions consider criminal measures ‘essential’ for the purposes of the effectiveness of Union law, not that they prove it to be ‘essential’.³⁸

Advocate General Mazák and Dougan have both defended this cautious approach from the Court on the basis of a functional perspective. Advocate General Mazák argued that the question of whether criminal measures are in a particular case ‘essential’ in order to ensure that rules are ‘effective’ require an objective consideration of the substantive legal basis or policy area in question, but also a degree of judgment. With this in mind, the Advocate

³³ See examples of deferential judicial review of EU legislation adopted under Article 114 TFEU: Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras 36-45; Joined cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-04721, paras 56, 57, 60, 67-69.

³⁴ See above chapter 2- section III A; chapter 3- section II.

³⁵ See Paul Craig, *EU Administrative Law* (OUP 2012) 592-602, with references to the relevant case-law

³⁶ See Case C-210/03 *Swedish Match* (n 32), para 48.

³⁷ See Case C-176/03 *Commission v Council* (n 5), para 50; Case C-440/05 *Commission v Council* (n 6), para 68.

³⁸ See Tobler (n 28) 847-848; André Klip *European Criminal Law* (Intersentia 2012) 164.

General endorsed as appropriate the Court's approach, when it found that the Council's view that criminal law was 'essential' for the enforcement of EU environmental policy constituted sufficient evidence to meet this criterion.³⁹ Dougan supports this view and has argued that the issue of whether criminal sanctions are 'essential' is in the first instance a political question not suitable for judicial review. The basic political choice as to the appropriate role and scope of the Union's criminal law powers and its impact on national criminal justice systems is not, and should not be, open to second-guessing by the Courts.⁴⁰

While Advocate General Mazák's and Dougan's arguments can be defended on functional grounds, their contention does not fit well with the Court's case-law on judicial review of EU legislation in the field of broad EU policies, nor is it consistent with the foundations of judicial review. The Court's test in the *Environmental Crimes* and the *Ship-Source Pollution* judgments is an even weaker test than the 'manifestly inappropriate' test, which the Court employs when reviewing EU legislation in the field of common policies. For this reason the Court's approach could be criticised as incoherent. 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 other the common policies. At the very least one would not envision the Court to adopt a lighter test than 'manifestly inappropriate' in a field such as criminal law which is sensitive for political reasons and fundamental rights concerns and where such concerns militate against turning the 'essentiality' condition to a political question.⁴¹ Under the test in the *Environmental Crimes* judgment the Court would be unable to question the Union legislator's choice even when it appears on the face of it to be patently unreasonable. In the Court's standard case-law on proportionality and the common policies, the Court would at least be able to perform this task.⁴² Secondly, from a more principled perspective it is questionable whether the interpretation favoured by Dougan and Mazak is tenable. There are strong political and moral reasons to contest the Court's *de facto* slippery essentiality test. Accepting such a test would exclude criminal law legislation from judicial review and would in principle prevent the Court from discharging its judicial review function.⁴³

³⁹ See Case C-440/05 *Commission v Council* (n 6), Opinion of AG Mazák, paras 119, 121.

⁴⁰ See Dougan, 'From the Velvet Glove to the Iron Fist' (n 2) 102.

⁴¹ See Asp (n 27) 131.

⁴² See Case C-210/03 *Swedish Match* (n 33), para 48.

⁴³ See above chapter 2- section IV (B), for an elaboration of this argument.

Does this mean that the analysis ends here and we should settle for the Court's current application of the 'manifestly inappropriate' standard for the review of legislation adopted under Article 83(2) TFEU? I do not believe so. Although the Court may be less suited to judge the 'essentiality' of criminal law measures for the enforcement of a specific Union policy, I would argue that the Court should involve itself in a more intense review of 'essentiality' than what follows from the its current application of the 'manifestly inappropriate' standard. This is because the intensity with which the 'manifestly inappropriate' standard is applied in relation to review of broad EU policies is ill-suited to police the exercise of the competence in Article 83(2) TFEU.⁴⁴

First, even if criminal law is delicate from a policy perspective, this sensitivity does not exclude criminal law from the domain of judicial review. From the perspective of judicial policy it is rather the case that the nature of criminal law favours a more demanding enquiry of the legality of broad EU criminal law measures. First, criminal penalties severely restrict the freedoms of individuals and are liable to infringe their fundamental right to freedom of movement and property. Imprisonment constitutes breaches of personal liberty and the right to property. Secondly, the imposition of criminal sanctions has serious socio-ethical implications and entails severe stigmatization of the offender. The moral and social blame inherent in every criminal sanction remains firmly attached to the convicted criminal long after the sentence has been served.⁴⁵ A more far-reaching application of 'essentiality' than the Court's current application of the 'manifestly inappropriate' standard is therefore justified by the fact that criminal sanctions are inextricably linked to individual fundamental rights and substantial social costs.

Thirdly, more serious judicial enquiry of legislation adopted under Article 83(2) TFEU is also justified because of the 'essentiality' requirement's appeal to the principle of *ultima ratio*.⁴⁶ Like the 'essentiality' requirement, the *ultima ratio* principle requires that criminalization

⁴⁴ For support of this argument: see above chapter 2- section III (A); chapter 2- section IV (A); chapter 3- section II.

⁴⁵ See the European Convention of Human Rights, Article 5; Gráinne de Búrca 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105, 113, 147; 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.

⁴⁶ That the 'essentiality' condition should be considered in the light of the principle of *ultima ratio* is clear from a number of important policy documents; COM 2011/573 (n 8) 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; CONV 426/02, 'Final report of Working Group X "Freedom, Security and Justice" ', Brussels, 2 December 2002, 10.

should only be used to address problems arising during the implementation of an EU policy and only be directed to seriously harmful acts which cannot be addressed through any other means.⁴⁷ The Commission itself has recognized that the *ultima ratio* principle should be a guiding principle for the EU legislator when it exercises the competence in Article 83(2) TFEU.⁴⁸ This principle, demands that criminal law is only used in situations of necessity, when something needs to be done because there has been a serious infringement of the interests of society and only when it has been established empirically that other less coercive measures are insufficient.⁴⁹ Adopting milder means as a matter of priority, as well as justifying criminal suppression as a last resort based on empirical data are the necessary prerequisites to ensuring respect for the *ultima ratio* principle.⁵⁰ If the ‘essentiality’ condition is interpreted in the light of the *ultima ratio* principle, we should expect two things. First, that it be demonstrated that the EU legislator considered other intrusive means before it adopted legislation. Second, as I argued above, that the EU legislator show by empirical evidence that non-criminal sanctions were not effective in the enforcement of EU policy. While the *ultima ratio* principle is primarily directed to the EU legislator⁵¹, we should expect the Court, given the emphasis placed by the literature and the official EU documents on the *ultima ratio* principle, to apply the ‘essentiality’ condition in the light of this principle.⁵² Such an application suggests a strict review of EU criminal law legislation and that the Court abandons its current weak application of the ‘manifestly inappropriate’ standard for broad EU policies.

Fourthly, from a contextual perspective, a more searching judicial enquiry is also supported by political statements of the 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. The application of this criterion requires a thorough analysis in the impact assessments preceding any legislative proposal, including an assessment of whether Member States’ sanctions have

⁴⁷ See Melander (n 45) 50; Kaiafa-Gbandi (n 45) 19.

⁴⁸ See COM 2011/573 (n 8) 7-10.

⁴⁹ See Melander (n 45) 45-46.

⁵⁰ See Kaiafa-Gbandi (n 45) 17-19.

⁵¹ See Melander (n 45) 51-53.

⁵² *ibid* 50-51.

achieved the desired result and an assessment of the difficulties faced by national authorities implementing EU law.⁵³

Having argued for an intense review of the ‘essentiality’ requirement and contrasted the suggested approach with the Court’s previous case-law and the literature, we must consider how this condition should be enforced before the EU courts. Admittedly, it must be accepted that the Court, from a comparative institutional perspective⁵⁴, has a limited capacity to reassess factual evidence for a particular criminal law measure and limited legitimacy in performing the balancing exercise that the Union legislator must perform when it adopts criminal sanctions. The solution to addressing these concerns is for the Court to apply the test and standard of legality developed in chapter 3 to implement the ‘essentiality’ condition. This test of legality, requiring that the EU legislator offer reasons for the ‘effectiveness’ and ‘essentiality’ of criminal laws that are compelling in theory and supported by sufficient and relevant evidence, provide for more intensity than the Court’s conventional ‘manifestly inappropriate’ test, which is inadequate to enforce the ‘essentiality’ condition.

In order to complete the analysis of the substantive conditions of Article 83(2) TFEU, in the following sub-section I will consider whether the new Market Abuse Crimes Directive, adopted on under Article 83(2) TFEU, conforms to the ‘effectiveness’ and ‘essentiality’ condition. I will return in the second part of the chapter to consider this proposal from the perspective of the ‘harmonization’ requirement. Although the ‘essentiality’ condition and the ‘harmonization’ requirement are connected⁵⁵, I wish to separate their analysis here to enable a better understanding of their meaning. This division of the analysis is appropriate since the ‘effectiveness’ and ‘essentiality’ conditions are substantive whereas the harmonization requirement is procedural in nature. The Market Abuse Crimes Directive is assessed on the basis of the standard and test for legality developed in chapter 3.

C Application of the ‘essentiality’ requirement in Article 83(2) TFEU to the Market Abuse Crimes Directive

⁵³ 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 (n8) 5-7, 11.

⁵⁴ See above chapter 3- section II, for a discussion of institutional arguments for judicial deference.

⁵⁵ They are connected because unless there is previous harmonization in place, criminal sanctions would not be ‘essential’ for the enforcement of EU policies. Logically criminal laws cannot be necessary if there is no policy to enforce; see Asp (n 27) 135.

The Directive

As a part of its regulatory enforcement reform package in the financial services sector, the Commission decided to propose a directive on criminal sanctions for market abuse which was later endorsed as a directive.⁵⁶ The Directive defines three offences; insider dealing, unlawful disclosure of information and market manipulation, which should be regarded by Member States as criminal offences if committed intentionally⁵⁷ and punishable by criminal sanctions which are effective, proportionate and dissuasive.⁵⁸ Given that the Market Abuse Crimes Directive is the first directive based on Article 83(2) TFEU, it is an illuminating example of the legal assessment of the ‘essentiality’ requirement.

I now turn to a legal enquiry of whether the EU legislator correctly exercised its competence in conformity with the ‘essentiality’ requirement when it adopted the Directive. The first question to examine is whether the Commission’s reasoning in the legislative background documents is adequate to support the claim that criminalization is ‘effective’ and ‘essential’ for the enforcement of EU market abuse policies.

Is the Commission’s reasoning ‘adequate’ to sustain that criminal laws are ‘effective’ and ‘essential’ for the enforcement of EU market abuse policies?

The Commission advances one general argument for criminalization. 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 associated with criminal laws and the expressive function of criminal sanctions give it a dissuasive value. The Commission claims that criminal sanctions demonstrate a particularly strong social disapproval towards individual offenders. This contention is also used to explain why criminal sanctions are more effective than non-criminal sanctions. According to the Commission criminal sanctions are of a qualitatively different nature as compared with

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 (‘Market Abuse Crimes Directive’ ‘Directive’); 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, (‘Market Abuse Crimes Proposal’ or ‘Proposal’).

⁵⁷ See Market Abuse Crimes Directive (n 56), Articles 3- 5.

⁵⁸ *ibid*, Article 7 (1), Article 9.

administrative penalties and entail are more dissuasive than non-criminal penalties.⁵⁹ This argument has strong support in the literature.⁶⁰ 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 emphasize that such behaviour is regarded as unacceptable. Criminalization sends a message to the public and potential offenders that these offences are taken very seriously by competent authorities. Thirdly, the ‘communicative’ function of criminal law also contributes to the deterrent function of criminal laws according to the Commission. It is contended that successful convictions for market abuse offences under criminal law often results 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.⁶¹ The second and the third arguments are well-defended by criminological literature.⁶² The Commission also employs those two arguments to explain why other non-criminal sanctions are inferior to criminal sanctions. Non-criminal sanctions are insufficient for enforcing compliance with the EU rules on market abuse. This is because the current framework, built upon Member State autonomy in the enforcement of EU financial regulations, is ineffective. The vague criteria that Member States shall impose ‘proportionate, effective and dissuasive’ sanctions give too much room for interpretation and thus become difficult to enforce through infringement procedures.⁶³ The Commission distrusts the effectiveness of civil liability regimes and administrative fines. It claims that the deterrence effect of civil sanctions is limited as firstly 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, compensation of losses is not

⁵⁹ See 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 1 May 2014.

⁶⁰ See above chapter 4 n 52 for references to the relevant literature.

⁶¹ See Market Abuse Crimes Proposal (n 56), recitals 2, 6 and 7 in the proposed directive; 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.

⁶² For support of the deterrent function of criminal laws due to its educative function: see Joel Feinberg, ‘The Expressive Function of Punishment’, in Joel Feinberg, *Doing & deserving; essays in the theory of responsibility* (Princeton University Press 1970); James Gobert and Maurice Punch, *Rethinking Corporate Crime* (CUP 2003) 216. For support of the deterrent function of criminal laws due to its communicative function: A P Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs- On the Principles of Criminalisation* (Hart 2011) 11- 14; Antony Duff, *Punishment, Communication, and Community* (OUP 2001)19; Mark R Reiff and Rowan Cruft, ‘Antony Duff and the Philosophy of Punishment’ in Rowan Cruft, Matthew H Kramer and Mark R Reiff (eds) *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011) 7.

⁶³ See Market Abuse Crimes Proposal (n 56) 2; SEC (2010) 1496 (n 19) 12-14, 18, 26.

a deterrent in cases where the profit derived from the violation is higher than the damages awarded.⁶⁴ Nor, according to the Commission, are individual administrative fines or corporate fines the solution to the enforcement problem. Violations of insider dealing can lead to gains of several million euro, well in excess of the maximum levels of fines provided for in several Member States. In this context a fine of few thousand euro does not seem to be sufficiently dissuasive.⁶⁵ That non-criminal fines and civil liability sanctions generally are inferior to criminal sanctions is also well-supported by the scholarship.⁶⁶

As we know from chapter 3, the test of legality for passing the standard of ‘adequate reasoning’ is whether *one* of the reasons submitted is sufficient in itself to justify criminalization. The reference point for whether the reasons presented are justified is the general criminological and criminal law literature on the effects of criminalization.⁶⁷ First, we check whether the Proposal is ‘adequately’ reasoned in terms of the effectiveness of criminal laws. 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, the ‘educative’ and ‘communicative’ function of criminal laws. It is argued that the general claim as well as the three sub-arguments are sufficiently compelling to justify why criminal laws are appropriate for the enforcement of EU market abuse policies. As shown above, both the general claim and the three sub-arguments have considerable support in the relevant literature and offer a proper justification *per se* for criminal sanctions. Secondly, we control whether the Commission has proposed adequate reasoning for the contention that criminal laws are ‘essential’ for the enforcement of EU market abuse policies. In this regard, it is more difficult to assess whether the standard has been passed. First, what is required by the ‘essentiality’ condition is a concrete discussion as to why criminal sanctions are more effective than administrative sanctions in the enforcement of EU policies. This is lacking in the Commission’s proposal. The Commission’s analysis is flawed since it fails to distinguish between the Member States’ current lack of sufficient administrative sanctions and the current lack of strong administrative sanctions on a Union level.⁶⁸ It is the Union’s own sanctioning power which should be the reference point subject in terms of Article 83(2)

⁶⁴ See SEC (2010) 1496 (n 19), 19.

⁶⁵ *ibid* 12-14, 25- 26; SEC (2011) 1217 (n 60) 26; FSA Market Watch newsletter, ‘Our strategy and key objectives for tackling market abuse’, issue 26, April 2008, 7.
<http://hb.betterregulation.com/external/mw_newsletter26.pdf>. Accessed 1 May 2014.

⁶⁶ See above chapter 4, n50-53, for references to the relevant literature supporting this point.

⁶⁷ See chapter 3- section IV (D).

⁶⁸ See SEC (2010) 1496 (n 19) 11-17.

TFEU, not the Member States' sanctioning powers.⁶⁹ Another flaw in the Commission's reasoning is that the Commission has not properly considered whether a harmonization of administrative sanctions would have been sufficient to achieve compliance with Union market abuse rules.⁷⁰ The Commission has particularly failed to reflect upon why criminalisation is 'essential' in light of the fact that the EU legislator has decided to simultaneously adopt a battery of severe administrative sanctions through the new Market Abuse Regulation (MAR).⁷¹ The MAR for example includes serious sanctions such as disqualification orders⁷² and high individual administrative fines.⁷³ Given the assumption that the battery of sanctions prescribed by said regulation is, in conjunction, equally deterrent as criminal laws, it is striking that the Commission has failed to compare the effectiveness of criminal laws with the sanctions provided for by that regulation.⁷⁴

Despite these criticisms, I believe that the Market Abuse Crimes Directive should pass the test for 'adequate' reasoning. The Commission has suggested *one argument* which in itself supports why criminal laws are superior to non-criminal sanctions. This is the moral stigma argument. The general capacity of criminal sanctions to express public censure and the special moral condemnation of insider dealing offences contributes strongly in reinforcing the deterrence associated with such sanctions. Since this argument is strongly supported by the relevant literature it offers an independent justification for the 'essentiality' of criminal laws.⁷⁵ In the best of worlds, we could of course have expected the EU legislator to engage in a more general discussion of why criminal laws are more appropriate than non-criminal sanctions and why the MAR is not sufficient for the enforcement of EU market abuse policies. However, it is not the Court's job to assess whether the EU legislator could have justified the Market Abuse Crimes Directive in a more comprehensive, convincing and

⁶⁹ See SEC (2011) 1217 (n 61) 124-125.

⁷⁰ *ibid* 161-164.

⁷¹ See 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); Commission, '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'), chapter 5.

⁷² MAR (n 71), Article 30 (g). See also Martin F McDermott M, 'Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation' (1982) 73 *Journal of Criminal Law and Criminology* 604, 615-617, 620-621, 641, for the general benefits of disqualification orders as a sanctioning mechanism.

⁷³ See MAR (n 71), Article 30(h), Article 30 (i).

⁷⁴ See for similar criticism: Ester Herlin-Karnell, 'White-collar crime and European financial crises: getting tough on EU market abuse' (2012) 37 *European Law Review* 481, 494; Decision 646/11 of the Bundesrat, '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; Council doc. 16000/11', 16.12.11, 2-3.

⁷⁵ See above chapter 4, n 52, for references to the relevant literature.

sophisticated way than it did. The threshold for legality is whether one reason was submitted which could demonstrate the ‘essentiality’ of criminal laws. Since the Commission has successfully done so it is not possible to condemn the Directive for inadequate reasoning. We therefore move on to evaluate whether the evidence submitted supports the claims and conclusions made regarding the need for criminal sanctions.

Is the Commission’s evidence sufficient and relevant to support the conclusion that criminal laws are ‘effective’ and ‘essential’ for the enforcement of EU market abuse policies?

The evidence criterion suggests that the rationale for exercising a criminal law competence under Article 83(2) TFEU must be backed up by evidence showing that criminal laws are ‘essential’ for the enforcement of EU policies. It cannot, however, be given a too demanding an interpretation. If the evidence for a legislative measure is mixed, where some evidence supports the ‘essentiality’ of criminal laws and there is equally strong evidence supporting the position that non-criminal sanctions are as effective as criminal sanctions, the legality of the measure cannot be contested. Nor can one neither require hard empirical data supporting the assertion that criminal law measures are ‘essential’ or that criminal sanctions have substantial effects on compliance, since such data will seldom be available. Notwithstanding this, the ‘evidence’ criterion requires a serious attempt to justify the conclusion by means of reference to empirical data in combination with adequate arguments.⁷⁶ This suggests that it is insufficient for the Commission to make simple assertions that ‘criminal sanctions’ are ‘effective’ and ‘essential’ in the enforcement of the Union policy at stake. Each of the justifications that are considered sufficiently compelling to defend the ‘effectiveness’ of criminal sanctions and the ‘essentiality’ of criminal laws must, as we know from chapter 3, be backed up by ‘relevant’ and ‘sufficient evidence’.⁷⁷

Are any of the Commission’s compelling justifications for the appropriateness of criminal laws supported by relevant and sufficient evidence? The Commission relies on the statements of Margaret Cole, a former director of enforcement and financial crime 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 for strong deterrence and since action against individuals has a much greater impact in terms

⁷⁶ See Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (n 10) 59; Asp (n 27) 131.

⁷⁷ See above chapter 3- section IV (D).

of achieving credible deterrence than action against firms. Her statement is also invoked to support the ‘essentiality’ of criminal laws. According to her, criminal sanctions and in particular custodial sentences have a stronger deterrent effect on potential market abuse offenders than that of administrative sanctions.⁷⁸ Those statements are also used to claim that some national regulators consider criminal sanctions to have a deterrent value.⁷⁹ The Commission, however, clearly misrepresents the reality since ‘some national regulators’ refers only to the views of the director of one national regulator. Moreover, the evidentiary value of hearsay 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 enforcement of market abuse regulation is effective.⁸⁰ In sum, this evidence is certainly 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 recognized by the FSA itself, prove any causal link between increased enforcement and the reduction in the indicator.⁸¹ Many factors other than insider trading, such as media speculation or strategic leaks of information, could cause such movements.⁸²

Thirdly, the Commission points to one company survey from the Office of Fair Trading (OFT) suggesting that criminal sanctions and in particular incarceration is the strongest possible deterrent for a potential infringer.⁸³ The OFT report refers to an earlier OFT company survey⁸⁴ highlighting the importance of sanctions that operate at the individual, as opposed to corporate, level. The earlier OFT survey lists the average ranking by companies of

⁷⁸ See SEC (2011) 1217 (n 61) 166; Speech by Margaret Cole (n 59)

⁷⁹ See SEC (2011) 1217 (n 61) 166 at n 312.

⁸⁰ See also statements to the same effect from Martin Wheatley, one of the new directors of the FCA (The Financial Conduct Authority); Martin Flanagan, “FCA chief pledges to enforce ‘credible’ deterrence” *Scotsman* (31 March 2013) <<http://www.scotsman.com/scotland-on-sunday/business/fca-chief-pledges-to-enforce-credible-deterrence-1-2868289>> Accessed 1 May 2014.

⁸¹ See UK Financial Services Authority, ‘Annual report 2010/11’, 62 <http://www.fsa.gov.uk/pubs/annual/ar10_11/ar10_11.pdf> Accessed 6 May 2014.

⁸² See SEC (2011) 1217 (n 61) 52 at n 127.

⁸³ See London Economics, ‘An assessment of discretionary penalties regimes’ OFT1132, Report for the Office of Fair Trading (UK), October 2009, para 1.18.

⁸⁴ *ibid*, para 3.32.

the factors that promote compliance and indicates that criminal penalties are highly ranked.⁸⁵ While this study gives some support for the statement that criminal laws are superior over non-criminal sanctions, I believe it is insufficient as evidence for the general superiority of criminal laws. First, this study is not included in the Commission's impact assessment from 2011. For this reason 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.⁸⁶

The additional evidence for the 'effectiveness' of criminal sanctions arises from an article by Michael Levi on the use of stigma and shaming within the context of corporate fraud. He cautiously suggests that criminal sanctions may, under certain conditions, contribute to the objective of increasing deterrence due to the stigma attached to criminal conduct.⁸⁷ Although the argument gives some support for the effectiveness of criminal law, it is debateable whether it amounts to evidence of the 'essentiality' of criminal sanctions. First, Levi's shaming argument only relates to the fraud offence and the Commission does not explain how this has any relevance for market abuse or could be used to justify criminal sanctions in the field of market abuse.⁸⁸ Secondly, the Commission's representation of the article is misleading. Levi's article does not say that 'criminal sanctions contribute strongly to the objective of increasing deterrence due to the stigma attached to criminal conduct'.⁸⁹ On the contrary, 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.⁹⁰

In addition, the Commission refers to 6 scientific articles⁹¹ and studies for support of the statement that fines must be optimal to be an effective sanction and to support the contention

⁸⁵ 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, para 1.23, < www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft962.pdf > Accessed 6 May 2014.

⁸⁶ *ibid*, para 1.26, paras 5.58-5.59, paras 5.109-5.110.

⁸⁷ 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 56) 3.

⁸⁸ See Levi (n 87) 149.

⁸⁹ See SEC (2011) 1217 (n 61) 166.

⁹⁰ Levi (n 87) 155, 158.

⁹¹ 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, 13 ff <<http://ssrn.com/abstract=967482>>. Accessed 6 May 2014; Uldis Cerps, Greg Mathers and Anete Pajuste, 'Securities Laws Enforcement in Transition Economies' (2012), 20 December 2012, 12 ff <https://iweb.cerge-ei.cz/pdf/gdn/RRCV_100_paper_01.pdf>. Accessed 6 May 2014; 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

that existing fine levels in Member States are too low.⁹² Having reviewed all those articles and studies submitted by the Commission it is striking that none of them support the conclusion that criminal sanctions generally are superior to non-criminal fines. As mentioned above, they only support the view that current fine levels in the Member States are ineffective and that fines must be optimal in order to be effective. Moreover, as to the comparison between criminal laws and civil liability sanctions, there is no evidence referred to in the impact assessments preceding the Market Abuse Crimes Directive supporting the contention that such sanctions are less effective than criminal sanctions.⁹³ Finally, there is no reference in the legislative background documents to any study or literature supporting the view that criminal laws are more effective than disqualification orders.⁹⁴

Does the evidence nevertheless pass the test of legality? As we know from above, the Commission was able to invoke one general claim for the effectiveness of criminal laws, i.e. that criminal laws have a greater deterrence value. This general claim was supported by three sub-arguments for criminalization; moral stigma, the educative function of criminal laws and the communicative function of criminal laws. Both the general claim and the three sub-arguments were sufficiently compelling in themselves to offer independent justification for the appropriateness of criminalization. The first point is that while Levi's article, the market cleanliness survey and the OFT study are not in themselves sufficient evidence to support these arguments, that evidence would probably, if considered together, be sufficient to demonstrate the 'effectiveness' of criminal laws for the enforcement of EU market abuse rules. The difficulty here is to decide whether those studies were invoked to support the stigma, communicative or educative function of criminal laws. Indeed, it seems that only one of these studies, Levi's article, was intended to support the argument based on the stigma of criminal laws.⁹⁵ The market cleanliness survey was intended to show that criminal laws contribute to market integrity while the OFT survey was intended to demonstrate the

1/2008, 13 ff; 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 6 May 2014.

⁹² See SEC (2010) 1496 (n 19) 12.

⁹³ The impact assessment from 2010, SEC (2010) 1496 (n 19) 19, merely state that civil liability sanctions do have a limited deterrent effect while completely failing to compare such sanctions to criminal sanctions.

⁹⁴ The usefulness of disqualification orders was recognized by the Commission in SEC (2010) 1496 (n 19) 12.

⁹⁵ See SEC (2011) 1217 (n 61) 55.

particularly deterrent effect of criminal laws.⁹⁶ That being so, we must acknowledge that all the sub-arguments for criminalization, the stigma argument, the ‘educative function’ argument and the ‘communicative function’ argument contribute to demonstrate the deterrent nature of criminal laws. This is clear from the preamble of the Directive⁹⁷, from the wording of the preceding proposal⁹⁸ and from the accompanying impact assessment.⁹⁹ There only needs to be sufficient and relevant evidence to support one of the reasons, which constitutes an independent justification for criminalization, to pass the standard of legality. Since the Commission has been able to refer to three separate studies 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.

But is the evidence sufficient to show that criminal sanctions are more effective than non-criminal sanctions for the enforcement of EU market abuse policies (‘essentiality’ condition)? Having dismissed above¹⁰⁰ the statements by Margaret Cole, the market cleanliness study from FSA, the OFT study on discretionary penalty regimes, Levi’s article, the scientific studies on the impact of different level 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. As accounted for above, while relevant this piece of evidence is not sufficient in itself to show that criminal laws are more effective than non-criminal sanctions. The problem here goes to the quantity of the evidence. Although this study goes in the right direction, more evidence than a single study would need to be produced in order to make a compelling case. One could of course argue that Levi’s article on the stigmatising nature of criminal laws could be used as support for the conclusion that criminal sanctions are more effective than non-criminal sanctions. The problem is that the Commission has not clearly referred to this article explicitly to make the case that criminal

⁹⁶ *ibid.*

⁹⁷ See Market Abuse Crimes Directive (n 56), recital 6 : ‘Establishing criminal offences for the most serious forms of market abuse *sends a message to the public and potential offenders* that competent authorities take such behavior very seriously these are taken very seriously by competent authorities.’ I added emphasis added to pinpoint the deterrence element.

⁹⁸ The Market Abuse Crimes Proposal, (n 56) 3, states that: ‘convictions for market abuse offences, which often result in widespread media coverage, help to improve *deterrence*...’ I added emphasis to pinpoint the deterrence element.

⁹⁹ See SEC (2011) 1217 (n 61) 55: ‘evidence from studies and Member States shows that criminal sanctions contribute strongly to the objective of increasing *deterrence*. They have a *deterrent* effect due to the stigma attached to criminal conduct; criminalization and in particular incarceration are considered by companies to be the strongest possible *deterrent*.’ I added emphasis to underline the deterrence element.

¹⁰⁰ *ibid* 165-167.

laws are more effective than non-criminal sanctions.¹⁰¹ Even if the Commission had explicitly referred to Levi's article as evidence for criminal law's superiority over non-criminal sanctions for the purposes of deterrence, this would not be sufficient evidence. The problem with such an argument is that Levi does not claim that criminal laws are more effective than non-criminal sanctions. It could also be argued that the reference to the Levi article at least implicitly indicates that criminal laws are superior to non-criminal sanctions because of their social stigma. This is not however a logical conclusion. That a particular sanction communicates stigma does not make it automatically more effective than other sanctions. A criminal sanction could arguably be more effective than other non-criminal sanctions because it communicates in a more unequivocal manner moral social stigma.¹⁰² This point is nevertheless not argued by the Commission. As the Commission has failed to make this argument based on Levi's article, one can see why the reference is insufficient as evidence for the 'essentiality' of criminal laws. From above it is also clear that the Commission's evidence for the inadequacy of civil liability sanctions and individual administrative fines is both insufficient and irrelevant. 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 not possible to support this thesis with sufficient evidence. This is because this claim can only be supported with one relevant piece of evidence, i.e. the OFT study.¹⁰³

What then is the result of this examination? It is a tight case. The Market Abuse Crimes Directive was 'adequately reasoned' and supported with sufficient evidence for the thesis that criminal laws are 'effective'. However, I would cautiously suggest that the Directive falls foul of the 'essentiality' condition. This is because the evidence in the legislative background documents preceding the Directive does not fully substantiate the conclusions regarding the greater effectiveness of criminal sanctions over non-criminal sanctions. The Commission has

¹⁰¹ *ibid* 165.

¹⁰² See Dan M Kahan 'What do alternative sanctions mean?' (1996) 63 *University of Chicago Law Review* 591, 592, 652-653.

¹⁰³ There are evidence for the superiority of criminal laws over civil liability: Urska Velikonja, 'Leverage, Sanctions, and Deterrence of Accounting Fraud' (2011) 44 *University of California, Davis Law Review* 1281, 1313-15; Cally Jordan, 'Lessons from the Bennett Affair', (1993) 38 *McGill Law Journal* 1071, 1086, 1088; Richard Macrory, 'Regulatory Justice—Making Sanctions Effective', *Macrory Review*, Cabinet Office, London, Final Report, November 2006 <<http://www.berr.gov.uk/files/file44593.pdf>> Accessed 6 May 2014, 18-19. There is also evidence for the superiority of criminal laws over individual administrative fines: Kahan (n 102) 593, 620-622, 650; 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; Gobert and Punch (n 61) 273; Elizabeth Szockyj and Gilbert Geis, 'Insider trading: Patterns and analysis' (2002) 30 *Journal of Criminal Justice* 273, 282

failed to show, as required by the proposed test of legality, that the reasons offered as justifications for the ‘essentiality’ of criminal laws are supported by sufficient evidence. The Commission has only been able to invoke one study as relevant evidence for the ‘essentiality’ of criminal laws. Because of this, the Market Abuse Crimes Directive should be annulled. Having examined the ‘essentiality’ conditions as a limit to the exercise of the competence under Article 83(2), the chapter moves on to consider whether there are any procedural requirements that can act as a check on the exercise of Union competences under this provision.

II ARE THERE ANY PROCEDURAL CHECKS ON THE EXERCISE OF UNION COMPETENCES UNDER ARTICLE 83(2) TFEU?

This second part of the chapter considers whether there are any procedural limitations on the exercise of Union competences under Article 83(2) TFEU. The analysis begins by considering the definition of ‘harmonization’ measures under Article 83(2) TFEU, followed by a discussion of how much harmonization is required before Article 83(2) TFEU can be invoked. Finally, the applications of the general discussion are illustrated by means of two case studies; EU market abuse rules and EU competition law.

A What is the meaning of ‘harmonisation measures’ in Article 83(2) TFEU?

When examining the meaning of ‘harmonization measures’ in Article 83(2) TFEU it is appropriate to consider first when harmonisation must have taken place. Peers has argued that criminal law measure cannot be adopted before the harmonization 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.¹⁰⁴ While it seems reasonable, as Peers suggest, to take into account the effectiveness principle when interpreting this provision I would challenge the view that ‘effectiveness’ can be used to circumvent the textual constraints of Article 83(2) TFEU. As argued above, a functional interpretation must fit with the design and wording of the Treaties to be justified.¹⁰⁵

¹⁰⁴ See Peers, *EU Justice and Home Affairs Law* (n 4) 776.

¹⁰⁵ See above chapter 4- section I (B) for an elaboration of this point.

In contrast to Peers' interpretation, it is claimed here that there can be no simultaneous adoption of the harmonization measure and the criminal law directive. My argument is supported by the wording that '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'. The wording 'as was followed' points to past legislative activity and suggest that the underlying harmonisation measure must already have been adopted before the criminal law measure is adopted. This linguistic temporal interpretation is, in addition to the English version, supported by the Swedish¹⁰⁶, French¹⁰⁷, Italian¹⁰⁸ versions of the Treaties, which all use the past tense to indicate that harmonization measures must have been adopted prior to the adoption of the criminal law measure. Finally, 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. To use Article 83(2) TFEU, it would not be enough for the Union to have the theoretical ability to implement a policy, even if it had not yet exercised its competences. The offences in question must be linked to harmonization measures already adopted by the Union. Additionally, this strict temporal interpretation meets the concern that the provision should not lead to excessive and hasty recourse to criminal sanctions.¹⁰⁹ In sum, it appears that there must be a previous harmonisation measure before one can take resort to Article 83(2) TFEU and adopt a criminal law directive.¹¹⁰

The second issue is what kind of harmonisation is necessary in order to justify the use of Article 83(2) TFEU. A textual and systematic analysis of Article 83(2) TFEU and the other relevant provisions of the Treaties suggest that harmonisation must have taken place through secondary law in the form of regulations, directives or decisions¹¹¹ and through procedures designated as the 'ordinary' or 'special' legislative procedures.¹¹² To understand the argument, it is crucial to understand the meaning of 'ordinary' and 'special' legislative

¹⁰⁶ '...som använts för beslutet om harmoniseringsåtgärderna i fråga...'

¹⁰⁷ '...à celle utilisée pour l'adoption des mesures d'harmonisation en question...'

¹⁰⁸ '...utilizzata per l'adozione delle misure di armonizzazione in questione...'

¹⁰⁹ See Asp (n 27) 133-134.

¹¹⁰ See Gurgun Hakopian, 'Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon?' (2010) 7 Competition Law Review 157, 165.

¹¹¹ 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 150; Craig, *The Lisbon Treaty* (n 4) 365.

¹¹² See Peers, *EU Justice and Home Affairs Law* (n 4) 776; Dougan, 'From the Velvet Glove to the Iron Fist' (n 2) 109.

procedure and the meaning of ‘legislative acts’¹¹³ as they are defined in the Treaties. A 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.¹¹⁴ First, it appears that regulations, directives and decisions are the only types of legislative acts that can be subject to the ‘ordinary’ or ‘special’ legislative procedures. Since directives and regulations are the main legislative instruments of the Treaties employed for harmonization¹¹⁵, it appears that ‘harmonisation measures’ in Article 83(2) TFEU mainly refers to such instruments. Secondly, it follows from Article 289 TFEU and the general scheme of the Treaties that legislative procedures in the Treaties can 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.¹¹⁶ Legislative acts are therefore, according to Article 289(3) TFEU, defined formally by the procedure in which they are adopted.¹¹⁷ Union measures adopted through procedures that are not designated as ‘special’ or ‘ordinary’ legislative procedures are therefore not by definition ‘legislative acts’ but designated as non-legislative acts pursuant to Article 289(3) TFEU and Article 297(2) TFEU.¹¹⁸ Harmonisation that has taken place through Treaty amendments or other secondary measures that have been designated as non-legislative in character cannot therefore constitute the basis for ‘harmonization’ under Article 83(2) TFEU.¹¹⁹

¹¹³ See Alexander Türk, ‘Law-Making After Lisbon’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley, *EU Law After Lisbon* (OUP 2012) 66-74.

¹¹⁴ Pursuant to Article 289 (1) TFEU it follows that: ‘The *ordinary legislative procedure* shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.’ It further follows from Article 289 (2) TFEU that: ‘In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a *special legislative procedure*.’ I added emphasis to underline the definitions of ordinary and special legislative procedure.

¹¹⁵ See Article 288(1) and Article 289(1) TFEU.

¹¹⁶ See Türk (n 113) 70.

¹¹⁷ *ibid* 67-68; Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 *Common Market Law Review* 617, 638.

¹¹⁸ Article 289(3) TFEU provides that ‘Legal acts adopted by legislative procedure shall constitute *legislative acts*.’ It further follows from Article 297 (1) TFEU that ‘*Legislative acts* adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. *Legislative acts* adopted under a special legislative procedure shall be signed by the President of the institution which adopted them...’. From Article 297 (2) TFEU it follows that ‘*Non-legislative acts* adopted in the form of regulations, directives or decisions.....shall be signed by the President of the institution which adopted them.’ I added emphasis to pinpoint the definitions of legislative acts and non-legislative acts and the distinction between them.

¹¹⁹ This interpretation is supported by Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 2) 109, and Türk (n 113) 69-70.

The next issue to consider is what degree and nature of harmonization must have taken place in order to trigger the competence in Article 83(2) TFEU.

B What is the nature of harmonization required in order to exercise the competence under Article 83(2) TFEU?

Another other 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 said article.¹²⁰ 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 European Union and that could not be linked to the effectiveness criteria as stipulated in Article 83(2) TFEU. The ‘harmonization’ requirement does not therefore seem to constitute an obstacle to the exercise of Union competences under Article 83(2) TFEU.¹²¹ In slight contrast to Herlin-Kernell, 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 harmonization through the ‘ordinary’ and ‘special’ legislative procedure and secondly because it demands harmonization of a certain quality.

In order to determine the nature of harmonization necessary to trigger Article 83(2) TFEU, we must dig deeper into the meaning of the term ‘harmonization’ measures found in Article 83(2) TFEU. A natural starting point for this enquiry is to examine how ‘harmonization’ is defined elsewhere in the Treaties. We therefore approach the question by examining Title VII, Chapter 3 of the TFEU, entitled ‘Approximation of Laws’.¹²² It follows from Articles 114 (1), 115 (1) and 116 (1) TFEU that ‘harmonization’ refers to the approximation of the provisions laid down by 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.¹²³ Applying these general definitions to Article 83(2) TFEU we can therefore assume that the underlying harmonization measures must have as its object the removal of disparities between national laws or remove distortions of

¹²⁰ See Josephine Steiner, Christian Twigg-Flesner and Lorna Woods, *EU Law* (9th edn, OUP 2006) 326-334; Peers (n 4) 775.

¹²¹ See Herlin-Karnell, ‘White-collar crime and European financial crises’ (n 74) 485.

¹²² See Walter Van Gerven ‘Harmonization of Private Law: Do we need it?’ (2004) 41 *Common Market Law Review* 505, 505- 506.

¹²³ That this is a correct definition of ‘harmonization’ measures is clear from Article 114 (4) and Articles 114 (5), 114(7), 114(8) and 114 (10) TFEU which all refer back to the term ‘harmonization’ to describe the measures adopted under Article 114 (1) TFEU. See also Article 115(1) TFEU for a similar definition of ‘harmonization’ measures.

competition. Harmonization entails a modification of the substance of internal laws by providing for common substantive EU laws in relation to certain policy fields. Such substantive provisions could for example relate to prohibited conduct and to conditions of liability.¹²⁴

From this brief examination of the definition of harmonization in the Treaties it seems to follow, that the precondition for employing Article 83(2) TFEU is ‘substantive harmonisation’.¹²⁵ The requirement for ‘substantive’ harmonization means that the underlying harmonisation cannot concern marginal questions or merely superficial harmonisation.¹²⁶ Underlying harmonisation measures must either contain the substantive content of the rule whose infringements entail criminal sanctions, be a substantive definition describing the prohibited activity and/or a measure prescribing certain administrative/civil liability sanctions for certain defined behaviour. If the underlying legislative measure is only concerned with procedural issues there is no substantive harmonisation.¹²⁷ Underlying harmonization measures can for example be expressed in terms of a prohibition, i.e. a prohibition for individuals or undertakings to engage in a specific activity.¹²⁸ Furthermore, if the previous harmonisation measure prescribes that certain Union sanctions would be imposed for certain behaviours it defines¹²⁹, the harmonization requirement would be fulfilled.

This textual and conceptual interpretation of ‘harmonization’ is also sensitive from a criminal policy perspective. It makes little sense to implement criminal sanctions unless there is a compliance deficit relating to an existing EU policy. There should at least have been an attempt to secure compliance of an EU policy by means other than via criminal law before criminal law measures are adopted.¹³⁰ If one demands substantive harmonisation prior to the introduction of criminal sanctions, it is reasonable to require that the prior harmonisation

¹²⁴ See Anne Weyembergh, *L'harmonisation des législations pénales: condition de l'espace pénal européen et révélateur de ses tensions* (Bruxelles, édition de l'Université de Bruxelles 2004) 31-36.

¹²⁵ See Ursula Nelles, ‘Definitions of harmonisation’ in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002) 35, 40.

¹²⁶ See Asp (n 27) 135.

¹²⁷ Nelles (n 125) 37; 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.

¹²⁸ See below section II (D) in the present chapter for the argument that the MAR (n 71) constitutes a substantive harmonization measure.

¹²⁹ See MAR (n 71), Articles 14-20, for a description of prohibited conducts which entail non-criminal sanctions.

¹³⁰ See Asp (n 27) 135.

measure approximating non-criminal sanctions for the prohibited activity has failed to ensure an effective enforcement of the law. It would appear premature to introduce criminal sanctions without specific evidence that a basic approximation of non-criminal sanctions was insufficient to ensure compliance with the substantive EU rules.¹³¹

Having defined what is meant by harmonization measures, it is now time to contrast the suggested concept with two case studies on EU competition law and EU market abuse rules. I have chosen these case studies for two reasons. First, in these areas there are either envisaged or already adopted EU criminal law legislation. EU competition law has been suggested as a candidate for criminalization by the scholarship¹³² whilst EU market abuse rules recently were criminalized by means of the Market Abuse Crimes Directive.¹³³ Secondly, these case studies illustrate how the ‘harmonization’ requirement can act as check on the exercise of the EU’s competence in Article 83(2) TFEU.

C Application of the ‘harmonization’ requirement to the field of EU competition law

It is no understatement that EU Competition law is one of the most harmonized and integrated areas of EU law. It has been stated that ‘after agriculture, competition policy is perhaps the most highly developed of the Community’s common policies, with the greatest impact on undertakings situated both inside and outside the common market.’¹³⁴ Broadly speaking, the material rules on what constitutes anti-competitive behaviour are similar in all Member States due to the high degree of harmonisation in this policy field.¹³⁵ However, even though there is substantive harmonization in the field of EU competition law, there are no specific harmonization measures adopted in the field of EU competition law that provide the necessary foundation for criminal law harmonization under Article 83(2) TFEU.

As stated above, Article 83(2) TFEU requires that prior harmonisation must have taken place through an ‘ordinary’ or ‘special’ legislative procedure. The problem is that harmonization of EU competition law has taken place primarily through the codification of substantive

¹³¹ See Kaiafa- Gbandi (n 45) 17-19; SEC (2011) 1217 (n 61) 55, 168.

¹³² See Wouter PJ Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117, 156-159; Peter Whelan, ‘Contemplating the Future: Personal Criminal Sanctions for Infringement of EC Competition Law’ (2008) 19 *King’s Law Journal* 364, 368-375.

¹³³ See n 56 for full reference to this directive.

¹³⁴ See Steiner, Twigg- Flesner and Woods (n 120) 571.

¹³⁵ See Giorgio Monti, *EC Competition Law* (CUP 2007) 401-404.

prohibitions contained in Articles 101 and 102 TFEU. Given that substantive harmonization of the EU competition rules has taken place by the Treaties¹³⁶, and not by means of a ‘legislative procedure’ within the meaning of Article 289 TFEU, the Union legislator cannot rely on this harmonization to trigger the competence in Article 83(2) TFEU.¹³⁷

It is clear however that some approximation of EU competition law has also taken place through secondary legislation, particularly based on the sectorial provision in Article 103 TFEU. In this regard it is appropriate to look more closely at Regulation 1/2003¹³⁸, adopted on the basis of Article 103 TFEU, and consider whether this measure constitutes a ‘harmonization’ measure within the meaning of Article 83(2) TFEU. As it was adopted on the basis of Article 103 TFEU, it is arguable that Regulation 1/2003 is such a ‘harmonisation’ measure. A directive criminalising infringements of the EU competition rules could therefore be adopted on the basis of Regulation 1/2003 as an underlying harmonization measure. Such a criminal law directive could be adopted simply through the consultation procedure contained in Article 103 TFEU, which was the procedure used for the adoption of Regulation 1/2003.

This solution is nevertheless, inappropriate both from a principled and legal perspective.

Firstly, as argued above, it seems inappropriate given the above-mentioned principle of *ultima ratio* that would be violated if criminal sanctions were adopted in the field of Union competition law prior to harmonisation of individual, non-criminal sanctions such as civil liability and administrative fines. As suggested above, the Union legislator should first adopt individual non-penal sanctions and monitor whether they can achieve effective implementation of Union competition rules prior to adopting criminal sanctions.¹³⁹ Secondly, I argue that Regulation 1/2003 is not a ‘substantive’ harmonization measure in the sense required to trigger the use of Article 83(2) TFEU. On the contrary, it is principally a procedural measure that provides for certain supervision, investigative and enforcement powers for the Commission and national courts in the implementation and application of Union competition rules. This Regulation does not provide for harmonisation of national

¹³⁶ The substantive prohibitions on competition policy were enshrined in Article 85 and Article 86 of the Treaty Establishing the European Economic Community [1957], March 25, 1957, 298 U.N.T.S. 11.

¹³⁷ See Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 2) 109.

¹³⁸ See 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 (‘Regulation 1/2003’).

¹³⁹ See Council, ‘Draft Council conclusions on model provisions, guiding the Council’s criminal law deliberations’, 16542/1/09, rev 1, JAI 868, DROIPEN 160, 5-6.

rules on individual non-criminal liability in cases of breaches of the EU competition rules.¹⁴⁰ Nor does it substantiate or elaborate on the underlying prohibitions on restrictive agreements and market abuse contained in Article 101 TFEU and Article 102 TFEU. Thirdly, since Regulation 1/2003 was adopted on the basis of Article 103 TFEU and this legal basis does not prescribe the use of the ‘ordinary’ or ‘special’ legislative procedure for adoption of legislation, Regulation 1/2003 cannot be used as a ‘harmonization’ measure for the purposes of Article 83(2) TFEU. While it could be argued that Article 103 TFEU in substantive terms must be considered a ‘special’ legislative procedure, as explained above¹⁴¹, the construction of the Treaties’ definitions of ‘legislative acts’ simply does not admit, such a conclusion.¹⁴² For all these reasons, Regulation 1/2003 cannot be used to justify criminal law harmonization.

If the EU legislator still wished to criminalize EU competition rules, the best solution from a criminal policy perspective and from the structure of Article 83(2) TFEU is to adopt two different directives. The *first* harmonisation measure should then contain the substantive prohibitions for a specific activity and a Union-wide harmonised regime of non-criminal sanctions against individuals, including personal fines and trading prohibitions. This directive could and should be based on Article 114 TFEU. As we know from above, Article 114 TFEU constitutes a broad power for the Union to enact measures for the establishment and functioning of the internal market.¹⁴³ It seems clear that the Union legislature under Article 114 TFEU, given its broad discretionary power to choose the method most appropriate for harmonization, has a competence to harmonize national laws concerning the type and level of administrative sanctions to be imposed.¹⁴⁴ This power arguably encompasses serious non-criminal sanctions such as disqualification orders or individual fines.¹⁴⁵

In theory, the criminal law directive could follow immediately upon the adoption of the first harmonization measure since Article 83(2) TFEU does not require any waiting period before

¹⁴⁰ See for example Regulation 1/2003 (n 138), Articles 23(2) (a) and Article 24 (1) (a), which, without establishing or complementing the conditions for liability, simply refer to the substantive prohibitions in Article 101 and Article 102 TFEU.

¹⁴¹ See above section II (A) in the present chapter.

¹⁴² See Dougan, ‘The Treaty of Lisbon 2007’ (n 117) 638-39; Türk (n 113) 71 at n 53.

¹⁴³ See above chapter 1- section I-II; chapter 2- section II (A); chapter 3- section II; chapter 4- section II (A).

¹⁴⁴ See Case C-58/08 *Vodafone and Others* [2010] ECR I-04999, para 35; Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771, para 43.

¹⁴⁵ See MAR (n 71), Article 30(h), Article 30 (i); SEC (2010) 1496 (n 19) 21.

the first harmonization measure and the second criminal law directive.¹⁴⁶ However, from a criminal policy perspective, it is preferable to wait for a certain period of time to examine whether the first measure establishing individual non-criminal liability was sufficient for the enforcement of the EU competition rules. If it was subsequently shown that harmonised individual non-criminal sanctions were not a sufficient deterrent, the Union legislator could proceed to adopt criminal sanctions. The *second* directive which would provide for the determination of the criminal offence and the criminal penalties to be imposed in case of infringements of the Union competition rules could then be adopted on the basis of Article 83(2) TFEU. This directive would have a firm basis on the previous harmonisation measure adopted on the basis of Article 114 TFEU and also be justified in the light of the *ultima ratio* principle, requiring that criminal law be the last resort.¹⁴⁷

Having discussed the application of the ‘harmonization’ requirement to the field of EU competition law, we move on to consider whether this requirement could limit criminalization in the field of EU market abuse law.

D Application of the ‘harmonization’ requirement to EU market abuse legislation

This subsection considers whether the Market Abuse Crimes Directive, proposed under Article 83(2) TFEU, complies with the ‘harmonization’ requirement. This implies querying whether the Market Abuse Crimes Directive was based on a ‘harmonization’ measure within the meaning of Article 83(2) TFEU.

In the current circumstances, the Commission could refer to either the Market Abuse Directive from 2003 (MAD)¹⁴⁸ or the recently adopted Market Abuse Regulation (MAR)¹⁴⁹ as the underlying ‘harmonisation’ measures given that references to both of these measures have been made in the Market Abuse Crimes Directive.¹⁵⁰

¹⁴⁶ See Asp (n 27) 134; Steve Peers ‘EU Criminal Law and the Treaty of Lisbon’ (2008) 33 European Law Review 507, 521.

¹⁴⁷ See above section II (A) - (B) in the present chapter showing how this example would fit the construction of Article 83(2) TFEU.

¹⁴⁸ 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’).

¹⁴⁹ See n 71 for full reference to the MAR. The MAR was adopted on 12 June 2014.

¹⁵⁰ 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 56), which all refer to the MAR (n 71)

The EU legislator should, however, rely on the MAR rather than the MAD as a ‘harmonization’ measure for the Market Abuse Crimes Directive. Firstly, the MAR amends and replaces all of the provisions of the MAD. The MAD will consequently be repealed from 3 July 2016.¹⁵¹ Even though the MAD will formally remain in force until this date, it seems moot to examine, given the existence of the MAR, whether the MAD could constitute an ‘underlying’ harmonization measure.¹⁵² Secondly, given the wide substantive scope of the MAR, the case for qualifying this measure as a ‘substantive’ harmonization measure is more compelling than sustaining this 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.¹⁵³ For example, whilst the MAD focused on financial instruments admitted to trading on a regulated market¹⁵⁴, 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.¹⁵⁵ 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’.¹⁵⁶ Finally, while the MAD lacks proper sanctioning measures¹⁵⁷ or investigative powers for the authorities of the Member States,¹⁵⁸ the MAR grants Member State authorities far-reaching investigative powers,¹⁵⁹ as well as wide-ranging powers to impose sanctions on natural and legal persons.¹⁶⁰

while the explanatory memorandum and recitals 2, 4 and 7 of the Market Abuse Crimes Directive refer to the MAD (n 148).

¹⁵¹ See MAR (n 71), recital 87, Article 37 and Article 39(2).

¹⁵² The title of the MAR (n 71) 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...*’

¹⁵³ See MAR (n 71), recital 3 and Article 1.

¹⁵⁴ See MAR Proposal (n 71) 10-11, 18-19; MAD (n 148), Article 9.

¹⁵⁵ See MAR (n 71), recital 8.

¹⁵⁶ See MAR (n 71), Article 7 and 12. See further description of this problem: MAR Proposal (n 71) 20-23.

¹⁵⁷ See MAR Proposal (n 71) 24-25. There was only a provision in the MAD (n 148), Article 14(1) stating that: ‘Member States shall ensure that the appropriate administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with... and that these measures are effective, proportionate and dissuasive.’

¹⁵⁸ See MAD (n 148), Article 12.

¹⁵⁹ Including, for example, powers to access data and demand information from persons involved in transactions, powers to obtain reports on transactions and have direct access to traders’ systems, powers to carry out on-site inspections and investigations at sites other than at the private residences of natural persons, powers to enter into the premises of natural and legal persons, powers to require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions, powers to require existing data traffic records held by a telecommunications operator, to request the

Having argued that the MAR is the relevant measure it must be examined whether it constitutes a ‘substantive’ harmonization measure within the meaning of Article 83(2) TFEU.

It is apparent that the EU legislator intended the MAR to be a ‘substantive’ harmonisation measure. The preamble of the MAR confirms that it was envisaged to approximate national laws as well as to contribute to the proper functioning of the internal market by reducing regulatory complexity and the compliance costs of undertakings. In particular, the MAR intends to remove problems arising from divergences by national laws by removing remaining obstacles to trade and significant distortions of competition and by preventing further obstacles to trade and distortions of competition from arising.¹⁶¹ Furthermore, fact that the MAR was adopted on the basis of Article 114 TFEU¹⁶², which is one of the general harmonization provisions of the Treaties, supports the conclusion that the MAR is, indeed to be regarded as a ‘substantive’ harmonization measure,¹⁶³ as well as the fact that both the preamble and the articles of the Market Abuse Crimes Directive refer to the MAR.¹⁶⁴

The MAR was not only intended to be a ‘substantive’ harmonisation measure but is one also *de facto*. 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 where a person possesses inside information and uses that information by acquiring or disposing of, for its 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

freezing or sequestration of assets, powers to suspend trading of the financial instrument concerned; see MAR (n 71), Article 23 (a)-(j).

¹⁶⁰ See MAR (n 71), Article 30.

¹⁶¹ See MAR (n 71), recitals 4-6; MAR Proposal (n 71), 2.

¹⁶² See MAR (n 71), recital 4

¹⁶³ See above section II B in the present chapter for a discussion, of the concept of ‘harmonization’ and Article 114.

¹⁶⁴ See n 150 for all the references to the MAR in the Market Abuse Crimes Directive.

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 mirrors this provision and criminalizes the same conduct.

Thirdly, in terms of market manipulation and dissemination offences, it seems that the criminalization in the Market Abuse Crimes Directive¹⁶⁵ is derived directly from the prohibitions in the MAR.¹⁶⁶ 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 or misleading inputs or any other behaviour which manipulates the calculation of a benchmark,’ the Market Abuse Crimes Directive perfectly complements the MAR by criminalizing those behaviours.

There are also some differences between the MAR and the Market Abuse Crimes Directive. By way of example, the offences in the Market Abuse Crimes Directive are generally more restricted, by encompassing fewer activities and behaviours.¹⁶⁷ The offences in the Market Abuse Crimes Directive also impose more demanding liability requirements by only criminalizing ‘intentional’ behaviours.¹⁶⁸ Furthermore, the market manipulation offence in the Market Abuse Crimes Directive imposes an additional condition for criminalization. It

¹⁶⁵ See Market Abuse Crimes Directive (n 56), Articles 5 (2) (a-c) for criminalization of ‘market manipulation’ and dissemination offences.

¹⁶⁶ The substantive prohibitions in the MAR (n 71) against market manipulation and dissemination offences appear from Article 12 and Article 15.

¹⁶⁷ See for example the dissemination prohibition in the MAR (n 71), Article 12 (1) (c), which prohibits the ‘dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading’ compared to the dissemination offence in the Market Abuse Crimes Directive (n 56), Article 5(2) (c). Pursuant to the dissemination offence in the Market Abuse Crimes Directive it is not sufficient that the person who made the dissemination of false or misleading information knew that the information was false or misleading but it is also required that ‘the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination of the information in question’. Moreover, the market manipulation prohibition in Article 12 of the MAR includes misleading behaviours relating to ‘auctioned product based on emission allowances’ whilst the market manipulation offence in Article 5(2) (c) in the Market Abuse Crimes Directive does not criminalize behaviours relating to such products.

¹⁶⁸ See Market Abuse Crimes Directive (n 56), Articles 3 (1), 3(7), 4(1), 4(4), 5(1) compared to the MAR (n 71), Articles 8, 10, 12, 14 and 15.

requires that the behaviours have a certain effect which is not required for the application of the corresponding prohibitions of the MAR. For example the market manipulation offence in the Market Abuse Crimes Directive only criminalizes behaviours which 'give' false or misleading signals as to the supply of, demand for, or price of a financial instrument or a related spot commodity contract',¹⁶⁹ behaviours 'securing' the price of a financial instrument or a related spot commodity contract at an abnormal or artificial level,¹⁷⁰ behaviours which 'affect' the price of a financial instrument or a related spot commodity contract including dissemination of information,¹⁷¹ or which 'give' false or misleading signals.¹⁷² These differences are, however, minor and do not negate the fact that the description of the offences in the Market Abuse Crimes Directive is directly derived from and mirrors the substantive prohibitions in the MAR.

Since the MAR provides for 'substantive' harmonisation regarding the prohibitions of insider dealing, unlawful disclosure of insider information and market manipulation, it should, therefore, also be considered a *de facto* 'substantive' harmonization measure. As a conclusion, the MAR can be considered a 'harmonisation measure' within the meaning of Article 83(2) TFEU.

III CAN THE NATURE OF ARTICLE 83(2) TFEU ACT AS A RESTRAINT TO THE EXERCISE OF A GENERAL UNION CRIMINAL LAW POWER UNDER ARTICLE 114 AND ARTICLE 352 TFEU

The final part of the chapter builds on the discussion in chapter 4 of the possibility of employing Article 114 TFEU and Article 352 TFEU to adopt criminalization measures. The chapter considers whether the nature of Article 83(2) TFEU could impede the exercise of a general Union criminal law power under these legal bases and under other legal basis of the

¹⁶⁹ See Market Abuse Crimes Directive (n 56), Article 5 (2) (a) (i). The MAR (n 71), Article 12(1) (a) (i) also prohibits behaviours which are '... likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument ...'

¹⁷⁰ See Market Abuse Crimes Directive (n 56), Article 5 (2) (a) (ii), compared to the MAR (n 71), Article 12(1) (a) (ii), which thereto prohibits behaviours which are '... likely to secure the price of one or several financial instruments... at an abnormal or artificial level...'

¹⁷¹ See Market Abuse Crimes Directive (n 56), Article 5 (2) (b). The prohibition in the MAR (n 71), Article 12 (1) (b) also includes such behaviours which are '... likely to affect the price of one or several financial instruments...'

¹⁷² See Market Abuse Crimes Directive (n 56), Article 5 (2) (c), compared to the prohibition in the MAR (n 71), Article 12 (1) (c), which thereto include dissemination of information which is '...likely to give, false or misleading signals...'

Treaties. This question has indeed 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 V do not apply if another legal basis in the Treaties can be used for the adoption of criminal law measures.¹⁷³ The use of Article 83(2) TFEU is preferable from a Member State perspective since it grants the possibility for the Member States to pull an emergency brake if a proposed measure affects the fundamental aspects of that Member States' criminal justice system. 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 that apply to in relation to legislation within the Area of Freedom, Security and Justice (AFSJ). Furthermore, subsidiarity control by national parliaments requires more votes under legislation adopted under for example Article 114 TFEU and Article 352 TFEU than under the AFSJ.¹⁷⁴ In addition, if criminal law legislation can be adopted under Article 114 TFEU future acts may be proposed in the form of directly applicable regulations.¹⁷⁵

In order to assess whether Article 83(2) TFEU is really of a *lex specialis* nature we will analyse whether it can act as a check on the exercise of a criminal law competence under the two broad functional provisions of Article 114 TFEU and Article 352 TFEU. We will begin by considering whether Article 83(2) TFEU is a *lex specialis* in relation to Article 352 TFEU.

A Can the existence of Article 83(2) act as a check on the exercise of the Union's general criminal law competence under Article 352 TFEU?

In order to hold that Article 83(2) TFEU has priority as a legal basis over Article 352 TFEU, it must be established that Article 352 TFEU is a subsidiary legal basis to Article 83(2) TFEU in terms of criminal law harmonization. This seems on the face of it to be a simple exercise. In fact, the wording of Article 352 TFEU suggests that this provision can only be used if 'the Treaties have not provided the necessary powers' (the 'necessity' requirement). This unequivocal phrasing suggests that Article 352 TFEU cannot in any circumstance be a *lex*

¹⁷³ See Peers, 'EU Criminal Law and the Treaty of Lisbon' (n 146) 518; House of Lords' European Union Committee, 'The Treaty of Lisbon: an impact assessment, '10th Report of Session 2007–08, Volume I: Report, HL Paper 62-11, London: The Stationery Office Limited, paras 6.179-6.189.

¹⁷⁴ See Article 76 TFEU; Protocol (no 2) on the Application of the Principles of Proportionality and Subsidiarity, Article 7(2).

¹⁷⁵ See Samuli Miettinen, 'Implied ancillary criminal law competence after Lisbon' (2013) 2 European Criminal Law Review 194, 194-196; Herlin-Karnell, 'White-collar crime and European financial crises' (n 74) 486.

specialis. Rather, it is a subsidiary legal basis only to be used exceptionally when no other legal basis in the Treaties confers the requisite competence for Union action.¹⁷⁶

It has also been acknowledged that the Court of Justice sees Article 352 TFEU as a subsidiary legal basis. It is true that the Court in *Massey Ferguson* took a lenient view of the ‘necessity’ requirement and accepted that Article 352 TFEU could be used despite the existence of other potentially applicable legal bases in the Treaties due to the concern for legal certainty.¹⁷⁷ It did, however, subsequently in the *Tariff Preferences* case seriously sharpen the interpretation of this limit.¹⁷⁸ It first demonstrated that the Court would not allow the use of Article 352 TFEU if the use another power for the envisaged legislative measure is more suitable.¹⁷⁹ Secondly, the Court did not in *Tariff Preferences* exclude the use of a more specific legal basis if some of the components of the envisaged Union measure were not explicitly included in the scope of that legal basis. The Court admitted a measure under Article 207 TFEU that pursued both the common commercial policy and development aid policies even though the latter was not explicitly included within the scope of Article 207 TFEU. Since the measure had a stronger relationship to the specific legal basis, Article 207 TFEU, the Court held that this legal basis should be used a sole legal basis instead of Article 352 TFEU.¹⁸⁰ Subsequent case-law also confirms that it would be difficult to adopt a legislative measure under Article 352 TFEU if another specific legal basis is more appropriate for the envisaged measure.¹⁸¹

Secondly, there is a systemic and teleological argument based on the new structure of the Treaties supporting the view that Article 83(2) TFEU is a *lex specialis* in relation to Article 352 TFEU. Such an argument would assume that Article 83(2) TFEU should be considered as a negative competence, similar to the constitutional saving clauses in the Treaties

¹⁷⁶ 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, 231-232, 238-240.

¹⁷⁷ See Case 8/73 *Massey Ferguson* [1973] ECR 897, para 4; Joseph H H Weiler ‘The Transformation of Europe’ (1991) 100 The Yale Law Journal 2403, 2446 at n 120; Konstadinides (n 176) 231-232.

¹⁷⁸ See Konstadinides (n 176) 232.

¹⁷⁹ See Case 45/86 *Commission v Council* [1987] ECR 1493, paras 11-14.

¹⁸⁰ *ibid*, paras 15-21.

¹⁸¹ See Case C-350/92 *Spain v Council* [1995] ECR I-01985, paras 25-27, 30-40; Case C-295/90 *Parliament v Council* [1992] ECR I-939 for a similar strict application of the *lex specialis* limitation of Article 352 TFEU. The Court’s ruling in *Parliament v Council*, which was concerned with an action for annulment of Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L 180/30, showed that Article 18 (2) TFEU has primacy over Article 352 TFEU. The Court gave Article 18(2) TFEU a broad interpretation and accepted that measures adopted under this provision need not be limited to rules governing the rights which derive from Article 18(1) TFEU but may also be concerned with matters in respect of which rules appear to be required in order to ensure that those rights can be effectively exercised. Since the Directive could have been adopted on Article 18(2) TFEU, the Council could not rely on Article 352 TFEU and the Directive was annulled (paras 14-16, 18-20).

discussed above¹⁸², implying that it excludes the possibility of criminal measures being pursued under other provisions. The argument has been developed by the Houses of Lords' European Union Committee. The Committee has argued that Article 83(2) TFEU is framed and apt to subsume and supersede any competence which would otherwise exist under articles outside Title V. Article 83(2) TFEU is explicitly concerned with 'criminal offences' and 'criminal sanctions' which means that this provision is more specific concerning criminal law harmonization in relation to other legal bases in the Treaties. Since the competence recognised in the Court's case-law did not extend to the power to set minimum sanctions, Article 83(2) suggests not only the procedure but also confers a substantive competence. It would be implausible to suggest that the Treaty drafters intended there to be several overlapping articles conferring differing degrees of criminal competence, on the basis of which was chosen as legal basis.¹⁸³

Asp has refined the European Union Committee's argument further. He has convincingly argued that there is no general implied criminal law competence outside Article 83(2) TFEU. 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 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. This argument is reinforced by the fact that the general competence, Article 83(2) TFEU allows for criminal law competence in relation to almost all areas of the Treaties, including transport, competition and agriculture. 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

¹⁸² See chapter 2- section II (A).

¹⁸³ See Houses of Lords' report (n 173), para 6.188; 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, Q 437 and QQ E499–501; Peers, *EU Justice and Home Affairs Law* (n 4) 765.

circumvented by resorting to previous jurisprudence by the Court¹⁸⁴ to give a general criminal law competence under all substantive legal bases of the Treaties.¹⁸⁵

Miettinen draws further support from the drafting process of the Lisbon Treaty for the argument that Article 83(2) TFEU is a *lex specialis*. The drafting process of the Lisbon Treaty proceeded on the basis that substantive EU criminal competence would be exhausted by those express provisions now in Articles 83(1) and 83(2) TFEU. This was reinforced by the fact that directive was finally chosen as the only instrument for criminalization in Article 83(2) TFEU. The choice of directives was material in agreeing to extend the EU's competence in this way.¹⁸⁶ The Final Report of Working Group X stated that the Treaty could provide that approximation of substantive criminal laws should be carried out in the form of directives or their successor only.¹⁸⁷ All this suggested that the Convention was convinced of the exclusivity of the express criminal competence in Article 83 TFEU, and that it should only be exercised through the adoption of directives.¹⁸⁸

While these are convincing arguments, they are not sufficient to exclude altogether the possibility of the Union exercising criminal law powers under Article 352 TFEU or the exercise of a general criminal law competence under the Treaties. First, there is case-law suggesting that the 'necessity' criterion in Article 352 TFEU does not impede the use of this legal basis in the case where the envisaged measure cannot, even with a broad and reasonable interpretation, be brought within the more specific legal basis. The Court does not necessarily adopt a broad reading of a specific legal base if there is a more appropriate broad legal basis, such as Article 352 TFEU, under which the envisaged measure can be adopted. In *European Parliament v Council*¹⁸⁹, which was concerned with the adoption of a Regulation on the statute for a European Cooperative Society¹⁹⁰, the Parliament disputed that Article 352 TFEU was the correct legal basis. The Parliament argued that the Regulation should have been adopted on the basis of Article 114 TFEU since it was concerned with the harmonization of national laws relating to cooperative societies. The Court, however, defended the choice of Article 352 TFEU. First, the Regulation introduced a new legal form in addition to the

¹⁸⁴ See Case C-176/03 *Commission v Council* (n 5), para 48.

¹⁸⁵ See Asp (n 27) 151-52, 163; Peers, *EU Justice and Home Affairs Law* (n 4)765-766; Dougan, 'From the Velvet Glove to the Iron Fist' (n 2) 111.

¹⁸⁶ See Miettinen (n 175) 199.

¹⁸⁷ See CONV 426/02 (n 46) 10.

¹⁸⁸ See Miettinen (n 175) 205.

¹⁸⁹ Case C-436/03 *Parliament v Council* [2006] ECR I-03733.

¹⁹⁰ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society [2003] OJ L 207/ 1.

national forms of cooperative societies. Secondly, the Regulation did not aim at harmonizing the national laws applicable to cooperative societies, but left different national laws already in existence. Since the Regulation did not fall squarely within the scope of Article 114 TFEU, recourse to Article 352 TFEU was justified.¹⁹¹

Secondly, there is also case-law from the Court, suggesting 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 ancillary 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. 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.¹⁹² *European Parliament v Council*¹⁹³ illustrates these observations. In this case, the Court had to assess what was the right legal basis for a measure concerned with collection of information for the EU’s energy policy.¹⁹⁴ The Court held that the general legal basis on energy in Article 194 TFEU¹⁹⁵ had priority over the specific legal basis in Article 337 TFEU in the area of information collection. The Court found that that the 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.¹⁹⁶ This system was held to be a prerequisite to allow the EU to take the appropriate measures to achieve the objectives laid down in the energy sector as provided by Article 194(1) TFEU, in particular as regards the functioning of the internal energy market, the security of the European Union’s energy supply, the promotion of energy efficiency and the development of new and renewable

¹⁹¹ Case C-436/03 *Parliament v Council* (n 189), paras 40-44. Subsequent case-law, Case C-166/07 *Parliament v Council* [2009] ECR I-7135, reinforces that the measure must be squarely contained within the specific legal basis to deny resort to Article 352 TFEU. This case was concerned with an action for annulment of Council Regulation (EC) No 1968/2006 of 21 December 2006 concerning Community financial contributions to the International Fund for Ireland (2007 to 2010) [2006] OJ L 409/86. In the case, the Parliament had argued that the Regulation, adopted on the basis of Article 352 TFEU was not adopted on an appropriate legal basis, but that the Regulation should have been adopted on the basis of Article 175 (3) TFEU, concerned with policies for economic and social cohesion. The Court, however, held that since the Regulation did not guarantee that all of the interventions and activities of the International Fund for Ireland would in fact address the objectives that are specific to the Union’s policy on economic and social cohesion, Article 175 (3) TFEU did not cover the whole measure. Because of this, the use of Article 352 TFEU was justified for part of the measure (paras 59-64, 68-69).

¹⁹² See Miettinen (n 175) 209.

¹⁹³ See Case C-490/10 *Parliament v Council* (Court of Justice, 6 September 2012).

¹⁹⁴ 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.

¹⁹⁵ See Case C-490/10 *Parliament v Council* (n 193), paras 63-64.

¹⁹⁶ *ibid*, paras 49-61.

energies. In those circumstances, the collection of information established by the contested regulation may be considered to be contributing directly to the achievement of the objectives of the European Union policy on energy, as defined in Article 194(1) TFEU, and, consequently, as constituting, a ‘necessary’ instrument for the achievement of the objectives within the meaning of Article 194(2) TFEU. An implied general competence to collect information could, since it was ‘necessary’, be attached to the energy competence in Article 194 TFEU even though an express competence to collect information was available elsewhere in the Treaties.¹⁹⁷

Based on the Court’s case-law the following observations can be made. Although the ‘necessity’ criterion in Article 352 TFEU is a limitation on the exercise of a criminal law competence under that provision, it has an important qualification. It is qualified by the fact that the envisaged criminal law measure must have a credible relationship to Article 83(2) TFEU. If there is a choice between Article 83(2) TFEU and Article 352 TFEU and if the aim and the content of the envisaged measure cannot easily be fitted within the scope of Article 83(2) TFEU, it is likely that Article 352 TFEU will be considered as the appropriate legal basis. This is despite the Court’s rulings in *Commission v Council* to the effect that all other legal bases take precedence over Article 352 TFEU.¹⁹⁸ The ‘necessity’ criterion in Article 352 TFEU only applies where the aim and the content of the envisaged measure suggests that the proposed measure can reasonably be contained within the scope of the specific legal basis.¹⁹⁹

In this regard, it is clear that the legal basis of Article 83(2) TFEU has a limited scope in the field of criminal law. Let us assume that the Union considered adopting a ‘regulation’ which both ‘criminalized’ and ‘de-criminalized’ certain activities and also imposed ‘maximum’ sanctions. The fictive reason for adopting a regulation is that the Commission considers that criminal laws enforced by means of directives leads to a divergent and 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-criminalization provisions in the Regulation is to restrain the over-penalization trend currently present in the

¹⁹⁷ *ibid*, paras 72-79.

¹⁹⁸ See Case 45/86 *Commission v Council* (n 179) para 13.

¹⁹⁹ *ibid*, paras 15-21. See specifically para 21: ‘It follows that the contested regulations are measures falling within the sphere of the common commercial policy and that since the Council had the power to adopt them pursuant to Article 133 of the Treaty, it was not justified in taking as its basis Article 235’.

Member States. Even though one could stretch the interpretation of Article 83(2) TFEU very far, it is difficult to argue that such a measure falls within the textual framework of said provision. Given that the Union only has a power to adopt ‘directives’ pursuant to Article 83(2) TFEU and given that it can only ‘criminalize’ under that provision, a cogent argument could be made that the Treaty has not provided the ‘necessary powers’ within the meaning of Article 352(1) TFEU for the envisaged measures. Even though it is generally correct to argue that Article 83(2) is a *lex specialis* in relation to Article 352 TFEU, the latter legal basis can be used as a legal basis for adopting a part of the hypothetical regulation for the simple reason that Article 83(2) does not provide the ‘necessary powers’ for certain criminal law measures.²⁰⁰

The last point should be developed. Since the hypothetical regulation would be concerned specifically with ‘criminal law’ one would also, consistent with the ruling in *European Parliament v Council of the European Union*²⁰¹, need to use Article 83(2) TFEU for the substantive criminal law part regarding for example the definition of offences, rules of liability and so forth. Article 352 TFEU could not be used for the whole measure since it is only a procedural power and does not provide substantive criminal law competence. The objections to such a hypothetical piece of legislation is that the different institutions have different influence under Article 83(2) TFEU and Article 352 TFEU, that the decision-making procedures are slightly inconsistent in these provisions since Article 83(2) TFEU uses qualified majority and Article 352 TFEU requires unanimity in the Council and since there are special procedures that apply in Article 83 TFEU with emergency brakes and opt outs.²⁰² These objections are not entirely convincing. First, the special procedures are not a serious problem since the safeguards of Article 83 TFEU of state sovereignty are fulfilled by the veto of Article 352 TFEU. The use of Article 352 TFEU would therefore not entail a circumvention of the safeguards of Article 83 TFEU.²⁰³ Secondly, it should be possible to combine the decision-making procedures contained in Article 83(2) and Article 352 TFEU and ensure a similar level of influence for the institutions if the Union legislator complies with the ordinary decision- procedure referred to in Article 294 TFEU and the requirement that the Council should act unanimously.²⁰⁴

²⁰⁰ See Asp (n 27) 137-38.

²⁰¹ See Case C-166/07 *Parliament v Council* (n 191), paras 59-64, 68-69.

²⁰² See Miettinen (n 175) 207.

²⁰³ See Asp (n 27) 138.

²⁰⁴ See Case C-166/07 *Parliament v Council* (n 191), para 69.

In sum, we can make the following observations. It has been shown that the ‘necessity’ criterion in Article 352 TFEU, stating that this legal basis can be used only if no other appropriate legal basis is available, is a serious limitation to the exercise of Union powers. Most proposals in the field of criminal law, which will, as envisaged by Title V of the Treaties, be concerned with ‘directives’, ‘minimum’ sanctions and ‘criminalization’, could thus not be adopted under Article 352 TFEU due to the existence of the specific legal basis in Article 83 TFEU.²⁰⁵ The exercise of ‘partial’ Union criminal law competences cannot, however, be excluded under Article 352 TFEU in the scenario where the envisaged measure does not fall within the textual confines of Article 83(2) TFEU. If Article 352 TFEU is to be employed for criminal law harmonization, it can, however, only be used in conjunction with Article 83 TFEU, which provides the ‘material’ criminal law competence.

Now we move on the examination by considering whether the existence of Article 83(2) TFEU could act as a check on the exercise of a criminal law competence under Article 114 TFEU.

B Does the nature of Article 83(2) TFEU act as a limitation of the exercise of a criminal law competence under Article 114 TFEU?

When analysing the question of whether Article 83(2) TFEU is a *lex specialis* in relation to Article 114 TFEU within the context of criminalization measures, it is appropriate to first briefly examine the wording of the latter provision. The expression ‘save where otherwise provided in the Treaties’ in Article 114 TFEU (‘*lex specialis* limitation’) seem 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. So perhaps we can end the discussion here and be satisfied with the conclusion that Article 83(2) TFEU always takes precedence over Article 114 TFEU? For the knowledgeable observer of the law on competences and the Court’s case-law, the answer is not that simple.

The early case-law on conflicting legal bases suggested that the only criterion which was necessary to give priority to Article 114 TFEU over other more specific legal bases in the Treaties is that the conditions for recourse to this provision be met. If the measure had a credible link to the internal market by either removing obstacles to trade or appreciable

²⁰⁵ See Dougan ‘From the Velvet Glove to the Iron Fist’ (n 2) 111.

distortions of competition, Article 114 TFEU 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.²⁰⁶

Titanium Oxide is a good example to illustrate these points. In this case, concerned with an action for annulment of the Waste Directive²⁰⁷, 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.²⁰⁸ The Court, who 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 and thus there was no predominant legal basis for the directive.²⁰⁹ 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, providing for a different role for the Parliament.²¹⁰ The Court then, having again reviewed the aim and the content of the measure, found that since environmental protection could and should be integrated in legislation under Article 114 TFEU and since different environmental legislation in Member States could distort competition to an ‘appreciable’ extent, Article 114 TFEU was the more appropriate legal basis.²¹¹

The Court’s ruling is actually somewhat perplexing. How can a measure be equally concerned with two legal bases and then in the end be found to have a stronger relationship to one of these two legal bases? The answer to this is that the environmental law component in the measure in fact was weaker than the internal market component. Since the measure harmonized the programmes for the reduction and elimination of pollution caused by waste from existing establishments and harmonized obligations concerning the treatment of waste from the titanium dioxide production process, the measure primarily intended to equalize

²⁰⁶ 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.

²⁰⁷ 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.

²⁰⁸ See Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-02867, paras 2-9.

²⁰⁹ *ibid*, paras 10-16.

²¹⁰ *ibid*, paras 17-21.

²¹¹ *ibid*, paras 22-25.

competitive conditions for firms in the titanium oxide business.²¹² The Court's final textual argument was persuasive. Given the fact that the Treaties had provided that environmental protection should be integrated into the policies of the internal market and given the broad scope of Article 114 TFEU, it was logical that the measure was brought into the framework of that legal basis.²¹³

Herlin-Karnell has, on the basis of the Court's case-law on the scope of Article 114 TFEU, constructed a compelling 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, notwithstanding that the latter legal basis is residual to other specific legal bases. First, she is concerned that 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 harmonization of national criminal laws. 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 and based on the same rationales as legislation that is normally adopted under Article 114 TFEU. The rationale for the Market Abuse Crimes Proposal is to prevent market failures in the form of manipulative practices that lead to an inefficient allocation of resources and damages the marketplace in capital allocation 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 undermines trust in the internal market. Moreover, the case-law on legal basis supports the use of Article 114 TFEU for the Market Abuse Crimes Proposal. While typically, a dispute of conflicting legal basis has been resolved by recourse to the 'centre of gravity' test, there is according to her no real centre of gravity test available under Article 114 TFEU pursuant to the *Tobacco Advertising II* judgment.²¹⁴ The only relevant issue under Article 114 TFEU is if the measure at issue contributes to 'market creation'. Since the Market Abuse Crimes Proposal has a strong link to the internal market due to the

²¹² See Waste Directive (n 207), recital 2 and Article 3.

²¹³ See Article 11 and Article 114(3) TFEU; Barents (n 206) 98- 99.

²¹⁴ Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

fact that the fight against market abuse is about regulating market failures, the proposal should have been adopted under Article 114 TFEU.²¹⁵

Although Herlin-Karnell's argument of 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, no one suggested any appropriate legal basis for the contested directive in *Tobacco Advertising II* other than Article 114 TFEU. This case was indeed about the scope of Article 114 TFEU and whether the Union had a competence *at all* to adopt the measure under the Treaties.²¹⁶ Secondly, subsequent case-law after *Titanium Oxide* shows that the *lex specialis* limitation should be taken seriously.

Particularly illustrating for the subsidiary nature of Article 114 TFEU is *Commission v Council* (recovery of indirect taxes).²¹⁷ In this case the Commission argued that the directive on recovery of indirect taxes²¹⁸, 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 because it was primarily an internal market measure.²¹⁹ The Court first restated the 'predominant purpose' rule, holding that a sole legal basis should be used as a main rule and then went on to consider if, by way of exception, a dual legal basis could be used.²²⁰ 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 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 concerned the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation. The Court also pointed to the fact that Article 114 (2)

²¹⁵ See Herlin-Karnell, 'White-collar crime and European financial crises' (n 74) 485-87.

²¹⁶ See Case C-380/03 *Germany v Parliament and Council* (n 214) paras. 15-24, 45-65, 70-88.

²¹⁷ See Case C-338/01 *Commission v Council* [2004] ECR I-04829.

²¹⁸ 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.

²¹⁹ See Case C-338/01 *Commission v Council* (n 217), paras 13-14, 17-18.

²²⁰ *ibid*, paras 54-57.

TFEU expressly excludes ‘fiscal provisions’ whose harmonization therefore cannot take place on the basis of Article 114 TFEU. Since the concept of ‘fiscal provisions’ also covers measures relating to arrangements for the collection of indirect and direct taxes and given the fact that an examination of the purpose and the aim of the Directive suggested that it was 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.²²¹

This case reinforces three lessons learned from earlier and subsequent case-law²²² 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 cannot be used for the measure.²²³ The second lesson from *Commission v Council* is that the exclusion of harmonization of certain areas enumerated in Article 114 (2) TFEU should be taken seriously by the EU legislator.²²⁴ Thirdly, the mere fact that a measure has an indirect effect on the internal market is not sufficient for Article 114 TFEU to apply. 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.²²⁵

Herlin-Karnell’s argument, suggesting that Article 114 TFEU can be used as a *plein pouvoir* for imposing criminal laws, must thus be qualified. Article 114 TFEU is only to be used as a subsidiary legal basis when other specific legal bases, such as Article 83(2) TFEU, cannot be employed for the adoption of criminal laws. Similar considerations as those discussed above in relation to Article 352 TFEU apply here.²²⁶ If the envisaged criminal law measure does not fall within the scope of Article 83(2) TFEU, because the proposed measure is a ‘regulation’

²²¹ *ibid.*, paras 59-62, 67, 70-76.

²²² See Case C-155/91 *Commission v Council* [1993] ECR I-00939. In this case, the Court upheld Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste [1991] OJ 1991 L 78/32, adopted on the basis of Article 192 TFEU despite the fact that the Commission had asserted that the Directive should have been adopted on Article 114 TFEU due to its effects on the internal market. The Court held that even if some provisions of the directive had ancillary effects on the conditions of competition and trade, the mere fact that the internal market was affected was not sufficient for resorting to Article 114 TFEU. The harmonization provided for by the Directive had as its main object to ensure, with a view to protecting the environment, the effective management of waste in the Union, regardless of its origin. Thus, the Directive was validly adopted on the basis of Article 192 TFEU (paras 11-20).

²²³ See Case C-338/01 *Commission v Council* (n 217), para 59; Case C-533/03 *Commission v Council* [2006] ECR I-01025 paras 45-46; Case 68/86 *UK v Council* [1988] ECR 855 paras 15-16. The latter case, whilst concerned with Article 115 TFEU, can also be invoked to support that the general harmonization provisions concerned with the common market are subsidiary in relation to other more specific legal bases, such as for example Article 43 TFEU on agricultural policy.

²²⁴ Case C-338/01 *Commission v Council* (n 217), paras 61, 76; Case C-533/03 *Commission v Council* (n 223), paras 46, 63-64.

²²⁵ See Case C-155/91 *Commission v Council* (n 222), paras 19-21; Case C-533/03 *Commission v Council* (n 223) para 48.

²²⁶ See above section III (A) in the present chapter.

and it requires the ‘de-criminalization’ of certain offences, there could be a case for employing Article 114 TFEU, as long as the conditions of this legal basis are met.

C The nature of Article 83(2) TFEU cannot limit the use of Article 114 TFEU and Article 352 TFEU for criminalizing infringements of the EU competition rules

As argued above²²⁷, Article 83(2) TFEU does not provide the necessary powers to adopt criminal law harmonization of certain fields of EU law, such as EU competition law, where there is a lack of previous ‘harmonization measures’ within the meaning of Article 83(2) TFEU. It therefore seems possible to use other legal bases of the Treaties such as Article 114 TFEU and Article 352 TFEU for such criminalization measures. The limitations of Article 114 TFEU and Article 352 TFEU stating that those provisions can only be used if the Treaty does not otherwise provide the necessary powers are no obstacles for the criminalization of EU competition rules.²²⁸ This is for the simple reason that no other power in the Treaties exist for harmonizing national criminal laws in relation to competition law infringements.²²⁹

What about the fact that competition policy is an exclusive Union policy according to Article 3 (b) TFEU?²³⁰

This could lead to the quite remarkable consequence that neither the Member States nor the Union could adopt criminal sanctions to enforce Union competition rules. However, it appears questionable whether the expression ‘competition rules’ in Article 3(b) TFEU should be interpreted as also encompassing the criminal law provisions ‘necessary for the functioning of the internal market’.²³¹ There would be some force in the argument that criminal law provisions are not ‘competition rules’ within the meaning of Article 3(b) TFEU. This is because ‘criminal law’ necessarily does not belong to the sphere of ‘competition law’. Criminal law provisions, regardless of the substantive rules they intend to enforce, are arguably more concerned with the Area of Freedom, Security and Justice (AFSJ) than the

²²⁷ See above section II (C) in the present chapter.

²²⁸ See above chapter 4- section II A for an outline of the argument why criminalization of competition law would be possible under Article 114 (and Article 352 TFEU).

²²⁹ See Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 2) 111.

²³⁰ Article 3 (b) TEU provides that the Union has exclusive competence in providing ‘the establishing of the competition rules necessary for the functioning of the internal market’.

²³¹ See, however, for a different opinion: Giorgio Monti, ‘Legislative and Executive Competences in Competition Law’ in Loïc Azoulay, *The Question of Competence in the European Union* (OUP 2014) 107.

substantive exclusive Union competence on competition policy. This is so because the AFSJ concerns ‘the approximation of criminal laws’ according to Article 67(3) TFEU and Article 83 TFEU. The specificity and sensitivity of criminal law reinforce the assumption that the Union’s implicit criminal law power in the field of competition law cannot be an exclusive competence of the Union.²³² It would not make sense if the EU had an exclusive competence to enforce the EU competition rules by criminal sanctions but a general shared competence for other criminal law measures within the Area of Freedom, Security and Justice.²³³ It seems inconsistent if the nature of the EU’s criminal law competence would differ depending on whether criminalization is employed for supporting exclusive EU policies or whether it is used to enforce rules adopted in fields of shared competences. It seems unlikely that the Member States, given their general unwillingness to transfer sovereignty in criminal law²³⁴, would have agreed to confer exclusive competences on the EU in the criminal enforcement of EU competition policy. The Court’s case-law also supports the view that the EU’s power to criminalize its competition rules must be a shared competence. The EU’s general criminal law competence in the *Environmental Crimes* judgment was derived from Article 192 TFEU and the environmental policy field, which is a shared competence between the Member States and the EU.²³⁵

What about the final objection then that the *telos* of Article 83 TFEU and Title V of the Treaties exclude the possibility that criminal law competences can be exercised under other legal basis of the Treaties?

I do not think this objection can challenge the exercise of a criminal law competence under other legal bases of the Treaties in the situation where the envisaged measure cannot be validly adopted under Article 83 TFEU. First, it seems unreasonable that the Treaty drafters would have had the intention of removing the previously held competence under the Court’s jurisprudence if they were aware of the fact that Article 83(2) TFEU does not cover criminalization in fields such as competition policy. Secondly, there is no clear textual indication in the Treaties that the harmonization of criminal law would be prohibited under other provisions of the Treaties other than those in Title V. Although criminal law is sensitive and the drafters of the Treaties may have intended to expressly reserve criminal law

²³² See Craig, *The Lisbon Treaty* (n 4) 160.

²³³ See Article 4(2) (j) TFEU.

²³⁴ See above chapter 1- section I, for a discussion of the politically and legally complicated relocation of the decision-making powers in the field of criminal law from the Member States to the EU.

²³⁵ See Article 4 (2) (e) TFEU; Article 192 TFEU.

harmonization to Title V of the Treaties, this objective has not been realized by the current structure of the Treaties. If the drafters of the Treaties would have had such an intention, they should have expressed this by means of more unambiguous wording. Given this, it is not reasonable to argue that Title V excludes the use of other legislative powers in the Treaties for criminal law.²³⁶ Thirdly, the EU's general implied competence to criminalize, derived from the Court's jurisprudence, is a broad one. It also clearly applies to EU competition law. It was shown in chapter 4 that this power is only limited to the objectives and to the structure of the Treaties.²³⁷ The structure of the Treaties is not built on a formal distinction between areas of civil, administrative and criminal law. Instead 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. Criminal law is neither an independent policy in the Treaties nor a self-standing framework in the Treaties. The Union's implied criminal law powers are of a horizontal nature and used as an enforcement tool, 'a means to an end'²³⁸, to the benefit of all or nearly all forms of Union regulatory policies and objectives.²³⁹

Having shown that the nature of Article 83(2) TFEU cannot prevent the adoption of criminal law measures sanctioning breaches of EU competition law under Article 114 TFEU or Article 352 TFEU, it is time to wrap up the findings of the chapter.

IV CONCLUSIONS

Building on the findings in chapter 2 on the conceptual limits to the exercise of EU competences and the findings in chapter 3 on the scope of judicial review in setting limits to EU competences, the chapter's purpose was to consider the limits to the Union's express criminal law under Article 83(2) TFEU.

The chapter had three themes.

²³⁶ This position is supported by recent legislative practice from the Commission which has 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.

²³⁷ See above chapter 4- section I (B); chapter 4- section II (A).

²³⁸ For this expression: Valsamis Mitsilegas, 'Constitutional Principles of the European Community and European Criminal Law' (2006) 8 European Journal of Law Reform 301, 307.

²³⁹ See Case C-240/90 *Germany v Commission* [1992] ECR I-05383, Opinion of AG Jacobs, para 12.

The first theme I considered was how criminal law contributes to the enforcement of existing EU policies. This theme was illuminated and explored within the framework of the EU's express criminal law competence in Article 83(2) TFEU whose exercise is dependent upon the effectiveness of criminal laws and its superiority over other sanctions. A strict systematic, linguistic and contextual interpretation of this provision unravelled the limits to the exercise of a criminal law competence. I argued, in contrast to the predominant view of the literature, that the 'essentiality' condition is a check on the exercise of the powers in Article 83(2) TFEU. It was proposed that the 'essentiality' condition in Article 83(2) TFEU should be subject to a two-part test. First, the Union legislator must show that criminal laws are 'effective' for the implementation of Union policies. If criminal sanctions are 'effective', the Union legislator must secondly show that other non-criminal sanctions are not equally effective as criminal sanctions in implementing Union policies. I then challenged the general view in the literature that review of the 'essentiality' condition is mainly a question for the EU political institutions. I argued instead that there needs to be a strict judicial enquiry, on the basis of the proposed test in chapter 3, to control conformity with this condition. The Union legislator would have to prove, through empirical evidence, that criminal sanctions are 'essential' for the effective implementation of Union policies.

I then examined closely whether specific instances of criminalization really contribute to the implementation of a specific EU policy. I analysed this question by reviewing the Market Abuse Crimes Directive adopted on the basis of Article 83(2) TFEU. It was demonstrated that this directive did not meet the proposed legality test in chapter 3 that the Commission must show that at least one of the reasons, which are considered to offer an independent justification for criminalization, is supported by sufficient and relevant evidence. This was particularly because the Commission in the legislative background documents had only been able to invoke one study as relevant evidence for the 'essentiality' of criminal laws. The cautious conclusion from this review was that the EU legislator, by adopting the Market Abuse Crimes Directive, endeavoured to harmonise national laws under the guise of Article 83(2) TFEU without considering available non-criminal sanctions and without any clear idea why this is a necessary option. This approach from the EU legislator must be condemned both as a matter of policy and from a legal perspective.

The second consideration of the chapter was the relationship between criminalization and existing EU harmonization measures. It was maintained that one of the general limitations to

the exercise of an EU criminal law competence under Article 83(2) TFEU is that there must be previous harmonization measures in place before the criminal law proposal is adopted. This view challenged the general understanding in the literature that has not interpreted the ‘harmonization’ requirement as a limit to criminalization under Article 83(2) TFEU. Based on the structure of the Treaties and the new division between ‘legislative’ acts and ‘non-legislative’ acts, I suggested that it is only secondary legislation adopted through the ‘ordinary’ or ‘special’ legislative procedure adopted prior to the criminal law directive that can constitute a ‘harmonisation’ measures for the purposes of Article 83(2) TFEU. Harmonisation through Treaty amendments, recommendations or international agreements would not be considered as ‘harmonisation’ measures under Article 83(2) TFEU since such harmonisation has not taken place through the ‘special’ or ‘ordinary’ legislative procedure as required by this legal basis. Because the EU’s express criminal law competence is ancillary and connected to the underlying EU policy, I also maintained that the EU needs to have adopted ‘substantive’ harmonisation measures prior to the adoption of the criminal law directive. Such ‘substantive’ harmonisation measures could for example be the approximation of the relevant prohibitions for an activity or approximation of conditions of non-criminal liability which describe the prohibited types of behaviour in detail.

I then examined the practical application of the harmonization requirement. EU competition law was the first example. It was found that this field of law could not be harmonized under Article 83(2) TFEU. First, harmonization through the founding Treaties in Articles 101 and 102 TFEU could not constitute ‘harmonization’ measures since such harmonization was not adopted through the ‘ordinary’ and the ‘special’ legislative procedures. Secondly, it would not be possible to use Regulation 1/2003 as an underlying ‘harmonisation’ measure to trigger Article 83(2) TFEU. This was because this regulation does not provide for ‘substantive’ harmonization of the material rules on competition and because it was adopted on the basis of Article 103 TFEU, which is not a ‘special’ or ‘ordinary’ legislative procedure. In the case of EU financial regulations, it was conversely shown that the recently adopted Market Abuse Regulation (MAR) provides for sufficient ‘harmonisation’ to be used as a basis for the recently adopted Market Abuse Crimes Directive. This is firstly because the MAR was intended to constitute a ‘substantive’ harmonisation measure. It was adopted on the legal basis of Article 114 TFEU, which is the general harmonization provision of the Treaties, and aims to remove distortions of competition and obstacles to trade arising from divergent national laws on the regulation of market abuse. It was found that the MAR is not only

intended to be a substantive ‘harmonization measure’ but that it is a *de facto* harmonisation measure. The crucial harmonising features of the MAR is that it lays down the material prohibitions against insider dealing and market manipulation, which is then directly linked to the description of the offences in the Market Abuse Crimes Directive.

The third theme of the chapter was the question of legal basis for criminalization after Lisbon Treaty. I argued that whilst Article 83(2) TFEU may have been intended by the Treaty drafters to be a *lex specialis* for criminalization, the structure and the wording of the Treaties has not been able to unequivocally exclude the use of other legal basis for criminalization. I thereby contested the prevailing opinion in the literature that the nature of Article 83(2) TFEU would altogether exclude the exercise of criminal law competence under other legal bases of the Treaties. In the scenario where the envisaged measure does not fall within the scope of Article 83(2) TFEU, because the proposed measure is a ‘regulation’ and provides for the ‘de-criminalization’ of certain offences, there could be a case for employing other legal bases such as Article 114 TFEU and Article 352 TFEU for the measure. Furthermore, given that there is no underlying ‘harmonisation measures’ in the field of EU competition law necessary to trigger the competence in Article 83(2) TFEU, I proposed that other legal bases, such as Article 114 TFEU or Article 352 TFEU could be used for criminal law harmonization in this field of EU law.

CHAPTER 6- CAN SUBSIDIARITY ACT AS A CHECK ON THE EXERCISE OF UNION COMPETENCES?

Introduction

This chapter examines the potential of subsidiarity as a ground to challenge EU legislation. 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. From the perspective of judicial enforcement it takes the argument of procedural review from chapter 3 further to show how the subsidiarity principle can help the Court to construct limits on the exercise of EU competence.

The principle of subsidiarity is one of the most contested issues in European Law scholarship. While the debate of subsidiarity was initially focussed on its impact on EU law and whether it was judicially enforceable¹, the discussion on whether subsidiarity is justiciable has now come to an end.² Subsidiarity is justiciable and to suggest anything else would run counter to the whole institution of judicial review and fly in the face of the new Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality ('Protocol no 2') which explicitly requires the Court to hear actions on the basis of subsidiarity.³ The subsidiarity debate has also for a long time revolved around the issue on how subsidiarity can be made operational. It has been generally alleged that subsidiarity's vague character and weak conceptual contours has made it unworkable as a legal principle that restricts the exercise of Union competences.⁴ Those allegations are well-defended and supported by a judicial record

¹ 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; George Bermann 'Taking Subsidiarity Seriously' (1994) 94 *Columbia Law Review* 332; 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; AG Toth 'Is Subsidiarity justiciable?' (1994) 19 *European Law Review* 269.

² See Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 217-219.

³ See above chapter 2- section IV (B), for an elaboration of this argument.

⁴ See Antonio Estrella, *The EU Principle of Subsidiarity and Its Critique* (OUP 2002) 96; Gráinne de Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper no. 7/1999, 25; Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009) 250-253; Gareth Davies,

demonstrating that the Court has so far 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. Those observers have not, however, yet proposed any conceptual tools that the Court could use in order to credibly review on the basis of subsidiarity. Nor has the scholarship developed comprehensive objective criteria against which subsidiarity can be measured.⁵ The debate on the weaknesses of subsidiarity must move on and it is now necessary to consider how subsidiarity can be made operational.

The discussion on subsidiarity has also at times suffered from conceptual confusion. For example, while some commentators have conceptualised subsidiarity as ‘federal proportionality’⁶ and as a ‘matter of competence’⁷ others have focussed on subsidiarity’s meaning as a ‘democratic principle’⁸ and as a tool to strengthen ‘legal diversity’ and ‘national self-determination’.⁹ Admittedly, subsidiarity concerns may potentially be related to matters of competence and proportionality.¹⁰ I suggest however that the problems of delineating subsidiarity from ‘competence’ and ‘proportionality’ have undermined the effectiveness of the principle as a limit to the exercise of EU competences. Conceptually, subsidiarity cannot be transformed into a proportionality mechanism. 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.¹¹ Subsidiarity’s aim is to ensure economic efficiency and democratic legitimacy.¹² Subsidiarity is not a matter of competence nor is it a matter of

‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 *Common Market Law Review* 63, 68-75.

⁵ See Schütze, *From Dual to Cooperative Federalism* (n4) 255-256; 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.

⁶ See Davies (n 4) 81-83; Schütze, *From Dual to Cooperative Federalism* (n 4) 263-265.

⁷ See Philip Kiiver, *The Early Warning System for the Principle of Subsidiarity* (Routledge 2012) 75, 98, 100.

⁸ See Nicholas W Barber, ‘The Limited Modesty of Subsidiarity’ (2005) 11 *European Law Journal* 308.

⁹ See Bermann (n 1) 340-342; Alexia Herwig, ‘Federalism, the EU and international law’, in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 66-68.

¹⁰ See Bermann (n 1) 386-390; Xavier Groussout and Sanja Bogojevic, ‘Subsidiarity as a Procedural Safeguard of Federalism’ in Loïc Azoulay, *The Question of Competence in the European Union* (OUP 2014) 236-237, 251; European Convention, CONV 353/02, ‘Final report of Working Group IV on the role of national parliaments’, Brussels, 22 October 2002, 10. 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 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453. In this case the Court conflated the subsidiarity test both with the competence question (para 182) and the proportionality assessment (para 184).

¹¹ See Bogojevic and Groussout (n 10) 249.

¹² See, however, for divergent interpretations of the aim of subsidiarity: Schütze, *From Dual to Cooperative Federalism* (n 4) 264-65; Groussout and Bogojevic (n 10) 251; François-Xavier Millet, ‘The Respect for

proportionality. Subsidiarity asks ‘who’ should implement the EU’s regulatory objective. 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, the nature and the geographical scope of the problem, be adopted by the Member States or the Union.¹³ I believe that the values of subsidiarity such as ‘legal diversity’, ‘democratic values’ or ‘national self-determination’ must be protected. Such values can and should influence the interpretation of the subsidiarity concept. However, I argue that in order to implement these values we must first construct proper legal criteria that can structure the subsidiarity analysis.

Having shown that the current conceptual understanding of subsidiarity is inadequate and that judicial enforcement of the principle must be improved, we can move on to present the outline and the arguments of the chapter. Building on the lessons from chapter 2 regarding the problems of finding a meaningful definition of subsidiarity, the first section of the chapter tries to respond to the conceptual challenges of subsidiarity. It develops a theory of how subsidiarity can be reconceptualised as a principle that challenges the paradigmatic internal market justification for exercise of Union competences. The argument here, building on the Edinburgh Guidelines and the Court’s jurisprudence ruling, is to require the Union to make its case for harmonization by demonstrating the risk or the existence of a serious ‘market failure’¹⁴ which requires EU action.¹⁵ Although the internal market justification is not without merit, it rests on questionable assumptions regarding alleged dysfunctions in the internal market. Such assumptions need to be substantiated by the Union legislator in order to make the case for harmonization.¹⁶

In the second part of the chapter, the challenge of judicial enforcement is tackled. On the basis of the general argument on procedural review presented in chapter 3 this part examines the potential of a procedural review of subsidiarity as a solution for the problems of judicial review. On the basis of the general literature of judicial review and the literature on judicial review of subsidiarity¹⁷, I argue that a procedural perspective is the way forward to

Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism’, in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014) 262-263.

¹³ See Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union’ (n1) 875.

¹⁴ See chapter 1 n 61 for a definition of ‘market failure’.

¹⁵ See Thomas Horsley ‘Subsidiarity and the Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?’ (2012) 50 *Journal of Common Market Studies* 267, 269-272; Niamh Moloney, *EC Securities Regulation* (2nd edn, OUP 2008) 27.

¹⁶ See Case C-58/08 *Vodafone and Others* [2010] ECR I-04999, Opinion of AG Maduro, paras 30-31.

¹⁷ See Bermann (n 1) 336-337; De Búrca, ‘Re-appraising Subsidiarity’s Significance after Amsterdam’ (n 4) 28-30.

operationalize subsidiarity. The concern that the Court has no legitimacy or competence to assess material subsidiarity can be rebutted through the employment of a procedural review of subsidiarity.¹⁸ By applying the standard of legality developed in chapter 3 on ‘adequate reasoning’ and ‘relevant evidence’ it is shown how subsidiarity can be judicially enforced.

In the third part of the chapter, the subsidiarity concept developed in the chapter is applied to one case study in the field of EU criminal policy, the recently adopted Market Abuse Crimes Directive¹⁹. This case study is chosen for two reasons. First, the example demonstrates clearly how subsidiarity is applied in the field of EU criminal law. It shows how the need for EU action in the field of EU criminal law is primarily defended on the basis that differences in national criminal laws create distortions of competition through regulatory arbitrage.²⁰ Secondly, because the Market Abuse Crimes Directive and the accompanying proposal²¹ and impact assessment²² encompass a subsidiarity justification it is possible to test the theories developed in the chapter. The examination shows that the Directive, whilst being adequately reasoned, does not conform to the legality test of providing for ‘relevant’ evidence. This is because the proposal and the impact assessment accompanying the Directive do not contain any evidence to support the Commission’s allegations of the risk for distortions of competition arising from different criminalization regimes.

I MATERIAL SUBSIDIARITY AND THE INTERNAL MARKET JUSTIFICATION

A Pragmatic concern about the subsidiarity criterion justifies a shift of focus from ‘national insufficiency’ to ‘comparative efficiency’?

¹⁸ See Mattias Kumm, ‘Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ 12 (2006) *European Law Journal* 503, 528-30.

¹⁹ 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’ ‘Directive’).

²⁰ 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, 33, 125; Commission, ‘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 (‘Market Abuse Crimes Proposal’), 5.

²¹ See Market Abuse Crimes Proposal (n 20) 5.

²² See SEC (2011) 1217 (n 20) 33.

This section examines the conceptual basis of the subsidiarity concept. The analysis begins with a consideration of the relevance of the ‘national insufficiency’ criterion for giving meaning to the subsidiarity concept. To understand the relevance of the ‘national insufficiency’ criterion, it is appropriate first to consider the textual expression of the subsidiarity principle in the relevant legal sources. A linguistic interpretation of Article 5 TEU and Protocol no 2 suggests the following subsidiarity test. First, the Union must show that the Union objective at stake cannot sufficiently be achieved by the Member States acting alone or in conjunction (‘national insufficiency’ test). Then, it must be demonstrated that Union action is better at achieving those objectives by reason of the scale or effects of the measure (‘comparative surplus’ test).²³ Those two limbs must be supported by an adequate justification and qualitative and quantitative indicators.²⁴

One important interpretive issue is whether the two limbs are alternative. Here there is room for different interpretations. First, there is a ‘narrow’ construction of subsidiarity which, in a simplified version, provides that unless the Union is able to show that Member State action is insufficient to achieve the objectives at stake, the exercise of the competence remains with the Member States. Thus, even if the Union would be more ‘efficient’ in achieving the outcome, Union action would be precluded if Member State action ‘sufficiently’ achieves the envisaged outcome of the proposed action.²⁵ Secondly, there is a ‘functional’ interpretation that is concentrated on the ‘comparative surplus’ test. This construction implies that if Union action is significantly better at achieving the objectives in terms of scale and effects, there is a case for Union action based on subsidiarity regardless if Member States actions are sufficient to achieve the EU objectives.²⁶

It is difficult to square the criteria of ‘national insufficiency’ and the ‘comparative surplus’ criterion. As we know, the first part of Article 5 TEU provides that 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’ while the second part states that the Union shall only act if ‘...by reason of the scale or effects of the proposed action’, the objectives of the proposed action would be better achieved at Union level’. It can be argued that the wording of Article 5 TEU provides some support for the ‘narrow interpretation’ because the provision first mentions the ‘national

²³ See Christoph Ritzer, Marc Ruttloff and Karin Linhart, ‘How to Sharpen a Dull Sword - The Principle of Subsidiarity and its Control’ (2006) 7 *German Law Journal* 733, 739.

²⁴ See Protocol no 2, Article 5.

²⁵ See Lenaerts (n 1) 875-877; Edward T Swaine, ‘Subsidiarity and Self-Interest: Federalism at the European Court of Justice’ (2000) 41 *Harvard International Law Journal* 1, 52.

²⁶ See Estrella (n 4) 94-96.

insufficiency’ test and only then emphasizes, by a double conditional marker ‘only if’ and ‘in so far as’, that the national insufficiency test should be fulfilled before one can consider the ‘comparative surplus’ test. The ‘narrow interpretation’ is, however, contradicted by the second part of Article 5 TEU which suggests that Union action must take place if either Member States cannot achieve the objectives at stake *or* if Union action can better achieve those objectives, which is indicated by the phrase ‘but can rather...be better achieved at Union level’. Subsidiarity compliance could thus in this scenario be justified on either the fact that Member State action was ‘insufficient’ or on the basis that the Union had a ‘comparative surplus’. In sum there is neither robust support for the ‘narrow’ nor the ‘broad’ interpretation.

Since it is nearly impossible, by a textual interpretation, to determine whether a ‘narrow’ or ‘functional’ interpretation is the most appropriate, we should take into account other considerations to select the correct interpretation. In this regard, there are both ‘systemic/genetic’ and ‘dynamic criteria’.²⁷ On the basis of a genetic method of interpretation²⁸ it is not possible to determine whether a narrow or ‘functional’ interpretation was preferred. Given the drafting history of the Maastricht Treaty we can see that some preferred a narrow interpretation and some preferred a functional one. While the German, Dutch, and French Governments preferred a version of subsidiarity in which the Union would be entitled to act whenever it had a comparative advantage, the British argued for an interpretation under which Union action would be permissible only when necessary. In the end, these two concepts were cobbled together into what is now Article 5 TEU.²⁹ Given the fact that the ‘genetic’³⁰ interpretation is just as inconclusive as a textual interpretation, we should take into account dynamic criteria to determine the correct interpretation of Article 5 TEU.

It is argued that ‘functional’ and ‘consequentialist’ considerations³¹ favour a ‘broad’ interpretation focussing on the ‘comparative efficiency’ test. A functional interpretation

²⁷ See Giulio Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10 German Law Journal 537, 549-557, for the use of this terminology. See also Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 210-219, for a similar use of terminology.

²⁸ See Niall Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1996) 20 Fordham International Law Journal 656, 664-668, 670-676, on the ‘teleological method’.

²⁹ See Swaine (n 25) 52, at n 246; Paul Green, ‘Subsidiarity and European Union: Beyond the Ideological Impasse? An Analysis of the Origins and Impact of the Principle of Subsidiarity Within the Politics of the European Community’ (1994) 22 Policy & Politics 287, 290- 293.

³⁰ See Itzcovich (n 27) 553-555; Beck (n 27) 217-219.

³¹ See Beck, (n 27) 132, who sees them as evaluative or teleological considerations.

assumes that a legal provision must be interpreted in a way that ensures its capacity to function in an effective way while a consequentialist method suggests that one should take into account the foreseeable legal-economic consequences of an interpretation.³² In order for subsidiarity to maintain its capacity to function in an efficient way and to not overburden the Court in its task of applying the principle, the interpretation of subsidiarity must focus on the ‘comparative efficiency’ test. First, it would always be difficult for claimants to argue, based on competing scenarios that Member States’ actions could have reached the same objective. Secondly, it is very difficult for the Court to evaluate the Commission’s assertion that Member State action had been or would be insufficient to achieve the objectives at stake of the action.³³ Thirdly, the Commission could always frame the objective so narrowly as to ‘disintegrate’ the ‘national insufficiency’ test to a test of ‘comparative efficiency’. If the Commission defines the objectives to be achieved by the measure very narrowly so as to indicate that the objectives include optimum attainment, and since such objectives are the touchstone for subsidiarity, they may circumvent the distinction between the ‘national insufficiency’ and ‘comparative efficiency’ tests.³⁴ Finally, there are principled reasons why the focus should move away from national insufficiency to ‘comparative efficiency’. By focusing on Member State alternatives, we would miss the essential question of subsidiarity which is whether there is a market failure and whether Union action would provide for strong added value in correcting the problem.³⁵ It seems very plausible that the real battle in subsidiarity cases will be fought over the issue of whether Union action provides for ‘comparative surplus’.

Having dismissed the significance of the national insufficiency test, we now move on to consider in more detail the comparative surplus test.

B Comparative surplus and the internal market justification

In order to understand the concrete content of the ‘comparative surplus’ test we should closely review the Edinburgh Guidelines³⁶, which provide substantive guidelines on how

³² These are well-recognized method of interpretation of EU Law; Itzcovich (n 27) 549- 555; Beck (n 27) 210-215.

³³ See Bermann (n 1) 391-92.

³⁴ See Swaine (n 25) 52, at n 250; Bermann (n 1) 383.

³⁵ See Swaine (n 25) 53-55.

³⁶ See 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, 18-19.

subsidiarity should be conceptualised.³⁷ These guidelines list three criteria that must be taken into account in assessing the need for Union action: i) the ‘cross-border’ criterion; ii) the ‘internal market criterion’; and iii) the ‘clear benefits’ criterion.³⁸

The first criterion asks whether the transnational nature of the envisaged measure makes the Union a better regulatory body. The scope of Union competences both in the field of Union legislative action and in the field of application of the free movement rules, have always depended on the need for the Union to show a cross-border aspect.³⁹ The cross-border nature of an issue is the conventional justification for the Union in its harmonization efforts under the Treaties, in particular under Article 114 TFEU and Article 352 TFEU.⁴⁰ The Commission usually defends its proposal in terms of the scale of action, affirming that an action of the EU is necessary because the proposed measure has cross-border effects and therefore the adoption of national measures could not attain the same result.⁴¹ The rationale for Union action is based on ‘collective action problems’ arising from situations in which, for example, certain behaviours or problems affect more than one Member State at the same time and independent actions by the Member States fail to secure citizens’ welfare because the Member States’ cost of regulating the problem on their own is higher than the cost of taking

³⁷ Even though there has been no conclusive ruling on the Edinburgh Guidelines, the Court assumes that the 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 for an authoritative definition of subsidiarity. For this reason, they are a relevant source of interpretation; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 10), para 178; Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* [2005] ECR I-06451, para. 102; Case C-58/08 *Vodafone and Others* (n 16), paras 72-74.

³⁸ The Edinburgh Guidelines (n 36), 18-19, state that the Union should consider the following criteria to decide 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.’

³⁹ See regarding scope of application of the fundamental freedoms: 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 7 May 2014. Regarding the scope of EU legislative competence; see René Barents, ‘The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation’ (1993) 30 Common Market Law Review 85, 106-109.

⁴⁰ See Swaine (n 25), 53.

⁴¹ See 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* (OUP 2012) 95.

‘collective’ action.⁴² Weatherill has explained this rationale. In some circumstances, made more common by transnational economic integration, a decision taken by one bloc of citizens may have serious negative consequences for another politically more remote bloc of citizens. In short, national-level decision-making may be flawed in its assumption that there exist a stable set of consumers of those decisions, whose preferences will be fully satisfied by the national polity and who are not joined by other ‘external’ affected parties. EU law needs to correct these malfunctions.⁴³ There is a case for common Union action since such actions may reap efficiency benefits by reducing the costs associated with these spill-overs and prove mutually beneficial for the Member States.⁴⁴ The ‘cross-border’ criterion is the least controversial of the three listed in the guidelines. If there is a truly transnational problem and Member States cannot resolve that problem, the legitimacy for Union to act in the matter does not seem to be disputed.⁴⁵

Whilst it is true that the ‘cross-border’ nature of the regulated problem certainly may support Union action under the subsidiarity problem, 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 affect only incidentally more than one Member State, I maintain that we should be very suspicious of the Union’s right to act in the matter.⁴⁶ Incidental or theoretical cross-border effects cannot, as the Court stated in the *Tobacco Advertising* judgment, be used as a reason for exercising the EU’s internal market competence under Article 114 TFEU.⁴⁷ It only arises where the cross-border nature and effect of an activity is such that the EU is substantially better equipped than the Member States to regulate that activity.⁴⁸ The cross-border criterion should thus be considered in conjunction with the ‘clear benefits’ criterion, which entails that Union action must entail concrete benefits in terms of dealing with the cross-border problem.

⁴² See Swaine (n 25) 107; Frederick J Lee, ‘Global Institutional Choice’ (2010) 85 *New York University Law Review* 328, 329-336.

⁴³ See Stephen Weatherill, ‘Competence creep and competence control’ (2004) 23 *Yearbook of European Law* 1, 34-35; Case C-58/08 *Vodafone and Others* (n16), Opinion of AG Maduro, para 34.

⁴⁴ See Richard B Stewart: ‘Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions’ (1992) *University of Chicago Legal Forum* 41, 44.

⁴⁵ See Bermann (n 1) 370; De Búrca, ‘Re-appraising Subsidiarity’s Significance after Amsterdam’ (n 4) 25; Lee (n 42) 330.

⁴⁶ See Kiiver (n 7) 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 7 May 2014.

⁴⁷ See Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, paras 83-84.

⁴⁸ See Case C-58/08 *Vodafone and Others* (n 16), Opinion of AG Maduro, para 34.

The second criterion - the ‘internal market’ one - repeats the standard claim for why Union harmonization is necessary. When the Union’s commitment to maintain and create an internal market requires action or when Member State action would jeopardize the achievement of the internal market, Union action is preferable.⁴⁹ The internal market justification is a wide one. It can theoretically be employed to justify Union intervention in all national policy fields. This appears from the fact that potentially any difference in the laws of the different Member States can be construed as a distortion to competition or as a barrier to trade. When the Court defines an obstacle in the context of free movement law and the Treaty prohibitions, it also defines the kind of things that may be harmonized. This reading of the internal market is supported by the use of Article 114 TFEU by the Union legislative institutions whose legislative practice suggests that there are no constraints on Union action under the internal market paradigm. The idea is that since the integration of states and peoples are unequivocally affected by matters such as language, culture and identity, as well as infrastructure, wealth differences and education, all these matters can be harmonized. If there are to be genuinely no obstacles to the fundamental freedoms and a level playing field for competition, then almost any aspect of life can be harmonized.⁵⁰

By contrast, I maintain that limits must be constructed to the use of the internal market paradigm in order to avoid an indefinite expansion of Union competences and to protect localism and national diversity.⁵¹ The most effective technique of providing for 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 and the ‘internal market’ criterion, the Union must show that only Member State action will lead to or has led to a market failure and that the failure is of such a nature that only Union action can provide a remedy.⁵² The claim that the EU action benefits the internal market must be substantiated by proper evidence that Union action provides added value.⁵³

The Court’s ruling in *Tobacco Advertising* supports the application of such a test to the internal market justification. This point is nicely elaborated by Horsley. He notes that the Court’s core subsidiarity test has not developed under the subsidiarity heading, but under the

⁴⁹ See Swaine (n 25) 53.

⁵⁰ See De Búrca, ‘Re-appraising Subsidiarity’s Significance after Amsterdam’ (n 4) 25-27; Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2013) *European Law Journal*, 7, 17. Doi: 10.1111/eulj.12079.

⁵¹ See Bermann (n 1) 370; Kumm (n 18) 509-510.

⁵² See Kumm (n 18) 524.

⁵³ See Bermann (n 1) 370, 383-84; Swaine (n 25) 54.

Court's case-law on Article 114 TFEU. In Horsley's analysis, it appears that *Tobacco Advertising* was not so much about setting limits to the competence contained in Article 114 TFEU, but rather about operationalizing the subsidiarity principle.⁵⁴ The Court has consistently held that the Union does not enjoy a general power to regulate the internal market, and that it has to show either 'appreciable distortions to competition' and 'genuine obstacles to trade'.⁵⁵ Even if national differences may impact indirectly or incidentally on the conditions of competition for the undertakings concerned, this is not evidence of 'appreciable' distortions of competition and cannot justify action under Article 114 TFEU.⁵⁶

By distilling some important lessons from *Tobacco Advertising*, it is shown how the subsidiarity principle can be strengthened and limits placed on the use of the internal market paradigm. On the basis of the Court's ruling, I argue that the 'clear benefits' criterion in the Edinburgh Guidelines demand that it is necessary for the EU legislator to show that a measure 'objectively' and/or 'appreciably' contributes to the internal market.⁵⁷ This test is not satisfied by merely showing an 'abstract' case that the measure might serve internal market purposes but by showing concretely through evidence that the measure actually will serve such purposes. Market analysis, economic impacts, 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. From a constitutional perspective this approach is the most appropriate one. It takes the limits of competence to a significant extent outside questions of political preference, and brings them within the realm of what can be concretely defined and reviewed.⁵⁸ Conformity with the subsidiarity principle must, as argued by Advocate General Maduro, be supported by more than simply highlighting the possible benefits accruing from Union action. It also involves a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States.⁵⁹ 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 a common supranational intervention.⁶⁰

⁵⁴ See Horsley (n 15) 269-270.

⁵⁵ See Case C-376/98 *Tobacco Advertising* (n 47), para 84.

⁵⁶ *ibid*, paras 106-107.

⁵⁷ See Kumm (n 18) 515.

⁵⁸ See Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (n 50) 17-18.

⁵⁹ See Case C- 58/08 *Vodafone and others* (n 16), Opinion of Advocate General Maduro, paras 31, 34.

⁶⁰ 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, 124.

Kumm supports this approach. Although he conceives ‘collective action’ problems as a trigger for Union action, whilst I consider market failures as a reason for Union action, both positions are equally sceptical of the internal market rationale for EU harmonization. He contends that the subsidiarity requirement establishes that the EU may act only if the action of Member States is structurally tainted by collective action problems. An important outcome of this is that, since the only legitimate reason for EU action is to correct collective action problems, all other reasons are excluded as irrelevant when justifying Union intervention. I therefore agree with Kumm that EU harmonization cannot be justified on the basis of the *effet utile* of furthering integration. The EU legislator is also precluded from substituting its own substantive judgment of the wisdom of Member States policy choices with regard to market regulation. Moreover, it cannot employ expressive reasons as reasons justifying European legislation. This means, for example as Kumm suggests, that a comprehensive common European civil code may not be enacted in Europe on the legal basis of Article 114 TFEU, if its purpose is to serve as a prestige project for a European legal science, and it cannot successfully be justified on other terms.⁶¹

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 narrow ‘decentralised’⁶² 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. Any problem that has a cross-border dimension should therefore be subject to Union intervention. Factors such as the effect or the scale of the operation, trans-frontier problems, the cost of inaction, Member States’ lack of capacity, 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.⁶³

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 that ‘any kind of’ of cross-border spill-

⁶¹ See Kumm (n 18) 520.

⁶² See Cass (n 1) 1124.

⁶³ 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; Weatherill, ‘Competence creep and competence control’ (n 42) 9-11.

over effects justify Union action under those guidelines.⁶⁴ 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’.⁶⁵ Since Union action is more efficient, individual Member States will be ineffective in their efforts to sufficiently achieve the objectives of proposed Union action relating to cross-border spill-overs. 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. The three guidelines thus normally combine to support the need for Union action in environmental matters.⁶⁶

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 Union actions are justified if it is simply more efficient⁶⁷, I argue that it is not sufficient for Union action to be simply more efficient. The Edinburgh Guidelines requires ‘clear benefits’ in order to justify Union intervention. The only tasks which should be assigned to the Union are those whose effects clearly extend beyond national frontiers. Such an interpretation would be compatible with the ‘decentralizing’ aim of subsidiarity.⁶⁸ The central distinction between the ‘centralising’ interpretation and the ‘narrow’ interpretation is related to the role of evidence. We can easily show this by examining Lenaert’s previous example on environmental spill-overs. Under the narrow interpretation it is not sufficient to refer to a potential spill-over/theoretical risk of distortions to competition to make the case for EU harmonization. There must be concrete evidence that the existence of ‘spill-overs’ gives rise to or risks giving rise to a ‘regulatory race’ where states compete with each other by ever more lenient environmental laws. The risk must be concrete in the sense that the EU legislator must show it to be ‘likely’ to arise; hypothetical

⁶⁴ I am here only referring to ‘competitive spillover, while Lenaerts, (n 1) 880-881, also mentions’ product spillovers, pollution spillovers, and preservation spillovers’ which are derived from the classification provided by Stewart, (n 44) 41, 48-49.

⁶⁵ See Lenaerts (n 1) 880-881; Stewart (n 44) 46.

⁶⁶ See Lenaerts (n 1) 879, 880.

⁶⁷ *ibid* 865, 895.

⁶⁸ See Swaine (n 25) 53-54; Cass (n 1) 1124.

and abstract distortions will not be acceptable as evidence.⁶⁹ Conversely, the ‘centralising’ interpretation accepts the risk of potential spill-overs as a justification for Union action.

By extracting limits from the Court’s jurisprudence we have begun to construct an argument to contest the internal market justification. Further evidence from the economic and regulatory literature is, however, needed to make a convincing argument.

The limits imposed by *Tobacco Advertising*, such as the need to show ‘appreciable distortions’ of competition, as well as the limits in the Edinburgh Guidelines requiring the Union to show ‘clear benefits’ of Union harmonization, are not only legal inventions but can also be defended on more principled and economic foundations.⁷⁰ If we consider the economic rationales of harmonization, it can be argued that harmonization should, put simply, only take place if two conditions are fulfilled. First, it must be shown that national disparities give rise or risk giving rise to market failures in need of correction and that extend beyond national borders.⁷¹ Secondly, Union action must be more efficient than Member State action in avoiding or remedying those failures by increasing social welfare, taking into account the costs of the new rules.⁷²

The Commission often relies on ‘distortions of competition’ and ‘race to the bottom’ reasoning to justify the introduction of common European standards. Its recent proposals to harmonize 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 inefficient outcomes and competitive distortions.⁷³ Without giving a judgment on the validity of the Commission’s

⁶⁹ See Case C- 376/98 *Tobacco Advertising* (n 47), paras 84-86, 106-107.

⁷⁰ See Biondi (n 2) 215-216; Van Zeben (n 46) 15.

⁷¹ See Moloney (n 15) 7, 27.

⁷² 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, 953; Van Zeben (n 46) 15, 23.

⁷³ See Commission’s 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, 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.

reasoning in these proposals I argue that the available evidence does not always support the case for harmonization based on ‘distortions of competition’.

Enriques and Gatti illustrate generally why, in the context of European company law harmonization, arguments of ‘distortions of competition’ and ‘regulatory race to the bottom’ are not persuasive. First, they criticise the justification based on distortions of competition as not substantiated in the case of European company law harmonization. With no European ‘Delaware’ in sight, rules to prevent a ‘race to the bottom’ are unwarranted. Secondly, there are no other efficiency gains from EU harmonization. Far from lowering transaction costs, Union harmonization has raised them and can hardly be expected to do otherwise in the future.⁷⁴ Enriques and Gatti’s example of EU company law harmonization supports the general argument made here. The assumption that differences in legislation give rise to distortions of competition and a regulatory ‘race to the bottom’ is rarely justified on an empirical basis. Although their example is concerned with company law harmonization, there is no reason why their findings should not be generally applicable to EU harmonization measures.

There is also an abundance of regulatory and legal literature questioning the logic of ‘race to the bottom’ and ‘safe haven’ scenarios. First, governments do not show a high propensity to engage in prolonged races towards the bottom. There is no reason to suppose that an EU-wide competition for comparative advantage will lead to Member States adopting inappropriately weak standards. In the absence of evidence that there is a race to the bottom and that Union intervention will improve outcomes, the competitive outcome should prevail. Secondly, evidence from different policy areas suggest that ‘safe haven’ scenarios have overestimated the role played by regulation in market behaviour.⁷⁵

The criminal law scholarship has also showed scepticism towards the use of ‘safe havens’ scenarios as a justification for harmonization of criminal laws. The competitive parameter of sanctioning regimes has little significance in relation to factors such as wage costs, tax rules,

⁷⁴ See Enriques and Gatti (n 72) 969, 978, 998.

⁷⁵ See Claudio M Radaelli, ‘The Puzzle of Regulatory Competition’ (2004) 24 *Journal of Public Policy* 1, 2-3, 5-7, 15; David Vogel and Robert A Kagan, ‘An Introduction’, in David Vogel and Robert Kagan (eds) *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (University of California Press 2004) 5-6; David Vogel ‘Trading up and governing across: transnational governance and environmental protection’ (1997) 4 *Journal of European Public Policy* 556, 557-559, 561; Anu Bradford, ‘The Brussels Effect’ (2012) 107 *Northwestern University Law Review* 1, 4; Jukka Snell, ‘Who’s Got the Power? Free Movement and Allocation of Competences in EC Law’ (2003) 22 *Yearbook of European Law* 323, 334-335; Lawrence J White, ‘International Regulation of Securities Markets: Competition or Harmonization?’ in Andrew W Lo (ed) *The Industrial Organization and Regulation of the Securities Industry* (University of Chicago Press 1996) 223.

labour costs, access to markets, a well-developed industrial base, infrastructure and other non-regulatory variables. Not much criminological evidence supports the proposition that offenders will learn to exploit differences between legal orders. Criminal activities are seldom likely to be strategically planned and to follow such clear cost/profit calculations. For deterrence purposes the risk of being caught is generally of greater importance than the severity of penalties. Rather than trying to deter potential offenders with harsh punishments, it may be much more effective to ensure that enough resources are available for the investigation and clearance of crime, particularly if there is a low risk of detection and apprehension. In the absence of a European Delaware with weak enforcement standards where criminals would decide to engage in white-collar offences, the case for Union action in criminal law is, in principle, a weak case.⁷⁶

Summing up the argument, I maintain that the subsidiarity principle contains a presumption⁷⁷ in favour of Member State action which can be rebutted only if the legal conditions for harmonization are fulfilled. First, the Union must show that there are national divergences which give rise to a market failure or a risk for a failure in the form of distortions to competition or obstacles to trade.⁷⁸ Secondly, the EU legislator must show that the failure is of such a serious nature that only EU action is able to remedy it.⁷⁹ Having accounted for the substance of subsidiarity and given some objective criteria in how to assess compliance with the principle, the next section considers how judicial review of subsidiarity can be enhanced and competence review made effective.

II PROCEDURAL SUBSIDIARITY AND JUDICIAL REVIEW

A The problems of judicial enforcement of subsidiarity

While the previous section drew the contours of the subsidiarity concept in substantive terms, this section deals with procedural subsidiarity and judicial review. This section endeavours to respond to the challenge, discussed in chapter 2, that subsidiarity is bound to be subject to

⁷⁶See 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.

⁷⁷ See Swaine (n 25) 53-55.

⁷⁸ Simon Deakin, 'Regulatory competition and legal diversity: which model for Europe?' (2006) 12 *European Law Journal* 440, 453- 454.

⁷⁹ See Van Zeben (n 46) 23-24; Bermann (n 1) 451; Swaine (n 25) 5; Barber (n 8) 312-313.

inadequate judicial enforcement. I have already accounted above for the Court's deferential review of subsidiarity.⁸⁰ The reasons behind the Court's cautious stance to subsidiarity can be traced to two sources. First, the problem of judicial review of subsidiarity has been related to the principle's lack of firm justiciable limits, the complex Edinburgh guidelines and the principle's inherent 'political' nature.⁸¹ Secondly, because of the principle's weak legal content and the Court's relative institutional disadvantage in relation to the Union institutions in terms of legitimacy and competence, a firm judicial analysis of the need for Union action, as required by the subsidiarity principle, has not been seen by the Court as a serious option.⁸²

As was demonstrated previously in the thesis,⁸³ there are good reasons to assume that these standard accounts are correct and that these two challenges must be tackled in order to ensure that subsidiarity can act as a check on the exercise of EU competences. The challenge of providing tangible limits to material subsidiarity was thoroughly examined in the previous section. The remaining question is how to square judicial review of subsidiarity with the Court's relative institutional constraints in assessing the appropriateness of Union action. In particular, we must examine how the Court can move from a light touch review to a more demanding and evidence-based review of subsidiarity. I suggest that the main way for the Court to overcome its institutional disadvantage is, as indicated previously in the thesis⁸⁴, to maintain 'legality' review but review material subsidiarity indirectly through implementing procedural subsidiarity. The next section confronts the challenges of judicial enforcement of subsidiarity.

B The main challenges in making judicial review of subsidiarity effective

It was already concluded in chapter 3 that a more intense judicial enquiry of the enforcement of the limits of the Treaties is justified given the increased emphasis on competence control in the Lisbon Treaty and the increased use of impact assessments and other background documents to control the EU legislator. That Lisbon has improved the chances of stronger judicial enforcement is particularly clear in relation to the subsidiarity principle because of

⁸⁰ See above chapter 2-section IV (A).

⁸¹ See Estrella (n 4) 147, 165, 176; De Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (n 4) 7; Schütze, *From Dual to Cooperative Federalism* (n 4) 256.

⁸² See Estrella (n 4) 139; Werner Vandenbruwaene 'Multi-Tiered Political Questions: The ECJ's Mandate in Enforcing Subsidiarity' (2012) 6 *Legisprudence* 321, 323.

⁸³ See above chapter 2- section IV (B); chapter 3- section II.

⁸⁴ See above chapter 3- section IV (B).

the new early warning system (EWS) instituted by Protocol no 2.⁸⁵ As the Court, armed with the opinions of the national parliaments and the objections from the Commission provided through the EWS, will be provided with more material to assess subsidiarity compliance this would strengthen the judicial enforcement of subsidiarity.⁸⁶ Moreover, the Court has been conferred a specific role in Article 8 of Protocol no 2 to review actions on subsidiarity. These changes make it more feasible for the Court to employ subsidiarity to examine the legality of the exercise of Union competences.⁸⁷ Notwithstanding this, there are some serious challenges left to deal with in order to make the prospect of more intense judicial enforcement of subsidiarity plausible.

The main objections to stronger judicial enforcement of subsidiarity are related to the Court's comparative disadvantage in relation to the Union institutions in assessing subsidiarity both in terms of legitimacy, resources and competence.⁸⁸ This argument assumes that any review of subsidiarity, whether procedural or substantive, is detrimental to the Court's legitimacy.⁸⁹ Bermann argues that the degree of judicial scrutiny should reflect subsidiarity's highly problematic character. The Court's institutional constraints impede it from reviewing material subsidiarity. There are also limits to the resources that the Court can invest in verifying whether the political branches actually inquired into subsidiarity.⁹⁰ Vandenbruwaene observes that subsidiarity involves a complex empirical investigation by the legislator, who may then legitimately rely on a degree of epistemic superiority in relation to the Court. The Court faces a difficult task in assessing the trade-off between democratic legitimacy and efficiency as required by subsidiarity. Either the Court abstains *de facto* from subsidiarity review and relinquishes its role as a neutral arbiter, or it undertakes a comprehensive, subjective and non-legal assessment of social, economic, or political factors, which it is ill-

⁸⁵ See above chapter 3- section III (D).

⁸⁶ See Alan Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 *Common Market Law Review* 355, 369; 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, 853; Fabbrini and Granat (n 60) 1117-1118; Schütze, *From Dual to Cooperative Federalism* (n 4) 258-259;

⁸⁷ See Biondi (n 2) 226-227; Stephen Weatherill, 'The limits of legislative harmonisation' (n 86) 852-853; Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72, 74; 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 Policy* 1.

⁸⁸ These general objections to judicial review are more comprehensively discussed above in chapter 3- section II.

⁸⁹ See Ernest A Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 *New York University Law Review* 1612, 1679-82.

⁹⁰ See Bermann (n 1) 336, 391-92; Swaine (n 25) 64; David Edward, 'Subsidiarity as a Legal Concept' in Pascal Cardonnel, Allan Rosas, and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 100.

equipped to assess. The Court also lacks according to Vandenbruwaene, the democratic credentials to be involved in subsidiarity review because subsidiarity involves evaluations of ‘efficiency’ and ‘effectiveness’.⁹¹

I consider that all these challenges can be met. First, the way of dealing with concerns of competence and legitimacy is to limit substantive review of subsidiarity and focus on procedural requirements for subsidiarity compliance. Even though the test for material subsidiarity proposed above, requiring the Union legislator to demonstrate the existence of a ‘market failure’ that is of such a nature that it requires EU action, is outside the Court’s legitimacy and competence to examine; the Court is institutionally well-equipped to engage in a procedural enquiry of subsidiarity. By engaging in such an enquiry the Court would simply reinforce a procedural demand upon the Union institution that it must take subsidiarity seriously and adequately reason and submit proof of the need for Union harmonization.⁹² Such a review does not intrude upon the EU legislator’s discretion and the axiom that the Court can only engage in ‘legality’ review.⁹³ The objection as to the Court’s competence is also slightly overstated. It is surely true that the Court might, faced with an uncertain construction of Union legislation, in following procedural subsidiarity review be led to a different mode of analysis to which it may not be accustomed. This problem is, however, not unique to subsidiarity. The Court is normally engaged in open-ended empirical and normative assessments of acts of public authorities in its fundamental rights jurisprudence. The Court would not be engaging in a qualitatively different inquiry when applying subsidiarity. The lack of judicially enforceable standards to assess substantive subsidiarity does not constitute a compelling normative rejection of jurisdiction. While subsidiarity cannot be easily validated by operational criteria, this does not mean that the Court should refrain from procedural review because it lacks a certain epistemic ability to deal with findings of fact. Rather, it is a function of the Court within its procedural review to devise a judicially manageable standard against which subsidiarity can be assessed.⁹⁴ Secondly, the concern that the Court would suffer from an alleged legitimacy problem is misdirected. While procedural review partly empowers the Court, a non-representative institution, at the expense of Union institutions serving majoritarian interests, it should be recognized that those other Union institutions may

⁹¹ See Vandenbruwaene (n 82) 321, 324-325, 328, 333-336.

⁹² See Bermann (n 1) 337.

⁹³ See Andreas Fritzsche, ‘Discretion, scope of judicial review and institutional balance in European law’ (2010) 47 *Common Market Law Review* 361, 387-88, for a lucid description of the problem of ‘legality’ review.

⁹⁴ See Vandenbruwaene (n 82) 324, 339; Swaine (n 25) 67; Kumm (n 18) 528.

serve democracy imperfectly.⁹⁵ The other Union institutions also suffer, as already mentioned in chapter 3⁹⁶, from a ‘democracy deficit,’ one that may not be remedied in the near future.⁹⁷ The historical record suggests that the efficacy of particular political and institutional checks fluctuate over time. It is risky to rely exclusively on a system of political checks that is contingent and mutable over the course of time.⁹⁸ It is difficult, even for a conscientious EU legislator, confronted with a regulatory concern that seems highly pressing or attractive on its own merits, not to convince herself that the subject falls within her jurisdiction. Given this, it is not illegitimate to entrust subsidiarity review to the Court if such a review is confined to procedural demands.⁹⁹ Finally, even if procedural subsidiarity review ultimately imposes substantive limits to the exercise of Union competences, which I think it does, there are good reasons for the Court to enforce those substantive limits. The Court has indeed an important role as guarantor of the values of subsidiarity, national diversity and localism, in cases where the Union legislator fails to adhere to such values. It is evident that the Union political institutions take indications from the Court as to what subsidiarity values should be safeguarded. If the Court were to announce that subsidiarity values are entirely subject to the caprices of politics, the Union political branches would not take these values seriously in their own deliberations.¹⁰⁰ While taking subsidiarity seriously is a difficult constitutional choice and implies that the Court must develop a stricter standard in its subsidiarity review and become involved in fundamental social and political questions, it is argued that such a review is both necessary and legitimate to maintain the safeguards of federalism.¹⁰¹

Having shown that the challenges brought against judicial review of subsidiarity were not able to seriously undermine the case for stronger judicial enforcement of the principle, we move on to consider the test for legality for subsidiarity compliance.

⁹⁵ See Swaine (n 25) 66.

⁹⁶ See above chapter 3- section II, for a more comprehensive discussion of the democratic argument against judicial review.

⁹⁷ See Miguel Maduro, *We the Court- The European Court of Justice and the European Economic Constitution*, (Hart 2002) 118-125; Young, ‘Protecting Member State Autonomy in the European Union’ (n 89) 1693-1705, mapping out some of these democratic deficits.

⁹⁸ See Ernest A Young, ‘Two Cheers for Process Federalism’ (2001) 46 Villanova Law Review 1349, 1391.

⁹⁹ See Swaine (n 24) 67; Schütze, *From Dual to Cooperative Federalism* (n 4) 261-62; Young, ‘Protecting Member State Autonomy in the European Union’ (n 89) 1679.

¹⁰⁰ See Young, ‘Two Cheers for Process Federalism’ (n 98) 1391.

¹⁰¹ See Schütze, *From Dual to Cooperative Federalism* (n 4) 261-62, 266.

C A test for legality of ‘adequate reasoning’ and ‘relevant evidence’

Having argued that procedural review is the way forward to make review of subsidiarity effective, we must examine in detail how the Court should go about such a review. Bermann and Swaine have argued that the Court’s main task in enforcing procedural subsidiarity is to analyse whether the Union institutions, before adopting legislation, meaningfully enquired into the capacity of the Member States to attain the objectives of the proposed measure and examine whether the Union institutions properly explained why they concluded that action at the Union level was necessary. The Union institutions must examine the possibility of alternative remedies at, or below, the Member State level.¹⁰² The test for intervention must however take into account the Court’s institutional constraints in assessing subsidiarity. Bermann has suggested framing the subsidiarity standard of review in terms of ‘manifest error’. Substitution of judgment cannot take place, but at the very most the Court can decide whether the Union institutions’ decision to act, based on the information available to them, was egregiously mistaken.¹⁰³ De Búrca conceives the demands of procedural subsidiarity as a requirement on the EU institutions to provide a structured and reasoned assessment of subsidiarity compliance. It is a matter of showing that the Union legislator articulated the choices at hand, listed the arguments for and against Union harmonization and explained how the balancing exercise between different values was made and reasoned its choices openly. The Union legislator must explain how it has taken into account national diversity when proposing Union legislation and articulate the kinds of competitive distortions and barriers to trade created by disparities in national laws.¹⁰⁴ She also proposes a more demanding test for judicial intervention and suggests that the Union legislator should ultimately be condemned for its failure to justify proposals. Inadequate reasoning may provide evidence of the failure to take the subsidiarity questions seriously and would thus provide a sufficient basis for a challenge to the measure.¹⁰⁵

These are interesting proposals. Building on Bermann’s suggestion of framing the test in terms of ‘manifest error’, I argue that the Court must adopt a slightly more demanding

¹⁰² See Bermann (n 1) 332, 336, 379, 391; Swaine (n 25) 64.

¹⁰³ See Bermann (n 1) 385-386, 393, 400.

¹⁰⁴ See De Búrca, ‘Re-appraising Subsidiarity’s Significance after Amsterdam’ (n4) 28-30; Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union’ (n 1) 894; Kumm (n 18) 526-529.

¹⁰⁵ See De Búrca, ‘Re-appraising Subsidiarity’s Significance after Amsterdam’ (n 4) 33.

standard of review and test of legality in accordance with what I proposed in chapter 3.¹⁰⁶ While the Court, if it abandoned the ‘manifest error’ test and more intensively assessed subsidiarity, would ultimately impose substantive limits on EU harmonization and become involved in substantive political and economic questions, this is something desirable since such a more searching mode of review is necessary to enforce the subsidiarity principle.¹⁰⁷ De Búrca’s proposal is commendable since it shows how the Court can intervene to police subsidiarity. Based on her general idea I suggest a more concrete test for judicial intervention. Stated in general terms the procedural subsidiarity review requires a test for legality of Union legislation in two steps; i) an examination of whether the reasoning provided is ‘adequate’ to justify compliance with subsidiarity, ii) an enquiry into whether the Union legislator has submitted ‘relevant’ evidence to demonstrate conformity to the subsidiarity criterion. Whilst these criteria were already articulated above in chapter 3, section IV (D), I would like to explain a bit further their meaning within the context of subsidiarity.

‘Adequate reasoning’ for subsidiarity compliance

What does the standard of review of ‘adequate reasoning’ mean in the context of subsidiarity? First in terms of formal aspects, we know that the EU legislator should articulate the reasons for subsidiarity compliance in recitals, explanatory memorandums and impact assessments.¹⁰⁸ Pursuant to the Court’s case-law on Article 296 TFEU, the statement of reasons must show unequivocally the reasoning of the Union legislator. The EU legislator must disclose the essential factual and legal considerations on which a measure is based and the essential objective pursued by the measure. The reasoning must enable the Court to exercise its power of review.¹⁰⁹

Nevertheless, the reason-giving requirement in Article 296 TFEU seems in light of case-law to be of a merely formal nature and requires very little to demonstrate show compliance with the principle of subsidiarity.¹¹⁰ I however maintain here that the justification for subsidiarity compliance cannot be a purely formal, one accepting any kind of reason regardless of its merit. While Article 296 TFEU is triggered only if no reasons at all were given for

¹⁰⁶ See above chapter 3- section IV (D).

¹⁰⁷ See Schütze, *From Dual to Cooperative Federalism* (n 4), 265.

¹⁰⁸ See Article 296 TFEU; Protocol no 2, Article 5.

¹⁰⁹ See Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-02405, para 22; Joined cases C-154/04 and 155/04 *Alliance for Natural Health and others* (n 37), paras 133-134.

¹¹⁰ See Martin Shapiro, ‘The Giving Reasons Requirement’ (1992) *University of Chicago Legal Forum* 179, 198, 215; Young, ‘Protecting Member State Autonomy in the European Union’ (n 89)1681.

legislation¹¹¹, I argue that procedural subsidiarity requires not only that reasons be given for subsidiarity compliance but that these reasons are ‘relevant’. ‘Relevance’ implies that the reasoning must be related to the material subsidiarity criterion proposed above, meaning that the Union legislator in the legislative background documents must articulate what kind of market failure is at stake and explain why the failure requires Union action. The source of this benchmark is whether the proposed justification for EU action makes sense given the economic and legal rationales for harmonization of the internal market as this has been expressed by the relevant literature and the Court’s case-law. If the proposed reasons have no logical relationship to the material subsidiarity criterion the reasoning is inadequate.¹¹² The test proposed in chapter 3 requires the EU legislator to show that at *least one* of the reasons proposed by the Commission is capable of, on the basis of the pertinent literature and the Court’s case-law, independently constituting a justification for subsidiarity compliance.¹¹³

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 to mention subsidiarity in the contested Deposit Guarantee Directive. Despite this, the Court ascertained the reasons for subsidiarity compliance in the form of the cross-border effects of different deposit protection schemes in the Member States. The Court mentioned the recital where the Commission pointed to a scenario where ‘deposits in a credit institution that has branches in other Member States become unavailable’ and that it was ‘indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community’. The Court also pointed to the preamble where 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 Union level.¹¹⁴

The Commission’s statement of reasons was not acceptable in this case due to the fact that the EU legislator had failed to offer *one reason* which was sufficient to independently justify

¹¹¹ See Shapiro (n 110) 182.

¹¹² See Kiiver (n 7) 75, 96.

¹¹³ See chapter 3- section IV (D).

¹¹⁴ See Case C-233/94 *Germany v Parliament and Council* (n 109), paras 27-28. For a similar extremely light review of the giving reason requirement, see Case 68/86 *United Kingdom v Council* [1988] ECR 855, paras 27-35.

compliance with the subsidiarity criterion. In fact, none of the recitals in the Directive mentioned expressly 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.¹¹⁵ The problem was that the EU legislator did not 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.¹¹⁶ Whilst the reasons offered in the preamble were from a theoretical perspective cogent to defend subsidiarity compliance, we must condemn this reasoning as inadequate since they were not expressly linked to the subsidiarity principle.¹¹⁷

‘Relevant evidence’ for subsidiarity compliance

Having looked at the content of the reasoning requirement, we move on to look to the second part of the test for legality proposed in chapter 3; the requirement of ‘relevant evidence’. This requirement implies that the relevant facts of the case must support the reasoning and the conclusions in the legislative measure.¹¹⁸ The Court is entitled pursuant to Protocol no 2 to require the Union legislator to expound on the qualitative and quantitative evidence upon which it based its legislative choice.¹¹⁹ What is required for legality is, as argued in chapter 3, that *one of the stated reasons*, which was compelling enough to justify compliance with one of the substantive subsidiarity criteria, can be defended with sufficient and relevant evidence. Each justification considered sufficient for demonstrating subsidiarity compliance must be supported by such evidence.¹²⁰ By linking the evidence criterion to the material subsidiarity test above, it follows that the Union must show with ‘quantitative’ and ‘qualitative’ indicators that there is a market failure and that Union action provides for ‘clear benefits’ over Member States action in correcting such a failure.¹²¹ For the Court this implies

¹¹⁵See 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.

¹¹⁶See Case C- 233/94 *Germany v Parliament and Council* (n 109), paras 13-20.

¹¹⁷ See Estrella (n 4) 155, 157-58.

¹¹⁸ See Case C- 310/04 *Spain v Council* [2006] ECR I-07285, para 123; Vandenberghe (n 82) 338.

¹¹⁹ See Estrella (n 4) 158.

¹²⁰ See chapter 3- section IV (D).

¹²¹ See Swaine (n 25) 57-58 at n 277; Estrella (n 4) 125-126.

that it must, in contrast to its previous case-law¹²², enforce the rule that the burden of proof for compliance with subsidiarity lies with the Union legislator.¹²³

The evidence also needs to be of a certain quality. In order to assess the type of evidence required for subsidiarity compliance, we should dig deeper into the meaning of ‘qualitative’ and ‘quantitative’ indicators. Such indicators provide a means to reflect the changes connected to a legislative intervention and used in establishing baselines, monitoring and evaluation. Quantitative evidence is factual evidence such as measures of quantities or amounts that rely on objective estimates while qualitative evidence is concerned with more subjective predictions such as the judgments of individuals or perceptions about a subject.¹²⁴ Quantitative indicators in the framework of internal market legislation are for example concerned with trade statistics and market research. Such indicators are often necessary to assess the potential impact of harmonization or the envisaged scenario of non-Union action. Subject matters such as transnational effects, distortions of competition, and restrictions on trade, are particularly susceptible to quantitative analysis.¹²⁵ Even though it is nearly always the case that the Commission’s judgments about subsidiarity are founded upon qualitative indicators, such evidence is not sufficient if quantitative indicators are available. A rhetorical assertion from the Union legislator that differences in legislation give rise to obstacles to trade or distortions to competition is not sufficient to guarantee compliance with subsidiarity since such subjective judgments are not evidence of a market failure.¹²⁶

The evidence need not be comprehensive in order to support *one of the* reasons advanced for ‘subsidiarity compliance’. What is required is that some relevant empirical evidence, qualitative or quantitative, is provided in the legislative background documents supporting

¹²² See Case C-84/94 *United Kingdom v Council* [1996] I-05755, paras 74-77, 81; Case C- 233/94 *Germany v Parliament and Council* (n108), paras 26-28. Recent case-law suggest cautiously that the Court now enforces the evidence requirement more fiercely: Case T-374/04 *Germany v Commission* [2007] II-4431, para 79; Case T-263/07 *Estonia v Commission* [2009] II-03463, para 53.

¹²³ See Protocol no 2, Article 5: ‘The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.’

¹²⁴ See Cheyanne Church and Mark M. Rogers, *Designing for Results: Integrating Monitoring and Evaluation in Conflict Transformation Programs* (Search for Common Ground /United States Institute of Peace 2006) 44, 50. <<http://www.sfcg.org/Documents/manualpart1.pdf>> Accessed 8 May 2014; Caroline Cecot, Robert Hahn, Andrea Renda and Lorna Schrefler, ‘An evaluation of the quality of impact assessment in the European Union with lessons for the US and the EU’ (2008) 2 *Regulation & Governance* 405, 409; Anne Meuwese, *Impact Assessment in EU law-making*, (2008) 68. Doctoral dissertation of 6 February 2008 at the University of Leiden.

<<https://openaccess.leidenuniv.nl/bitstream/handle/1887/12589/Thesis.pdf?sequence=3>> Accessed 8 May 2014; ‘Impact Assessment Guidelines’, 15 January 2009, SEC (2009) 92, 38.

¹²⁵ See Wyatt (n 87) 8.

¹²⁶ Case C- 376/98 *Tobacco Advertising* (n 47), para 84; De Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’ (n 5) 225; Swaine (n 25) 53-55.

the existence or risk of a market failure as well as supporting the need for Union action. Such sources could for example be national or comparative studies on legal diversity and risks for distortions to competition. It is sufficient for subsidiarity compliance if the Commission in the explanatory memorandum or the impact assessment refers to the relevant background studies where it is demonstrated that Union action is preferable to Member State action. It would also be sufficient for the Commission to point to complaints received by private parties, if they reach a certain quantity, about national obstacles to fundamental freedoms or distortions of competition to justify subsidiarity compliance.¹²⁷ The evidence cannot, however, be too insignificant. If the evidence invoked does not *in itself* support the EU legislator's claim, more evidence is needed to pass the legality standard. If the evidence invoked is relevant but not significant enough to maintain that there is a market failure, the EU legislator may however rely on other evidence to support this claim.

The Environmental Crimes Directive¹²⁸ is a good example of a piece of legislation where the Union legislator relied on relevant evidence to support subsidiarity compliance. The proposal to this directive referred to an impact assessment which restated and referred to studies made by consultancy firms on the extent and nature of sanctions for infringement of Union environmental law. First, the legislative background documents reported appreciable differences in terms of the definition of the offences and in terms of the nature of sanctions imposed for committing the offences.¹²⁹ Secondly, there was also substantial evidence in the background documents supporting the contention that environmental crimes have a cross-border dimension. The evidence suggested that environmental pollution knows no borders and that many well-known and significant catastrophes have had a cross-border nature. Thirdly, there was proof suggesting that differences in legislation would be exploited by organized criminals and firms intending to reduce their business cost by not complying with environmental rules. In order to comply with the legality standard above, *one of the reasons* stated, which is sufficiently compelling to justify compliance with one of the substantive

¹²⁷ See Joined cases C-154/04 and C-155/04 *Alliance for Natural Health and others* (n 37), paras 36-37.

¹²⁸ 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; 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.

¹²⁹ See Study by The Law Firm HUGLO LEPAGE & Partners, 'Study on environmental crime in the 27 Member States' For European Commission, Study JLS/D3/2006/05, Final Report, Brussels, 5 April 2007, 7; <http://ec.europa.eu/environment/legal/crime/pdf/report_environmental_crime.pdf> Accessed 8 May 2014; Study by The Law Firm HUGLO LEPAGE & Partners, 'Study on environmental crime in the 27 Member States' For European Commission, Study JLS/D3/2006/05, Annex III-table per offence, Brussels, 5 April 2007 <http://ec.europa.eu/environment/legal/crime/pdf/crime_annex3.pdf>. Accessed 8 May 2014.

subsidiarity criteria, must be supported with sufficient and relevant evidence. Without discussing this in detail it seems that the distortion of competition rationale invoked by the Commission to demonstrate subsidiarity compliance was both theoretically defensible and justified by relevant and sufficient evidence. The evidence invoked¹³⁰ supported the contention that distortions to competition can arise because of differences in the definition of offences and that only EU action can remedy this problem.¹³¹

The 2006 Intellectual Property Crimes Proposal is conversely illustrative of a lack of 'relevant' evidence.¹³² The Commission claims in the proposal that intellectual property infringements are of a global scale and linked to organized crime thereby requiring Union action. It also suggests 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 hampers the proper functioning of the internal market. The Proposal also, while approximating legislation, respects the different legal traditions and systems of the Member States. The direct objective of this initiative which is to protect intellectual property can be better achieved at a Union level. For all these reasons the proposal complies with the principle of subsidiarity.¹³³ In terms of evidence, the Proposal must be condemned. The Commission has failed to offer any evidence to support the statement, 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 failure or how the nature of the problem gives rise to 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 organized crimes, without referring to any empirical sources. The Commission seems to presume that its arguments are in no need of evidence. That is not however the case. The evidence requirement requires that the Commission, at the very least, refers to some credible sources when it seeks to demonstrate the need for Union action. Since there is no evidence to support

¹³⁰ See SEC (2007) 160 (n 73) 12-19, at n 29-38, for references in the impact assessment to 'relevant' and 'sufficient' evidence.

¹³¹ *ibid* 37-38.

¹³² 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', 'Intellectual Property Crimes Proposal').

¹³³ *ibid* 1-3, 9.

the Commission's assertions, the Proposal falls foul of the evidence requirement.¹³⁴ Having explained in detail the meaning of the requirement of 'adequate reasoning' and 'relevant evidence' in the subsidiarity context we examine how this benchmark fits into the Court's existing jurisprudence.

D How does the standard of legality fit into the Court's current case-law?

We already know from chapter 2¹³⁵ that the Court's current approach to judicial review of subsidiarity is unsatisfying since it does not impose any serious informational demands on the Union legislator but accepts very meagre evidence and reasoning for a proposal.¹³⁶ The Court's cautious review of subsidiarity is rejected and my proposal entails a departure from the Court's previous case-law on the review of subsidiarity. My proposal does not accept a mere reference in a preamble as justification for legislation nor does it accept insufficient or inconsistent evidence for establishing compliance with subsidiarity.¹³⁷ The Court must reverse its extreme light test for judicial intervention evidenced by previous case-law¹³⁸ and actually strike down legislation which contains assertions that are not justified in light of the individual facts of the case. The test for legality I propose imposes stricter informational and evidential requirements than those that follow from the Court's current approach. This is because my approach not only requires that a justification is given for subsidiarity compliance¹³⁹ but that this justification is 'adequate' given the economic and legal rationales for harmonization and is supported by 'relevant' and 'sufficient' evidence.¹⁴⁰ Given the reinforcement of judicial review after the Lisbon Treaty, given the new subsidiarity Protocol no 2 and given the Court's power under Article 263 TFEU and Article 296 TFEU to ask for

¹³⁴ See 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 8 May 2014.

¹³⁵ See above chapter 2- section IV (A).

¹³⁶ See Case C-84/94 *United Kingdom v Council* (n 122) paras 47, 74-77, 81; Case C- 233/94 *Germany v Parliament and Council* (n 109), paras 26-28; Case C-58/08 *Vodafone and Others* (n 16), paras 76-78; Case 68/86 *United Kingdom v Council* (n 114), paras 27-35; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (n 10), paras 181-183.

¹³⁷ See De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (n 5) 225; Schütze, *From Dual to Cooperative Federalism* (n 4) 254- 255.

¹³⁸ See above n 136 in the present chapter for references to this case-law.

¹³⁹ See joined cases C-154/04 and C-155/04 *Alliance for Natural Health and others* (n 37), para 133.

¹⁴⁰ See Case C- 310/04 *Spain v Council* (n 118), paras 122-123; Case T-183/07 *Poland v Commission* [2009] ECR II-03395 paras 133-153; Alberto Alemanno, 'Regulatory Impact Assessment and European Courts: When Ex Ante Evaluation Meets Ex Post Judicial Control' (2011) 17 *European Public Law* 485, 492-502.

extended reasoning¹⁴¹, this modified stricter approach to the review of subsidiarity does not seem an exceptional move for the Court. Having developed an argument for procedural review of subsidiarity and argued for how such review should be carried out by the Court, the next section analyse the practical application of the proposed subsidiarity concept to a discretely selected piece of EU legislation: the Market Abuse Crimes Directive.

III PRACTICAL APPLICATION OF SUBSIDIARITY TO THE MARKET ABUSE CRIMES DIRECTIVE

While it was already demonstrated above¹⁴², by examining a couple of examples of legislation, how the legality standard proposed in chapter 3 should be applied to check conformity with the subsidiarity principle, it seems appropriate to provide for a more in-depth analysis of a piece of legislation to show the limits of the subsidiarity principle. The very recently adopted Market Abuse Crimes Directive¹⁴³ is a useful example to clarify the meaning of the subsidiarity concept. This directive harmonizes national criminal laws by defining three market abuse offences, insider dealing, unlawful disclosure of inside information and market manipulation, which if committed intentionally must be regarded by Member States as criminal offences and by imposing a requirement on Member States to ensure that those offences are punishable by effective, proportionate and dissuasive criminal sanctions.¹⁴⁴

The purpose here is to enquire whether the EU legislator, 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, it is discussed whether the proposal to the Directive is adequately reasoned from a subsidiarity perspective. Secondly, it is analysed 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 criterion.

¹⁴¹ See Shapiro (n 110) 203.

¹⁴² See above section II (C) in the present chapter.

¹⁴³ See above chapter 5- section I (C) for a previous discussion of this proposal within the framework of Article 83(2) TFEU and the ‘essentiality’ criterion.

¹⁴⁴ See Market Abuse Crimes Directive (n 19), Articles 3-5, 7, 9.

A Is the Commission’s reasoning adequate to justify compliance with subsidiarity?

When examining the legality of the Market Abuse Crimes Directive I will examine the legislative background documents to this directive including the proposal and the impact assessment. I suggest that the EU legislator when adopting the Market Abuse Crimes Directive met the demands of ‘adequate reasoning’ because it has offered, in accordance with the proposed test of legality¹⁴⁵, one justification, which on the basis of the relevant legal and economic literature and the Court’s case-law, can, consistent with the substantive subsidiarity test¹⁴⁶, demonstrate subsidiarity compliance. The substantive subsidiarity criterion demands that a market failure is identified and that EU action gives ‘clear benefits’ through the planned legislative measure to correct this problem.

How then do divergences in the definitions and sanctions for violations of EU market abuse rules give rise to market failures according to the EU legislator? The Commission has identified one market failure, namely potential distortions to competition, in the proposal and in the impact assessment that justifies harmonized 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 criminalization requirement throughout the Union, perpetrators of market abuse would choose to commit their violations in the jurisdiction that has the most lenient sanctioning regime.¹⁴⁷ Legal diversity in sanctioning cannot be justified since such diversity results in different costs for the undertakings engaged in financial services activities, leading to unequal treatment and competitive disadvantages for undertakings from certain Member States.¹⁴⁸ This concern is well-defended by the relevant scholarship, which recognizes that far-reaching deregulation of commercial law, including extensive exemption for economic offences like fraud, insider and money-laundering, may result in unfair competitive

¹⁴⁵ See above chapter 3- section IV (D).

¹⁴⁶ See above section I (B) in the present chapter for an account of this test.

¹⁴⁷ Whether such races occur often is according to the Commission unclear. The Commission consider there to be a certain scope for forum-shopping in the proposal from 2011; see SEC (2011) 1217 (n 20), 53-54, 125,166, 171; Market Abuse Crimes Proposal (n 20) 3, 5, recital 7. This phenomenon, however, only occur in ‘extreme circumstances’ according to the Commission in the impact assessment from 2010; see 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, 14-15.

¹⁴⁸ See SEC (2010) 1496 (n 147) 22.

advantages.¹⁴⁹ Furthermore, the Commission that unless harmonized criminal law measures for the enforcement of market abuse offences is 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’.¹⁵⁰ This assumption is also accepted by the pertinent literature in the field on the basis of the so called ‘Delaware effect’.¹⁵¹ It has been suggested by some authors that, in the absence of common rules, Member States could enter into a deregulatory race with reduced sanctions in order to attract business and capital to their own jurisdiction. Such a race can arise if simply one or two jurisdictions adopt more lenient sanctioning regimes for firms and individuals.¹⁵² There is also a theoretical foundation for the occurrence of such races on the basis of ‘prisoners’ dilemma scenarios. When Member States compete under such a scenario, national rules will produce a worse result than a harmonized standard. Member States trying to attract business through regulatory laxness will only attract increased business when other Member States do not act in the same way. However, if all the other Member States follow, only businesses will gain. The results of this game are sub-optimal from the point of view of the Member States.¹⁵³

We should also check whether the Commission in the legislative background documents has provided for *one* reason, which, independently, can explain why EU action has ‘clear benefits’ in relation to Member State action. In this regard, it 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 is characterized by cross-border elements since the relevant conduct can occur in one or more Member States different from that where the market concerned is localized and because the relevant actors might operate in different countries. Although the

¹⁴⁹ For a forceful argument in favor of this justification to harmonize EU criminal law: Hanna G Sevenster ‘Criminal Law and EC Law’ (1992) 29 *Common Market Law Review* 10, 53-56. See also 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; Niamh Moloney, ‘EU Financial Market Regulation after the Global Financial Crisis: “More Europe” or more Risks?’ (2010) 47 *Common Market Law Review* 1317, 1356-1357.

¹⁵⁰ See Market Abuse Crimes Proposal (n 20) 3, 5; SEC (2010) 1496 (n 147) 15.

¹⁵¹ See William L Cary, ‘Federalism and Corporate Law: Reflections upon Delaware’ (1974) 83 *Yale Law Journal* 663, 668, 701-705; Lucian Arye Bebchuk, ‘Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law’ (1992) 105 *Harvard Law Review* 1435, 1443-44.

¹⁵² See Kumm (n 18) 510; Sevenster (n 149) 54, 61; 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 <<http://www.cbr.cam.ac.uk/pdf/WP323.pdf>>. Accessed 30 April 2014.

¹⁵³ See Roger Van den Bergh, ‘The subsidiarity principle in European Community law: some insights from law and economics’ (1994) 1 *Maastricht Journal of European and Comparative Law* 337, 345, 355-56.

problems of market abuse have important implications for each individual Member State, its overall impact and the risk of regulatory arbitrage can only be fully perceived and dealt with in a cross-border context.¹⁵⁴

The scholarship generally supports the assumption that the cross-border dimension of a problem is a valid reason for the EU, rather than the Member States, to regulate an issue.¹⁵⁵ It has been suggested in the literature that market abuse has an important transnational dimension. To this end, one should consider that market abuse can be carried out across borders and takes place on a financial market that is increasingly integrated. First, market abuse offences can occur in one or more Member States different from that where the market concerned is localized. Secondly, the relevant actors, e.g. the insider and the tippee, might operate in different countries. Consequently, the market failure caused by either insider dealing or manipulation has a transnational dimension that requires a coordinated reaction from the Member States' authorities.¹⁵⁶ It can be legitimately argued that the Union policymaker should specify in more detail how divergences among national definitions of market abuse offences and divergences in sanctions would give rise to distortions to competition. It can also be queried why the EU legislator did not explain in more detail why EU action provides for 'clear benefits' in relation to Member State action. It could for example have been argued that there is, at least, a risk that disparities in national sanctioning regimes create 'regulatory races' to the bottom, which the Member States do not have incentives to correct.¹⁵⁷ However, the point of the legality enquiry is not to assess whether the Commission could have offered more reasons and provide for a more comprehensive justification. The only question here is whether the reasoning is 'inadequate' to support the claim for harmonization. The Commission has proposed two separate justifications for why there is a risk for a market failure, i.e. risk for 'safe havens' and 'regulatory races' and also offered one reason, the 'cross-border dimension' of market abuse to justify why EU action provide for 'clear benefits'. All those justifications are supported by the relevant literature as constituting compelling justifications for EU harmonization. Because the Commission has offered at least one reason for compliance with the 'market failure criterion' and the 'clear

¹⁵⁴ See Market Abuse Crimes Proposal (n 20) 3, 5; SEC (2010) 1496 (n 147) 15; SEC (2011) 1217 (n 20) 33.

¹⁵⁵ Van Zeben (n 46) 30; Jacques Pelkmans, 'The Economics of Single Market Regulation', Bruges European Economic Policy Briefings 25/2012, 10-11. <<http://www.coleurope.eu/sites/default/files/research-paper/beep25.pdf>> Accessed 8 May 2014.

¹⁵⁶ See Guido A Ferrarini, 'The European Market Abuse Directive' (2004) 41 *Common Market Law Review* 711, 717-718.

¹⁵⁷ See Van Zeben (n 46) 24; Bermann (n 1) 451-52.

benefits' criterion¹⁵⁸, it must be concluded that the Commission/EU legislator has met the test of 'adequate reasoning'.

B Has the Commission submitted sufficient evidence to justify compliance with the subsidiarity principle?

This section consider whether the Commission had submitted sufficient evidence in the legislative background documents to justify that the Market Abuse Crimes Directive conformed to the subsidiarity principle.

First, let us look at the Commission's claim that harmonization 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. This claim is substantiated by 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 administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD).¹⁵⁹ The CESR's report and the summary of this report in the Impact Assessment¹⁶⁰ show the following. First, neither of the offences of insider dealing or 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 (BG-SI) for infringements of Article 2 of the MAD 2003/6/EC providing for insider dealing by a primary insider whereas five Member States (BG-CZ-EE-FI-SI) 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 (BG-SI) lack criminal sanctions for the offence of 'tipping' by primary insiders contained in Article 3b MAD whilst four Member States (BG-IT-SI-ES) do not provide for criminal sanctions for insider dealing by secondary insiders (Article 4 MAD). It

¹⁵⁸ See above section I (B) in the present chapter for a discussion of the 'market failure' criterion and the 'clear benefits' criterion.

¹⁵⁹ 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 as the legal situation looked 17 Oct 2007.

¹⁶⁰ The CESR Report, (n 159) 3, also includes Iceland and Norway while the Impact Assessment from 2011, SEC (2011) 1217 (n 20) 124-125, only concerns the 27 Member States of the Union. My summary is only concerned with the situation in the Member States.

also emerges that eight Member States (BG; CZ; ET; FI; DE; IT; SI; ES) lack criminal sanctions for improper disclosure of insider information by secondary insiders pursuant to Article 4 in MAD whereas six Member States (BG; CZ; DE; IT; SI; ES) lack criminal sanctions for ‘tipping’ by secondary insiders (Article 4 MAD). Finally, it is clear that four Member States (BG-SK-SI-AT) do not criminalize infringements of Article 5 of the MAD providing for market manipulation cases.¹⁶¹ The Commission argues that these divergences, as shown by the CESR report, give rise to safe havens and a race to the bottom thus creating a risk for distortions of competition.

The threshold for legality is divided into two parts. The Commission satisfied the first limb, as demonstrated above, by articulating two reasons, the distortion of competition rationale and the cross-border nature of market abuse offences, which were compelling enough in theory, to demonstrate subsidiarity compliance. The second part of the test considers whether those rationales are substantiated with ‘sufficient’ and ‘relevant evidence’. I argue that the Commission’s reasoning does not pass this test. This is because the Commission’s only evidence, i.e. the CESR report, does not validate the far-reaching conclusion that these divergences give rise to or imply an imminent risk of distortions of competition. Whilst the EU legislator can use Article 114 TFEU for pre-emptive harmonization to avoid the emergence of future obstacles to trade resulting from multifarious development of national laws in relation to the criminalization of market abuse, the emergence of such obstacles must be *likely*. This means that there cannot be an abstract or remote risk of distortions of competition but proof that the risk is going to be realised in the immediate future.¹⁶² The EU legislator has failed to show that it is ‘likely’ that distortions of competition would arise from divergences in the Member States’ sanctioning of market abuse offences.¹⁶³

Whilst the report is able to support the conclusion that there are divergences in Member States’ legislation and the assumption that these divergences potentially give rise to distortions of competition, it does not prove that these potential distortions are imminent or concrete.¹⁶⁴ ‘Simple disparities’, as shown by the CESR report, are not sufficient to show the

¹⁶¹ See CESR Report (n 159) 2-3, 5; SEC (2011) 1217 (n 20) 124-125; Market Abuse Crimes Proposal (n 20) 3

¹⁶² See Case C-376/98 *Tobacco Advertising* (n 47), para 86.

¹⁶³ *ibid*, paras 84, 86, 107, 109.

¹⁶⁴ See Catherine Barnard, ‘Social dumping revisited- some lessons from Delaware’, ECSA’s Sixth Biennial Conference, 2-5 June 1999, Pittsburgh, USA, 16-18. < http://aei.pitt.edu/2222/1/002651_1.pdf >. Accessed 8 May 2014.

presence of distortions of competition justifying legislation under Article 114 TFEU.¹⁶⁵ Nor is it possible to invoke, as the Commission does, an ‘abstract’ or a ‘hypothetical’ risk for distortions of competition as a justification for EU legislation under Article 114 TFEU.¹⁶⁶ Subsidiarity compliance can only be justified if there is some proof of an imminent risk for a ‘race to the bottom’.¹⁶⁷ 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 ends up with all countries in a position that is worse than the one they could have secured by coordinating their policies.¹⁶⁸

The CESR report does not provide support for these assumptions. Whilst it can be assumed that there is sufficient economic interdependence in the EU, the report does not demonstrate that divergences in criminalization of market abuse and criminal sanctions for such offences have caused any Member State to unilaterally lower their enforcement standards. The report definitely does not demonstrate that the divergence in criminalization and the type of sanctions in relation to market abuse offences has created any general regulatory move to lower enforcement standards. Given the absence of evidence for a European Delaware with lenient market abuse sanctioning regimes where market abuse perpetrators would decide to engage in insider dealing transactions, the case for Union action based on a hypothetical ‘race to the bottom’ is a weak case.¹⁶⁹ Furthermore, because asymmetrical information, costs of

¹⁶⁵ See Case C- 376/98 *Tobacco Advertising* (n 47), para 84. There is an abundance of economic literature contesting that the mere presence of divergences give a reason for harmonization. In order to find that divergences must be removed by harmonization, the assessment must look more broadly at the costs and benefits of divergence. First, harmonization itself generates costs as opposed to the mere removal of the benefits of the current situation, and secondly the benefits of harmonization must be discounted to reflect uncertainty as to realization. Indeed from an economic perspective, the mere fact of divergence is not undesirable; 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.

¹⁶⁶ See Case C-376/98, *Tobacco Advertising* (n 47) paras 84, 106.

¹⁶⁷ See Enriques and Gatti (n 72) 966.

¹⁶⁸ See Radaelli (n 75) 2.

¹⁶⁹ See, however, an interview with EP Member Arlene McCarthy who seems to suggest that such havens exist: ‘There are currently considerable divergences between member states’ approaches to market abuse. It is important to have harmonised rules on criminal sanctions in order to ensure perpetrators cannot exploit differences in regimes across the EU. There is no *safe haven* for those intent on committing abuse.’ (emphasis added). She does not however refer to any concrete examples or evidence for this assertion; see European

information and the lack of transparency make it difficult for insider fraudsters to calculate and predict where legislation is most friendly and effective for them to commit insider dealing offences, there is no imminent risk of such safe havens arising.¹⁷⁰ In addition, while a claim can be made for the existence of a potential market failure in the form of safe havens for insider fraudsters, 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 such failures will occur. The only thing we can ascertain from these documents is an unsubstantiated claim that divergence undermines the internal market and leaves a certain scope for perpetrators of market abuse to carry out such abuse in jurisdictions which do not provide for criminal sanctions for a particular offence. It would have been perfectly feasible for the Commission to refer to academic articles¹⁷¹, national studies, company surveys or other sources to establish the risk for distortions of competition arising from different sanctioning regimes. The Commission has, however, failed to refer even to such general evidence.

In sum, since the race to the bottom and safe haven assumptions suggested in the proposal and the impact assessments to show compliance with the subsidiarity criterion have not been substantiated by sufficient evidence, the Market Abuse Crimes Directive fails to meet the standard of ‘relevant evidence’. Even though background studies and the impact assessments refer to some evidence for the existence of divergences in Member States’ laws in relation to the definitions of market abuse offences, this cannot justify a wide harmonization on the basis of a risk of ‘market failure’. There is no causal relationship between divergences and problems of ‘safe havens’ or regulatory ‘races to the bottom’. Since the Commission has been

Parliament News Article, ‘Insider trading: “No safe haven for those intent on committing abuse”’ (10 October 2012), No:20121005STO53037 <<http://www.europarl.europa.eu/news/en/news-room/content/20121005STO53037/html/Insider-trading-No-safe-haven-for-those-intent-on-committing-abuse>>. Accessed 8 May 2014. See also Jim Brunsten and Ben Moshinsky ‘No Escape From Jail or Fines in Global Market-Abuse Curbs’, *Bloomberg*, (25 September 2013) <<http://www.bloomberg.com/news/2013-09-24/no-escape-from-jail-or-fines-in-global-market-abuse-clampdown.html>> Accessed 8 May 2014. This article includes an interview with David Wright, secretary general of the International Organization of Securities Commissions who states that one wants to avoid a situation where ‘those who want corrupt global financial markets will go to those jurisdictions with low sanctions’.... ‘We don’t want that. We want tough and sufficient sanctions everywhere. It’s about closing loopholes.’ Wright however fails to offer any concrete examples on safe havens and loopholes.

¹⁷⁰ See above n 75 in the present chapter for reference to literature sustaining this point.

¹⁷¹ See Christopher Harding, ‘Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a ‘Joint Action’ Model’, in Christopher Harding and Bert Swart (eds), *Enforcing European Community Rules: Criminal Proceedings, Administrative Procedures and Harmonization* (Dartmouth publishing 1996) 31; Mireille Delmas-Marty, ‘The European Union and Penal Law’ (1998) 4 *European Law Journal* 87, 107; 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 149) 54-55.

unable to submit ‘sufficient’ evidence in the legislative background documents to sustain the distortion of competition argument, the Market Abuse Crimes Directive must consequently be condemned as not conforming to the subsidiarity criterion.

IV CONCLUSIONS

This chapter’s purpose was to consider the potential of subsidiarity as a limit on the exercise of Union powers. Building on the lessons from chapter 2 and 3 on the problems of constructing limits to EU competences and judicially enforcing those limits, the chapter examined three themes.

The first theme concerned the substantive construction of the subsidiarity principle and the rationales for EU harmonization. The literature has generally suggested that the weak legal content of subsidiarity makes it impossible to give any serious meaning to the principle. It has even been maintained that the subsidiarity principle is essentially a political principle and not a legal principle. Building on the criticism of the principle’s weak legal content I showed how the legal content of the principle could be reconstructed. I illustrated the potential for subsidiarity by examining closely the case for EU harmonization. It was demonstrated that EU harmonization is often justified on the basis of the EU’s commitment to protect the internal market and on the basis of the regulated problems’ cross-border nature and effect. I however, contended that the EU legislator’s justification for approximation on the basis of alleged market failures are often either exaggerated or not supported by the facts of the individual case. The key role of subsidiarity is to challenge the internal market rationale for EU harmonization. It was argued, on the basis of a cumulative reading of Article 5 TEU, the Court’s jurisprudence on the scope of Article 114 TFEU and the Edinburgh Guidelines that the subsidiarity principle demands that the EU legislator show the presence of or a risk of market failure of such a nature that only the EU could deal with it. This substantive criterion involves two sub-conditions. First, the Union legislator must establish that there is a risk of or an existing market failure. Secondly, the Union must show that that EU action provides for ‘clear benefits’ in removing that failure.

The second theme of the chapter was judicial review of subsidiarity. As shown by chapter 2, it is clear that the Court’s current approach so far has led to inadequate enforcement of the subsidiarity principle. Because the Court’s existing approach is based on its institutional

constraints and the principle's weak legal content, the proposed solution sought to tackle these problems. By applying procedural review, the Court could avoid criticism that it would intrude on the EU legislator's discretion by engaging in substantive policy judgments and economic assessments, which it would be less equipped to perform than the EU legislator. Building on the previous lessons in the scholarship on the problems of enforcing subsidiarity and recent proposal on enforcing subsidiarity with procedural means, I developed a comprehensive argument for procedural review of subsidiarity. I suggested, on the basis of the lessons of chapter 3, that the Court apply the standard of 'adequate reasoning' and 'relevant evidence' to implement the subsidiarity principle before the Court. Diverging from the prevailing approach in the literature advocating a deferential approach to subsidiarity review, I argued that the Court needs to move to a more intense and fact-based review of subsidiarity. To do this, I maintained that the Court should rely on the legality threshold developed in chapter 3 that the EU legislator must first offer at least one reason, which is compelling enough to independently justify compliance with each of the relevant subsidiarity conditions, the 'market failure' criterion and the 'clear benefits' criterion. The second part of the test requires that this/these reason/s be supported by 'sufficient' and 'relevant' evidence. The Court's procedural enquiry would depart significantly from the Court's previous case-law of subsidiarity, e.g. *Germany v Council*, *Alliance Health* and *Vodafone*, which only requires that reasons for subsidiarity be mentioned in the preamble to legislation and not that those reasons be linked to subsidiarity. It was argued that the time was ripe for the Court to move from a light touch approach to subsidiarity to a more intense and fact-demanding review. This was because of the introduction of the new Protocol (no 2) attached to the Lisbon Treaty, which firstly grants the Court an explicit power to review subsidiarity, secondly introduces a demanding reasoning and evidence requirement on the Union legislator and finally gives power to national parliaments to review subsidiarity.

The final theme of the chapter considered the application of subsidiarity. I examined the implementation of subsidiarity by examining the legality of the Market Abuse Crimes Directive. By applying the standard of review and test of legality in chapter 3 it was found that the Market Abuse Crimes Directive failed to conform to the subsidiarity criterion. Based on the standard of 'adequate reasoning' and 'relevant evidence' it was shown that the subsidiarity principle imposes serious limits on the exercise of EU competences. It was found that the Directive conformed to the requirement of 'adequate reasoning'. This was because the proposal and the impact assessment preceding the Directive had offered two justifications

for compliance with the ‘market failure’ criterion and one justification for compliance with the ‘clear benefits’ criterion. Those justifications had support in the relevant literature and were thus considered sufficiently compelling to demonstrate compliance with the subsidiarity principle. The Market Abuse Crimes Directive, however, failed to meet the ‘evidence’ requirement. This was because none of the Commission’s justifications, which were considered adequate for the purpose of the reasoning requirement, was supported by ‘sufficient’ and ‘relevant evidence’. The invoked evidence, the CESR report and the impact assessment, was only able to show the existence of divergences in relation to sanctioning and criminalization of market abuse in Member States, not that those divergences led to ‘safe havens’ and a ‘race to the bottom’. Nor was there was any other general or specific evidence which demonstrated a risk of ‘safe havens’ or a risk of ‘regulatory races’. The Commission’s broad assertions that divergences in national sanctioning regimes would give rise to distortions of competition were thus entirely unsubstantiated. Because the evidence submitted in the proposal and the accompanying impact assessment to sustain EU intervention on the basis of alleged distortions of competition and on the basis of the clear benefits of EU action was not sufficient, the Market Abuse Crimes Directive was consequently condemned.

This thesis set out to answer the question of how limits can be constructed to the exercise of Union competences. This concluding chapter seeks to give a final response to this question. The first part of the chapter examines the relevance of the research question. The second part of the chapter discusses the main findings of the thesis while the final part indicates directions for future research.

I THE RELEVANCE OF THE RESEARCH QUESTION

The thesis' departure point was to identify the central question in the current debate on EU competences. It was shown that the evolution of EU law and the development of EU competences mirror a change of focus from the 'existence' of competence to a focus on the 'exercise' of EU competences.¹ While for a long time it was discussed whether the Union should have powers in sensitive fields such as criminal law and asylum, this question no longer exists after the ratification of the Lisbon Treaty. After Lisbon, the important question is what the limits to the exercise of Union powers are.² It was also demonstrated that the mechanisms introduced by the Lisbon Treaty to divide powers between the Member States and the EU such as the competence catalogue and the description of the nature of EU powers has not been successful in limiting the expansion of EU powers under the functional powers in Article 114 TFEU and Article 352 TFEU. Nor has an obsession with retaining important national competences been fruitful in limiting the scope for competence creep.³ Instead of focussing on the formal delimitation of competences between the EU and the Member States we should examine how the powers are exercised. This is what in fact determines the division of powers between the EU and the Member States.

I further questioned whether thinking in terms of the 'existence' of competences makes sense in practical terms. This is because the issue of whether the EU acts within the scope of the limits of the Treaties actually depends on 'how' the EU legislates. If the EU proposes a measure outside the scope of a designated legislative power of the Treaties, the measure will

¹ See Article 5 TEU for the distinction between the 'existence' and the 'exercise' of EU competences.

² See above chapter 1-section I.

³ See above chapter 1- section II; chapter 2- section II (A).

be declared invalid, not necessarily because the EU does not have the power to act at all in that particular area but because the EU has exercised its competence incorrectly.⁴

In addition, it was shown by numerous examples that the limits to the exercise of EU competences are more important than limits to the existence of EU powers.⁵ The thesis demonstrated the existence of a number of procedural and substantive limits to the exercise of EU powers. In this regard, the requirement of the EU to act on the correct legal basis is a good illustration of the importance of focussing on the exercise of powers rather than whether the EU has a power to act at all.⁶ There are abundant examples in the Court's recent case-law showing how this condition is enforced by the Court. In those cases there has been no question of whether the EU would be competent to act at all but whether it should be done on a specific legal basis.⁷ The legal basis requirement matters greatly in practice because it dictates the rationale for exercising the competence and because it determines the decision-making to be followed and therefore the relative importance of each EU institution as well as, indirectly, the role of the Member States within the Union's system.⁸ In addition to the requirement of legal basis, the thesis showed several other important limits to the exercise of EU powers. These included the limitation on the use of competences contained in by Article 114 TFEU⁹, the subsidiarity principle¹⁰, which limits harmonization of national laws to where it is necessary to remedy a market failure (such as the limits to harmonization in Article 83(2) TFEU according to which 'harmonization' must be in place prior to the adoption of criminal law measures)¹¹ and the requirement to show that criminal law is essential for the enforcement of a specific EU policy when exercising its implied¹² and express¹³ criminal law competence.

⁴ See above chapter 1- section I.

⁵ See Loïc Azoulay, 'Introduction: the Question of Competence' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014) 14; Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2009) 285.

⁶ See above chapter 5-section III.

⁷ See above chapter 2, n 88, for references to this jurisprudence.

⁸ See René Barents' 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) *Common Market Law Review* 85, 90-94.

⁹ See above chapter 4- section II A.

¹⁰ See above chapter 6- section I.

¹¹ See above chapter 5- section II.

¹² See above chapter 4- section I A.

¹³ See above chapter 5- section I.

The thesis thus reinforced, on the basis of numerous examples of important limits to the exercise of EU competences, that we must shift the focus from the question of the ‘existence’ to the question of the ‘exercise of competences’.

II MAIN FINDINGS OF THESIS

In this section I will briefly summarize the main findings of the thesis and make some observations regarding their broader implications.

The thesis contained two main arguments that ran throughout the thesis. First, by reviewing specific EU criminalization measures adopted under the legal bases of the Treaties such as the Market Abuse Crimes Directive¹⁴, the Intellectual Property Crimes Proposal¹⁵ and the Environmental Crimes Directive¹⁶ and by generally examining the scope of the EU’s power under the legal bases of the Treaties to impose criminal sanctions¹⁷ and the scope of the subsidiarity principle in setting limits to the exercise of EU competences¹⁸, the thesis demonstrated the constraints faced by the EU legislator when exercising its legislative powers. It was suggested that the main way to establish limits is to develop the existing limits in the Treaties with appropriate criteria under which the legality of EU legislation can be assessed. This can be done on the basis of textual, policy-based and contextual reasons and criminological and economic evidence. Secondly, noting that a reconstruction of the limits of the Treaties also must tackle the institutional challenges of judicial review, the thesis developed an argument for a more intense and evidence-based judicial review. It proposed a procedural standard of legality which requires the EU legislator to show that it has adequately reasoned its decisions and has taken into account relevant evidence. I will begin by discussing the second argument.

A Judicial enforcement of the limits of the Treaties

Part I of the thesis examined the problems of the judicial review of the exercise of EU competences and in particular in reviewing their limits. It also endeavoured to build a framework for the review of EU legislation to be applied in Part II of the thesis. Part II then

¹⁴ See above chapter 5- section I (C); chapter 5- section II (D); chapter 6 III.

¹⁵ See above chapter 4- section II (A); chapter 6-section II (C).

¹⁶ See above chapter 4- section I (A); chapter 6- section II (C).

¹⁷ See above chapter 4; chapter 5.

¹⁸ See above chapter 6.

applied this framework and illustrated the limits of EU competences by analysing specific pieces of EU criminal law legislation and by examining the scope of the EU's competence to impose criminalization measures under different legal bases of the Treaties. I will now summarize and reflect upon the main findings of Part I of the thesis.

More objective criteria and external checks on the Court is needed to overcome conceptual and structural problems of the exercise of EU competences

Part I of the thesis, including the introduction and chapters 2 and 3, showed that while there are limits to the exercise of EU legislative competences, it is clear that these limits suffer from conceptual, structural and practical problems. Chapter 2 demonstrated these problems by analysing the three most important grounds of review; 'lack of competence', 'subsidiarity' and 'proportionality'. By examining the impact of these grounds of review before the Court, it was shown that judicial enforcement of all three grounds has been inadequate. The chapter reinforced the general recognition in the scholarship that the theoretical limits to EU competences do not coincide with practice.¹⁹ It was maintained that the Court's problem of 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 and the vague wording of the limits 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 legislator's political choices. Secondly, given the overarching *telos* of further European integration, the Court has not been structurally well-placed to engage in a strict review of EU competences.²⁰ While recognizing 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 scholars must offer the conceptual basis for controlling the exercise of EU competences to enable stronger judicial review of the limits of the Treaties. I devoted Part II of the thesis and chapters 4-6 to demonstrating how both substantive and procedural limits can be constructed to 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 reasons to take a more serious stance in competence

¹⁹ See above chapter 2- section II (A); chapter 2- section III (A); chapter 2- section IV (A).

²⁰ See above chapter 2- section II B; chapter 2- section III (B); chapter 2-section IV(B);chapter 3- section II.

litigation. The increased emphasis in the Lisbon Treaty on the limitation of competences and the adoption of new protocols and actors in the monitoring of EU competences demonstrate this point. In addition, the pressure from national courts will prompt the Court to become a credible arbiter in competence disputes. The Court cannot continue with low-level review without endangering its own legitimacy. The increased emphasis on the limitation of competences in the Lisbon Treaty, the recent conflicts on jurisdictional boundaries and the concern that the Court is not an objective arbiter in competence disputes, gives the Court strong reasons to move to a more intense form of judicial review in order to maintain its credibility.²¹

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

Even though the Court may be well-placed to review EU legislation and even if 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. Chapter 3 was devoted to the institutional and practical problem of judicial review. 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 legislator. While those constraints must be recognised and while such constraints have permeated the Court's practice in relation to its review of the exercise of broad Treaty powers, I argued that such reasons cannot be given a too broad interpretation such as to disqualify the Court from the area of competence review.²² But how should the Court then develop a more intense form of judicial review?

There are different options for the Court. The Court could engage in more intense substantive review or develop new heads of review.²³ The reasons based on institutional legitimacy and competence makes it difficult for the Court to move to more intense substantive review.²⁴ The main proposal for remedying the institutional problems of the judicial enforcement of existing EU limits was for the Court to examine the evidential and procedural basis for the legislative measure and to change the focus from 'substantive review' to 'procedural review'. I defined procedural review as an approach to judicial review that requires the Court to consider

²¹ This thought was further developed above in chapter 3- section II; chapter 3- section III (D).

²² See above chapter 3- section II.

²³ See Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 439-440.

²⁴ See Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271, 287-288.

whether the EU legislator's reasoning and evidence is adequate to support the exercise of its legislative powers.²⁵

Procedural review was found to be attractive for several reasons. First, such a review requires the EU political institutions to provide the Court with adequate justifications and evidence. The Court therefore becomes empowered to review whether EU legislation conforms to the Treaties. Secondly, because such review is not focussed on the appropriateness of legislation it does not intrude on the EU legislator's sphere of discretion. For this reason, the Court is well-equipped to fulfil this task. Thirdly, because procedural review forces the EU legislator to openly justify its legislative choices in legislative background documents; transparency is likely to be improved by means of procedural review.²⁶

A test of legality, which demands the EU legislator to 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 reasons of competence and legitimacy often 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 fell short of achieving credible judicial enforcement of the limits of the Treaties.²⁷ In addition, while there are some indications in the Court's jurisprudence of a more procedural approach to judicial review, this type of procedural review has not so far been successful in restraining the exercise of EU competences.²⁸ 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 review of all broad EU policy measures. I distilled the standard of review from the Court's judgment in *Spain v Council*²⁹, which provided an appropriate benchmark. The proposed standard of review suggested that the EU legislator must offer 'adequate reasoning' and 'relevant evidence' to maintain that a proposed legislative measure conforms to the limits of the Treaties.³⁰

²⁵ See above chapter 3- section III (A).

²⁶ See above chapter 3- section III (B).

²⁷ See above chapter 2- section II (A); chapter 2-section III (A); chapter 2- section IV (A); chapter 3- section II.

²⁸ See above chapter 3-section III (C).

²⁹ See Case C-310/04 *Spain v Council* [2006] ECR I-07285, paras 122-123.

³⁰ See above chapter 3- section IV (A) - (C).

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. 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 legislator to prepare more evidence-based legislation and also increase the legitimacy of the Court and the EU's legislative procedure.³¹ I considered the latter considerations more important when designing the test. I therefore suggested, on the basis of the Court's ruling in *Kadi II*³², an intrusive test to control whether the proposed standard of 'adequate reasoning' and 'relevant evidence' has met. First, the EU legislator must articulate at least one justification, which in theory is sufficient as a basis for exercising the competence. If there are several conditions to be met in the relevant EU rule, the legislator must offer one compelling rationale for each of these conditions. The benchmark when examining whether the justifications are 'adequate' is the relevant literature and the Court'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. The evidence criterion requires that the evidence is of a certain quantity and quality. To support the theoretical reasons for exercising the competence, there needs to be references in the legislative background documents to, at least, two different sources. In order to be reliable and adequate, the evidence submitted must be in the form of statistical studies, policy studies and/or scientific articles.³³

Having summarized the main argument of the first part of the thesis, i.e. that more intense and evidence-based judicial review and a clear test for legality are key mechanisms in constructing checks to the exercise of EU competences, it is now time to reflect on the practical application of this argument in the second part of the thesis.

B Reconstructing the limits of the Treaties

This subsection summarizes and reflects on the main findings of Part II of the thesis. Part II of the thesis used the EU's competence to impose criminal sanctions as an example on how

³¹ See Craig, *EU Administrative Law* (n23) 396; Dorota Leczykiewicz, "Constitutional Justice' and Judicial Review of EU Legislative Acts' Oxford Legal Studies Research Paper No. 95/2013 (November 17, 2013), 12-13. <<http://ssrn.com/abstract=2355961>>. Accessed 9 May 2104.

³² 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), paras 118-119, 124.

³³ See above chapter 3- section IV (D).

limits can be constructed to the EU's competences. The limits of EU competences were reconstructed by employing the framework developed in Part I. In particular, the practical analysis of specific criminal law measures in chapters 4-6 was done on the basis of standard of legality and test of legality developed in chapter 3.

The EU legislator and the Court must move towards a more evidence-based test of legality of EU legislation

It is well-known that the real scope of Union competences can only be determined by a comprehensive and detailed review of actual pieces of legislation and the relevant Treaty provisions.³⁴

The thesis reinforced this proposal. It demonstrated, by a review of concrete examples of EU criminal law legislation, the limits to the exercise of EU competences. The outcome of the examination was that few pieces of EU legislation seem to hold up to the standard of legality proposed of 'adequate reasoning' and 'relevant evidence'.³⁵ In some cases, such as the Intellectual Property Crimes Proposal³⁶ or the Directive on Deposit Guarantees³⁷, the EU legislator had failed to offer 'one' compelling justification for why the measure conformed to the relevant conditions of the Treaties. These examples illustrated that, while the requirement placed on the EU legislator, pursuant to the first limb of the test, to provide for at least one substantive justification for the exercise of a competence is not a high threshold to pass, this limb of the test is apt to exclude reasoning that is both insufficient and logically incoherent. Nevertheless, it often seems that the EU legislator is able to meet the criterion of 'adequate' reasoning when justifying EU legislation.³⁸

The difficult question, as shown from the review of selected EU criminal law measures, is for the EU legislator to provide relevant information for conformity with the evidence condition. The outcome of the enquiry is that while the EU legislator is surely able to invoke some

³⁴ See Robert Schütze 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 Yearbook of European Law 91, 146; Craig, *EU Administrative Law* (n 23) 368-371.

³⁵ See above for practical analysis of legislation: chapter 4- section I (A); chapter 4- section II (A); chapter 5- section I (C); chapter 5- section II (D); chapter 6- section II (C); chapter 6- section III.

³⁶ See above chapter 4- section II (A).

³⁷ See above chapter 6- section II (C).

³⁸ See above chapter 4- section I (A); chapter 4- section II (A); chapter 5- section I (C); chapter 6- section III (A).

evidence to justify its actions, the evidence presented is not generally³⁹ of such quality and quantity to match the EU legislator's broad claims of compliance with the relevant legal basis.⁴⁰ This suggests that what is really missing in the EU legislator'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's jurisprudence. In general terms, it seems 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.⁴¹ The Court's current test for judicial review in competence litigation has adversely affected the procedure for drafting of EU legislation. As suggested by Weatherill, the Court's case-law on Article 114 TFEU has indirectly worked as a 'drafting guide' for the EU legislator when designing legislation.⁴² The Court's current approach is, as shown in this thesis, inadequate. The Court must, I believe, be more intrusive when considering whether the necessary facts have been established before declaring the legality of the proposed measure.

The outcome of the examination of concrete examples of EU legislation suggest that the current way of drafting EU legislation, which is supported and confirmed 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.⁴³ However, if the EU legislator wishes to improve its legitimacy⁴⁴ and if the Court wishes to become a credible arbiter between Member States and the EU in competence disputes⁴⁵, it may not be sufficient for the Court to control the EU legislator's reasoning. It can be legitimately argued that the EU legislator 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 legislator has exercised its discretion correctly.⁴⁶

³⁹ The exception is the Environmental Crimes Directive, which was considered to conform to the standard of 'relevant' evidence when examined in the light of the subsidiarity principle; see above chapter 6- section II(C).

⁴⁰ See above chapter 4- section I (A); chapter 5- section I (C); chapter 6- section II (C); chapter 6- section III (B).

⁴¹ See above chapter 3- section IV (E).

⁴² 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, 844.

⁴³ See above chapter 4- section I (A); chapter 5- section I (C); chapter 6- section II (C); chapter 6-section III (B) for evidence of this point.

⁴⁴ See above chapter 3- section II.

⁴⁵ See above chapter 2- section II (B).

⁴⁶ See Case C-310/04 *Spain v Council* (n 29), paras 122-135.

The ‘essentiality’ condition is a substantive limitation apt to act as a check to the exercise of the EU’s implied and express criminal law competence

Chapter 4 and chapter 5 examined the scope of the EU’s implied and express criminal law competence. The examination demonstrated several important substantive and procedural limits to the exercise of EU powers in this field.

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’s jurisprudence and to the new power contained in Article 83(2) TFEU. Due to the Court’s weak legitimacy in assessing the appropriateness of criminal law measures⁴⁷ and a belief that ‘essentiality’ condition will be or should be interpreted in light of the effectiveness principle,⁴⁸ the role of this limit has been underestimated in EU scholarship, which has argued that it has no role to play in limiting the exercise of EU competences.

Instead, the thesis demonstrated by examining some recently adopted EU criminal law measures⁴⁹ that this requirement can act as check on the exercise of the EU’s criminal law competences. The thesis showed that the light ‘essentiality’ test, evidenced by the Court’s previous judgments in *Environmental Crimes* and *Ship-Source Pollution*, 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, political and criminological arguments to challenge the rationale for the exercise of EU criminal law competences and to develop a test for judicial review.⁵⁰ I suggested that criminological evidence is needed to establish the legality of the exercise of EU criminal law competences. It was demonstrated 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 empirical evidence, that criminal sanctions are ‘essential’ for the ‘effective’ implementation of Union policies.⁵¹

⁴⁷ 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)102.

⁴⁸ See Ester Herlin Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012) 57-60, 65.

⁴⁹ See above chapter 4- section I (A); chapter 5- section I (C).

⁵⁰ See above chapter 5- section I (B).

⁵¹ See above chapter 4- section I A; chapter 5- section I (B).

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 should sharpen judicial review of EU criminal law legislation and the thesis argued for a strict test of judicial review under Article 83(2) TFEU. It is the fact that the EU potentially has a power to impose imprisonment sanctions which ultimately give a reason for more intense judicial review of the exercise of this power. Because criminal penalties severely restrict the freedoms of individuals and are liable to infringe their fundamental right to freedom of movement and property and because the imposition of criminal sanctions entails severe stigmatization of the offender and substantial social costs, intense judicial review of criminal law measures are justified.⁵²

The potential of the ‘essentiality’ condition was illustrated by its application to the Market Abuse Crimes Directive and to the Environmental Crimes Directive. This analysis was done on the basis of the legality standard of ‘adequate reasoning’ and ‘relevant evidence’.⁵³

The result of these enquiries was similar. They showed that the EU legislator in both cases had properly explained compliance with the ‘essentiality’ condition on the basis of convincing deterrence logic.⁵⁴ It was also, however, shown in these two case studies that the EU legislator was unable to fulfil the requirement of ‘relevant’ evidence. In both the cases, the Commission’s only compelling justification, the ‘deterrence’ argument, was not supported by sufficient evidence that could support the superiority of criminal over non-criminal sanctions.⁵⁵

The examination of both the Environmental Crimes Directive and the Market Abuse Crimes Directive showed how powerful the limits to the exercise of the EU’s criminal law competence are. If we apply the test of legality, requiring that the substantive justifications for exercising this competence, i.e. the ‘deterrence’ rationale, must be supported by ‘sufficient’ and ‘relevant’ evidence, it can be ascertained that the EU legislator justifies criminal law legislation on questionable assumptions, which are not backed by proven facts. The examination of these examples also regrettably shows that the EU legislator currently employs its criminal law competence without considering available non-criminal sanctions and without

⁵² See above chapter 5- section I (B).

⁵³ See above chapter 4- section I (A); chapter 5-section I (C).

⁵⁴ *ibid.*

⁵⁵ *ibid.*

any clear idea of why criminal sanctions are necessary.⁵⁶ This approach from the EU legislator must be condemned both as a matter of policy and from a legal perspective. 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 'effective 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 legislator intended that criminal laws should only be used in exceptional situations when other non-criminal measures were shown to be deficient.⁵⁷ The conditions for exercising the competence requires the EU legislator to prove on a case-by case basis that criminal sanctions are 'essential' to ensure the effective implementation of a specific Union policy.⁵⁸ These example showed that the EU legislator needs to seek out and refer to more substantial and reliable evidence to convince the general public that EU criminalization is 'essential' for the enforcement of EU rules. These examples also indicate that the EU legislator, despite the Commission's assurance that it will rely on clear factual evidence and use criminal law as a 'last resort'⁵⁹, cannot yet be trusted as a conscientious legislator observing the limits of its legislative powers in the field of criminal law.

If the EU legislator did not have sufficient evidence at its disposal for criminalization what could then have been the rationale for pursuing these initiatives? It is difficult to speculate but it is plausible to argue that there are expressive reasons behind these initiatives. The thesis 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 EU's action in such cases could potentially be explained with reference to the Union's need to reaffirm its core values and to strengthen its political identity. This is the expressive dimension of EU criminal law.⁶⁰ This expressive dimension has not only, as suggested by Turner, saturated the EU's initiatives

⁵⁶ *ibid.*

⁵⁷ See CONV 426/02, 'Final report of Working Group X "Freedom, Security and Justice"', Brussels, 2 December 2002, 10; 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'), 7, 8, 10.

⁵⁸ See CONV 727/03, 'Draft sections of Part Three with comments', Brussels, 27 May 2003, 32.

⁵⁹ See COM 2011/ 573 (n 57) 7-8.

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

under Article 83(1) TFEU.⁶¹ It is also argued that they may, by reference to the proposals examined in this thesis, explain the EU's recent criminal law initiatives under the EC Treaties and under Article 83(2) TFEU.

What are those reasons then? The expressive/symbolic dimension is to communicate a common sense of justice and to express that 'certain forms of conduct are unacceptable'⁶². This observation is well-supported by the Commission's Green Paper on criminal sanctions.⁶³ In this document, the Commission stated that by defining common offences and penalties in relation to certain forms of crime, the Union would be putting out a symbolic message. The approximation of penalties would help give the general public a shared sense of justice, which is one of the conditions for establishing the area of freedom, security and justice. This would send a clear signal that certain forms of conduct are unacceptable and punished on an equal basis.⁶⁴

Nevertheless, the current Treaties provide no clear authorization for harmonizing criminal law on expressive grounds.⁶⁵ 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 harmonizing criminal laws in the absence of a real practical need and firm legal basis for harmonization. This means that the EU should limit itself to harmonize national criminal laws to instances where criminalization is 'essential' to implementing existing EU rules.⁶⁶

An important substantive limitations to the exercise of EU harmonization powers is the need to show the presence of 'serious' 'market failures'

Chapter 4 and chapter 6 of the thesis furthermore examined the relationship between criminal law and the internal market. The problems of employing the internal market rationale for criminalization was analysed within the framework of Article 114 TFEU and the subsidiarity

⁶¹ *ibid* 564-574.

⁶² See Commission, '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, recital 7.

⁶³ See Thomas Elholm, 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 191, 224-225, for this argument and for more symbolic/expressive reasons for criminalization.

⁶⁴ 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.

⁶⁵ See Turner (n 60) 558.

⁶⁶ *ibid* 579.

principle. 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 harmonization. The thesis demonstrated how legal, functional and economic arguments can be employed to challenge the exercise of competence under Article 114 TFEU and how those arguments can construct a robust subsidiarity principle. My key argument was that EU harmonization can only be pursued on the basis of proof of a risk for ‘market failures’. Unless such a risk is demonstrated, there is no case for EU harmonization.⁶⁷ This approach to subsidiarity and Article 114 TFEU was not only supported by comprehensive research on regulatory policies and economic arguments but firmly supported by the Court’s judgment in *Tobacco Advertising*.⁶⁸

EU criminal law was a case in point for challenging the internal market justification. It was first shown that that the EU legislator’s general theoretical assumption that national divergences in relation to the definition of offences or divergences between Member States’ sanctioning regimes laws leads to distortions of competition in the form of safe havens and a race to the bottom is misplaced. The existences of such divergences cannot in themselves justify a broad harmonization of criminal laws.⁶⁹ This is because there is no logical relationship between divergences of laws and distortions of competition.⁷⁰ The empirical research instead suggests that differences in sanctioning regimes or differences in criminalization 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. Because of this, the use of the general distortion of competition rationale to justify harmonization of criminal law at an EU level was questioned.⁷¹

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 threshold developed in chapter 3 that at least one compelling justification for compliance must be submitted for compliance with the ‘market failure’ criterion and the ‘clear benefits’ criterion, and that those justifications must be supported with sufficient and relevant evidence, I showed that neither the Intellectual

⁶⁷ See above chapter 4- section II (A); chapter 6- section I (B).

⁶⁸ See above chapter 6- section I (B).

⁶⁹ This idea is well-supported by the Court’s case-law: Case C- 376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419, para 84.

⁷⁰ 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) 22-25.

⁷¹ See above chapter 4- section II (A); chapter 6- section I (B).

Property Crimes Proposal⁷² nor the Market Abuse Crimes Directive⁷³ conformed to the proposed limits to harmonization. From a broader perspective, the examination of the Market Abuse Crimes Directive and the Intellectual Property Crimes Proposal demonstrated the strong potential of the subsidiarity principle and the limits in Article 114 TFEU in restraining the exercise of the EU's competence. They also further showed how the procedural application of the subsidiarity principle⁷⁴ and Article 114 TFEU⁷⁵ is enhanced by employing the test of legality and standard of review proposed in chapter 3.

These examples and the discussion in the thesis show that while EU harmonization is often defended on the basis of the EU's commitment to protect the internal market⁷⁶ and on the basis of the regulated problems' cross-border nature and effect⁷⁷, the EU legislator's justification for approximation on the basis of alleged market failures are often either exaggerated or not supported by the facts of the individual case.⁷⁸ This cautiously suggests that, in relation to harmonizing criminal law measures, the objective of the EU legislator objective is harmonization as such. Harmonization of national criminal laws cannot, however, be a goal in itself⁷⁹ but must meet the precepts of the Treaties and only be triggered if there is a legitimate justification for approximation.⁸⁰

One of the key procedural limits to the exercise of EU criminal law powers is the need to have harmonization measures in place before the adoption of criminalization measures

In addition, the thesis established some important procedural limitations to the exercise of EU regulatory criminal law competences. One of these limitations is that the EU under Article 83(2) TFEU must have 'harmonization measures' in place before it can adopt criminal law measures. I argued that it is only secondary legislation adopted through the 'ordinary' or 'special' legislative procedures that have been adopted prior to the criminal law directive can

⁷² See above chapter 4- section II (A).

⁷³ See above chapter 6- section III.

⁷⁴ See above chapter 6- section III.

⁷⁵ See above chapter 4- section II (A).

⁷⁶ See above chapter 4- section II (A); chapter 6- section I (B).

⁷⁷ See above chapter 6- section III (A).

⁷⁸ See above chapter 4- section II (A); chapter 6 section III (B).

⁷⁹ See 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) 12-13.

⁸⁰ See 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) 56.

constitute ‘harmonisation’ measures within the meaning of Article 83(2) TFEU. This meant that harmonisation through Treaty amendments, recommendations or international agreements would not qualify as ‘harmonisation’ measures under Article 83(2) TFEU as such harmonisation measures have not taken place through the ‘special’ or ‘ordinary’ legislative procedure as required by this legal basis. It was also argued that the precondition for employing Article 83(2) TFEU is ‘substantive’ harmonisation of the relevant prohibitions or harmonization of conditions for non-criminal liability which describe the prohibited types of behaviour in detail.⁸¹

I examined the application of the ‘harmonization’ requirement by considering two fields of EU law; EU competition law and EU market abuse law. It was first demonstrated that EU competition law could not be harmonized under Article 83(2) TFEU because this field of law has not been subject to ‘harmonization’ measures within the meaning of Article 83(2) TFEU. Because of the requirement that the legislative procedure must be of an ‘ordinary’ or ‘special’ nature, the EU legislator could neither use the Treaty harmonization in Article 101 TFEU and Article 102 TFEU nor Regulation 1/2003 TFEU to trigger the competence in Article 83(2) TFEU.⁸² In the case of EU financial regulations, it was conversely shown that the 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 firstly intended to constitute a ‘substantive’ harmonisation measure. It was adopted on the legal basis of Article 114 TFEU, which is the general harmonization provision of the Treaties, and aims to remove distortions of competition and obstacles to trade arising from divergent national laws on the regulation of market abuse. It was not only intended as a substantive harmonization measure but 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.⁸³

These examples showed the importance of the ‘harmonization’ requirement in practice and why it is ‘essential’ that EU adopts harmonization measures before it resorts to

⁸¹ See above chapter 5- section II (A) - (B).

⁸² See above chapter 5- section II (C).

⁸³ See above chapter 5- section II (D).

criminalization. While the application of this requirement could at first sight seem overly formalistic, its application could be defended on logical and principled grounds. 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 harmonization measures. Only if non-criminal rules and harmonization of substantive EU rules prove insufficient to achieve compliance with the underlying EU rules, is there a need to adopt criminal sanctions.⁸⁴ The application of this condition showed how the Lisbon Treaty has changed the legal landscape of EU law on competences by imposing new, demanding conditions for harmonization.⁸⁵

The nature of Article 83(2) TFEU can act as a restraint for the adoption of criminal law ‘directives’ under Article 114 TFEU and Article 352 TFEU

One of the most important general limitations to the exercise of EU competences is the need to act on the correct legal basis. I analysed this limitation by examining what the correct legal basis for criminalization of existing EU policies after Lisbon is. By scrutinizing the relationship between Article 83(2) TFEU and the general legislative powers under Article 114 TFEU and Article 352 TFEU, I demonstrated that the Lisbon Treaty, despite the Member States’ attempt to limit criminal law cooperation to Title V and Article 83 TFEU, has not been able to resolve the potential for litigation over the appropriate legal basis for criminalization measures.⁸⁶

First, it was shown that Article 83(2) TFEU has assumed the role of *lex specialis* within the field of criminal sanctions for the enforcement of existing EU policies.⁸⁷ It was demonstrated that the existence of Article 83(2) TFEU could restrain the adoption of criminal law measures on the basis of other legal bases of the Treaties such as the broad functional power of Article 114 TFEU and Article 352 TFEU. The wording of Article 114 TFEU and Article 352 TFEU and the Court’s case-law suggests that those provisions are subsidiary to other more specific legal bases. Given the fact that most legislative proposals adopted in the field of criminal law

⁸⁴ See Petter Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part I* (Jure 2013)133-135; Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 47) 109-111.

⁸⁵ See Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 45 *Common Market Law Review* 617, 638-48.

⁸⁶ See 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) 332-333, 339; Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 47) 103-109.

⁸⁷ See Dougan, ‘From the Velvet Glove to the Iron Fist’ (n 47) 109-111.

must be adopted on the more specific legal basis of Article 83(2) TFEU, I maintained that the nature of this provision generally limits the exercise of criminal law powers under the functional powers of Article 114 TFEU and Article 352 TFEU.⁸⁸

However, the nature of Article 83(2) TFEU could not entirely extinguish the exercise of an implied criminal law competence under other legal bases of the Treaties. This was firstly because EU criminal law measures in the form of ‘regulations’ which both criminalize and ‘de-criminalize’ certain behaviours fall outside the scope of the power contained in Article 83(2) TFEU. Secondly, the existence of Article 83(2) TFEU could not limit the criminalization of EU competition law infringements under other legal bases of the Treaties. This was because such criminalization cannot take place under Article 83(2) TFEU due to the lack of previous ‘harmonization’ measures in the field of competition law. Thirdly, because the EU’s general competence to harmonize criminal laws derived from the Court’s judgments in *Environmental Crimes* and *Ship-Source Pollution* was premised on the ‘effectiveness’ principle and because the enforcement of several EU policies in theory could benefit from criminalization, there was a strong case for employing this power for criminalization even after Lisbon.⁸⁹ 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. This means that EU criminal law ‘regulations’ and EU measures de-criminalizing certain behaviours in the fields of EU environmental law, EU market abuse law and EU competition law, can still be adopted under legal bases of the Treaties other than Article 83(2) TFEU. The legal bases of Article 114 TFEU (competition⁹⁰ and market abuse⁹¹), Article 192 TFEU (environment⁹²) would be strong candidates for such measures.

These findings reinforced a well-known lesson from EU law that the EU’s system of competences is not coherent. The Treaties have created a complex system of specific and general legal powers, which is inconsistent in many ways. Since the system of competences is founded on the EU’s objectives, given the fact that not all 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

⁸⁸ See above chapter 5- section III (A) - (B).

⁸⁹ See above chapter 5- section (A) - (C).

⁹⁰ See above chapter 4-section II A; chapter 5- section II (C).

⁹¹ See above chapter 4- section II (A).

⁹² See above chapter 4- section I (A).

legal basis for a potential EU measure.⁹³ The general argument of the incoherence of the EU's system on competences is strengthened by another example provided in the thesis, i.e. the problem of retained EU powers.⁹⁴ As we know there are constitutional prohibitions against harmonization in the Treaties of certain policy areas such as human health. In this policy area it is clear that the Union only has a complementary or supporting competence.⁹⁵ However, since the Union has been conferred with a Treaty mandate to take into account human health when it defines its policies, the construction of the Treaties has failed to secure the existence of exclusive Member State powers in this field.⁹⁶ While measures that directly harmonize national laws in culture, human health or education are contrary to the Treaties, it must be recognised that those fields⁹⁷ may be affected when the Union exercises its competence under Article 114 TFEU.⁹⁸ This is for the simple reason that the Union is tasked with promoting these policies when it implements its policies.⁹⁹

This discussion reinforces the initial observation of the thesis¹⁰⁰ 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. 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, one would have to renegotiate and draft the Treaties differently. There would have to be an additional provision in Title V of the TFEU to the effect that EU criminal law harmonization can only be pursued under Article 83 TFEU and an additional clause in Article 114 TFEU stating that EU internal market legislation cannot have a significant effect on the Member States' retained policy fields such as public health and culture.¹⁰¹

⁹³ See Stephen Weatherill, 'Competence creep and competence control' (2004) 23 Yearbook of European Law 1, 4-5.

⁹⁴ See above chapter 2- section II (A).

⁹⁵ See Articles 6 (a) and 168(5) TFEU.

⁹⁶ See Articles 9, 114 (3) and 168 TFEU; European Convention, CONV 375/1/02, 'Final Report of Working Group V on Complementary Competencies', Brussels, 4 November 2002, 4-5.

⁹⁷ That education and human health are complementary competences follows from Articles 6 (a) and 6 (e) TFEU; CONV 375/1/02 (n 96) 9.

⁹⁸ See Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin von Bogdandy and Jürgen Bast *Principles of European Constitutional Law* (Hart 2009) 286-287, and Robert Schütze *From Dual to Cooperative Federalism* (OUP 2009) 150-151, for support of this argument.

⁹⁹ See Article 9 TFEU; Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2013) *European Law Journal*, 8-9. Doi: 10.1111/eulj.12079.

¹⁰⁰ See above chapter 1- section I.

¹⁰¹ See Weatherill, 'The limits of legislative harmonisation' (n 42) 855-856, cautiously supporting this point.

III OUTLOOK FOR THE FUTURE

EU law on competences is a vast topic which has been subject to countless examinations and academic books.¹⁰² The intention of the thesis was not to comprehensively cover the whole subject-matter. The ambition was more modest. The thesis firstly aimed to identify the important questions regarding EU law on competences after the Lisbon Treaty.¹⁰³ Secondly, the thesis endeavoured to contribute to an understanding of how limits to the exercise of Union competences can be constructed.

The thesis made important choices by restricting the scope of the examination. First, the enquiry was restricted to the EU's competences to impose individual criminal sanctions for the enforcement of substantive policies, i.e. EU regulatory criminal law. This was because EU regulatory criminal law illustrates the general evolution of EU competences, showing a shift in focus from the existence to the exercise of EU competences and because an examination of the EU's competences in this field nicely demonstrated the limitations to the EU's competences.¹⁰⁴ There are obviously other EU policy fields that would further help to understanding the limits to EU competences.¹⁰⁵ Because my enquiry was limited to EU regulatory criminal law, my thesis only covered the legal bases of Articles 83(2) TFEU, 103 TFEU, 114 TFEU, 192 TFEU and 352 TFEU.¹⁰⁶ While the chosen legal bases are important in terms of their impact on harmonization (Article 114 TFEU and Article 352 TFEU) and in terms of EU criminal policy (Article 83(2) TFEU and Article 192 TFEU)¹⁰⁷, a more accurate understanding of the limits to EU competences would require an analysis of the scope of several other legal bases of the Treaties.¹⁰⁸ Moreover, although I examined Article 114 TFEU and Article 352 TFEU, my examination was focussed on the scope to impose criminal

¹⁰² See above chapter 1, n 1-2, n 11 and n 31, for references to some of the most relevant literature.

¹⁰³ See above chapter 1- section I.

¹⁰⁴ See above chapter 1- section I; chapter 1- section IV.

¹⁰⁵ See for more general accounts of EU competences: 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); Schütze, *From Dual to Cooperative Federalism* (n 98).

¹⁰⁶ See above chapter 1- section V.

¹⁰⁷ See COM 2011/ 573 (n57) 6, 10-11.

¹⁰⁸ See Schütze, *From Dual to Cooperative Federalism* (n 98), chapter 3, 156-179, and chapters 4-6; Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014), chapters 3-6.

sanctions under these provisions and not on the general scope of these provisions for harmonization.¹⁰⁹

Secondly, the scope of the examination was limited to the legal grounds of subsidiarity and lack of competence. While the thesis justified this limitation on the basis of the relevance of these legal grounds¹¹⁰, it is clear that I did not examine all of the main grounds for judicial review.¹¹¹ It is arguable that other legal grounds such as proportionality¹¹² or fundamental rights¹¹³ can act as checks on the exercise of EU powers in other contexts, such as review of EU administrative decisions.¹¹⁴ For this reason, an important direction for future research is to consider which of the other general principles of law¹¹⁵ and the other limits of the Treaties can be used as ground on which the exercise of EU powers can be challenged. This is particularly the case for EU criminal law where several fundamental rights can restrict the exercise of EU legislative competences.¹¹⁶

It must also be recognised that although the thesis contributed to the debate on judicial review, this field is still an undeveloped field of EU law. While some scholars have begun to examine the rationale for, the nature of and the standard of judicial review in EU law¹¹⁷, this is still an emerging research area. This can easily be demonstrated with a comparison to the US where

¹⁰⁹ See in relation to Article 114 TFEU: Weatherill, 'The limits of legislative harmonisation' (n 42); Derrick Wyatt, 'Community Competence to Regulate the Internal Market' in Michael Dougan and Samantha Currie (eds), *50 Year of the European Treaties: Looking Back and Thinking Forward* (Hart 2009). In relation to Article 352 TFEU; 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; Carl Lebeck, 'Art. 308 EC-treaty, from a democratic to a constitutional deficit? implied powers, accountability and the structure of the European Community' (2007) *Europarättslig tidskrift* 365.

¹¹⁰ See above chapter 2- section I.

¹¹¹ François-Xavier Millet has for example presented a compelling argument for why the obligation to respect national constitutional identities in Article 4 (2) TEU is an important limit to the exercise of EU competences; see 'The Respect for Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014).

¹¹² Proportionality was dismissed as a relevant ground for judicial review of general EU legislation primarily because of the conceptual problems of arguing that an EU measure objectively infringes on national autonomy; see above chapter 2- section III (B).

¹¹³ 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 Article 7 and 8 of the Charter of Fundamental Rights.

¹¹⁴ See Craig, *EU Administrative Law* (n 23) 591-615.

¹¹⁵ *ibid*, chapters 14-21.

¹¹⁶ See Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 675-688, 767-769; Dougan, 'From the Velvet Glove to the Iron Fist' (n 47) 113-127.

¹¹⁷ See Craig, *EU Administrative Law* (n 23), chapters 15, 19-20; Alexander Fritzsche, 'Discretion, scope of judicial review and institutional balance in European law', (2010) 47 *CML Rev*, 361; Alexander Türk, *Judicial Review in EU Law* (Edward Elgar 2009).

the debate on judicial review has been a central issue of constitutional debate for centuries.¹¹⁸ There is also substantial scope for more research on the general relevance of procedural review for other fields of EU law, such as competition law and state aid, or considering its relevance for other jurisdictions.¹¹⁹ There is also room for examining further the legitimacy of judicial review in the EU legal order. This thesis provided a narrow example of how judicial review of EU legislation can be defended on principled grounds.¹²⁰ There is definitely scope for doing more general research on how different factors, such as the nature of democracy in the Union, the workload of the Court, its resources, the amendments of the Treaties, political climate, influence and affect the standards and scope of judicial review.¹²¹ While some of my arguments discussed these factors, the relevance of these factors may change and some of my assumptions may then be shown not to substantiate my argument. There is particularly ample opportunity for research on comparative institutional analysis to understand both why and how the Court of Justice intervenes in litigation. There is certainly a need for more transparent rules on when the Court should leave decision-making power to the political institutions and when it should intervene.¹²²

In terms of the substantive areas of law, EU criminal law is still a young field of EU law. There is thus a broad scope for more substantive research on the scope of the legislative powers in this field. It should be remembered that my thesis was limited to the field of EU regulatory criminal law. There are obviously good reasons to also consider the scope of Article 83(1) TFEU, the workings of the ‘emergency brake’ procedures in 82(3) and 83(3) TFEU and the scope for adopting criminal law measures on other legal bases of the Treaties such as Articles 67, 79 or 325 TFEU, all of which have been suggested as providing a basis for criminal legislation.¹²³ My enquiry was also limited to substantive EU criminal law and did not cover EU procedural criminal law, which is emerging as an important field of EU criminal

¹¹⁸ See *Marbury v. Madison* - 5 U.S. 137 (1803). See for the recent debate between Dworkin and Waldron: Ronald Dworkin, *Freedom's law- The Moral Reading of the American Constitution* (Harvard University Press 1996); J Waldron, ‘The Core of the Case against Judicial Review’ (2006) *Yale Law Journal* 1346.

¹¹⁹ See Joanne Scott and Susan Sturm ‘Courts as Catalysts: Rethinking the Judicial Role in New Governance’ (2007) 13 *Columbia Journal of European Law* 565.

¹²⁰ See above chapter 3- section II.

¹²¹ See AG Toth ‘Is Subsidiarity justiciable?’ (1994) 19 *European Law Review* 269; P Takis Tridimas, *The General Principles of EU law* (OUP 2006); Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2009) 182-192.

¹²² 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; Miguel Maduro, *We, the Court; The European Court of Justice and the European Economic Constitution* (Hart 1998).

¹²³ See Asp (n 84) 78-125, 139-164.

policy.¹²⁴ A good deal of research is consequently still lacking in order to understand this field of EU law. It is also clear that the EU criminal law is rapidly developing. The initiatives in this field are substantive and complex and give rise to new legal problems, which must be tackled by EU scholarship.¹²⁵ In fact, it is plausible that much of what was being said in this thesis, although it may continue to have relevance for the general field of EU law, is not going to be particularly topical in say twenty to thirty years time.¹²⁶ What is certain, however, is that the EU legislator already has and will have to tackle many of the issues raised in this thesis in the coming years.¹²⁷ This is particularly related to the interpretation of Article 83(2) TFEU, the question of legal basis and the question of subsidiarity. It is apparent that the EU legislator is already struggling with how it should use its competence and under what legal basis it should act.¹²⁸ Given this, it seems that this thesis has not only theoretical but practical value.

This being said on the future directions of EU criminal law, it is time to wrap up this thesis. As we recall from the introduction, the thesis set out to examine how we can construct limits to the exercise of EU competences. The problem of controlling the exercise of Union competences is not only central for EU law but also for the legitimacy of the Union legal order. Today, the legitimacy of the EU legal order is subject, probably more than ever, to very serious challenges and one of the fiercest challenges is based on the assumption that the EU political institutions use their powers in arbitrary and illegitimate ways thereby usurping national powers.¹²⁹

Whilst these challenges are legitimate, the thesis has shown that the EU's competences are not 'unlimited'. There are limitations that act as checks on the exercise of the EU's competences, such as the need to act on correct legal basis, the 'harmonization' requirement and 'essentiality' condition in Article 83(2) TFEU and the requirement in Article 114 TFEU and

¹²⁴ See Peers (n 116) 655-752; Valsamis Mitsilegas, *EU Criminal Law* (Hart 2009) 115-161; European Criminal Policy Initiative 'A Manifesto on European Criminal Procedure Law', (2013) 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 430 <http://www.zis-online.com/dat/artikel/2013_11_777.pdf> Accessed 9 May 2014.

¹²⁵ See Christopher Harding and Joanna Banach-Gutierrez, 'The emergent EU criminal policy: identifying the species', (2012) 37 *European Law Review* 758; Steve Peers, 'Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon' (2011) 48 *Common Market Law Review* 661.

¹²⁶ See Valsamis Mitsilegas, 'The third wave of third pillar law: which direction for EU criminal justice?' (2009) 34 *European Law Review* 523, 560.

¹²⁷ See COM 2011/ 573 (n 57).

¹²⁸ The confusion surrounds the fact that the Commission, subsequent to the Lisbon Treaty, already has used two legal bases for the adoption of regulatory criminal law measures: 1) The Market Abuse Crimes Directive (n 65), adopted on the basis of Article 83(2) TFEU and 2) 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', Brussels, 11.7.2012, COM(2012) 363 final, which was adopted on the basis of Article 325 TFEU.

¹²⁹ See chapter 1, at n 31-32, for the relevant literature.

Article 5(3) TEU to give proof that EU harmonization contributes to correcting or removing existing or imminent ‘market failures’. While the thesis was able to theoretically reconstruct limits to the exercise of EU competence, this was not enough to provide for a general theory of EU competences. If these limits cannot be made operational before the Court, we cannot claim that they can act as checks on excessive EU harmonization. In order to construct limits on the basis of which EU legislation can be successfully challenged, it was necessary to tackle the question of judicial enforcement. By implementing judicial mechanisms such as procedural review, the Court was able to move from a light touch enquiry to a more demanding judicial review without impinging on the discretion of the EU legislator through engaging in substantive review. Because this review is operationalized through a test of legality that requires the EU legislator to offer at least one compelling rationale to defend the exercise of competence, and that this rationale is defended by ‘sufficient’ and ‘relevant’ evidence, the Court’s capacity to enforce the limits of the Treaties became substantively enhanced.

This thesis has provided a modest contribution to the understanding of the limits of the EU’s competences and thus provided us with insights into the nature of the EU’s legal order. It has also given some direction to where scholarship on EU competences should move in the future. If we wish for more transparent and legitimate workings of the EU legal order, it is argued that competence monitoring must be taken more seriously by both scholarship and the EU political institutions. In particular, I strongly encourage the EU legislator and the Court to move to a more evidence-based test for examining the legality of EU legislation.¹³⁰ I hope this will not remain simply a hope but a principle that both the European Union legislator and the Court build on and implement in practice.

¹³⁰ Stephen Weatherill, ‘Better Competence Monitoring’ (2005) 30 *European Law Review* 23, 28; European Council, ‘Laeken Declaration on the future of the European Union’, 14–15 December 2001, 3-5.

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