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Criminalization Powers of the European Union and the Risks of Cherry-Picking between Various Legal Bases: The Case for a Single Legal Framework for EU-Level Criminalization

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**CRIMINALISATION POWERS OF THE EUROPEAN UNION AND THE RISKS OF CHERRY-PICKING
BETWEEN VARIOUS LEGAL BASES: THE CASE FOR A SINGLE LEGAL FRAMEWORK FOR EU-LEVEL
CRIMINALISATION**

*Jannemieke W. Ouwerkerk**

Abstract

Outside the express criminalisation competences in Article 83 of the Treaty on the Functioning of the European Union, several other Treaty provisions have the potential to serve as legal bases for the adoption of EU-level criminal prohibitions. But the requirements for adopting such legislation differ notably throughout these various legal bases. In the absence of adequate legal tools to counter these divergences under the current legal framework, there is a real risk of cherry-picking between legal bases for EU-level criminalisation. Because this must be held unacceptable for several reasons, this paper argues for the development of a single legal framework for the adoption of criminal prohibitions in EU law.

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INTRODUCTION

In 2012 the European Commission has submitted a proposal for a new Directive on the fight against EU-fraud.¹ It aims to require Member States to criminalise in their national laws fraud and related illegal activities that negatively affect the EU-budget. The proposal is based on Article

¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.

325(4) of the Treaty on the Functioning of the European Union² (hereinafter: TFEU) which allows the EU legislature to enact “the necessary measures” in the field of preventing and combatting EU-fraud for the aim of “effective and equivalent protection” throughout the EU.³ The appropriateness of this legal basis, however, has been under discussion since the Council Legal Service as well as the European Parliament’s Committee on Legal Affairs published their recommendations to replace Article 325(4) TFEU by Article 83(2) TFEU. The latter provision enables the EU legislature to design EU-wide definitions of offences if “essential” for the “effective implementation” of a harmonised Union policy.⁴ According to both the Council Legal Service and the Legal Affairs Committee, Article 83(2) TFEU must be qualified as a *lex specialis* and should therefore be considered the proper legal basis for the proposed Directive on EU-fraud.⁵

The example above expresses a lack of clarity with regard to the proper legal basis for EU-wide criminalisation of EU-fraud. But the debate on EU criminal law competences goes beyond this specific area of crime. One might have expected that the fierce debates on legal bases for harmonising substantive criminal law would have been solved by Lisbon’s express criminal law competence of Article 83 TFEU. However, today’s state of affairs shows differing views on whether Article 83 TFEU applies exclusively or whether other legal bases could be invoked to introduce EU-wide rules on criminal law; and if so, how these various legal bases hierarchically interrelate to each other.

² Treaty on the Functioning of the European Union, Dec. 26 2012, 2012 O.J. (C 326/47) [hereinafter TFEU].

³ See Article 325(4) TFEU (“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies”).

⁴ See Article 83(2) TFEU (“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 harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned...”).

⁵ Council Legal Service, Opinion on the Proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law – Legal basis, doc. 15309/12 (22 October 2012); European Parliament Committee on Legal Affairs, Opinion on the legal basis for the proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law, A7-0251/2014 (25 March 2014).

This article concerns the exercise of the EU's competence to criminalise conduct Union-wide; the approximation of (levels of) penalties falls outside the scope of this article. The premise of this article is that outside Article 83 TFEU a variety of ancillary legal bases do exist to underpin the approximation of criminal laws. Under those circumstances there is a real risk of cherry-picking between legal bases, which in turn could endanger the legitimacy and coherence of EU criminal law. Therefore, the central question of this article is how the rational and consistent exercise of criminalisation competences in the EU can be better safeguarded. It is argued that for this aim the EU is in need of a *single* legal framework that should govern the EU legislature during the process of initiating and negotiating new definitions of offences, as well as the EU Court of Justice, irrespective on which legal provisions such definitions of offences were based.

The structure of this article is as follows. Part I gives an overview of the express and ancillary (potential) criminalisation competences of the EU. In Part II, it will be demonstrated that the existence of numerous legal bases with differing legal requirements, and the potentially very broad scope of criminalisation competences in the EU, causes the pitfall of cherry-picking between those various legal bases. In view of that, Part III argues why such cherry-picking is unacceptable in the EU legal order and raises the idea of a *single* legal framework for EU-level criminalisation. Part IV shares some initial thoughts on the content of this single legal framework, hoping that this would provoke further debate and research. The article closes with some final remarks.

I. POST-LISBON CRIMINAL LAW COMPETENCES

The scope of criminalisation powers has since long been a matter for debate.⁶ The Amsterdam Treaty did provide a legal basis to adopt minimum norms with regard to the definitions of

⁶ For a brief summary on the development of EU criminal law, more generally, see Jannemieke Ouwerkerk, *Criminal Justice Beyond National Sovereignty: An Alternative Perspective on the Europeanisation of Criminal Law*, 23 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE, 17-18 (2015). For an overview of the evolvement of substantive criminal law competences, see Anne Weyembergh, *Approximation of substantive criminal law: The new institutional and decision-making framework and new types of interaction between EU actors*, in APPROXIMATION OF SUBSTANTIVE CRIMINAL LAW IN THE EU. THE WAY FORWARD 9-33 (Francesca Galli & Anne Weyembergh eds., 2013) and (pre-Lisbon) Gert Vermeulen, *Where do we currently stand with harmonisation in Europe?*, in HARMONISATION AND HARMONISING MEASURES IN CRIMINAL LAW 65-76 (André Klip & Harmen van der Wilt eds., 2002) (presenting the 2002 state of affairs regarding

offences⁷, but opinions differed strongly on what areas of crime could be subjected to minimum harmonisation⁸. Moreover, it has been fiercely discussed whether matters of criminal law were exclusively governed by the former intergovernmental Third Pillar, or whether criminal law could also fall within the then First Pillar of Community Law. I suppose we all remember the European Commission's position regarding both issues. Not only was the Commission in favour of a broad interpretation of the Third Pillar competence to adopt EU-wide definitions of offences, it also took the view that in certain situations the Community legislature, outside the scope of the Third Pillar, would be competent to prescribe criminal sanctions to the Member States. With regard to this latter viewpoint, the Commission was put in the right by the Court of Justice of the European Union; in the famous 2005 *Environment Case*, the Court stipulated that the Community legislature did have the power to require Member States to introduce criminal sanctions "when the application of effective, proportionate and dissuasive criminal penalties is an essential measure for combating serious environmental offences"⁹.

harmonisation of criminal law in the European Union). A more elaborate overview of the development of EU criminal law has been provided by PETTER ASP, *THE SUBSTANTIVE CRIMINAL LAW COMPETENCE OF THE EU* 24-39 (2012) (providing a comprehensive account of the EU's substantive criminal law powers under the Lisbon Treaty).

⁷ See Title VI ("provisions on police and judicial cooperation in criminal matters") of the Amsterdam Treaty on European Union, Nov. 10 1997, 1997 O.J. (C 340/162) [hereinafter Amsterdam Treaty].

⁸ Some referred to Article 31(e) Amsterdam Treaty as an exclusive competence to enact common definitions of offences in the specified areas of organised crime, terrorism and illicit drug trafficking (see Article 31(e) Amsterdam Treaty, *supra* note 6: "Common action on judicial cooperation in criminal matters shall include: ... (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the areas of organised crime, terrorism and illicit drug trafficking"). This position was for instance taken by Anne Weyembergh, see Anne Weyembergh, *Approximation of criminal laws, the Constitutional Treaty and The Hague Programme*, 42 COMMON MARKET LAW REVIEW 1568-1571 (2005) (examining the controversy around approximation of criminal laws in the EU and discussing the added value of the (never adopted) Constitutional Treaty for the future of approximation in this field of law). Others argued that pursuant to Article 29 Amsterdam Treaty such harmonised definitions of offences could also be adopted in the areas of human trafficking, offences against children, illicit arms trafficking, corruption, fraud, racism and xenophobia (see Article 29 Amsterdam Treaty, *supra* note 7: "Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:... approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)"). See, e.g., Vermeulen, *supra* note 6, at 70.

⁹ Commission v. Council, Case C-176/03, ECLI:EU:C:2005:542 (*Environment Case*), ¶¶ 47-48; see also the follow-up decision Commission v. Council, Case C-440/05, ECLI:EU:C:2007:625 (known as the *Ship-Source Pollution Case*, in which the Court confirmed its ruling in Case C-176/03 and annulled a Framework Decision on the matter on the ground that Community legislature had a preceding competence to adopt the criminal law provisions at issue, but

It seems that we are in a somewhat similar situation under the Lisbon Treaty. Whereas initially the express criminalisation competences provided for in Article 83 TFEU seemed sufficiently clear and containable¹⁰, it is now apparent that outside Article 83 TFEU several other treaty provisions may have the potential to serve as a legal basis for the adoption of EU-level definitions of offences.

The following provides an overview of express and (potential) ancillary criminalisation competences of the EU. For obvious reasons, this overview starts with mentioning Article 83(1) TFEU. This provision encompasses a competence in specified areas of crime, whereas Article 83(2) TFEU¹¹ envisages a so-called “regulatory criminal law competence”, enabling the EU-wide criminalisation of conduct if this “proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures”. In order to understand the main difference between both paragraphs of Article 83 TFEU, I would like to refer to Mitsilegas who pointed out that the two paragraphs of Article 83 TFEU reflect different views on criminalisation; whereas Article 83(1) expresses “securitised criminalisation” (criminalisation aims to address global security threats; this appears from the explicit mentioning of crime areas), the regulatory criminal law competence of Article 83(2) expresses “functional criminalisation” (criminalisation serves the effectiveness of EU law).¹²

A. EU Criminalisation Powers in Specific Areas of Crime

in which it explicitly held that the determination of the type and level of criminal penalties fell outside the scope of the Community’s powers).

¹⁰ Previously, I myself assumed that the EU’s criminalisation powers were exhaustively laid down in Articles 83 and 325(4) TFEU, *compare* Ouwerkerk, *supra* note 6, at 19-20.

¹¹ See discussion *infra* Section I.B.

¹² See Valsamis Mitsilegas, *EU Criminal Law Competence After Lisbon: From Securitised to Functional Criminalisation*, in *EU SECURITY AND JUSTICE LAW AFTER LISBON AND STOCKHOLM* 110-128 (Diego Acosta Arcarazo & Cian C. Murphy eds., 2014) (“...EU competence to criminalise can be justified in a twofold manner: upon the need for the Union to address security threats (securitised criminalisation); and upon the need for the Union to use criminal law in order to ensure the effectiveness of Union law (functional criminalisation”).

As said, this paragraph solely focuses on the competences for “securitised criminalisation”.¹³ It describes the (potential) scope of Article 83(1) TFEU and, thereafter, discusses a potential alternative legal basis for criminalisation in specific areas of crime.

1. Article 83(1) TFEU: Criminalisation Competence in Specified Areas of Crime

As mentioned before, Article 83(1) TFEU differs from Article 83(2) TFEU in that it expressly enumerates the areas of crime in which the EU is competent to enact criminal prohibitions. It concerns: terrorism, human trafficking, 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. In these areas of crime, Article 83(1) TFEU requires that the types of conduct to be prohibited have a cross-border dimension “resulting from the nature or impact of such offences or from a special need to combat them on a common basis”. The competence to enact common norms under the heading of Article 83(1) TFEU is restricted to minimum norms, to be adopted by means of directives.¹⁴

Whereas at first reading, criminalisation powers under Article 83(1) TFEU might seem restricted, its wording leaves ample room for a quite broad interpretation. After all, the enumerated *areas of crime* potentially involve a very broad range of human actions.¹⁵ This applies to some areas of crime in particular, e.g. organised crime: as rightly pointed out by Mitsilegas, one can think of many specific criminal offences that could be characterized as being connected with the activities

¹³ *Id.*

¹⁴ See Article 83(1) TFEU (“The European Parliament and the Council may, by means of directives...establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: 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”).

¹⁵ Moreover, other areas of crime may be identified on the basis of a unanimous Council decision, see the third paragraph of Article 83(1) TFEU (“On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament”).

of an organised crime group.¹⁶ Something similar applies to computer crime, also mentioned as one of the areas of crime under Article 83(1) TFEU: this concept could cover criminal offences that would not immediately be associated with computer crime but could be characterized accordingly, simply because of the involvement of a computer, e.g. market abuse¹⁷, or sexual offences that do not fall within the scope of sexual exploitation of women and children as enlisted in Article 83(1) TFEU. Beyond specific areas of crime, EU action has shown that while criminal prohibitions mainly cover completed crimes, they increasingly entail inchoate acts as well.¹⁸ And, in addition to criminalising the actual commission of prohibited acts, it has become quite common to also criminalise the aiding or abetting in the commission of a crime.¹⁹ Moreover, whereas the *cross-border requirement* suggests a real attempt to limit Article 83(1) TFEU to the most serious types of transnational crime, the practical impact of harmonised criminal prohibitions based on this provision automatically exceeds the transnational sphere; national implementation legislation obviously also applies in a purely national context.

Until now four directives have been adopted under the heading of Article 83(1) TFEU, three of which include novel criminal prohibitions.²⁰ Directive 2011/92/EU criminalises several acts in the field of sexual abuse, sexual exploitation, and child pornography.²¹ Directive 2011/36/EU concerns trafficking in human beings, extending the definition of “exploitation” to forced

¹⁶ Mitsilegas, *supra* note 12, at 116; *See also* Ester Herlin-Karnell, *White-Collar Crime and European Financial Crises: Getting Tough on EU Market Abuse*, 34 *EUROPEAN LAW REVIEW*, 483 (2012) (analyzing the feasibility of the then existing regime against market abuse and discussing the legal basis of proposed instruments).

¹⁷ This example was given by Ester Herlin-Karnell, *see supra* note 16.

¹⁸ *See, e.g.*, Parliament and Council Directive 2014/57/EU, on criminal sanctions for market abuse (market abuse directive), Article 6(2), 2014 O.J. (L 173/87) that criminalises the attempt to commit several forms of insider dealing as well as the attempt to commit market manipulation.

¹⁹ *See, e.g.*, Parliament and Council Directive 2014/57/EU, *id.* at Article 6(1) that criminalises the aiding and abetting to the unlawful disclosure of information, market manipulation and some forms of insider trading.

²⁰ The fourth Directive that has been adopted based on Article 83(1) TFEU relates to currency counterfeiting: Parliament and Council Directive 2014/62/EU, on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, 2014 O.J. (L 151). However, the adopted provisions do not extend the scope of criminal prohibitions that have previously been adopted in this field.

²¹ Parliament and Council Directive 2011/92/EU, on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Articles 3-7, 2011 O.J. (L 335).

begging, exploitation of criminal activities, and the removal of organs.²² Directive 2013/40/EU includes a number of criminal prohibitions in the area of computer crime: attacks against information systems.²³

Moreover, a pending proposal on the basis of Article 83(1) TFEU concerns the definition of drug and aims to extend the existing scope of EU-level offences to new psychoactive substances (so-called “designer drug”) that pose severe health, social and safety risks, and are therefore submitted to permanent market restrictions under a newly proposed Regulation.²⁴ With regard to this proposal, it can be questioned whether Article 83(1) TFEU is the right legal basis; although the deterrence of trafficking in new psychoactive substances has been mentioned as one the reasons to extend the scope of prohibited drugs, the main aim of the proposal seems to be the prevention of health and social harm. Also pending is a 2015 proposal on combating terrorism which – partly in order to implement new international standards and obligations with regard to the evolving terrorist threat – proposes the criminalisation of travels to third countries with terrorist intentions, being trained for terrorist purposes, and terrorist financial funding provided for all terrorism related offences.²⁵

2. Article 79 TFEU: Criminalisation Competence in the Area of Human Trafficking

It is open to debate whether Article 83(1) applies *exclusively* in the areas of crime it expressly enumerates. The issue is of particular relevance with regard to trafficking in human beings. This area of crime is explicitly mentioned in Article 79 TFEU on the EU’s task to “develop a common immigration policy”. For that purpose, Article 79(2) TFEU enables the EU legislature to adopt

²² Parliament and Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 2(3), 2011 O.J. (L 101).

²³ Parliament and Council Directive 2013/40/EU on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, Articles 6-8, 2013 O.J. (L 218).

²⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council (amending Council Framework Decision 2004/757/JHA) laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug, COM(2013) 618 final.

²⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council (amending Council Framework Decision 2002/475/JHA) on combating terrorism, COM(2015) 625 final.

measures for “combating trafficking in persons, in particular women and children”.²⁶ Commentators do not agree on whether this implies a specific criminalisation competence for the EU. For Asp, even though the word “combating” does suggest that measures under this provision can be of a criminal nature, the express mentioning of human trafficking in Article 83(1) TFEU provides a strong argument against criminal law competence under Article 79 TFEU. He finds this confirmed by the fact that the EU has adopted a directive on the topic under Article 83(1) TFEU – the aforementioned Directive 2011/36/EU.²⁷ Satzger, on the contrary, does derive from Article 79 TFEU an EU competence to establish “supranational criminal law”, but states that when it comes to minimum harmonisation through directives, Article 83(1) TFEU is *lex specialis* to Article 79 TFEU.²⁸ In other words – if I understand Satzger correctly – a regulation on the basis of Article 79 TFEU still can include EU-level criminal prohibitions in the area of trafficking in persons.²⁹

B. EU Regulatory Criminalisation Powers

Whereas the scope of the express criminalisation competence under Article 83(1) TFEU is defined on the basis of areas of crime (as described above), the scope of Article 83(2) TFEU is defined on the basis of previously harmonised Union policies. In such harmonised policy areas, minimum rules on the definition of offences may be established by means of directives, provided that such approximation “proves essential to ensure the effective implementation” of a Union policy.³⁰

²⁶ See Article 79(1) and (2) TFEU (“1. The Union shall develop a common immigration policy aimed at ensuring...the prevention of, and enhanced measures to combat...trafficking in human beings. 2. For the purposes of paragraph 1, the European Parliament and the Council...shall adopt measures in the following areas: ...(d) combating trafficking in persons, in particular women and children”).

²⁷ See Asp, *supra* note 6, at 157-160.

²⁸ HELMUT SATZGER, INTERNATIONAL AND EUROPEAN CRIMINAL LAW 56, 81 (2012) (tracing the influence of international and European law on national criminal law).

²⁹ The issue of hierarchy between legal bases for criminalisation will be elaborated on in Section II.C.2.

³⁰ See Article 83(2) TFEU (“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 harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned...”). Article 83(2) TFEU is considered a “quasi-codification” of the European Court of Justice’s case-law in the *Environment Case* (Commission v. Council, Case C-176/03, ECLI:EU:C:2005:542) and the *Ship-Source Pollution Case* (Commission v. Council, Case C-440/05, ECLI:EU:C:2007:625), in which the Court ruled

Outside Article 83(2) TFEU several other Treaty provisions have been mentioned as potential legal bases for regulatory criminalisation.

1. Article 83(2) TFEU: Criminalisation in Harmonised Policy Areas

The introduction of Article 83(2) TFEU into the Lisbon Treaty has since led to many discussions on its potential and desirable scope. History shows that the European Commission is used to apply a broad interpretation of powers in the field of regulatory criminal law; this is evident from pre-Lisbon initiatives to submit proposals for regulatory criminal law measures in the policy areas of environment protection³¹, maritime safety³², migration³³, and intellectual property protection³⁴. While the intellectual property crimes proposal was rejected³⁵, the other proposals were adopted³⁶; and two of them eventually brought the European Commission to apply successfully for the annulment of corresponding Framework Decisions in the famous *Environment* and *Ship-Source Pollution* cases.³⁷ A 2011 Communication of the Commission on EU criminal policy confirms that a broad interpretation of regulatory criminal law competences is

in favour of a (then) Community's criminalisation competence if essential for the enforcement of EU policy. See, amongst others, Weyembergh, *supra* note 6, at 16; Mitsilegas, *supra* note 12, at 117.

³¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM(2007) 51 final. The proposal was based on former Article 175(1) TEC, which corresponds to Article 192 TFEU.

³² European Commission, Proposal for a Directive of the European Parliament and of the Council (amending Directive 2005/35/EC) on ship-source pollution and on the introduction of penalties for infringements, COM(2008) 134 final. This proposal was based on former Article 80(2) TEC which corresponds to Article 100(2) TFEU.

³³ European Commission, Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007), 249 final. This proposal was based on former Article 63(3) sub b TEC, which corresponds to Article 79 TFEU.

³⁴ European Commission, Amended Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2006) 168 final. This proposal was based on former Article 95 TEC which corresponds to Article 114 TFEU.

³⁵ The proposal was mentioned on the list of proposals withdrawn, 2010 O.J. (C 252/9).

³⁶ Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, OJ 2008, L 328/28, see Articles 3 and 4 in particular; Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ 2009, L 280/52, see Article 1(5) in particular; and Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009, L 168/24, see Article 9 in particular.

³⁷ Commission v. Council, Case C-176/03, ECLI:EU:C:2005:542 (*Environment Case*); Commission v. Council, Case C-440/05, ECLI:EU:C:2007:625 (*Ship-Source Pollution Case*).

also advocated under the heading of Article 83(2) TFEU.³⁸ In addition to the often-heard areas of financial market integrity (e.g. to fight market abuse and insider dealing), EU-fraud³⁹ and euro-counterfeiting⁴⁰, the Commission expressly sets out to reflect on the potential role of criminal law in a number of harmonised policy areas (some of which have not been mentioned before in the context of criminal law), namely: road transport, data protection, customs rules, environmental protection, fisheries policy and internal market policies (e.g. to fight counterfeiting and corruption).

The Commission's intention to classify a wide range of areas under the scope of Article 83(2) TFEU produces uncertainty on the use of this provision in practice. Whether the wording of Article 83(2) TFEU itself can serve as a limit on the exercise of EU competences in the policy areas mentioned above is rather doubtful – despite the fact that its wording does suggest high thresholds for EU action. A first significant restriction on the exercise of EU powers could be read into the provision's requirement that in the area concerned *harmonisation has previously taken place* (harmonisation requirement). However, commentators differ on whether this implies a minimum degree of harmonisation, or whether any degree of harmonisation fulfills the requirement. Whereas, for instance, Peers argues that “there is nothing in the current legal framework of the Treaty of Lisbon that requires *full* harmonization as a pre-condition”⁴¹, Öberg states that previous harmonisation must at least be “substantive harmonisation”, or, in the words of Asp, harmonisation “of a certain quality”.⁴² On the basis of general definitions of harmonisation elsewhere in the treaties, Öberg, following Asp, concludes that “the underlying

³⁸ European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, 9–11 in particular (presenting the European Commission's framework for the further development of a criminal policy under the Treaty of Lisbon).

³⁹ Even though the Commission's statements with regard to a criminal law competence under Article 325(4) TFEU strongly suggests that its mentioning of EU-fraud refers to this provision, rather than to Article 83(2) TFEU, *id.* at 6. This is confirmed by the fact that the Commission's proposal for a Directive in this area is based on Article 325(4) TFEU): European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.

⁴⁰ The mentioning of this area surprises as it concerns one of the expressly enumerated areas of Article 83(1) TFEU, *supra* note 14.

⁴¹ See STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW 775 (2011); see also Mitsilegas, *supra* note 12, at 118.

⁴² JACOB ÖBERG, UNION REGULATORY CRIMINAL LAW COMPETENCE. SCOPE, LIMITS AND JUDICIAL REVIEW 64 (SIEPS, 2015) (discussing the limits of the EU's regulatory criminal law mandate and developing proposals to improve judicial control in this field); Asp, *supra* note 6, at 135.

harmonisation measures must have, as their object, either strengthening the internal market or maintaining competition in the common market. Harmonisation, from a qualitative perspective, furthermore entails a modification of the substance of internal laws by providing for common substantive EU laws in relation to certain policy fields. [...] Underlying harmonisation cannot thus concern marginal questions or merely superficial harmonisation”.⁴³ Since a definite answer cannot be given on the degree of harmonisation that Article 83(2) TFEU requires, it remains to be seen whether the harmonisation requirement will serve as a limit on the exercise of regulatory criminalisation powers.

In addition to the aforementioned procedural limit of requiring previous harmonisation, Article 83(2) TFEU contains two substantive limits on the exercise of EU powers.⁴⁴ Not only does it require that the approximating measure *contributes to the effective implementation* of a harmonised Union policy, it also demands that approximation is *essential* for that aim. Both limits come close to the requirements laid down in the *Environment* case in which the introduction of criminal sanctions was permitted on condition that the application of “effective, proportionate and dissuasive criminal penalties” would be “essential” for combating serious environmental crime.⁴⁵

The crucial question is of course how the EU legislature will in practice deal with the barriers that have been put by introducing the requirement of effective implementation as well as by the essentiality condition. Will they truly serve as limits on the exercise of the EU’s criminal law powers? The past suggests not. I recollect the activist attitude of the European Commission in the pre-Lisbon era, mainly reflected in its wide use of criminal law competences, and for the most part positively responded to by the legislature. Such a wide application of powers is also supported by the European Commission under the current legal framework of the Lisbon treaties;

⁴³ Öberg, *supra* note 42, at 64.

⁴⁴ The terms “procedural limit” and “substantive limit” are borrowed from Jacob Öberg, *supra* note 42, § 3.3.1 at 52 (“Substantive limitations on the exercise of Union competence under Article 83(2) TFEU”) and accompanying text, and § 3.3.2 at 61 (“This subsection of the chapter considers one of the procedural limits to the exercise of EU competences under Article 83(2) TFEU...”) and accompanying text.

⁴⁵ *Commission v. Council*, Case C-176/03, ECLI:EU:C:2005:542, ¶¶ 47-48.

this follows from the aforementioned large number of policy areas that is considered to qualify for EU action under the heading of Article 83(2) TFEU.

Moreover, the single directive that so far has been adopted on the basis of Article 83(2) TFEU demonstrates significant weaknesses in arguing why criminal law measures are essential for the effective implementation of a harmonised Union policy, in this case EU market abuse law. Directive 2014/57/EU *inter alia* entails obligations for the Member States to criminalise in their national laws the intentional commission of insider trading, market manipulation, unlawful disclosure of inside information, and also inciting, and aiding and abetting to these offences as well as, to a certain degree, attempts to insider dealing and market manipulation.⁴⁶ Particularly weak is the Commission's reasoning that criminal sanctions are *essential* to effectively implement the EU's policy to prevent and fight market abuse. It appears that the essential nature of the proposed criminal law measures is based on their capability to improve deterrence. According to the Commission, the expected increase of deterrence would follow from: a) the social disapproval that criminal sanctions do demonstrate; b) the widespread media attention that often accompanies criminal convictions in this field; c) the reduction of divergences between the national criminal laws of Member States, which would reduce the scope for potential offenders to carry out market abuse offences in Member States with more lenient provisions and sanctions; and d) the facilitation of transnational cooperation.⁴⁷

In its reasoned opinion under Article 6 of Protocol No. 2, the German *Bundesrat* sharply criticized parts of the Commission's reasoning concerning the essentiality of criminal law measures in the sense of Article 83(2) TFEU. It pointed out that the essentiality condition can neither be considered satisfied by the mere argument that criminal sanctions in this area "could contribute to overcoming a problem or could have a positive impact on attaining a goal does not constitute

⁴⁶ Parliament and Council Directive 2014/57/EU, on criminal sanctions for market abuse (market abuse directive), Articles 3-7, 2014 O.J. (L 173/179).

⁴⁷ See European Commission, Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, Explanatory Memorandum at 2-3, COM(2011) 654 final; Impact Assessment accompanying the Proposal for a Regulation on insider dealing and market manipulation (market abuse) and the Proposal for a Directive on criminal sanctions for insider dealing and market manipulation, particularly §§ 3.2.3 and 8.1.4.4 (SEC(2011) 1217 final); Parliament and Council Directive 2014/57/EU, *supra* note 46, at Preamble, Recitals 6-8.

a substantiation of the essential nature of such measures”⁴⁸, nor by the mere theoretical consideration that perpetrators might move to Member States with more lenient criminal laws to engage in market abuse offences.⁴⁹ Academics have also passed criticism on the tenability of arguments that have been put forward to support the essential nature of criminal law measures in this field. Observations that the alleged essentiality of such measures lacks sufficient evidence in the proposal and impact assessment⁵⁰ naturally follow from the Bundesrat’s remark that mere arguments and considerations on deterrent effect cannot suffice to comply with the essentiality condition of Article 83(2) TFEU.

In common with Article 83(1) TFEU, the criminalisation competence of Article 83(2) TFEU is neither restricted to completed criminal offences only, nor to the actual commission of prohibited acts; it has become quite common that EU-level criminal prohibitions also cover attempts⁵¹ and preparatory acts as well as the aiding or abetting in the commission of a crime. Needless to say that such a use of Article 83(2) TFEU may significantly stretch the boundaries of criminalisation competences in the EU.

⁴⁸ Reasoned opinion by the Bundesrat of the Federal Republic of Germany on the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, available at the European Parliament’s archive, PE478.632v01-00, 3 (submitted under Protocol No. 2 to the Lisbon Treaty, on the application of the principles of subsidiarity and proportionality, Article 6, 2010, O.J. (C 83/206); stating why it considers that the proposal does not comply with the subsidiarity principle). The Bundesrat might well have alluded to the wide use of “could” and “can” in the legislative documents. See for instance the Impact Assessment, *supra* note 47, at 27 (“Since market abuse *can* be carried out across borders, this divergence (i.e. divergence in the criminal or non-criminal approach towards market abuse throughout the Member States, JO) *can* be expected to have negative effects on the single market and *could* encourage potential offenders to carry out market abuse in Member States which have the least strict sanctions”) (italics added); see also at 168 (“The increased deterrent effect of criminal sanctions for the most serious offences *could* be expected to result in greater market integrity and a reduction in the losses suffered by investors due to market abuse”) (italics added).

⁴⁹ Reasoned opinion by the Bundesrat of the Federal Republic of Germany, *supra* note 48, at 3.

⁵⁰ See Marta Miglietti, *The New EU Criminal Law Competence in Action: The Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation*, IES WORKING PAPER SERIES, 26-32 (5/2013) (analyzing the first proposed directive under Article 83(2) TFEU, i.e. the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, *supra* note 46); See also Öberg, *supra* note 42, at 56-61. Asp, though, is of the opinion that requiring “hard empirical data” to support the essentiality of criminal law measures would be unrealistic, *supra* note 6, at 131.

⁵¹ In her analysis of the legal framework on market abuse, Herlin-Karnell has pointed out that due to a lack of clarity as to the boundaries of attempt, the national delineation of prohibited attempts may lead to divergence in the application of EU measures, see *supra* note 16, at 490-491.

The foregoing indicates that Article 83(2) TFEU is likely to be interpreted as providing a broad competence to criminalise conduct EU-wide. But outside the express competence laid down in Article 83(2), the TFEU contains several other potential legal bases to underpin the adoption of criminal law prohibitions in the field of regulatory criminal law.

2. Article 325(4) TFEU: Criminalisation in the Field of EU-Fraud

Article 325(4) TFEU has often been mentioned in this regard.⁵² Article 325 TFEU generally envisages the adoption of measures to counter EU-fraud. For that specific aim, the fourth paragraph allows the adoption of “necessary measures” in order to afford “effective and equivalent protection in the Member States and in all the institutions, bodies, offices and agencies”.⁵³ Contrary to its predecessor provision Article 280(4) TEC – which in its final sentence did exclude the adoption of criminal law provisions⁵⁴ – the “necessary measures” of Article 325(4) TFEU are considered to include the enactment of criminal law provisions⁵⁵; the removal of Article

⁵² According to Mitsilegas, Article 86 TFEU also provides an alternative legal basis to enact criminal law provisions in the field of EU-fraud. Article 86 TFEU enables the creation of a European Public Prosecutor’s Office in order to effectively combat fraud offences against the EU’s financial interests. Mitsilegas suggests that the power to adopt EU-level definitions of fraud offences can be derived from the wording of Article 86(2) TFEU that “[t]he European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment [...] the perpetrators of, and accomplices in, offences against the Union’s financial interests, *as determined by the regulation provided for in paragraph 1*” (italics added). He admits that the application of such criminal law provisions would be restricted to exercising the tasks of the European Public Prosecutor’s Office (EPPO), with the consequence that EU-fraud related norms adopted under the heading of Article 83(2) TFEU or Article 325(4) TFEU would apply outside the EPPO context. See Mitsilegas, *supra* note 12, at 120. In the framework of this paper, Article 86 TFEU will not explicitly be mentioned as a potential legal basis for EU-level criminalisation of conduct. The reason is, that I consider it highly unlikely that Article 86 TFEU can be considered a legal basis to create substantive criminal law norms. In my view, the phrase “as determined by the regulation provided for in paragraph 1” does *not* refer to defining the offences that should be covered by the regulation, rather to the very determination of which offences will fall into the future EPPO’s jurisdiction.

⁵³ See Article 325(4) TFEU (“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies”).

⁵⁴ The last sentence of former Article 280(4) TFEU reads as follows: “These measures shall not concern the application of national criminal law or the national administration of justice”.

⁵⁵ For instance by the European Commission, as follows from European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, at 6 (under the heading ‘Scope for EU Criminal Law’).

280(4) TEC's reservation concerning criminal law has by several scholars been interpreted as the conferral of criminal law competences in the field of EU-fraud.⁵⁶

It is true that EU-level criminal prohibitions could also be categorized under the scope of Article 83(2) TFEU since fraud against the EU-budget concerns an area in which harmonisation has previously taken place. However, compared to the express competence of Article 83(2) TFEU, which is restricted to minimum rules by means of directives only, Article 325(4) TFEU generates a wider competence; besides the enactment of not directly applicable minimum rules, it also allows for the adoption of directly applicable regulations. Opinions differ on the relationship between Article 83(2) TFEU and 325(4) TFEU, but the Commission apparently holds the opinion that Article 325(4) TFEU is a *lex specialis* of Article 83(2) TFEU: the 2012 Commission's proposal to adopt EU-level criminal prohibitions regarding serious types of EU-fraud and related conduct is based on Article 325(4) TFEU.⁵⁷

3. Articles 33, 79, 91, 103, 114 and 192 TFEU: Criminalisation Competences in the Areas of Customs Law, Illegal Immigration, Transport Law, Competition and Taxation Law, and Environmental Law

Attention has also been drawn to a number of other provisions that, like Articles 325(4) and 86 TFEU, relate to a very specific area of competence. It concerns Article 33 TFEU on customs law, Article 79 TFEU on immigration policy, Article 91 TFEU on transport law, Article 114 TFEU on competition and taxation law, Article 103 TFEU on competition law, and Article 192 on environmental protection.

With regard to Article 33 TFEU, Satzger, for instance, holds the view that the deletion of the pre-Lisbon reservation of former Article 135 TEC (which equally to the abovementioned reservation

⁵⁶ Mitsilegas, *supra* note 12, at 119; Satzger, *supra* note 28, at 55-56, 81; See also Asp, *supra* note 6, at 142-154, who concludes that Article 325(4) TFEU does provide a legal basis, though a legal basis that must be applied in combination with the application of Article 83(2) TFEU.

⁵⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.

in former Article 280(4) TFEU⁵⁸ excluded the creation of criminal law) means that the adoption of supranational criminal law provisions is no longer excluded in the area of protecting the customs union.⁵⁹ Satzger's view is disputed by Asp, who points out that Article 33 merely refers to measures "in order to strengthen custom *cooperation* between Member States and between the latter and the Commission" (*italics added*).⁶⁰ Asp convincingly argues that this phrase cannot be interpreted as including the creation of EU-level norms of substantive criminal law.⁶¹

An attentive reader may remember that the European Commission in its 2011 Communication on EU Criminal Policy has listed "customs rules" as a harmonised policy area that would qualify for action under the heading of Article 83(2) TFEU.⁶² This could be considered an argument against interpreting Article 33 TFEU as conferring criminalisation powers upon the EU. At the same time, however, parallel criminalisation competences have been recognized in other areas of crime. Time will tell if the Commission regards Article 33 as a sufficient legal basis to underpin EU-wide criminal prohibitions in the area of customs.

Views also diverge with regard to Articles 91, 103, 114 and 192 TFEU. Article 114 TFEU, to start with, envisages the adoption of approximating measures for the achievement of establishing or ensuring the functioning of the internal market in accordance with Article 26 TFEU.⁶³ As appears from a 2006 proposal for a directive in the area of intellectual property protection, the Commission considers Article 114 TFEU to constitute a proper legal basis for the harmonisation of EU regulatory criminal law: the draft directive proposed to oblige the Member States to

⁵⁸ See *supra* note 54 and accompanying text.

⁵⁹ Satzger, *supra* note 28, at 55-56. See also SAMULI MIETTINEN, CRIMINAL LAW AND POLICY IN THE EUROPEAN UNION 86-87 (2013) (assessing the development of EU criminal law and arguing that the removal of the former limit with regard to criminal law measures makes it "not inconceivable" that criminal law regulations could be created in the field of customs).

⁶⁰ See Article 33 TFEU ("Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission").

⁶¹ Asp, *supra* note 6, at 160-161.

⁶² See European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final.

⁶³ See Article 114(1) TFEU ("Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council, shall...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").

criminalise in their national laws “all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements” (draft Article 3).⁶⁴ Notwithstanding the fact that this very proposal was rejected⁶⁵, the Commission’s view that Article 114 TFEU does allow for the harmonisation of regulatory criminal law has been supported by several scholars.⁶⁶ As evident from the wording of Article 114 TFEU, criminalisation adopted under its heading is required to contribute to market integration; the adopted legislation must, in other words, demonstrate a link to the internal market. This very requirement has brought Herlin-Karnell to the position that Article 114 TFEU creates a higher threshold for EU-level criminalisation than Article 83(2) TFEU which “only” requires previous harmonisation: “an interpretation of art. 83(2) TFEU with no threshold at all in terms of market creation will become an even lower test than that of art. 114 TFEU”.⁶⁷

Article 91 TFEU envisages the possibility to enact “any other appropriate provisions” within the framework of a common transport policy (Article 91(1)(d) TFEU *in conjunction with* Article 90 TFEU).⁶⁸ According to Satzger, a broad interpretation of this competence leads to the conclusion that the enactment of such appropriate provisions “might include criminal provisions in the field of traffic law”⁶⁹, to be adopted either through regulations or through directives.

Article 103 TFEU allows the adoption of regulations or directives for the aim of ensuring compliance with EU competition rules as laid down in Articles 101 and 102 TFEU. Article 103(2) TFEU specifically mentions which matters such regulations and directives may “in particular” deal

⁶⁴ European Commission, Amended Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2006) 168 final. This proposal was based on former Article 95 TEC which corresponds to Article 114 TFEU.

⁶⁵ See *supra* note 35.

⁶⁶ See amongst others Öberg, *supra* note 42, at 73; MICHAEL J. FRESE, SANCTIONS IN EU COMPETITION LAW. PRINCIPLES AND PRACTICE 101 (2014) (examining the implications of decentralizing enforcement competences in the field of EU competition law); Herlin-Karnell, *supra* note 16, at 485-487; Peter Whelan, *Contemplating the Future: Personal Criminal Sanctions for Infringement of EC Competition Law*, in 19 KING’S LAW JOURNAL, 364, 369 (2008) (assessing the necessity, appropriateness, and the existence of a legal basis for criminalisation in the field of EC competition law).

⁶⁷ Herlin-Karnell, *supra* note 16, at 485-486.

⁶⁸ See Article 91 TFEU (“1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall...lay down:...(d) any other appropriate provisions”).

⁶⁹ Satzger, *supra* note 28, at 54.

with; they may concern, for instance, fines and periodic penalty payments for the imposition of unfair trading conditions, which is prohibited in Article 102(a) TFEU).⁷⁰ Satzger states that the term “in particular” suggests a non-exhaustive listing of possible provisions, which means that the adoption of criminal law provisions is not excluded.⁷¹

Article 192 TFEU, finally, provides for “action [...] to be taken by the Union” for the aim of achieving the environmental policy objectives set out in Article 191 TFEU (i.e. preserving, protecting and improving the quality of the environment; protecting human health, etc.).⁷² According to Satzger, it falls into the discretion of the European Parliament and the Council whether such “action” should consist in the adoption of criminal law provisions.⁷³

Satzger’s most significant argument for the assumption that unlike their pre-Lisbon equivalents (respectively former Articles 71, 83 and 175 TEC), Articles 91, 103 and 192 TFEU do entail criminal law competences adds up to the observation that the current treaties, in contrast to the former treaties, contain detailed provisions on criminal law without them being placed in a special pillar with a deviating decision-making process; as a result, the creation of supranational criminal law in the areas of transport law, competition law and environmental law falls within the EU’s competence.⁷⁴ The same conclusion has been drawn by Öberg, though on a more general level and therefore with consequences for the interpretation of Article 114 TFEU as well. Öberg considers it “unlikely” that Article 83(2) TFEU is intended to exclude criminalisation through regulations or criminalisation outside the harmonised policy areas, also in view of the fact that the treaties contain “no clear textual indication” to support such a conclusion.⁷⁵ Most compelling in his opinion, however, is the “EU objectives”-driven interpretation of the scope of the EU’s

⁷⁰ See Article 103 TFEU (“1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council...2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments...”).

⁷¹ Satzger, *supra* note 28, at 54.

⁷² See Article 192 TFEU (“1. The European Parliament and the Council...shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191”).

⁷³ Satzger, *supra* note 28, at 54.

⁷⁴ *Id.* at 55.

⁷⁵ Öberg, *supra* note 42, at 72.

implied criminal law competence; this can be derived from European Court of Justice's case-law in which the implied criminal law competence of the EU is conditioned on the principle of effectiveness.⁷⁶ For the aim of enhancing the effective enforcement of Union policies, criminalisation would thus be allowed outside Article 83(2) TFEU⁷⁷ - for instance under the heading of Article 192 TFEU, provided that the criminal prohibitions are effective and essential for the enforcement of the EU's environmental policies.⁷⁸ With regard to Article 114 TFEU, Öberg states that "[i]f the Union is to achieve the objective of creating an internal market and enforce those policies effectively, the necessary criminal powers must be placed at the service of the Union".⁷⁹

Whereas Asp admits that the interpretation as given above is not as such opposed to the wording of the TFEU, he is not ready to accept a general competence outside Article 83 TFEU which would allow the harmonisation of criminal law by means of either directives, or regulations. His main argument is that the acceptance of such a general competence would make it hard to understand the restrictions on the application of criminalisation competences, which have been included in Article 83 TFEU: "The main reason is that it seems difficult to explain why one would bother to provide for so many safeguards and limitations in relation to Article 83 TFEU, if there are more extensive competences outside Title V Chapter 4".⁸⁰ Asp does, however, accept criminalisation powers outside Article 83, or even outside Title V, but only insofar the provision in hand provides

⁷⁶ Commission v. Council, Case C-176/03, ECLI:EU:C:2005:542 (*Environment Case*), ¶¶ 47-48 ("47...As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence...48. However, the last-mentioned finding 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*"); Commission v. Council, Case C-440/05, ECLI:EU:C:2007:625 (*Ship-Source Pollution Case*), ¶ 66 ("Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence ... the fact remains that when the application of *effective*, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully *effective* (see, to that effect, Case C-176/03 *Commission v Council*, paragraph 48)") (all italics added).

⁷⁷ Öberg, *supra* note 42, at 73.

⁷⁸ *Id.* at 46-49.

⁷⁹ *Id.* at 73.

⁸⁰ Asp, *supra* note 6, at 163.

special reasons to derive the existence of such powers; but such special reasons can in his view only be found with regard to Article 325 TFEU on EU-fraud.

As far as I know, Article 79 TFEU has not been considered as a potential legal basis for *regulatory criminalisation*. The provision has been interpreted as providing a legal basis for the adoption of criminal prohibitions in the specific area of human trafficking.⁸¹ Now, if Article 79 TFEU must be understood as laying down a criminal law competence, its implications may surpass the context of human trafficking and related offences. After all, for the purpose of developing a common immigration policy, Article 79(1) TFEU further mentions enhanced measures to combat “illegal immigration”.⁸² The reference to illegal immigration has already been interpreted to encompass a criminalisation competence too; the pre-Lisbon equivalent of Article 79 TFEU (Article 63 TEC) has led in 2009 to the adoption of Directive 2009/52/EC which in Article 9 contains an obligation for Member States to make the employment of illegally staying third-country nationals a criminal offence.⁸³ As stated in the preamble to this directive, employing these people is considered a “key pull factor” for illegal immigration; for that reason, “[a]ction against illegal immigration and illegal stay should [...] include measures to counter that pull factor”.⁸⁴

4. The Catch-All Provision of Article 352 TFEU: Additional Criminalisation Powers

Finally, attention must be given to the catch-all provision of Article 352 TFEU (not to be confused with the aforementioned provision of Article 325 TFEU on EU-fraud) which has also been interpreted as to allow the creation of substantive criminal law provisions. While the

⁸¹ See Section I.A.2. As indicated, the explicit reference to human trafficking makes it possible that Article 79 TFEU provides an alternative legal basis to Article 83(1) TFEU in which human trafficking is amongst the enumerated areas of crime.

⁸² See Article 79(1) and (2) TFEU (“1. “The Union shall develop a common immigration policy aimed at ensuring...the prevention of, and enhanced measures to combat, illegal immigration...2. For the purposes of paragraph 1, the European Parliament and the Council...shall adopt measures in the following areas: ...(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation”).

⁸³ Parliament and Council Directive 2009/52/EC, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 2009 O.J. (L 168/24). This directive is based on former Article 63(3) sub b TEC, which corresponds to Article 79 TFEU.

⁸⁴ *Id.* at Preamble, Recital 2.

aforementioned potential legal bases for regulatory EU-level criminalisation relate to specific areas of competences, Article 352 TFEU has been formulated in general terms and confers onto the EU the power to act if proved “necessary [...] to attain the objectives set out in the Treaties” where “the Treaties have not provided the necessary powers” (Article 352(1) TFEU).⁸⁵ The option that this provision would provide an alternative legal basis for EU-wide criminalisation of conduct has, however, been contested by Asp. He points out that in comparison with Article 83(2) TFEU, Article 352(1) TFEU does *not* require previous harmonisation in the policy field in which criminal law measures are considered desirable; Article 352(1) TFEU thus provides a lower threshold for criminalisation than Article 83(2) TFEU. But Asp cannot think of any justification to use Article 352(1) TFEU instead of Article 83(2) TFEU in cases where harmonisation measures have not (yet) been adopted.⁸⁶

Other commentators, however, do derive from Article 352 TFEU a general, additional, criminalisation competence.⁸⁷ Mitsilegas, for instance, deems it logical to interpret Article 352 TFEU as enabling the EU legislature to adopt criminal law measures in cases where the requirements of Article 83(2) TFEU (in particular the harmonisation requirement) would not have been fulfilled; it fits into the Treaty’s endorsement of “functional criminalisation”, in the course of which criminalisation must serve the effectiveness of EU law.⁸⁸ Regardless of which view is most convincing, it is worth mentioning that it seems unlikely that in practice the EU legislature would take refuge in Article 352 TFEU in order to circumvent the harmonisation requirement of Article 83(2) TFEU. After all, the ultimate adoption under the heading of Article 352 TFEU would not only require unanimity, it would also demand the UK, Ireland, and Denmark to give up the

⁸⁵ See Article 352(1) TFEU (“If action 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...”).

⁸⁶ Asp, *supra* note 6, at 137-138. See also ESTER HERLIN-KARNELL, *THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW* 87 (2012) (examining the progression of supranational criminal law in the EU and the role of the effectiveness in that regard).

⁸⁷ See, e.g., Mitsilegas, *supra* note 12, at 121; Satzger, *supra* note 28, at 54.

⁸⁸ Mitsilegas, *supra* note 12, at 121.

opt-outs they have negotiated with regard to measures adopted in the framework of the area of freedom, security and justice.⁸⁹

5. DIFFERING REQUIREMENTS UNDER DIFFERENT LEGAL BASES FOR CRIMINALISATION

On the basis of the foregoing, it may fairly be concluded that outside the express criminalisation competences of Article 83 TFEU, the Lisbon Treaty provides for several ancillary criminalisation powers, both inside and outside Title V TFEU on the Area of Freedom, Security and Justice (AFSJ). In various areas of crime, legal bases for criminalisation overlap, for instance with regard to EU-fraud: both Article 83(2) and Article 325(4) TFEU are considered to enable the adoption of criminal prohibitions.⁹⁰

This Part aims to show that the requirements for adopting criminal prohibitions may differ notably throughout the parallel legal bases. This can best be demonstrated from the perspective of the legal requirements laid down in Article 83 TFEU – and how these differ from what other provisions stipulate. The most striking contrasts in procedural requirements will be listed first, followed by the most important substantive differences. Subsequently, it will be shown that the EU legal framework is unsuitable to counter these diverging requirements for EU-level criminalisation.

A. Differing Procedural Requirements

The express criminal law competence envisaged in Article 83 TFEU⁹¹ is limited to *minimum rules* in *directives*, whereas most of the other provisions merely refer to *measures* (e.g. Articles 325(4), 79, and Article 114 TFEU), or even more vaguely to *action* (Article 192).⁹² That way these other provisions clear the path for the adoption of supranational criminal law: the measures and action

⁸⁹ See also Asp, *supra* note 6, at 138-139.

⁹⁰ See *supra* Sections I.B.1-2.

⁹¹ See *supra* notes 14 and 30 for the respective texts of the first and the second paragraph of Article 83 TFEU.

⁹² See *supra* notes 53, 26, 63, and 72 for the respective texts of these provisions.

referred to in these provisions may exceed the level of minimum rules, and, moreover, may be adopted by means of directly applicable *regulations*.

Furthermore, would criminalisation powers be exercised under Articles 103 TFEU, a less onerous decision-making process would suffice, since unlike criminalisation on the basis of Article 83 TFEU, the European Parliament's consent would not be required.⁹³ It is true that unanimity is required for the adoption of criminal prohibitions under the catch-all provision of Article 352 TFEU⁹⁴, whereas criminalisation under Article 83 TFEU can be established with a qualified majority. But insofar criminal prohibitions under Article 352 TFEU would be established through regulations, their effect would as such be more interfering on the national legal order than minimum rules through directives would be.

It is also worth mentioning that unlike all other potential legal bases for criminalisation, Article 83(3) TFEU grants Member States access to the *emergency brake procedure*: where a Member State has serious concerns that a draft directive would affect fundamental aspects of its national criminal justice system, it may request the referral of the legislative proposal to the European Council. Pending a suspension of the ordinary legislative procedure for a maximum duration of four months, the draft directive will be discussed in the European Council. Would this not result in a consensus, Article 83(3) TFEU enables a minimum number of nine Member States to establish enhanced cooperation.⁹⁵ This enhanced cooperation would obviously not bind the opposing Member States; as such, it enables a single Member State to block EU-wide decision-making in the areas covered by Article 83 TFEU. Klip rightly points out that the emergency brake procedure

⁹³ Article 103(1) TFEU merely requires that the Council consults the European Parliament (“...and after consulting the European Parliament”).

⁹⁴ See *supra* note 85.

⁹⁵ See Article 83(3) TFEU (“Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply”).

cannot be considered a veto right; it only prevents Member States from being bound by legislative measures that it considers a threat to fundamental aspects of national criminal justice.⁹⁶ Though not as powerful as the right to veto, the emergency brake procedure must nevertheless be considered an important tool for Member States to express fundamental concerns on proposed legislation. Most relevant in the context of this Section is that outside Article 83 TFEU, Member States do not have access to the emergency brake procedure or something similar in relation to proposed criminalisation.

The choice of legal basis is further relevant because of differing thresholds for subsidiarity controls by national parliaments. Pursuant to Protocol No. 2 to the Lisbon Treaty, any national parliament may submit a reasoned opinion stating why it considers a legislative proposal contrary to the subsidiarity principle.⁹⁷ Provided that the submitted reasoned opinions represent a minimum number of all votes allocated to the national parliaments, the Commission must review the proposed legislative act. It strikes that Protocol No. 2 sets different thresholds. Regarding proposals submitted under Title V TFEU on the Area of Freedom, Security and Justice (AFSJ), which covers Article 83 TFEU, reasoned opinions must at least represent a quarter of all the votes. But in all other cases of proposed EU-level criminal prohibitions, the submission of reasoned opinions will only result in a review by the Commission if at least one third of all votes is represented.⁹⁸ As a result, a subsidiarity review can easier be procured in relation to proposed criminal prohibitions based on Article 83 TFEU.

B. Differing Substantive Requirements

⁹⁶ ANDRÉ KLIP, *EUROPEAN CRIMINAL LAW. AN INTEGRATIVE APPROACH* 39-40 (3rd ed. 2016).

⁹⁷ Protocol No. 2 to the Lisbon Treaty, on the application of the principles of subsidiarity and proportionality, Article 6, 2010 O.J. (C 83/206) (“Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act ... send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers...”).

⁹⁸ *Id.* at Article 7 (“Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice”).

A comparison between substantive legal requirements in the various legal bases shows diverse differences too. The following presents the most striking ones, first those that follow from a comparison between Articles 83(1) and (2) TFEU, then the differences between Articles 83(1) and (2) TFEU and their respective concurring legal bases.

1. Article 83(1) TFEU versus Article 83(2) TFEU

Even if Article 83 TFEU would apply exclusively, the fact remains that both paragraphs contain differences in substantive legal requirements for the adoption of criminal prohibitions. These differences concern the cross-border requirement, the harmonisation requirement, and the essentiality condition.⁹⁹

It follows from the first paragraph of Article 83 TFEU that action in the enumerated areas of crime is allowed insofar as the conduct at stake has a cross-border dimension. This condition has not been included in the second paragraph of Article 83 TFEU. In its turn, this latter paragraph's requirement of previous harmonisation has not been included in the first paragraph. There may be obvious reasons for including the harmonisation requirement in Article 83(2) TFEU contrary to Article 83(1) TFEU; after all, it goes without saying that the areas of crime covered by Article 83(1) TFEU – terrorism, human trafficking, money laundering, etc. – differ in nature from the crime areas that qualify for action under the heading of Article 83(2) TFEU – environmental crime, insider dealing, *et cetera*.¹⁰⁰ With regard to these crime categories, it seems reasonable to demand the additional requirement of previous harmonisation before being able to opt for an EU-level criminal law approach. For the difference concerning the cross-border requirement, however, such an obvious explanation is absent. One could argue that the harmonised policy areas of Article 83(2) TFEU have a cross-border dimension as such, simply because it concerns areas in which EU-wide measures have been adopted. But such an argument cannot be

⁹⁹ See *supra* Sections I.A.1 and I.B.1.

¹⁰⁰ Clearly expressed by the terms “securitised criminalisation” versus “functional criminalisation”, *cf.* Mitsilegas, *supra* note 12.

considered very convincing; the very existence of EU-level rules does not suffice to demonstrate that a specific type of conduct crosses internal borders in the sense of Article 83(1) TFEU.

In comparing the substantive legal requirements of both paragraphs of Article 83 TFEU, it is also worth to mention the so-called essentiality condition laid down in Article 83(2) TFEU: harmonisation of definitions of offences must be essential for the effective implementation of an already harmonised policy area. This contrasts with Article 83(1) TFEU. Although it is true that Article 83(1) TFEU does mention “a special need” for EU action, close reading suggests that such a special need does not constitute an imperative for harmonisation; it may bear the conclusion that the offences at stake have a cross-border dimension, but this cross-border dimension may also result from their “nature or impact”.

2. Article 83 TFEU versus Other Legal Bases for Criminalisation

A general distinction between Article 83 TFEU *versus* other potential legal bases for criminalisation exists in the territorial scope of legislation. In the AFSJ context, which covers criminalisation under Article 83 TFEU, harmonised measures are likely to have a narrower territorial scope than outside the AFSJ context. This stems from the fact that three Member States (the UK, Ireland, and Denmark) have negotiated special arrangements – so-called opt-outs – which allow them to decide *not* to participate in Title V TFEU measures, so including criminalisation measures.¹⁰¹ These opt-outs cannot be invoked outside the AFSJ context; criminal prohibitions adopted outside Article 83 TFEU are therefore likely to have a broader territorial scope.

3. Article 83(1) TFEU versus Concurring Legal Bases

¹⁰¹ Protocol No. 21 to the Lisbon Treaty, on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, 2010 O.J. (C 83/295); Protocol No. 22 to the Lisbon Treaty, on the position of Denmark, 2010 O.J. (C 83/299). A recent referendum on ending the Danish opt-out clause has been rejected in 2015, see <http://www.bbc.com/news/world-europe-35002158> (last accessed on July 13, 2016). On the background of these protocols, see generally Peers, *supra* note 41, at 73 *et seq.*

With regard to the EU's criminalisation powers in specific areas of crime¹⁰², it has been shown that Article 83(1) TFEU envisages an explicit competence to design criminal prohibitions in expressly enumerated areas of crime, among which human trafficking.¹⁰³ In this specific area, however, EU-wide definitions of offences may also be adopted on the basis of Article 79 TFEU.¹⁰⁴ Criminalisation competences thus overlap with regard to human trafficking.

A comparison between both provisions reveals that unlike Article 79 TFEU, Article 83(1) TFEU requires a cross-border dimension: To enact criminal prohibitions under the heading of Article 83(1) TFEU, the EU legislature must demonstrate a cross-border dimension of the conduct, either as the result of its nature or impact, or from a special need to combat it on a common basis.¹⁰⁵ Article 79(1) and (2) TFEU, in contrast, does not include such a concrete prerequisite at all; the verbatim text merely stipulates that the adopted measures contribute to developing a common immigration policy, more specifically to the prevention and combat of trafficking in human beings.¹⁰⁶ As follows from the text of Article 79(1) and (2)(d) TFEU, criminal prohibitions in the field of "combating trafficking in persons" must be adopted for the purposes of "ensuring [...] the prevention of, and enhanced measures to combat, [...] trafficking in human beings" (Article 79(1) TFEU) – this is what I would call a circular reasoning.

One may wonder if the lack of the cross-border requirement in Article 79 TFEU would have consequences in practice, in the sense that Article 79 TFEU sets a lower threshold for criminalisation than Article 83(1) TFEU. Does the cross-border dimension not automatically result from the nature or impact of offences such as human trafficking? Not necessarily. The term human trafficking covers exploitation of people in a broad sense, irrespective of whether a person has been transferred from one Member State to another.¹⁰⁷ It can therefore be concluded

¹⁰² See *supra* Section I.A.

¹⁰³ See *supra* Section I.A.1.

¹⁰⁴ See *supra* Section I.A.2.

¹⁰⁵ See Article 83(1) TFEU, *supra* note 14.

¹⁰⁶ See Article 79 TFEU, *supra* note 26.

¹⁰⁷ This follows from the definition of human trafficking in Parliament and Council Directive 2011/36/EU, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 2, 2011 O.J. (L101/6) ("The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"). This directive has been adopted on the basis of Article 83(1)

that the adoption of criminal prohibitions has to meet more stringent requirements under Article 83(1) TFEU than under Article 79 TFEU.

4. Article 83(2) TFEU versus Concurring Legal Bases

The landscape of regulatory criminalisation powers is rather fragmented, simply because of the number of potential legal bases for criminalisation outside the explicit competence laid down in Article 83(2) TFEU.¹⁰⁸

A first prerequisite that distinguishes Article 83(2) TFEU from the other provisions concerns the so-called harmonisation requirement. While it is true that commentators differ on the degree of harmonisation that Article 83(2) TFEU calls for,¹⁰⁹ it is clear from the outset that the condition of underlying harmonisation is at least meant to limit the criminal law competence laid down in this provision; the requirement could however be circumvented if criminal prohibitions were based on another Treaty provision since none of these require previous harmonisation in the area concerned.

In relation to the harmonisation requirement, Article 83(2) TFEU further stipulates that measures adopted under its heading contribute to the effective implementation of harmonisation measures previously adopted in the area concerned. Because this effectiveness criterion relates to the requirement of previous harmonisation, it seems hardly comparable to effectiveness criteria in other provisions. Article 325(4) TFEU, for instance, requires that measures serve the “*effective and equivalent protection*” against EU-fraud in all Member States, institutions, agencies, bodies and offices (italics added) – but the object of effectiveness is not necessarily the implementation of previous harmonisation measures in the field of EU-fraud.¹¹⁰ A similar situation arises under Article 192(1) TFEU which merely determines that action must serve to

TFEU, although one could question thus whether the cross-border requirement has been fulfilled with regard to all types of criminalised conduct.

¹⁰⁸ See *supra* Section I.B.

¹⁰⁹ See *supra* notes 41-43 and accompanying text.

¹¹⁰ See *supra* Section I.B.2.

achieve the environmental policy objectives of Article 191 TFEU; that harmonisation measures have previously been adopted in this field is not explicitly required.¹¹¹

It must be admitted that both policy areas – the protection of the EU’s financial interests and environmental policy – have largely been harmonised, so that the practical value of the aforementioned differences between Article 83 TFEU on the one hand, and Articles 325(4) and 192 TFEU on the other hand might be very little. Yet in relation to Article 114 TFEU the question arises if the lack of a harmonisation requirement in Article 114 TFEU would actually make it easier for the EU legislature to establish EU-level criminal prohibitions. As argued by Herlin-Karnell, this question should be answered in the negative.¹¹² She holds the view that the specific prerequisite of Article 114 that measures must contribute to market integration, means a higher threshold for criminalisation. In her view, the mere requirement of previous harmonisation *de facto* covers much more areas than market integration alone “since there is not much in contemporary EU law that has not already been the subject of some kind of harmonisation by the European Union”.¹¹³

The so-called “essentiality condition” of Article 83(2) TFEU is also worth comparing; it stipulates that the adoption of criminal prohibitions is “essential” to ensure a well-defined aim, i.e. the effective implementation of the underlying harmonisation measures. The requirement of essentiality boils down to a requirement of necessity. Necessity conditions have also been laid down in Articles 325(4) TFEU (“necessary measures”) and 352 TFEU (“If action [...] should prove necessary”). Equal to what has been argued with regard to the effectiveness criterion, it should be stressed that the object of necessity can reach beyond underlying harmonisation measures in the field: Article 325(4) TFEU only requires that measures are necessary “with a view to affording effective and equivalent protection” against EU-fraud; and Article 352 TFEU generally indicates “one of the objectives set out in the Treaties” as the object of necessity.¹¹⁴

¹¹¹ See *supra* Section I.B.3.

¹¹² See *supra* Section I.B.3.

¹¹³ Herlin-Karnell, *supra* note 16, at 485.

¹¹⁴ See *supra* Section I.B.2 and Section I.B.4 respectively.

The remaining potential legal bases for criminalisation do not explicitly demand the necessity of EU-level criminal prohibitions. Articles 91 and 103 TFEU require that legislative measures are “appropriate”,¹¹⁵ but semantically this cannot be considered to stipulate the necessity of those measures.

Not yet mentioned in this Section are Articles 33 and 79 TFEU, for these provisions do not stipulate any substantive requirements for the adoption of measures. Article 33 TFEU only states that measures must serve the strengthening of customs cooperation between Member States mutually and between Member States and the Commission.¹¹⁶ Article 79 TFEU merely stipulates that the adopted measures contribute to developing a common immigration policy, more specifically to the prevention and combat of illegal immigration.¹¹⁷

C. The Insufficient Counterbalancing Capacity of the Current Legal Framework

Now that the procedural and substantive differences in requirements for criminalisation under the various legal bases have been presented, one could well wonder if the EU legal framework itself already holds several instruments to counter the effects of diverging criminalisation requirements. In this regard, it seems obvious to firstly point out that the exercise of competences by the EU is legally governed by the principles of conferral, subsidiarity and proportionality. Would these principles guarantee that – in any case to a significant extent – equal requirements *de facto* apply for the adoption of EU-level criminal prohibitions? A second issue that could be raised relates to the hierarchy of powers. Does the Court’s case-law on choices of legal bases suffice to prevent the EU legislature from selecting the favorable provision in terms of procedural and/or substantive requirements for criminalisation? As explained below, both questions must unfortunately be answered in the negative.

¹¹⁵ See notes 68 and 70 for the texts of these respective provisions.

¹¹⁶ See Article 33 TFEU, *supra* note 60.

¹¹⁷ See Article 79 TFEU, *supra* note 82.

1. The Limited Role of Limiting Principles: Subsidiarity and Proportionality

It is true that the Lisbon Treaty itself defines the legitimate scope of EU powers and how they should be exercised: Article 5 of the Treaty on European Union¹¹⁸ (hereinafter TEU) encompasses the governing principles. It starts with the principle that the European Union has only the powers conferred upon it; other powers remain with the Member States.¹¹⁹ If under this principle of conferral the EU is as such competent to act, the principle of subsidiarity determines whether the EU should act, that is “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...], but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.¹²⁰ The principle of proportionality addresses the “how-question” of proposed action; it must be ensured that the content and form of a measure does not go beyond what is necessary to achieve the objectives of the Treaty.¹²¹ The Court of Justice contributes to containing the exercise of competences; under Articles 263 and 264 TFEU, the Court is empowered to annul legislation that infringes the principles of conferral, subsidiarity or proportionality.¹²²

A first reason why the above system of defining and governing the EU’s competences must be considered insufficient to counter the undesirable consequences of diverging conditions for EU-level criminalisation, is that they do not fully cover, not even collectively, the most stringent requirements that have been found in the relevant Treaty provisions.¹²³ Although the opposite

¹¹⁸ Treaty on European Union, Dec. 26 2012, 2012 O.J. (C 326/13) [hereinafter TEU].

¹¹⁹ See Article 5(2) TEU (“Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”).

¹²⁰ See Article 5(3) TEU (“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...”).

¹²¹ See Article 5(4) TEU (“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...”).

¹²² See Article 263 TFEU (“The Court of Justice of the European Union shall review the legality of legislative acts...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...”) and Article 264 TFEU (“If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void...”).

¹²³ See for these various requirements *supra* Part II.

might have seemed the case at a first reading of these beautifully formulated principles, a closer look at the meaning of the principles of subsidiarity and proportionality demonstrates that most divergences remain to exist. This is demonstrated below, first with regard to subsidiarity, then with regard to proportionality.

The role of subsidiarity in restraining the exercise of EU powers

Before reviewing the concrete content of the subsidiarity principle, it is important to remind ourselves of the fact that this principle does not apply in areas in which the EU has exclusive competence (Article 5(3) TEU). Although it is true that very few areas come under exclusive EU competence, the fact that subsidiarity does not apply in these areas could be relevant where EU-level criminal prohibitions are adopted on the basis of Article 103 TFEU. As argued before, it must be considered very plausible that this provision allows the adoption of criminal law provisions – through regulations or directives – for the aim of ensuring compliance with EU competition rules.¹²⁴ Because the establishment of competition rules which are necessary for the functioning of the internal market is an exclusive competence of the European Union¹²⁵, the use of criminalisation powers under the heading of Article 103 TFEU is not restricted by subsidiarity concerns. This means that divergent requirements always remain to exist between Article 103 TFEU and other legal bases for criminalisation, even if subsidiarity would be concluded to cover the most stringent requirements for EU-level criminalisation of conduct.

Apart from Article 103 TFEU, however, it remains relevant to have a closer look at the meaning of subsidiarity. It follows from Article 5(3) TEU that the principle of subsidiarity demands, firstly, that the objective of the proposed measure cannot be sufficiently achieved at the Member States' level, and, secondly, can be better achieved at the EU level.¹²⁶ If these requirements are not met, the EU must refrain from action. As such, the subsidiarity principle aims to determine *whether* the EU should act at all. In the framework of this paper, the question therefore arises whether and to what extent both aspects of the subsidiarity principle actually cover the most

¹²⁴ See *supra* Section I.B.3.

¹²⁵ This follows from Article 3(1)(b) TFEU.

¹²⁶ See Article 5(3) TFEU, *supra* note 120.

stringent *substantive legal requirements* that have been found in the Treaty competences for criminalisation.

As follows from the previous analysis, these most stringent requirements are to be found in Article 83 TFEU.¹²⁷ It has been demonstrated that Article 83(1) TFEU requires *a cross-border dimension* whereas other potential legal bases for criminalisation in the same areas of crime (so-called Euro-crimes) as well as for regulatory criminalisation lack such a requirement. Moreover, Article 83(2) TFEU stipulates that regulatory criminalisation powers can only be invoked provided that the *harmonisation requirement* and the *essentiality/necessity condition* are fulfilled. Previous harmonisation is however not required under other relevant Treaty provisions. And the requirement of essentiality can be found in some of them, although the objects of necessity do vary: whereas Article 83(2) TFEU requires that criminal prohibitions are essential for the effective implementation of underlying harmonisation measures in EU policy areas, Article 325(4) TFEU stipulates that criminal prohibitions under its heading are necessary for the aim of affording effective and equivalent protection against EU-fraud, whereas Article 352 TFEU generally indicates Treaty objectives as the object of necessity.

In order to determine whether and to what extent these requirements form part of the subsidiarity test anyhow, it would be obvious to focus a little bit more on the concrete substance of the principle under consideration. This, however, appears not an easy task, in particular because neither the legislature nor the European Court of Justice apply substantive criteria in order to check compliance with the subsidiarity principle – although such criteria were formulated in the so-called Edinburgh Guidelines. These Guidelines were adopted by the European Council in Edinburgh in 1992 and later on codified by means of Protocol No. 30 to the 1997 Amsterdam Treaty.¹²⁸ The Edinburgh Guidelines envisage that in assessing whether the EU should act (subsidiarity), the EU legislature must examine three aspects:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or

¹²⁷ See *supra* Section II.B.

¹²⁸ Protocol No. 30 annexed to the Treaty establishing the European Community by the Treaty of Amsterdam of 2 October 1997, on the application of the principles of subsidiarity and proportionality, 1997 O.J. (C 340/105).

- 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; and/or
- The Council must be satisfied that 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.¹²⁹

These substantive criteria for subsidiarity have not been reproduced in the current protocol on subsidiarity and proportionality, i.e. Protocol No. 2 to the Lisbon Treaty.¹³⁰ But already previous to the entry into force of the Lisbon Treaty, the Edinburgh Guidelines have never been applied by the European Court of Justice. Many commentators have noted that the Court's review of subsidiarity has not been very meaningful at all.¹³¹ The Court appears satisfied when the preamble contains general statements on the objective of the measure and the need for EU action, without requiring a thorough justification for the need to pursue the said objective, and without requiring quantitative or qualitative evidence¹³² to underpin the conclusion that the objective can be better achieved at the EU level and cannot be sufficiently achieved at the

¹²⁹ European Council, Conclusions adopted at Edinburgh European Council, in Annex I to Part A, p. 19, Dec. 12, 1992, available at http://www.europarl.europa.eu/summits/edinburgh/default_en.htm.

¹³⁰ Protocol No. 2 to the Lisbon Treaty, on the application of the principles of subsidiarity and proportionality, 2010 O.J. (C 83/206).

¹³¹ See, e.g., Gabriël A. Moens & John Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?* 41 JOURNAL OF LEGISLATION, 65-102 (2015) (explaining the failure of subsidiarity as a judicial review principle and showing the potential of subsidiarity as a legislative principle); Stephen Weatherill, *The Limits of Legislative Harmonisation Ten Years After Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"*, 12 GERMAN LAW JOURNAL, 828-864 (2011) (demonstrating that the Treaty's imprecise definition of the EU's legislative competence vests a wide discretion in the legislative institutions, and arguing that against that background the Court's case-law has been converted into a drafting guide, on the basis of which the legislative institutions may adopt a given 'formula' that the Court can only approve); Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MARKET LAW REVIEW, 63-84 (2006) (stating that the principle of subsidiarity is ill-suited to operate as a constraint on Community powers and underlining that the proportionality principle is better equipped to solve competence questions); Grainne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, HARVARD JEAN MONNET WORKING PAPER SERIES (7/1999), available at <http://jeanmonnetprogram.org/archive/papers/99/990701.html> (arguing the importance of identifying criteria for assessing the appropriateness of decision-making through the subsidiarity principle and examining the potential of Protocol No. 30 annexed to the Amsterdam Treaty (see *supra* note 128) in that regard).

¹³² Despite the fact that such evidence is required on the basis of Article 5 of Protocol No. 2 to the Lisbon Treaty, *supra* note 130.

national level.¹³³ It has therefore been concluded that the subsidiarity principle is “under-enforced”.¹³⁴

Several reasons have been given to explain why the judicial enforcement of such a fundamental principle has been so weak. It has, for instance, been argued that the under-enforcement of subsidiarity by the Court of Justice has been so anemic because it concerns a political question, rather than a legal question. The subsidiarity judgment should therefore be made by the political institutions of the EU, and does not, or only marginally, qualify for judicial enforcement by the Court.¹³⁵

Another, much more convincing, reason for the weakness of subsidiarity as a limiting principle may be its weak legal content. It has been argued that subsidiarity is ill-suited for its task to provide a method for competence division. Instead of being a mechanism by means of which the (competing) interests of the Union and its Member States could be carefully balanced – which would include the prioritizing of objectives to be achieved – subsidiarity presumes *a priori* the Treaty objectives as well as the need to achieve these objectives, and only asks if these goals are going to be achieved by Union action or by the Member States.¹³⁶ In a context in which the justification of EU action is predominantly defined in terms of goals to be achieved, neither

¹³³ See *United Kingdom v. Council*, Case C-84/94, ECLI:EU:C:1996:431, ¶¶ 74-77; *Germany v. European Parliament and Council (Re Deposit Guarantee Directive)*, Case C-233/94, ECLI:EU:C:1997:231, ¶¶ 26-28; *Commission v. Germany*, Case C-518/07, ECLI:EU:C:2010:125 ¶¶ 21-25, 54-55; *Netherlands v. European Parliament and Council*, Case C-377/98, ECLI:EU:C:2001:523, ¶ 33. In *R. v. Secretary of State (Re Vodafone Ltd.)*, Case C-58/08, ECLI:EU:C:2010:321, the Court indirectly referred to the impact assessment for its subsidiarity review of a specific recital, see ¶¶ 77-79. Vandenbruwaene considers this an important improvement of the Court’s subsidiarity review, because impact assessments could be “a veritable tool for dialogue in judicial proceedings”, see Werner Vandenbruwaene, *What Scope for Subnational Autonomy: The Issue of the Legal Enforcement of the Principle of Subsidiarity*, 6 PERSPECTIVES ON FEDERALISM, 57, 67 (2014).

¹³⁴ See Moens & Trone, *supra* note 131, at 77.

¹³⁵ TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 183-188 (2nd ed. 2006); see also Moens & Trone, *supra* note 131, at 77-78. Werner Vandenbruwaene disagrees with this view and argues that subsidiarity is a legal principle. On the basis of comparative studies, he proposes alternative strategies for the enforcement of subsidiarity in the EU, see Vandenbruwaene, *supra* note 133.

¹³⁶ See Davies, *supra* note 131, at 67-68. If only for this reason, I disagree with Ester Herlin-Karnell where she states in *Subsidiarity in the Area of Justice and Home Affairs Law – A Lost Cause?*, EUROPEAN LAW JOURNAL, 351-361 (2009) that in the context of EU criminal law the principle of subsidiarity is the EU equivalent of the last resort principle. Under the last resort principle, the first question that needs to be answered in the affirmative is whether the type of conduct under consideration requires a criminal law approach as such, irrespective of whether criminal law measures should be taken nationally or at the EU-level. This first question is, however, ignored where the necessity condition under the subsidiarity test boils down to the question of whether the protection of EU objectives requires EU-level harmonisation.

national interests nor other public interests that could militate against EU action are seriously assessed by the Court of Justice. Moreover, defined in terms of EU objectives, such objectives (e.g. the achievement of free movement) can automatically be better achieved by the EU, simply because it has the power to adopt uniform legislation. The situation becomes almost funny in those cases where the very aim of the proposed measure is harmonisation as such; harmonisation can for instance be considered necessary in order to prevent or end differences in national legislation causing trade barriers or obstacles to free movement. It goes without saying that the objective of harmonisation cannot be achieved by the Member States acting alone, and can in any case be better achieved by the EU.¹³⁷ To reason that in such cases the subsidiarity principle has been fulfilled basically amounts to circular reasoning. That the Court nevertheless rejects corresponding criticism in such cases¹³⁸ cannot but lead to the conclusion that subsidiarity challenges will automatically fail. In other words, there is not much to expect from the principle of subsidiarity anyhow where it comes to controlling the exercise of powers. In view of that, it will not come as a surprise that an EU measure has never been annulled on the basis of subsidiarity.

Considering the aforementioned weak judicial review of subsidiarity before the Court in connection with the absence of clear substantive guidelines for testing subsidiarity, it must be concluded that subsidiarity is currently incapable of overruling the divergences in substantive legal requirements for criminalisation.

The role of proportionality in restraining the exercise of EU powers

The principle of proportionality essentially requires that EU action does not go beyond what is necessary to achieve its goals. Thus, the proportionality principle determines *how* the EU should act. This *how*-question may either relate to the substance of a chosen measure (e.g. whether the scope of a criminal prohibition is proportional), or to its procedural aspects (e.g. whether the chosen measure – for instance a regulation instead of a directive – is proportional). It therefore

¹³⁷ See also Davies, *supra* note 131.

¹³⁸ See United Kingdom v. Council, Case C-84/94, ECLI:EU:C:1996:431, ¶ 47; The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd., et al, Case C-491/01, ECLI:EU:C:2002:741 ¶¶ 181-183; Netherlands v. European Parliament and Council, Case C-377/98, ECLI:EU:C:2001:523; Alliance for Natural Health and others, Joined Cases C-154/04 and 155/04, ECLI:EU:C:2005:449, ¶¶ 105-107.

must first be examined whether the proportionality principle, as applied in EU law, covers the most stringent *substantive legal requirements* for criminalisation, and second whether it urges or requires recourse to the most stringent *procedural requirements* (or from a Member States' perspective: the least intrusive measures).

To be able to answer these questions, it is necessary to have a closer look at the content of proportionality in the EU context. What proportionality actually means or should mean in the practice of law-making can be derived from the European Court of Justice's case-law which – in contrast to case-law on the subsidiarity principle – has formulated criteria in order to check fulfillment of the proportionality principle. The Court conventionally applies a triple test. It first tests if the proposed measure is appropriate or suitable to achieve the pursued aim (appropriateness test, or suitability test); if so, whether the chosen measure is necessary to achieve that aim (necessity test, or “least restrictive measure” test), and, thirdly, whether the proposed measures is proportional to the stated goal (*stricto sensu* test).¹³⁹

If these elements of proportionality are compared to the most stringent *substantive requirements* for criminalisation (as aforementioned)¹⁴⁰, it is clear from the outset that neither the cross-border dimension of Article 83(1) TFEU nor the harmonisation requirement of Article 83(2) TFEU fall under the scope of the proportionality requirement. Upon closer consideration, the same conclusion must be drawn with regard to the requirement of necessity as it has been included in Articles 83(2) and 325(4) TFEU. Whereas under these provisions necessity must respectively relate to the effective implementation of previous harmonisation measures in EU policy areas, or to the effective and equivalent protection against EU-fraud, necessity under the proportionality principle rather relates to the pursued aim of the proposed measure itself. It needs no explanation that this latter necessity requirement is broader in scope than the more specific necessity conditions included in Articles 83(2) and 325(4) TFEU; the only fact that the

¹³⁹ See, e.g., Liselotte Hauer v. Land Rheinland-Pfalz, Case C-44/79, ECLI:EU:C:1979:290, ¶ 23; Commission v. Germany, Case C-116/82, ECLI:EU:C:1986:322, ¶ 21. See also Tridimas, *supra* note 135, at 139-140; Grainne De Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 YEARBOOK OF EUROPEAN LAW, 105 (1993).

¹⁴⁰ See *supra* Section II.B.

pursued objective has not been predetermined makes it much easier to fulfill the necessity requirement under the proportionality principle.

Illustrative in this regard is the Court's judgment in the *Swedish Match* case: in this case, it was claimed that to prohibit the marketing of tobacco products for oral use, as included in Directive 2001/37/EC, breached the proportionality principle. But given the Directive's aim – which is to establish a high level of protection of human health – it cannot surprise that the prohibition was considered proportionate; complete prohibition obviously contributes to a higher level of health protection than less preventive measures.¹⁴¹ The critical comments that were made above in the context of subsidiarity equally apply to the necessity part of the proportionality test. The fact that justification of EU action is defined in terms of goals to be achieved makes it rather easy to fulfill the condition of necessity by simply formulating an objective (e.g. harmonisation) which cannot be achieved by less restrictive measures. This applies all the more since it is on those who claim a breach of proportionality to show the existence of less restrictive measures.¹⁴²

To follow up on this issue of less restrictive measures, the aforementioned interpretation of the necessity aspect of proportionality (including the fact that the existence of such measures must be demonstrated by the applicant) does not sound very promising for the procedural side of the coin. As appears, the various legal bases for criminalisation diverge significantly.¹⁴³ The most stringent procedural requirements are to be found in Article 83 TFEU. It concerns: *minimum rules* through *directives*, the availability of the *emergency brake procedure*, and a *threshold of 25 percent for subsidiarity controls* by national parliaments. In view of the necessity test (also called the “least restrictive measure” test), the question arises if under this test it is required to use the least intrusive measures, both from the perspective of Member States and from the perspective of the individual; that way, proportionality could contribute to safeguarding the application of stricter procedural conditions for criminalisation. The question must, however, be answered in the negative. The fact remains that justified EU action is defined in the terms of the stated

¹⁴¹ *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health*, Case C-210/03, ECLI:EU:C:2004:802, ¶¶ 46-58.

¹⁴² *Luxembourg v. Parliament and Council*, Case C-176/09, ECLI:EU:C:2011:290, ¶ 67.

¹⁴³ See *supra* Section II.A.

objectives of such action, and that the weight of demonstrating the existence of less restrictive alternatives has been placed on the applicant's shoulders.

The foregoing suggests that the Court's review of the necessity aspect of proportionality has not been very meaningful so far. This conclusion has been supported by several commentators with regard to the judicial enforcement of the proportionality principle in general. Analyses¹⁴⁴ have shown that when assessing EU legislation the Court allows the legislature a broad discretion, at least in areas "which involve political, economic and social choices on its part"¹⁴⁵, such as public health policy,¹⁴⁶ transport policy¹⁴⁷, environmental policy¹⁴⁸, agricultural policy¹⁴⁹, social policy¹⁵⁰, and in the area of combating EU-fraud.¹⁵¹ In such areas, EU legislation will only be quashed for violating proportionality if it is "manifestly inappropriate" to achieve the objectives pursued.¹⁵² This "manifestly inappropriate"-test applies to both the suitability aspect and the necessity aspect of proportionality.¹⁵³ It plainly leaves ample discretion to the EU legislature.

Moreover, the application of the *stricto sensu* test has sharply been criticized. While it is clear that proportionality *stricto sensu* stipulates that the proposed measure does not involve excessive effects on the applicant's interests, its exact content remains rather abstract. The application by the Court of Justice of the third test can therefore work out either way, and as such also fails to provide objective guidelines for the EU legislature.¹⁵⁴

¹⁴⁴ Öberg, *supra* note 42, at 27-32; Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 *European Law Journal*, 171 *et seq.* (2010); Tridimas, *supra* note 135, at 136-174.

¹⁴⁵ See *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health*, Case C-210/03, ECLI:EU:C:2004:802. ¶ 48.

¹⁴⁶ *Id.*

¹⁴⁷ *Luxembourg v. Parliament and Council*, Case C-176/09, ECLI:EU:C:2011:290, ¶ 62.

¹⁴⁸ *Omega Air and others*, Joined Cases C-27/00 and C-122/00, ECLI:EU:C:2002:161.

¹⁴⁹ *Spain v. Council*, Case C-310/04, ECLI:EU:C2006:521.

¹⁵⁰ *United Kingdom v. Council*, Case C-84/94, ECLI:EU:C:1996:431.

¹⁵¹ *Commission v. European Central Bank*, Case C-11/00, ECLI:EU:C:2003:395, ¶ 157.

¹⁵² *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health*, Case C-210/03, ECLI:EU:C:2004:802. ¶ 48.

¹⁵³ Tridimas, *supra* note 135, at 143-144.

¹⁵⁴ Harbo, *supra* note 144, at 165; Davies, *supra* note 131, at 81-82; Tridimas, *supra* note 135, at 139; Öberg, *supra* note 42, at 32.

The foregoing must lead to the conclusion that proportionality cannot counter the divergences in requirements for EU-level criminalisation.

2. Hierarchy of Legal Bases: A Largely Unsolved Matter

This Section deals with the question of how the right legal basis for criminalisation must be determined in situations where several alternative competences could be invoked. As things are, this is a most relevant question; without any indication of which provision takes priority over others, the EU legislature would be able to choose the most favorable provision in terms of procedural and/or substantive requirements for criminalisation. It is needless to say that such a method of decision-making would encourage a somewhat calculating approach towards decision-making in a context that rather calls for a principled approach, both with a view to individuals' rights and freedoms and to ensure respect for national criminal justice systems and traditions. In spite of this, however, the most relevant question of how the right legal basis must be determined in concrete cases of proposed legislation cannot be answered unequivocally. The following describes that amongst legal scholars as well as within the EU legislature opinions differ on the exact relationship between overlapping criminalisation powers; and that the European Court of Justice's marginal review in choice of legal basis disputes has thrown some, but not much light on the matter.

Amongst legal scholars, the relationship between criminalisation competences has especially been viewed from the perspective of the express criminalisation competences provided for in Article 83 TFEU. From that perspective, several commentators have expressed their views on whether Article 83 TFEU has to be interpreted as a *lex specialis* to the implied criminalisation competences envisaged in other Treaty provisions.

Asp takes the most perspicuous viewpoint on the matter. His opinion that Article 83 TFEU is a *lex specialis* in relation to other potential legal bases for EU-level criminalisation logically follows from that he firmly rejects the existence of a general criminalisation competence outside Article

83 TFEU.¹⁵⁵ The only alternative legal basis for criminalisation that he would be ready to accept is Article 325(4) TFEU (relating to EU-fraud), although, according to Asp, this ancillary competence only exists in combination with Article 83(2) TFEU: “Article 325 TFEU does not [...] provide the EU with Article 83(2)-independent criminal law competence”.¹⁵⁶ Asp does not elaborate on what the practical consequence of his view would be, for instance whether criminal prohibitions in the field of EU-fraud can only be adopted under the joint heading of both articles. His opinion is clear enough anyhow: Neither Article 325(4) TFEU nor any other Treaty provision can take priority over Article 83(2) TFEU.

As to criminalisation competences in the field of EU-fraud, Mitsilegas takes an opposite stand; he states that Article 325(4) TFEU constitutes a *lex specialis* to Article 83(2) TFEU.¹⁵⁷ But with regard to criminalisation competences in the field of human trafficking, the view of Asp seems to be shared by Satzger who believes Article 83(1) TFEU is a *lex specialis* to Article 79(2) TFEU. Quite ambiguously, however, Satzger states that Article 83(1) TFEU only takes precedence over Article 27(2) TFEU insofar the EU legislature wishes to adopt minimum rules through directives¹⁵⁸, thereby suggesting that if the EU legislature has decided in advance to opt for supranational criminal law provisions the relationship between Articles 83(1) and 79(2) TFEU has no relevance, simply because Article 83(1) TFEU does not allow for the adoption of supranational criminal law. Asp’s view that no Treaty provision can take priority over Article 83 TFEU has also been contested in the context of Article 114 TFEU. This latter provision has been interpreted as providing a legal basis for regulatory criminalisation, namely with a view to internal market approximation. When examining the precise relationship between Article 114 TFEU and Article 83(2) TFEU, attention could be drawn to the first sentence of Article 114(1) TFEU: “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26” (i.e. the internal market objective). This expression suggests that Article 114 TFEU is subsidiary to other more specific legal bases for establishing and ensuring the internal market. According to Herlin-Karnell this is indeed the case. But according to her, Article 83(2) TFEU cannot

¹⁵⁵ Asp, *supra* note 6, at 163. See also *supra* Section I.B.3.

¹⁵⁶ Asp, *supra* note 6, at 153.

¹⁵⁷ Mitsilegas, *supra* note 12, at 120.

¹⁵⁸ Satzger, *supra* note 28, at 81.

be considered a “more specific legal basis”, particularly because unlike Article 114 TFEU, Article 83(2) TFEU does not envisage any threshold in terms of market creation. Herlin-Karnell therefore concludes that Article 114 TFEU should take precedence over Article 83(2) TFEU.¹⁵⁹

Amongst the EU institutions, differences of opinion have been pronounced in the area of EU-fraud. While EU-level criminal prohibitions in this field can also be adopted under the heading of Article 83(2) TFEU – after all, fraud against the EU’s financial interests concerns an area in which harmonisation has taken place – the Commission’s remark on Article 325(4) TFEU in its 2011 Communication on EU Criminal Policy suggests that it sees Article 325(4) TFEU as a *lex specialis* to Article 83(2) TFEU: “[...] Article 325 (4) of the Treaty provides for the *specific possibility* to take measures in the field of the prevention of and fight against fraud affecting the financial interests of the Union, a field where some pre-Lisbon legislation already exists” (italics added).¹⁶⁰ The Commission’s proposal for a Directive on the fight against EU-fraud confirms this interpretation: the proposal, which requires Member States to criminalise EU-fraud and related activities, is based on Article 325(4) TFEU.¹⁶¹

But the appropriateness of this legal basis has been called into question by the Council Legal Service and the European Parliament’s Committee on Legal Affairs. Both have argued that Article 83(2) TFEU must be regarded as a *lex specialis* to Article 325(4) TFEU, and that therefore Article 83(2) TFEU constitutes the proper legal basis for the proposed EU-level criminalisation of EU-fraud.¹⁶² What their arguments boil down to is that the opposite view would make it too easy to circumvent the specific and strong requirements of Article 83(2) TFEU and deprive this provision of its “practical applicability”.¹⁶³

¹⁵⁹ Herlin-Karnell, *supra* note 16, at 485-486.

¹⁶⁰ European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, at 6.

¹⁶¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law, COM(2012) 363 final.

¹⁶² Council Legal Service, Opinion on the Proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law – Legal basis, doc. 15309/12 (22 October 2012); European Parliament Committee on Legal Affairs, Opinion on the legal basis for the proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law, A7-0251/2014 (25 March 2014). See also *supra* note 5 and accompanying text.

¹⁶³ Council Legal Service Opinion, *supra* note 162, at 5; Opinion of the European Parliament Committee on Legal Affairs, *supra* note 162, at 33-34.

Over the past decades legal basis disputes have arisen frequently, predominantly in matters outside the criminal law sphere. Quite a number of disputes have been brought before the European Court of Justice which has resulted in the development of the so-called “choice of legal basis” doctrine. According to this doctrine, EU institutions are not free to choose the legal basis they prefer for whatever reason; instead, the choice of legal basis must be based on “objective factors which are amenable to judicial review”. Factors of particular importance are the aim and content of the proposed measure.¹⁶⁴ Furthermore, it has been ruled that the most specific legal basis takes priority over alternative powers.¹⁶⁵ If a measure appears to pursue two aims, or if its content comprises two components, the Court applies the so-called “centre of gravity” test: if one of the aims or components can be qualified as dominant over the other, the measure must rest on a *single* legal basis, i.e. the legal basis required by the dominant aim or component.¹⁶⁶ For several reasons, commentators have criticized this aspect of the “choice of legal basis” doctrine. Firstly, it has convincingly been argued that the “centre of gravity” test actually enables the legislature to choose the preferred legal basis, simply by drafting the proposed measure in such a way that the objectives of this legal basis are especially emphasized.¹⁶⁷ As Miettinen has aptly put it, “the appropriate choice is in practice determined by the text of the instrument”.¹⁶⁸ A second point of critique comes from Miettinen himself and relates to how the incompatibility of two legal bases seems to influence the “centre of gravity” approach.¹⁶⁹ It is settled case-law that a measure cannot rest on joint legal bases if the corresponding legislative procedures differ

¹⁶⁴ See, e.g., Commission v. Council, Case C-300/89, ECLI:EU:C:1991:244 (*Titanium dioxide case*), ¶ 10; Commission v. Council, Case C-155/91, ECLI:EU:C:1993:98, ¶ 7; Austria v. Huber, Case C-336/00, ECLI:EU:C:2002:509, ¶ 30; Commission v. Council, Case C-176/03, ECLI:EU:C:2005:542 (*the famous Environment Case*, see *supra* note 9 and accompanying text), ¶ 45; Commission v. Parliament and Council, Case C-178/03, ECLI:EU:C:2006:4, ¶ 41; Commission v. Council, Case C-440/04, ECLI:EU:C:2007:625 (*the famous Ship-source pollution case*, see *supra* note 9), ¶ 61; Parliament v. Council, Case C-155/07, ECLI:EU:C:2008:605, ¶ 34.

¹⁶⁵ See Commission v. Council, Case 338/01, ECLI:EU:C:2004:253, ¶ 60; Commission v. Council, Case C-533/03, ECLI:EU:C:2006:64, ¶ 45; Parliament v. Council, Case C-155/07, ECLI:EU:C:2008:605, ¶ 34.

¹⁶⁶ See, for instance, Spain v. Council, Case C-36/98, ECLI:EU:C:2001:64, ¶ 59; Commission v. Council, Case 338/01, ECLI:EU:C:2004:253, ¶ 55; Commission v. Parliament and Council, Case C-178/03, ECLI:EU:C:2006:4, ¶ 42; Parliament v. Council, Case C-155/07, ECLI:EU:C:2008:605, ¶ 35.

¹⁶⁷ See Wheaterill, *supra* note 131.

¹⁶⁸ Samuli Miettinen, *Criminal competence and the choice of legal basis: space in the margins?*, 5 EUROPEAN CRIMINAL LAW REVIEW, 226 (2015).

¹⁶⁹ *Id.* at. 228-241.

significantly.¹⁷⁰ In the framework of this paper, this issue is of particular relevance since Article 83 TFEU is very likely to be seen as incompatible with most alternative legal bases for EU-level criminalisation; the Court's case-law suggests that the procedure envisaged in Article 83 TFEU cannot be reconciled with the procedures envisaged in most other provisions.¹⁷¹ In view of this, it is worrying to observe that criminal law components of proposed legislation easily seem to be qualified as ancillary, rather as predominant, especially in cases where the proposed measure links to another EU policy, such as transport policy.¹⁷² To base such legislation on a single legal basis outside the AFSJ suggests that the requirements of Article 83 TFEU can easily be circumvented in measures that are linked to a substantive EU policy.¹⁷³

All in all, the various (potential) legal bases for EU-level criminalisation lack a clear order or precedence. The Court's review in choice of legal basis disputes is only marginal and reliance on the important safeguards of Article 83 TFEU is not actively protected or encouraged. That way the Lisbon Treaty leaves ample opportunity to circumvent legal requirements that in a specific case are considered less convenient.

3. THE CASE FOR A SINGLE LEGAL FRAMEWORK FOR CRIMINALISATION AT THE EU LEVEL

It follows from what precedes that the existence of parallel legal bases for EU-level criminalisation currently enables the EU legislature to opt for the provision that in a specific situation is considered most convenient. This would not automatically have to result in picking the more lenient requirements, but it cannot be excluded that less stringent requirements are regarded as more convenient by law-making practitioners. This amounts to a risk of cherry-picking between legal bases for the adoption of EU-wide criminal prohibitions. The core

¹⁷⁰ Parliament v. Council, Case C-155/07, ECLI:EU:C:2008:605, ¶ 37; Parliament v. Council, Case C-130/10, ECLI:EU:C:2012:472, ¶ 49.

¹⁷¹ Commission v. Council, Case C-370/07, ECLI:EU:C:2009:590, ¶ 48. See also Samuli Miettinen, *Implied ancillary criminal law competence after Lisbon*, 3 EUROPEAN CRIMINAL LAW REVIEW, 207 (2013).

¹⁷² To underpin this, Miettinen analyzed three relevant judgments (i.e. Commission v. Parliament, Case C-43/12, ECLI:EU:C:2014:298; Commission v. Council, Case C-137/12, ECLI:EU:C:2012:675; and Parliament v. Council, Case C-658/11, ECLI:EU:C:2014:2025), see Miettinen, *supra* note 168, at 228-241.

¹⁷³ Miettinen, *supra* note 172, at 241.

argument of this paper is that differences in requirements for EU-level criminalisation cannot be accepted, let alone that in an individual case the EU legislature can choose the most convenient requirements. Rather, the EU needs a single legal framework for the adoption of criminal prohibitions. The following provides the two correlating reasons that give rise to this statement.

The first aspect that needs to be pointed out here is the long-standing, widely supported view amongst criminal law experts that the criminalisation of conduct requires a careful approach, because of the very consequences of criminalisation on citizens' life.¹⁷⁴ The effects of criminalisation go beyond the mere prohibition of a specific kind of behaviour. Among other things the entry into force of a criminal prohibition creates a variety of state powers to be enforced against those who (allegedly) do not comply with the criminal law; Simester & Von Hirsch characterize the criminal law as "a coercive system, directed at controlling the behaviour of citizens".¹⁷⁵ Law enforcement actions against citizens who (allegedly) broke the criminal law may cause serious infringements on their rights and privacy with the deprivation of liberty as the most drastic tool of law enforcement. Moreover, the moral voice of the criminal law is likely to generate a social stigma on those who have been suspected or convicted for the commitment of a crime. If only because of these potentially interfering and stigmatising consequences of illegalizing conduct the decision to invoke the criminal law requires explicit and thorough justifications, irrespective of whether such a decision is taken at the national level or at the EU level.¹⁷⁶

¹⁷⁴ This view has traditionally been widely acknowledged, see, *amongst others*, L.H.C. HULSMAN, *HANDHAVING VAN RECHT* (1965) (only available in Dutch, on the intersection of administrative law, civil law and criminal law and arguing that the criminal law should only be called for as a last resort); THEO A. DE ROOS, *STRAFBAARSTELLING VAN ECONOMISCHE DELICTEN* (1987) (only available in Dutch, presenting a model for criminalisation of economic crimes which is based on the premise that the criminal law should only be used when other mechanisms fail), Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD JOURNAL OF LEGAL STUDIES, 207-235 (2004); LINDSAY FARMER, R.A. DUFF, S.E. MARSHALL, MASSIMO RENZO & VICTOR TRADOS, *THE BOUNDARIES OF THE CRIMINAL LAW* (2010); A.P. SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS AND WRONGS. ON THE PRINCIPLES OF CRIMINALISATION* 19-32 in particular (2012).

¹⁷⁵ See Simester & Von Hirsch, *supra* note 174, at 19.

¹⁷⁶ A careful approach towards criminalisation at the EU level has widely been acknowledged as well, see for instance: Petter Asp et al, *A Manifesto on European Criminal Policy (European Criminal Policy Initiative)*, 4 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 707-716 (2009); Ester Herlin-Karnell, *What Principles Drive (or Should Drive) European Criminal Law?*, 11 GERMAN LAW JOURNAL, 1115-1124 (2010); 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*, 1 EUROPEAN CRIMINAL LAW REVIEW, 7-34 (2011); Petter Asp, *The Importance of the Principles of Subsidiarity and*

This has also been recognised explicitly in EU policy documents, such as the European Commission's 2011 Communication on EU criminal policy and the European Parliament's Resolution on EU criminal law.¹⁷⁷ Moreover, the need for a careful approach towards calling on the criminal law follows from the EU's adherence to the spirit of liberal democracy, as has been expressed in Article 2 TEU.¹⁷⁸ As a community based on the rule of law, respect for human dignity and human rights, freedom, democracy and equality,¹⁷⁹ the EU recognizes the sensitive nature of criminal law in general, simply because criminal law measures are potentially at odds with these values. It would therefore befit the EU legislature to exercise its criminalisation powers with restraint. Now, one could hold different views on which criteria would justify the adoption of criminal prohibitions in a certain area of crime; but it goes without saying that the agreed criteria for criminalisation would go completely out of power if they apply off and on.

This brings us to the second issue, i.e. coherence which is much needed in the context of EU criminal law. The possibility of cherry-picking between legal bases for criminalisation threatens the consistent exercise of criminalisation powers which, in turn, hinders the development of a coherent EU criminal policy. The need for coherence in the area of criminal law has broadly been recognised. The European Commission stated in its 2011 Communication on EU criminal policy that "it is particularly important to ensure that EU legislation on criminal law, in order to have a real added value, is consistent and coherent".¹⁸⁰ And in its 2012 Resolution on EU criminal law, the European Parliament even observed "the need for increased coherence" because criminal

Coherence in the Development of EU Criminal Law, 1 EUROPEAN CRIMINAL LAW REVIEW, 44-55 (2011); Jannemieke Ouwerkerk, *Criminalisation as a last resort: a national principle under the pressure of Europeanisation?*, 4 NEW JOURNAL OF EUROPEAN CRIMINAL LAW, 228-241 (2012).

¹⁷⁷ European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, at 6; European Parliament Resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208, under I (on the principles that should govern criminal law decision-making, on the importance of evidence-based legislation in this regard, and on the need for a coherent approach towards criminal policy amongst the EU institutions).

¹⁷⁸ Tridimas, *supra* note 135, at 15.

¹⁷⁹ See Treaty on European Union, art. 6, Dec. 26 2012, 2012 O.J. (C 326) 1; Treaty on the Functioning of the European Union, art. 20, Dec. 26 2012, 2012 O.J. (C 326) 1; Charter of Fundamental Rights of the European Union, Dec. 12 2007, 2007 O.J. 2007 (C 303) 1 (all expressing the European Union's constitutional commitment to the rule of law).

¹⁸⁰ European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, at 3.

law provisions have so far been adopted on an “ad hoc basis”.¹⁸¹ For the aim of creating more coherence in the area of criminal law, both the Commission and the Parliament have pointed out which principles and norms should be taken into account when legislating on matters of substantive criminal law. And academics too have formulated sets of principles and norms that should govern the exercise of EU criminalisation competences.¹⁸²

However, none of these initiatives is capable of solving the cherry picking issues as described above. Both the Commission’s Communication and the Parliament’s Resolution fail because of their limited scope; the Commission has only referred to Articles 83 and 325(4) TFEU¹⁸³, whereas the Parliament has simply and solely referred to Article 83 TFEU.¹⁸⁴ No other legal bases for criminalisation have been mentioned. Given that the Treaty contains several other (potential) legal bases for criminalisation, an indeed coherent application of criminalisation competences under Articles 83 and 325(4) TFEU will still not suffice to establish a coherent EU criminalisation policy.

Neither adequate are the academic appeals for coherence by formulating which principles must be taken into consideration when exercising criminalisation powers. It is true that Asp’s “meta-norms” are considered to apply to any exercise of EU criminalisation powers, but it has been shown that Asp only acknowledges criminalisation powers under Articles 83 and 325 TFEU.¹⁸⁵ And while the 2009 Manifesto on European Criminal Policy does seem to refer to criminalisation under whatever Treaty provision – when it states that the listed principles “should be recognised as a basis for every single legal instrument which deals with or which could influence criminal law” – the existence of legal bases outside Articles 83 and 325 TFEU have not explicitly been mentioned. Moreover, even if the Manifesto must be interpreted as applying to the exercise of criminalisation competences under whichever legal basis, the fact remains that the listed

¹⁸¹ European Parliament Resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208, under N, and also under H and O.

¹⁸² See Asp et al, *supra* note 176; See also Asp’s publication in which he formulates so-called “meta-norms”, *supra* note 6, at 164-212.

¹⁸³ European Commission Communication, *supra* note 180, at 5-6.

¹⁸⁴ European Parliament Resolution, *supra* note 181, under B.

¹⁸⁵ As stated in his chapter on “meta-norms”: “This chapter gives an account of the most important meta-norms that must be taken into consideration by the EU when exercising the competences it has *according to the description and analysis above in chapters 4 and 5*” (italics added), see Asp, *supra* note 6, at 164.

“fundamental principles of criminal policy” are not suitable to do away with all differences in requirements for EU-level criminal prohibitions, if only because the principles that have been agreed upon by the signing academics maintain the divergences in procedural requirements across the Treaty.

So, while initiatives so far will not suffice to develop a coherent policy with regard to EU-level criminalisation, the importance of coherence has been broadly recognised for obvious reasons. Firstly, the incoherent use of criminalisation powers creates insecurity amongst citizens and Member States as to the potential influence of EU law on national criminal law which is highly undesirable given its interfering nature. Secondly, if criminalisation competences are exercised incoherently, the adopted criminal prohibitions in their entirety are very likely to fall short of reflecting the agreed values of justice and blameworthiness; this threatens the legitimacy of harmonisation measures in the area of substantive criminal law.

It needs to be underlined that in order to be able to reflect collectively agreed values, the pursuit of coherence in the context of EU-level criminalisation should go beyond the level of EU law; it necessarily includes national criminal law. After all, EU-wide criminal prohibitions apply within the national legal orders of the respective Member States. It is not impossible that a specific definition of an offence conflicts with a fundamental value of a certain national criminal justice system (one could think of the doctrinal cornerstone that preparatory acts should not be criminalised). That way EU criminal law could disturb the inner coherence of national criminal law which for the above stated reasons cannot be justified.

The European Union needs a single legal framework for criminalisation so that equal requirements must be fulfilled each time the EU legislature wishes to walk the path of criminalisation. With a single legal framework, the EU would be better equipped to give voice to the specific nature of criminal law as well as to establish a coherent criminal policy. Moreover, if the EU legislature would no longer be able to juggle with legal bases for criminalisation it is very likely that such would raise awareness on the importance of careful and coherent law-making in the field of criminal law. Under the current situation this awareness may well exist amongst those attached to the justice departments of EU law-making, but for those based in the market and

trade departments the probable lack of knowledge and awareness on the needs of criminal justice should not be underestimated. A single legal framework for EU-level criminalisation could turn the tide, also because it would urge the need for inter-institutional and inter-departmental consultation and knowledge exchange.

Now there are several ways to realise such a single legal framework. A first option would be to create a new legal basis which would apply exclusively. This single source of competence should codify the procedural and substantive requirements that have been agreed upon in the course of in-depth discussions on the limits of EU-level criminalisation of conduct. Secondly, rather than creating a brand new legal provision, the exclusive legal basis could be chosen from the various legal bases that are currently existing under the Lisbon Treaty; given that Article 83 TFEU provides the most stringent criminalisation requirements one could imagine that this provision would widely be considered the most obvious choice. The third option is only slightly different from the previous one; instead of choosing one legal basis and doing away with the others, it would be possible to designate one of the existing legal bases as a *lex specialis* to all other potential criminalisation competences; again, the choice for Article 83 TFEU would be most likely.

Which of these options is preferred? The answer to this question obviously depends on the extent to which each of these options is capable to counter the unacceptable effects of divergent criminalisation requirements. It is true that the three options as presented above only modestly differ from each other, but in view of the need to establish a single legal framework an exclusively applicable legal basis (first and second option) is preferable to designating one provision as a *lex specialis* (third option). After all, the *lex specialis* concept would be too weak a tool to discourage or preclude the use of an alternative legal basis if considered more convenient, e.g. because of less severe criminalisation requirements. It has been shown that the Court of Justice's "choice of legal basis-doctrine" and its marginal review in that regard leaves ample opportunity to circumvent the legal requirements of a more specific legal basis, especially if the proposed measure links to a substantive EU policy.¹⁸⁶ It is therefore more appropriate to develop a sole legal basis for EU-level criminalisation. Whether this sole legal basis should either be engrafted

¹⁸⁶ *Supra* note II.C.2.

onto the express criminalisation competence of Article 83 TFEU, or freshly developed relates to the question of which procedural and substantive requirements should be included in such a sole legal basis; this question will be dealt with in the next Part.

Obviously, the most drastic way to establish a single legal framework for criminalisation of conduct at the EU level, in either of the aforementioned forms, would be through treaty amendment. Though time-consuming and politically complex, the very idea may not be ignored; as explained above, there are fundamental values at issue in the field of EU criminal law. In the shorter term, however, there might be another road to follow in a forward direction, i.e. the inter-institutional adoption of binding guidelines for criminalisation. Inter-institutional agreements are nothing new. Under the Lisbon Treaty, Article 295 TFEU provides the legal basis. It envisages the conclusion of inter-institutional agreements which may be binding for the contracting institutions. Yet recently the European Parliament, the Council, and the Commission have signed an inter-institutional agreement on better law-making¹⁸⁷, a topic as to which an agreement has already been concluded in the past.¹⁸⁸ Provided that it would lay down *binding* guidelines on EU-level criminalisation, the possibility of concluding such an agreement is in my view worth considering – if only as a first step towards establishing a more coherent legal framework on the matter.

4. TOWARDS A SINGLE LEGAL FRAMEWORK FOR EU-LEVEL CRIMINALISATION: INITIAL THOUGHTS AND SUGGESTIONS FOR FURTHER DEBATE

As argued above, the risk of cherry-picking between legal requirements for criminalisation cannot be accepted in the EU legal order. For that reason, it has been advocated to develop a single legal framework for EU-level criminalisation. But how should this look like?

¹⁸⁷ European Parliament, Council, and Commission, Interinstitutional Agreement on Better Law-Making, 2016 O.J. (L 123).

¹⁸⁸ European Parliament, Council, and Commission, Interinstitutional Agreement on Better Law-Making, 2003 O.J. (C 321).

This Part concerns the possible design of a single legal framework for criminalisation of conduct at the EU level. The aim is not to present a comprehensive set of single requirements, rather to share initial thoughts on the procedural and substantive requirements that EU-level criminalisation should stipulate. This rough outline will certainly leave open a number of questions which require further examination. Whereas I am looking forward to proceed to examine these questions, I also hope that this paper encourages other scholars to undertake research on the matter. The following could serve to kick-off this future research efforts.

A. Towards Single Procedural Requirements for EU-Level Criminalisation

A single legal framework for EU-level criminalisation implicates *inter alia* a single set of procedural requirements that are applicable each time the EU legislature wishes to adopt criminal prohibitions. Such a single set of procedural requirements does not apply yet. It has been shown that the existence of concurrent criminalisation competences enables the EU legislature to circumvent significant procedural requirements, such as the confinement of Article 83 TFEU to: minimum harmonisation by means of directives requiring implementation into national law; the possibility that Member States invoke the emergency brake procedure; and the lower threshold for subsidiarity controls by national parliaments.¹⁸⁹

Because an overall comparison between (potential) legal bases for criminalisation learns that Article 83 TFEU contains the most stringent procedural requirements, one could easily be inclined to advocate articulating this very provision as the single source of competence for EU criminal prohibitions. But are the procedural requirements laid down in Article 83 most appropriate to safeguard both a careful exercise of EU criminalisation powers and coherent law-making?

Viewed from the perspectives of careful and coherent law-making – which have been qualified as fundamental aspects of each criminalisation policy¹⁹⁰ – not all of the procedural requirements laid down in Article 83 TFEU can unambiguously be supported.

¹⁸⁹ See *supra* Section II.A.

¹⁹⁰ See *supra* Part III.

The aspect of careful law-making is definitely served by the restriction to *minimum norms* in *directives*. Both requirements convey a degree of restraint with regard to adopting EU-level prohibitions on the basis of Article 83 TFEU. And from the perspective of coherence, the choice for the instrument of the *directive* can be supported as it expresses a choice for coherent law-making in the field of substantive criminal law. The required process of adopting implementation legislation leaves some room for Member States to preserve the systematics of national criminal law, of course insofar the directive's result will be achieved. Besides, the same goes for the existence of the *emergency brake procedure*, a tool that certainly has the potential to protect the inner coherence of national criminal law.

However, it is the restriction of Article 83 TFEU to *minimum rules* where – viewed from the perspective of coherence – the trouble might come in, for it is the very idea of minimum rules to enable individual Member States to adopt in their national legislation a broader scope of criminal prohibitions.¹⁹¹ This way, the adoption of minimum rules could threaten the coherence of the EU's criminalisation policy. This could be considered problematic, even though minimum standards have the advantage to better serve the inner coherence of a national criminalisation policy. Precisely here the tension between national coherence and EU-wide coherence comes to the surface. If it is true that minimum rules are likely to have a negative effect on the development of a coherent EU criminal policy, it should be open for discussion whether either minimum harmonisation or another level of harmonisation (e.g. maximum harmonisation¹⁹²) would be appropriate for EU-level criminalisation.

Because of what precedes it would be a foregone conclusion to state that Article 83 TFEU provides an adequate body of procedural requirements which could in full be incorporated in a

¹⁹¹ This dominant interpretation of “minimum rules” has recently been defended by Petter Asp, *see supra* note 6, at 111-127. It has, however, been contested by Hans Nilsson who argues that such an interpretation would be contrary to “logic, legal certainty and respect for the principle of the unity of the common market (in this case the criminal law part of it), as well as for the uniform application of Community/Union law”. Hans Nilsson, *How to combine minimum rules with maximum legal certainty?*, 4 EUROPÄRÄTTSLIG TIDSKRIFT, 668 (2011). Klip takes a more moderate stand on the topic where he argues that “how the term ‘minimum’ must be interpreted depends...on the object (or spirit) of the instrument, and the broader context of the internal market”, *supra* note 96, at 182.

¹⁹² Meaning that Member States would not be allowed to criminalise more acts than those covered by the EU-level criminal prohibitions. According to Nilsson, minimum rules regarding the description of prohibited conduct that are adopted under the Lisbon Treaty are “maximum rules” already, *see supra* note 191.

single legal framework for EU-level criminalisation. To be able to identify the degree of harmonisation that is needed to best ensure the coherence of the EU's criminal policy, requires further study on the relationship between minimum harmonisation and a coherent criminalisation policy within the EU and its Member States.

B. Towards Single Substantive Requirements for EU-Level Criminalisation

A single set of substantive requirements for criminalisation of conduct at the EU level is needed to end the current situation in which substantive conditions for the adoption of EU-level criminal prohibitions diverge throughout the various sources of competence. As things are, the EU legislature has in several areas of crime the ability to circumvent the most stringent substantive requirements by applying a concurrent legal basis. It has been demonstrated that in the area of human trafficking the existence of parallel legal bases offers the opportunity to by-pass the cross-border requirement of Article 83(1) TFEU. And with regard to criminalisation for the aim of achieving a Union policy, picking on an alternative legal basis would mean a circumvention of the harmonisation requirement and in some cases also the essentiality/necessity condition of Article 83(2) TFEU. That way, criminal prohibitions would in most cases also have a wider geographical scope because outside Title V TFEU the UK, Ireland and Denmark cannot invoke their opt-outs arrangements. It has been concluded that under those circumstances there is a real risk of cherry-picking between legal bases.

Although the foregoing might seem to suggest that Article 83 TFEU stipulates the most stringent substantive requirements for EU-level criminalisation, such a statement is not supported by the outcomes of the comparison carried out in this paper.¹⁹³ As a matter of fact, it is impossible to give an unambiguous answer to the question of which (potential) legal basis provides the most stringent substantive requirements.

This can best be demonstrated by means of Article 83 TFEU, for this provision *in itself* fails to comprehend a single set of substantive requirements for EU-level criminalisation. Under the first

¹⁹³ See *supra* Section II.B.

paragraph which envisages criminalisation in specified areas of crime, other substantive requirements apply than under the second paragraph which allows for regulatory criminalisation in previously harmonised EU policy areas. Consequently, even if Article 83 TFEU would apply exclusively, different substantive requirements will apply anyway, depending on whether proposed criminal prohibitions are based under the first or the second paragraph.¹⁹⁴ It has been mentioned before that according to Mitsilegas the two paragraphs of Article 83 TFEU reflect different views on criminalisation. Whereas Article 83(1) TFEU provides a competence for “securitised criminalisation” – i.e. responding to global security threats – Article 83(2) TFEU envisages “functional criminalisation” – i.e. criminalisation for policy implementation.¹⁹⁵ This could explain why both paragraphs differ as to the substantive requirements they stipulate. However, the distinction between securitised criminalisation and functional criminalisation does not help to explain the mutual divergences in substantive requirements under the other (potential) legal bases for criminalisation.¹⁹⁶ For example, Article 79 TFEU can be characterized as providing an alternative legal basis for securitised criminalisation, namely in the specific area of human trafficking – an area that has also been mentioned under Article 83(1) TFEU. But unlike Article 83(1) TFEU, Article 79 TFEU does not demand fulfillment of the cross-border requirement.

In this patchwork of substantive requirements none of the Treaty provisions holds an obvious example for developing a single set of requirements for EU-level criminalisation. Even the most comprehensive source of competence, Article 83 TFEU, cannot automatically be considered suitable for this purpose. True as it may be that the divergences in requirements under the first and second paragraph of this provision could be explained with reference to the different views on criminalisation they wish to express, it could be argued that accepting these divergences would as such be at odds with the ambition to establish a coherent criminalisation policy in the EU.

Therefore, in the absence of an obvious model provision, the identification of single substantive requirements for EU-level criminalisation requires a fresh determination of which specific

¹⁹⁴ See *supra* Section II.B.1.

¹⁹⁵ Mitsilegas, *supra* note 12, at 110-128. See also Part I.

¹⁹⁶ This appears from Sections II.B.3-4.

substantive requirements are needed to safeguard a careful exercise of EU criminalisation powers as well as coherent law-making (previously, both parameters have been qualified as fundamental to any criminalisation policy).¹⁹⁷ For instance, in concrete terms: Should EU-level criminal prohibitions always require a cross-border element of the conduct they aim to prohibit? And if it is agreed that EU-level criminal prohibitions can only be adopted if necessary, what exactly should be the object(s) of necessity? Must criminalisation be necessary for the effectiveness of a Union policy, or for the effectiveness of judicial cooperation between Member States, or both?

In order to be able to establish a single set of substantive requirements for EU-level criminalisation, it is one step to conclude *that* such an exercise requires a fresh determination of which requirements are needed. It is another step to decide *how* such requirements are to be determined. The following argues that it is first necessary to agree on the objectives that EU criminalisation may legitimately pursue as these would contribute to the articulation of the substantive requirements that EU-level criminalisation calls for.

1. The Identification of Legitimate Objectives of EU-Level Criminalisation

In order to be able to establish a single legal framework for criminalisation, it needs to be clarified which values the European Union wishes to express in the whole of criminal prohibitions adopted within its legal order. This *leitmotiv* question could be answered at various levels, for instance at the level of *principles* that should govern the exercise of criminalisation powers by the state or by the transnational legislature. In that regard, several scholars have been referring to commonly accepted principles of last resort, legality, guilt, subsidiarity and proportionality.¹⁹⁸ As already mentioned, those principles have also been referred to by EU institutions in their policy

¹⁹⁷ See *supra* Part III.

¹⁹⁸ Klip, *supra* note 96, at 238-243; Asp, *supra* note 6, at 164-212; See also the 'Manifesto on European Criminal Policy', submitted by a number of academics in Asp et al, *supra* note 176.

documents on the exercise of powers in the field of substantive criminal law.¹⁹⁹ Being commonly accepted principles, they apply in the national criminal justice systems of the EU Member States and their mentioning in the context of EU criminalisation is therefore not very surprising.

Yet for the purpose of formulating single substantive requirements the articulation of these principles has very limited added value. This particularly applies to the references to subsidiarity – which includes the last resort principle – and proportionality. It has been demonstrated that the application of these principles has proven to be insufficient to solve the problem that comes with divergences in substantive requirements for criminalisation.²⁰⁰ It is therefore necessary to take a different perspective on the matter. Accordingly, the question of which values should be expressed by means of criminal prohibitions can also be answered at a level that goes beyond the level of governing principles, that is to say at the level of the *objectives* that criminal prohibitions should achieve.

Thinking over the aforementioned distinction between securitised criminalisation and functional criminalisation I became aware of the importance to agree on the objectives of criminalising people's behaviour, provided that such objectives are formulated in more concrete terms than is done with the terms "securitised" and "functional". Such an approach has the potential to guide the development of single substantive requirements. As a matter of fact, the identification of the objectives that EU-wide criminal prohibitions may legitimately pursue – both in view of the very goals of the European Union and in view of the need for careful and coherent law-making in matters of criminal law – will facilitate the articulation of substantive requirements that must underpin the adoption of criminal prohibitions. It is therefore needed to explore which possible objectives may legitimately justify the adoption of criminal prohibitions at the EU-level. In the course of this, traditional criminalisation doctrines will provide important sources of knowledge.

In debating the underlying values of EU-level criminalisation at the level of the *objectives* that criminalisation should aim to pursue, a number of concrete questions arises, such as: Would the

¹⁹⁹ European Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final; European Parliament Resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208.

²⁰⁰ See *supra* Section II.C.1.

perceived immorality of behaviour constitute a sufficient reason to forbid this behaviour in the context of EU law?; would it be justified to prohibit conduct which “only” creates a danger of harm?; *etcetera*. Over the past decades, the question of what reasons do and do not justify criminalisation has extensively been debated. Several theories have been developed over time, predominantly within the context of national law. The two most important and influential theories are the principle of harm-doctrine and the so-called *Rechtsgut*-theory. The doctrine of the harm principle has been articulated in the common law world and originates from John Stuart Mill’s argument that individual freedom can only be limited for the purpose of preventing harm to others.²⁰¹ Throughout the decades, this idea has been further developed. Several scholars have broadened Mill’s concept of harm by also including harm to self and offensive conduct.²⁰² Moreover, it has increasingly been debated whether it would be justified to criminalise conduct that does not cause harm *per se*, but creates a *risk* of harm, and if so how remote this harm may be to justify criminalisation.²⁰³

The *Rechtsgut*-theory is of German origin and basically states that criminal law serves the protection of *Rechtsgüter*, i.e. legally protected interests, and also referred to as legal goods.²⁰⁴ Whether and to what extent this theory is capable of properly limiting the scope of substantive criminal law obviously depends on the definition of legal goods, but the vast majority of legal scholars agree on that only *fundamental* liberties and values are eligible for being qualified as

²⁰¹ John Stuart Mill, *On Liberty*, in UTILITARIANISM; LIBERTY; REPRESENTATIVE GOVERNMENT 73 (John Stuart Mill, 1968 edition).

²⁰² See on this Feinberg’s 4-volume work: JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1984-1988). Volume 2 deals with “Offense to Others”, Vol. 3 concerns “Harm to Self”. Further on offensive conduct, see INCIVILITIES: REGULATING OFFENSIVE BEHAVIOUR (A.P. Simster & Andreas von Hirsch eds., 2006); Wolfgang Wohlers, *Criminal Liability of Offensive Behaviour in Public Spaces*, in LIBERAL CRIMINAL THEORY. ESSAYS FOR ANDREAS VON HIRSCH 247-265 (A.P. Simster, Antje Du Bois-Pedain & Ulfrid Neumann eds., 2014).

²⁰³ To mention only a selection of papers: R.A. Duff & S.E. Marshall, ‘Remote Harms’ and the Two Harm Principles, in LIBERAL CRIMINAL THEORY. ESSAYS FOR ANDREAS VON HIRSCH, *supra* note 202, at 205-223; Shlomit Wallerstein, *Criminalising Remote Harm and the case of Anti-Democratic Activity*, 28 CARDOZO LAW REVIEW, 2697-2738 (2007); Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harms*, 10 NEW CRIMINAL LAW REVIEW, 370-391 (2007).

²⁰⁴ On the origins and development of the *Rechtsgut*-theory, see, e.g., PETER SINA, DIE DOGMENGESCHICHTE DES STRAFRECHTLICHEN BEGRIFFS “RECHTSGUT” (1962); Albin Eser, *The Principle of “Harm” in the Concept of Crime – A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE UNIVERSITY LAW REVIEW, 345-417 (1965-1966); Sabine Swoboda, *Die Lehre vom Rechtsgut und ihre Alternativen*, 122 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 24-50 (2010).

legal goods.²⁰⁵ If only because “protection from harm” can be considered a “legal good” in the sense of the *Rechtsgut*-theory, it cannot be surprising that both theories have been the object of comparative legal research.²⁰⁶ Furthermore, some scholars have examined if both theories could be combined.²⁰⁷

Because of their significant influence on contemporary criminal justice, it is of utmost relevance to examine the added value of both theories in the context of identifying the legitimate objectives of EU-level criminalisation. It has been argued that until now the importance of values for EU-level criminalisation has predominantly been acknowledged at the level of principles, at the expense of sufficient attention for the objectives of criminalisation of conduct at the EU level. But the time is ripe to debate this latter aspect, especially since the focus on EU objectives has been sharply criticized and is considered to weaken the limiting effect of principles such as subsidiarity and proportionality.²⁰⁸ Which other objectives are legitimate objectives to achieve by means of criminalising conduct at the EU level?

A thorough inquiry into what the widely supported and well-developed doctrines of harm prevention and *Rechtsgüterschutz* could contribute to the development of a single framework for EU criminalisation is more than welcome. It may well be that the application of these theories or elements thereof in the EU context help to identify the legitimate objectives of criminalisation of conduct at the EU-level.²⁰⁹

²⁰⁵ See, e.g., Claus Roxin, *Der gesetzgebungskritische Rechtsgutbegriff auf dem Prüfstand*, 160 GOLTDMAMMER'S ARCHIV FÜR STRAFRECHT, 433-453 (2013); see also Winfried Hassemer, *Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?*, in DIE RECHTSGUTSTHEORIE. LEGIMITATIONSBASIS DES STRAFRECHTS ODER DOGMATISCHES GLASPERLENSPIEL? 57-64 (Roland Hefendehl, Andrew von Hirsch & Wolfgang Wohlers eds., 2003).

²⁰⁶ Eser, *supra* note 204; Swoboda, *supra* note 204.

²⁰⁷ Winfried Hassemer, *The Harm Principle and the Protection of “Legal Goods” (Rechtsgüterschutz): a German Perspective*, in LIBERAL CRIMINAL THEORY. ESSAYS FOR ANDREAS VON HIRSCH, *supra* note 202, at 187-204; Kai Ambos, *The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles. A Second Contribution Towards a Consistent Theory of ICL*, 9 CRIMINAL LAW AND PHILOSOPHY, 301-329 (2015) (examining the possibilities to combine both theories for the aim of their potential transfer to the level of international criminal law); Andrew von Hirsch, *Der Rechtsgutbegriff und das ‘Harm Principle’*, in DIE RECHTSGUTSTHEORIE. LEGIMITATIONSBASIS DES STRAFRECHTS ODER DOGMATISCHES GLASPERLENSPIEL?, *supra* note 205, at 13-25.

²⁰⁸ See *supra* Section II.C.1.

²⁰⁹ By analogy with Kai Ambos' effort to develop a theory of criminalisation for international criminal law, see Ambos, *supra* note 207.

2. Reconciling Traditional Criminalisation Doctrines and EU Criminal Law Singularities: An Impetus to Further Research

It follows from what precedes that the harm principle doctrine as well as the *Rechtsgut*-theory have been developed in the context of national criminal law. And it is indeed reasonably expected that the nationally agreed legitimate objectives of criminalisation can be transferred to the EU context. Yet some distinct characteristics in EU criminal law will undisputedly raise new issues in the course of developing a single legal framework. Albeit non-exhaustively the following mentions two issues that I consider to be in pressing need for further study.

One of these issues arises in the context of regulatory criminalisation powers. In addition to the explicit regulatory criminalisation competence of Article 83(2) TFEU, a number of other Treaty provisions have been interpreted as ancillary legal bases for regulatory criminalisation. It has been demonstrated that these ancillary competences relate to EU policy areas in which criminal prohibitions may also be adopted under the heading of Article 83(2) TFEU which generally covers previously harmonised EU policy areas.²¹⁰ Unlike the explicit legal basis in Article 83(2) TFEU, however, most of the ancillary legal bases for regulatory criminalisation fall outside the scope of Title V TFEU on the Area of Freedom, Security and Justice. As a consequence, the adoption of criminal prohibitions on the basis of an ancillary competence may be easily justified by referring to the expected positive influence of criminalisation on further market integration.

One may ponder that elements of market integration are also relevant under Article 83(2) TFEU, which is true; criminal prohibitions adopted under its heading aim to contribute to the effective implementation of an already harmonised EU policy. It must however be emphasized that Article 83(2) TFEU requires much more than a mere link to market integration.²¹¹

The predominance of market imperatives in the context of criminal law legislation might be considered to be at odds with the widespread belief amongst criminal law experts that the criminal law should be reserved for the most serious infringements on rights, freedoms, and

²¹⁰ *Supra* Section I.B. provides an overview.

²¹¹ *See supra* Section I.B.1.

human dignity. This belief is again built on the invasive character of criminal law enforcement for which the legislative act criminalising behaviour is a necessary condition. This brings us to the question which values the EU wishes to reflect in exercising its regulatory criminalisation powers. How should considerations of economic nature be approached in view of the traditional criminalisation theories as mentioned above? For instance, should we agree on market integration as a “legal good” that deserves protection by means of criminal law? In other words: could market integration be identified as a legitimate objective of EU-level criminalisation? Because of the (potential) influence of market considerations on the scope of substantive criminal law in the EU, future research should examine whether the purpose of market integration could be embedded in the theory of the harm principle and/or the *Rechtsgut*-theory.

A second issue that deserves particular attention in the context of EU-level criminalisation is the purpose of smooth judicial cooperation between the Member States. Yet recently the facilitation of judicial cooperation has been one of the reasons to adopt criminal prohibitions in several areas of crime, for instance in the areas of market abuse²¹² and child sexual abuse²¹³. It concerns an issue that for obvious reasons has never been mentioned in criminalisation debates at the national level, but if we shift to the EU level it is evident why smoother judicial cooperation constitutes a relevant aspect in the context of harmonising criminal prohibitions throughout the entire Union. It needs no explanation that a foreign search warrant in a child pornography case is easier to execute when the criminal laws of both Member States provide for the same definitions of child pornography, or at least cover the same conduct in this area. Moreover, that way offenders would be prevented from *forum shopping*. Whereas variations in the scope of

²¹² See European Commission, Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, Preamble, Recital 1 and Explanatory Memorandum at 8, COM(2011) 654 final; See also Impact Assessment accompanying the Proposal for a Regulation on insider dealing and market manipulation (market abuse) and the Proposal for a Directive on criminal sanctions for insider dealing and market manipulation, particularly §§ 3.2.3. and 5.4.4. as well as Annex 8 at 167-168 (SEC(2011) 1217 final).

²¹³ See European Commission, Proposal for a Framework Decision of the European Parliament and of the Council (repealing Framework Decision 2004/68/JHA) on combating the sexual abuse, sexual exploitation of children and child pornography, Explanatory Memorandum at 2, COM(2009) 135 final (the proposal was later on changed into a proposal for a Directive, COM(2010) 94 final). See also Impact Assessment accompanying the Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, particularly §§ 2.2, 2.4, 3.1 and 4.3 (SEC(2009), 355 final).

criminal offences would encourage (future) offenders to move to a Member State with more lenient criminal laws, harmonised definitions of offences would make such comparative shopping less evident.²¹⁴

It may well be so that harmonised definitions of offences facilitate judicial cooperation in criminal affairs, but does this automatically turn the facilitation of judicial cooperation into a legitimate objective to be achieved through criminalisation? Can this objective be part of the overall function of EU-level criminalisation of conduct? To date, these questions have been neglected in the EU criminal policy debate. However, since the facilitation of judicial cooperation apparently constitutes a factor of relevance for the EU legislature, it has to be part of the debate how these questions should be approached with reference to the harm principle-doctrine and the *Rechtsgut*-theory.

FINAL REMARKS

The writing of this article has been started under the premise to make a case for a single legal framework for criminalisation of conduct at the EU-level. In finishing my argument for this case it was, however, felt that I should also share my own thoughts on the design of such a single legal framework. It underlines why previously formulated sets of criminalisation principles and criteria must be held inadequate to solve the divergences in criminalisation requirements under the various (potential) legal bases. Besides, in the course of writing, my ideas on the design of a more adequate single legal framework started to develop and it was hard to resist sharing them.

Because of its interfering consequences, the exercise of EU criminalisation powers deserves thorough and ongoing debating. As I am well aware that this paper leaves many questions unanswered, and, presumably, other questions not asked, this paper hopefully provides enough

²¹⁴ The wish to avoid forum shopping has also been expressed in the course of designing criminal prohibitions in the areas of market abuse and child sexual abuse. With regard to market abuse, see Impact Assessment accompanying the Proposal for a Directive on criminal sanctions for insider dealing and market manipulation, *supra* note 212, § 3.2.3. With regard to child sexual abuse, see Impact Assessment accompanying the Proposal for a Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, *supra* note 213, § 2.4.

sources of inspiration to provoke further academic debate on the scope and limits of criminalisation competences in the EU legal order.