**The Legal Basis for EU Criminal Law Legislation—A Question of Federalism?**

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*Article 83(2) TFEU, introduced by the Treaty of Lisbon, confers a power on the EU to harmonize Member States’ legislation to define criminal offences and criminal sanctions. Nonetheless, uncertainty persists as to whether this provision exhaustively determines the EU’s power to adopt criminal law to enforce its policies. The article outlines the core case for viewing Article 83(2) TFEU as a lex specialis. It is argued that the post-Lisbon constitutional design alongside principled and teleological considerations provide persuasive arguments to prefer a Member-State centred approach for criminal law competence. This is particularly the case with regard to the adoption of harmonisation measures*.

# **Introduction - Legal basis for criminal sanctions as a choice of federalism**

Questions of legal basis in EU law may be viewed by some as technical issues of interest only to lawyers, and specialist EU lawyers at that.[[2]](#footnote-1) There is some truth in this. A capacity for quite sophisticated legal analysis is required to fully appreciate the competences of the Union and determine the balance of powers between it and the Member States in any specific field. It is also apparent that serious boundary problems exist between different competences[[3]](#footnote-2) even after reforms introduced in the Lisbon Treaty to categorise and rationalise the allocation of powers between the Union and its Member States.[[4]](#footnote-3) One of the key problems after Lisbon is how to distinguish between more general and cross-cutting legal basis on the one hand and more specific competences on the other and to determine their respective appropriate scope of application. In particular, there are endless boundary problems between the general provision for the regulation of the internal market, namely art. 114 of the Treaty on the Functioning of the European Union (TFEU), and more specific provisions covering policies that may affect the internal market. A case in point is the potential conflicts between provisions in the Area of Freedom, Security and Justice (AFSJ) and art. 114 TFEU. It is clear that many measures pursuing criminal law harmonization or judicial cooperation may have an impact on the internal market project.[[5]](#footnote-4) In order to distinguish between different EU competences, it is necessary to clearly define which EU policies and objectives can be pursued under a which provision. This is an arduous task and is made even more difficult when a certain provision, such as art. 114 TFEU, is capable of being used to pursue multiple EU policies and objectives at the same time. It may also be the case that certain provisions, such as art. 83(2) TFEU, provide the necessary tools to enforce a particular policy, e.g. the fight against EU fraud, while a legal basis exists elsewhere in the Treaties covering that policy-field in a more general sense, e.g. art. 325 TFEU.[[6]](#footnote-5) This result is an unavoidable potential for conflicts between competing legal bases.

One of these emerging legal basis controversies concerns the choice of legal basis for criminalization measures.[[7]](#footnote-6) The debate concerns whether the provision introduced in the Lisbon Treaty allowing for criminal law harmonization – art. 83(2) TFEU - is the exclusive legal basis for criminalisation measures or whether other legal bases of the Treaties, such as art. 114 TFEU and art. 325 TFEU, are also capable of being used to adopt measures harmonising criminal law. There are two opposing views on this issue. Member States[[8]](#footnote-7) and certain scholars[[9]](#footnote-8) argue that the new art. 83(2) TFEU is the exclusive legal basis for criminalization measures. The premise of this argument is that the ‘Communitarization’ of the third pillar and the intention of the drafters of the Treaties, suggest that this provision would codify and replace the European Community criminal law competence recognized by the Court of Justice’s pre-Lisbon case law.[[10]](#footnote-9) It is, however, the view of the Commission and some other commentators that an implicit general criminal law competence, along the lines suggested by the Court of Justice’s pre-Lisbon case law, continues to exist, in addition to that found in art. 83(2) TFEU.[[11]](#footnote-10) This competencecould thus be exercised under most legal bases of the Treaties, e.g. art.192 TFEU (environmental policy),[[12]](#footnote-11) art. 325 TFEU (fraud)[[13]](#footnote-12) or art. 114 (internal market).[[14]](#footnote-13)

This article intends to contribute to this debate by examining how the choice for criminalisation measures should be made between different legal bases in the Treaties. It argues for an alternative to the two views mentioned above and suggests that legal basis conflicts must be conceptualised and resolved as questions of federalism, i.e. there must be an appropriate balance of powers between the Union (the central government) and the Member States (its component entities) in the field of criminal law.[[15]](#footnote-14) This view recognises the pivotal role of the Court of Justice in the Union legal order (as a system of a federal nature) in shaping the constitutional order of competences.[[16]](#footnote-15) In legal basis disputes, the Court’s choice is often (but not always) between a more general and integration-friendly competence, such as art. 114 TFEU (where the Council acts by qualified majority), and a more narrow, Member-State friendly competence such as art. 83(2) TFEU (where there exists safeguards for the interests of Member States). If the Court interprets the integration-friendly competences in legal basis disputes expansively this tends to favour the central legislator vis-á-vis the states. A preference by the Court for legislative competences requiring unanimity in the Council (or similar limits) in legal basis disputes is conversely sensitive to Member State rights.[[17]](#footnote-16)

While the federal dimension of legal basis disputes is perhaps not present in all fields, it is underlined in the field of EU criminal law in light of the post-Lisbon constitutional landscape.[[18]](#footnote-17) Member States are particularly concerned that the safeguards regarding national competences contained in Title V of the AFSJ will be circumvented if a legal basis (such as art.114 or art. 325 TFEU) other than art. 83(2) TFEU is employed for the adoption of criminal law measures. Art. 83(2) TFEU allows a Member State to trigger an emergency brake on the legislative process when a proposed measure is deemed to affect the fundamental aspects of that Member States’ criminal justice system. Additionally, the use of legal bases other than those found in Title V would prevent the use of opt-outs on the part of the UK, Denmark and Ireland which would otherwise apply to AFSJ measures. Finally, if criminal law legislation can be adopted under for example art. 114 or art. 325 TFEU future acts may take the form of directly applicable regulations.[[19]](#footnote-18)

Against this background, this article explores the question of the choice of legal basis for criminalisation measures. The first section of the article considers the core case for viewing art. 83(2) TFEU as a *lex specialis*. It is argued that that the constitutional design of the Union after Lisbon provides persuasive arguments to prefer a Member-State centred approach for determining questions of criminal law competence and in particular in the adoption of harmonisation or approximation measures in the field of criminal law (thus tilting the balance in favour of Member State control). The second section considers in detail counter-arguments to the above position. Although this article is sympathetic to those arguing for the exclusivity of art. 83(2) TFEU, it recognises that it is not possible for this provision to entirely exclude the possibility of the EU criminalizing behaviour on the basis of other Treaty provisions. In the third section of the article the core argument is illustrated by a comprehensive discussion of legal basis conflicts between art. 83(2) TFEU and art. 114 and art. 325 TFEU. The first part of this section considers the scope of art. 114 TFEU for criminalisation measures and the relationship between this provision and art. 83(2) TFEU. The second part of this section examines the debate surrounding the choice of legal basis for the Directive on Fraud against the EU’s interests (‘PIF Directive’).[[20]](#footnote-19) In light of the controversial nature of the debate as to whether art. 83(2) TFEU or art. 325 TFEU should be chosen for this directive, this issue is considered in detail. The concluding section summarises the argument and offers some broader reflections on the findings of the article.

# **The core of the argument: the ‘lex specialis’ nature of art. 83(2) TFEU**

*The core argument- principled, systemic and teleological considerations*

Prior to Lisbon there was a long-standing constitutional debate between the Member States and the Commission on whether the Community had any competence to enforce its rules through criminal sanctions. The Commission argued for the existence of a Community competence in the field of criminal law on the grounds that it was necessary for the effective enforcement of EU policies.[[21]](#footnote-20) The Council argued on the other hand that the absence of an express conferral of competence in the Treaties together with concerns for sovereignty argued against recognising such a competence in the first pillar.[[22]](#footnote-21) Eventually the Court of Justice of the European Union was called upon to settle the issue in *Environmental Crimes*,[[23]](#footnote-22) in which the Court accepted the Commission’s argument that the Community did indeed possess a competence to impose criminal sanctions if this was essential for the effective enforcement of EU environmental policy, a finding that was subsequently reinforced in *Ship-Source Pollution*.[[24]](#footnote-23) The debate on the existence of a first pillar competence was brought to an end by the Lisbon Treaty, which explicitly conferred a competence on the EU to impose criminal sanctions to enforce substantive Union policies by means of art. 83(2) TFEU. The provision reads as follows:

‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.’

This provision gives the Union a broad competence to adopt criminalisation measures to the benefit of any Union policy, which has been subject to harmonisation measures. Teleological and systemic considerations support the interpretation that art. 83(2) TFEU is, or was at least envisaged to be, a *lex specialis* for criminal law measures after Lisbon. If one seeks to ‘divine’[[25]](#footnote-24) the intentions of the Treaty drafters, an analysis of the discussion in the European Convention preceding the adoption of the Lisbon Treaty supports the view that art. 83(2) TFEU was envisaged by the authors of the Treaty to constitute the main legal basis for the Union’s regulatory criminal policies. It is clear from the drafting process of the Lisbon Treaty that Member States proceeded on the basis that the substantive EU criminal competence would lie exclusively in art. 83 TFEU. Working Group X, which was responsible for the drafting of art. 83(2) TFEU, proposed that a novel legal basis, i.e. an explicit conferral of competence,[[26]](#footnote-25) was needed to ensure the criminal enforcement of existing EU policies. The Working Group explicitly referred to the previous Treaty of European Union as the only clear legal basis for criminal law prior to Lisbon. A strong indication for this is that the directive was finally chosen as the sole instrument for the adoption of criminalisation measures under art. 83 TFEU, a view which was reinforced by later discussions in the Council. Further evidence of this proposition is that Working Group X stated that art. 83(2) TFEU was intended to cover several types of criminalisation, including the protection of the Union’s financial interests by means of criminal law.[[27]](#footnote-26)

Systemic arguments reinforce the view that art. 83(2) TFEU is a *lex specialis* in relation to other legal bases of the Treaties. It is arguable that art. 83 TFEU and the new institutional setting in the AFSJ with special arrangements for criminal law cooperation reflects an intention on the part of Member States reassert control over the development of criminal law. It seems that Member States wished to reinforce a consistent message to the Commission[[28]](#footnote-27) and to the Court of Justice after *Environmental Crimes*,[[29]](#footnote-28) that the importance of criminal law is such that the EU should only be able to regulate those matters for which it is explicitly empowered. As mentioned in the introduction to this piece, cooperation under this provision is conditioned by the presence of an emergency brake[[30]](#footnote-29) and subject to opt-out arrangements for some Member States. The cooperation is furthermore explicitly limited to directives.[[31]](#footnote-30) Art. 83(2) TFEU would be superfluous if the national safeguards provided for in the Treaties could be circumvented by resorting to the Court of Justice’s pre-Lisbon case law[[32]](#footnote-31) to derive a criminal law competence from legal bases other than those found in Title V.[[33]](#footnote-32)

The intention of the drafters in relation to new provision in art. 83(2) TFEU is not always clear. From a federalist perspective, the introduction of the specific legal basis in art. 83(2) TFEU and the conditions attached to its use, would appear to reflect a desire to shift the balance of power between the Member States and the Union in favour of a Member State-friendly competence under art. 83 TFEU.[[34]](#footnote-33) It suggests that Member States may have been dissatisfied with the previous interpretation given by the Court of Justice and the Commission providing for an implied criminal law competence, despite the absence of an explicit conferral of competence. Under this interpretation Member States deemed it wise to repatriate some of the competences, which had been conferred to the Union unintentionally, and insulate those competences within a more Member State-friendly institutional framework. The wording of art. 83(2) TFEU furthermore provides support for the *lex specialis* argument as this provision refers explicitly to ‘criminal offences’ and ‘sanctions’ for the enforcement of EU policies. The mention of ‘criminal’ is significant as it highlights the fact that this is the only explicit criminal law competence in the Treaties and reinforces the argument that art. 83(2) TFEU was envisaged to be the main legal basis for substantive criminal law harmonisation.[[35]](#footnote-34) The argument so far thus suggests that the existence of art. 83(2) TFEU was envisaged to be the main legal basis for criminalisation initiatives. The use of other legal bases conferring implicit criminal law competence (e.g. arts 114, 192 and 325 TFEU) pursuant to the Court of Justice’s pre-Lisbon judgments should only be possible if art. 83(2) TFEU cannot constitute the proper legal basis for the measure.[[36]](#footnote-35)

Furthermore, adopting a position that art. 83(2) TFEU is to be the preferred legal basis for criminalisation measures furthers the legitimacy of the EU legislator’s criminal policy. The overall tenor of art. 83(2) TFEU reflects a restrained approach to criminal law harmonisation, containing power-restricting elements (such as the emergency brake and the ‘essentiality’ condition) and impeding excessive criminalisation on the part of the Union. This approach respects the distinctive nature of criminal law, as having a condemnatory function and as entailing direct and significant limitations on the liberty and other rights of an individual. The close connection between criminal law and sovereignty particularly favours a restrictive approach when it comes to EU-interference with criminal law.[[37]](#footnote-36) Criminal law for the enforcement of EU policies should thus be used as a last resort and only exercised under the strict conditions, such as those contained in art. 83(2) TFEU, thereby rejecting the use of other legal bases outside Title V.[[38]](#footnote-37)

*Constitutional realities- the Court of Justice’s approach in legal basis disputes relating to criminal law*

While it is arguable that art. 83(2) TFEU should be the legal basis of choice for EU criminalisation measures, there remains a possibility, based upon the Court’s past practice, that a general criminal law competence continues to exist elsewhere in the Treaties. Previous judgments of the Court have consistently held that the correct legal basis for EU criminalisation measures will be determined primarily by reference to the content and aim of the proposed EU legislative act (‘the centre of gravity test’).[[39]](#footnote-38) It is appropriate to examine this case law in detail.

There is one important pre-Lisbon judgment, *Ireland v Parliament and Council*[[40]](#footnote-39) that needs to be considered. The significance of this judgment to the present analysis lies in the fact that it was directly concerned with a conflict between a Union-friendly legal basis and a legal basis in the third pillar.[[41]](#footnote-40) In *Ireland v Parliament and Council*, Ireland challengedthe Data Retention Directive[[42]](#footnote-41) on the grounds that it was in fact a crime-fighting measure which should have been adopted on the basis of the (pre-Lisbon) Treaty on European Union[[43]](#footnote-42) and not the proposed legal basis of what is now art. 114 TFEU. The Court found against Ireland, finding that the directive related predominantly to the functioning of the internal market and could be adopted under art. 114 TFEU. In particular it rejected the argument that the contested directive was mainly concerned with the prosecution and fighting of crime. The provisions of the directive were, according to the Court, limited to the activities of service providers and did not govern access to data or its use by the police or judicial authorities of the Member States. This was demonstrated by the fact that service providers were only to retain data which was generated or processed in the course of their commercial activities. The Court also underlined that different requirements on service providers to retain data could constitute an impediment to their economic activities, potentially impacting the functioning of the internal market.[[44]](#footnote-43)

A critical reading of the case would question the Court’s acceptance of the argument that the measure was predominantly concerned with the internal market. It is clear from a study of the Data Retention Directive, the preamble and its history that the directive had one central purpose: the investigation, detection and prosecution of serious crime. For these reasons it would have been more appropriate to adopt it on the basis of the third pillar dealing with judicial cooperation in the Treaty on European Union.[[45]](#footnote-44) The market element in the Data Retention Directive was also limited, amounting to a mere reference to service providers and to future disparities.[[46]](#footnote-45) The Court’s conclusions in *Ireland v Parliament and Council* are also difficult to align with the recent *Digital Rights* judgment (concerning the compatibility of the Data Retention Directive with the Charter of Fundamental Rights) in which the Court underlined the fact that the main objective of the Data Retention Directive was to ensure that data is available for the purpose of the investigation, detection and prosecution of serious crime and that ultimately it is a measure aimed at enhancing public security.[[47]](#footnote-46)

Returning to the pre-Lisbon case law, the Court of Justice’s judgments in *Environmental Crimes* and the *Ship Pollution* highlighted the Court’s insistence on protecting the more integration-friendly legislatives competences in the first pillar where they conflicted with legal bases in the third pillar. In these judgments the Court held that the legal bases of arts 100(2) TFEU (transport policy) and 192 TFEU (environmental policy) had priority over third pillar provisions providing for a criminal law competence.[[48]](#footnote-47) The pre-Lisbon case law on conflicts of legal basis in relation to criminal law measures must, however, be viewed in light of the Treaties’ strong preference for the Community pillar under the previous three-pillar structure.[[49]](#footnote-48) Finally, the wording of ex-art. 47 EU provided the Court with textual support for its preference for Community pillar legal bases in disputes with third pillar legal bases.[[50]](#footnote-49)

However, a review of the case law after Lisbon suggests that the Court, despite the absence of a provision in the Treaties indicating preference for a specific decision-making framework in the TFEU, has continued to prefer stronger supranational competences in legal basis disputes. Recent judgments regarding conflicts between legal bases in the AFSJ and legal bases outside AFSJ illustrate this. The Court has applied its ‘main aim’ doctrine and consistently found that if the predominant component of the measure favours a non-AFSJ legal basis, this basis must be granted priority over an AFSJ legal basis. According to the Court this should apply notwithstanding the fact that there may be ancillary elements relating to criminal law[[51]](#footnote-50), police cooperation[[52]](#footnote-51), migration[[53]](#footnote-52) or any other AFSJ policy.[[54]](#footnote-53) The Court has been careful to underline the finding that the opt-out protocols attached to Title V cannot have the effect of prioritising the AFSJ legal bases, if a measure is only incidentally related to that legal basis.[[55]](#footnote-54) This clearly suggests that the Court of Justice’s case law allows for criminal law measures to be adopted outside Title V, if the criminal law aspect of the measure is merely incidental to another substantive policy which represents the ‘main aim’ of the instrument.[[56]](#footnote-55)

The argument here is critical of some of these judgments, not because of the approach they contain in examining the aim and content of the measure, but against the Court’s approach of interpreting legal bases outside the AFSJ in a very broad manner. On the face of it, it is difficult to question the Court’s approach in the social-security cases concerning Switzerland and Turkey relating to agreements intended to facilitate the free movement of persons (Switzerland) and the gradual free movement of workers (Turkey) in which the link to migration and art. 79 TFEU was weak.[[57]](#footnote-56) The Court’s approach to the Framework Agreement with the Philippines is more questionable. In *Commission v Council* the Court interpreted ‘development cooperation’ broadly, holding that all commitments in the agreement with regard to the environment, readmission of third-country nationals and transport contributed to ‘development cooperation’.[[58]](#footnote-57) This rhetoric, while similar to that used by the Court with regard to the internal market, is not especially illuminating.[[59]](#footnote-58) Clearly, different policies could always contribute to a country’s development but such an interpretation would effectively eliminate any limits to that competence. The result is that the Union-friendly legal basis (in this case art. 209 TFEU[[60]](#footnote-59)) becomes the rule in all matters somehow relating to the development in its ‘broadest’ sense.[[61]](#footnote-60)

The *Conditional Access Convention* judgment which was decided recently also indicates the Court’s preference for stronger and more federal EU competences such as that on Common Commercial Policy contained in art. 207 TFEU. In *Conditional Access Convention*, the Council argued that art. 114 TFEU would be a more appropriate legal basis for an agreement that extended the regime contained in Directive 98/84 of the European Parliament and the Council on the legal protection of services based on the legal protection of services based on, or consisting of, conditional access.[[62]](#footnote-61) While the claimants never argued that the Council decision adopting the Convention would encroach on the Union’s criminal law competence under art. 83(2) TFEU, it appears that there was a potential conflict.[[63]](#footnote-62) The Convention contained a provision obliging the Parties to adopt measures to ensure that the unlawful activities established in the Convention would be ‘punishable by criminal, administrative or other sanctions’ and that ‘such sanctions shall be effective, dissuasive and proportionate…’ Furthermore, art. 6 of the Convention stated that the parties shall adopt such measures ‘as may be necessary to enable [them] to seize and confiscate illicit devices or the promotional, marketing or advertising material used in the commission of an offence, as well as the forfeiture of any profits or financial gains resulting from the unlawful activity.’[[64]](#footnote-63)

It could be argued that those provisions did not entail a strict requirement on Member States to impose criminal sanctions and thereby avoiding any potential conflict. Indeed, this was the Court’s approach in the case. However, the Court’s reasoning was unconvincing.[[65]](#footnote-64) The wording of the provisions appeared to entail some kind of obligation for Member States to impose criminal sanctions. Arguably, the Council’s decision adopting the Convention should have been adopted on the main legal basis for internal criminalisation measures, namely art. 83(2) TFEU.[[66]](#footnote-65) Admittedly, the ultimate choice to opt for art. 207 TFEU as the proper legal basis for the Council Decision[[67]](#footnote-66) may have been justified. The Court’s reasoning on the criminal law nature of the provisions in the Convention seems, however, very questionable and if followed in the future, it would most probably operate to the detriment of the Member-State friendly competences contained in art. 83 TFEU.

Perhaps the most important judgment for understanding the Court’s current approach in legal basis disputes relating to criminal law is the *Road Traffic Directive* judgment. This case was concerned with the proper legal basis for a directive on the exchange of information for the purposes of enforcing road traffic offences.[[68]](#footnote-67) The candidates for the measure were art. 87 (2) (a) TFEU (the general provision on police cooperation) which provides a competence to establish measures concerning the collection, processing, analysis and exchange of relevant information and art. 91 TFEU (transport policy) which provides a general competence to enact measures in order to ensure road safety.

While the Court of Justice interpreted the scope of art. 91 TFEU broadly as covering any measure which is ultimately intended to enhance road safety,[[69]](#footnote-68) it found the scope of art. 87 TFEU to be narrow. The Court held that art. 87 TFEU had to be interpreted in its context, i.e. Chapter 5, entitled ‘Police Cooperation’ in Title V of the TFEU. It underlined that this cooperation continued to concern, as was the case under the pre-Lisbon provisions of the Treaty of European Union, the authorities of the Member States ‘in relation to the prevention, detection and investigation of criminal offences’. Art. 87(2) TFEU should also be understood in the light of the ‘General Provisions’ of the AFSJ, art. 67 TFEU, which provides, that the Union ‘shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws’. According to the Court, the Road Traffic Directive was not directly linked to those objectives and therefore fell outside the scope of art. 87 TFEU.[[70]](#footnote-69)

The Court’s conclusion that the predominant objective of the directive was to enhance road safety is open to question. A close review of the directive suggested that it was rather aimed to be a measure to enhance the criminal enforcement of road traffic measures. That is clear from the recitals of the Directive and the content of the directive which suggests that the aim is to enable more effective enforcement in relation to road traffic offences through the creation of a system of exchange of information concerning road traffic offences.[[71]](#footnote-70) It is also arguable that the objective of enhancing road safety by improving enforcement of road traffic offences could, *contra* the findings of the Court, be encompassed within the general objectives listed in art. 67 TFEU, i.e. to ensure a high level of security[[72]](#footnote-71).and thus constitute an ‘integral part of the construction of an Area of Freedom, Security and Justice’[[73]](#footnote-72).

The Court’s decision to give priority to art. 91 TFEU over art. 87 TFEU was premised on a too narrow construction of the term ‘criminal offences’ within the context of ‘police cooperation’ in the latter provision. As the system for exchange of information not only related to criminal offences but also administrative offences, art. 87 TFEU could not be used for the measure according to the Court.[[74]](#footnote-73) There is however an alternative and broader interpretation of art. 87 (1) TFEU, proposed by AG Bot, that the provision concerns ‘police cooperation involving all the ‘Member States’ competent authorities’ and not only police cooperation relating to criminal offences. The reference to the fact that those authorities include ‘police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences’ suggests that these services are mentioned as examples and that the list is not exhaustive. It therefore seems arguable that police cooperation in art. 87(1) TFEU can also involve cooperation between authorities in a wider sense, relating to the maintenance of law and order and the prevention of road traffic offences (regardless whether such offences are classified as criminal in the Member States).[[75]](#footnote-74) The Court’s narrow interpretation of police cooperation under art. 87 TFEU in the legal basis dispute with art. 91 TFEU is also inconsistent with previous rulings. This case law suggests that general access, exchange and use of personal data by national law enforcement authorities[[76]](#footnote-75) and more specifically access, use and exchange of information pertaining to the Visa Information System (VIS) falls in principle within the concept of police cooperation.[[77]](#footnote-76)

Several points can be made in relation to this review of the case law. The general observation seems to be that the Court of Justice, when faced with complex legal basis litigation with regard to criminal law measures, has tended to address the ‘constitutional question’ in favour of the Union and to the detriment of the Member States (favouring more integration-friendly competences).[[78]](#footnote-77) Although the selection of case law is selective, the Court’s approach seems to support the view that in legal basis disputes with provisions in the AFSJ it has a certain preference for the use of non-AFSJ competences with stronger federal elements. The narrow understanding of ‘criminal offences’ and ‘criminal enforcement’ which appears to have been adopted by the Commission and the Court of Justice is contestable as it removes most mixed measures – measures that have criminal and non-criminal aims and contents – from the AFSJ. The scope for using legal bases in the AFSJ thus becomes very narrow and becomes open to challenge by the Commission in litigation where the Court of Justice seems to favour Union-friendly interpretations.[[79]](#footnote-78) Art. 83 TFEU cannot be interpreted too narrowly by the Court of Justice when it examines, pursuant to the ‘centre of gravity’ test, whether another legal basis than art. 83 TFEU would be appropriate for the envisaged EU legislative act. Otherwise, the scope of using art. 83 TFEU as the main legal basis for criminalisation measures (which is the argument advanced here) becomes very confined.

# **Limits to the core argument: The (Narrow) Scope of art. 83(2) TFEU**

*The definition of ‘criminal’ law*

While the core argument advanced so far is that art. 83(2) TFEU should be the primary legal basis for criminalisation measures after Lisbon Treaty, there are some limitations to the use of this provision.

The most important constraint would appear to relate to the scope of art. 83(2) TFEU and the definition of criminal sanctions. The discussion regarding the legal basis for the recently adopted Fourth Anti-Money Laundering Directive[[80]](#footnote-79) illustrates this point. Whilst this directive was adopted on the legal basis of art. 114 TFEU it has been argued that it should have been adopted on a legal basis in Title V notwithstanding that it did not explicitly require the adoption of criminal sanctions. The basis for the argument is that money laundering is inherently concerned with criminal law.[[81]](#footnote-80)

Given the wording of art. 83(1) TFEU and the EU legislator’s recent practice[[82]](#footnote-81), it would seem reasonable to conclude that money laundering falls within the remit of this provision. By categorising money laundering as a crime with a particular cross-border dimension in art. 83(1) TFEU, the treaty has conferred a specific competence to adopt anti-money laundering criminal law legislation on the Union. The Fourth AMLD was however, like its predecessors, adopted under art. 114 TFEU.[[83]](#footnote-82) The rationale for not using art. 83(1) for the Fourth AMLD is that it contains, in contrast to the Commission’s Money Laundering Criminalization Proposal[[84]](#footnote-83), no explicit rules on ‘criminal law’. Art. 1 of the Directive, its main provision, simply states that ‘money laundering’ is prohibited, not that it is criminalised. The provision on sanctions contains no obligations on Member States to impose criminal sanctions. It merely prescribes that natural and legal persons can be held liable for breaches of national provisions transposing the directive and that resulting sanctions shall be effective, proportionate and dissuasive.[[85]](#footnote-84) The directive underlines the fact that the option to impose criminal sanctions remains in the hands of the Member States.[[86]](#footnote-85) Thus, it seems at first sight that this directive is not a ‘criminal’ law directive properly speaking.

Herlin-Karnell has, nevertheless, questioned this seemingly obvious conclusion. When discussing the Third Money Laundering Directive, which had similar provisions on sanctions, she maintained that, despite the fact that directive did not explicitly require criminalisation, it could be argued that it did so implicitly. She questioned whether in practice Member States had a real choice in refraining from harmonising their criminal laws in light of the need to provide for proportionate, dissuasive and effective sanctions.[[87]](#footnote-86) If the sanctions imposed by Member States were to comply with the ‘Greek Maize’ formula and the principle of loyalty[[88]](#footnote-87), they will often be obliged to provide for custodial sentences.[[89]](#footnote-88)

In support of her argument, it appears from a review of the Fourth AMLD that the expression ‘criminal’ and ‘criminals’ appears throughout the Directive.[[90]](#footnote-89) The Directive furthermore requires that Member States may only prohibit offences ‘when committed intentionally’ and that ‘knowledge, intent or purpose may be inferred from objective factual circumstances’.[[91]](#footnote-90) These subjective requirements implicitly suggest criminal law as opposed to administrative sanctions with strict liability. Furthermore, it appears that the directive foresees criminalisation by stipulating that Member States’ obligations to impose administrative sanctions is without prejudice to the right of Member States to impose ‘criminal sanctions’.[[92]](#footnote-91) There are also certain Court judgments which tentatively indicate that the principle of loyalty together with the ‘Greek Maize’ requirements may oblige Member States to impose criminal sanctions for offences against EU rules. The Court has, for example, held in *Nunes de Matos* that art. 4(3) TEU requires Member States to take all the measures necessary to guarantee the effectiveness of Union law, if necessary by instituting criminal proceedings.[[93]](#footnote-92)

The scope of this case law is, however, limited. It is significant in this respect that the Court has never construed art. 4(3) TEU as imposing an explicit obligation on Member States to impose criminal sanctions to enforce the relevant EU rules. Furthermore, there is no judgment that unequivocally states that the requirement to impose ‘effective, dissuasive or proportionate’ sanctions entails an obligation to impose criminal sanctions. There is thus scant evidence for the proposition that the principle of loyalty requires Member States to enforce Union obligations through criminal sanctions.[[94]](#footnote-93)

The argument that the Fourth AMLD falls outside the scope of art. 83 TFEU is premised on the proposition that this provision only provides the EU with competence to adopt ‘criminal’ sanctions in a ‘strict’ sense. The definition of criminal sanctions for the purposes of determining the remit of art. 83 TFEU is narrower than the definition of ‘criminal charge’ in art. 6 of the European Convention on Human Rights and Fundamental Freedoms.[[95]](#footnote-94) The latter definition would also include criminal sanctions in a broad sense, e.g. competition law fines and disqualification orders.[[96]](#footnote-95)

To constitute a criminal sanction within the meaning of art. 83 TFEU the sanctions at issue must, however, if they are not ‘labelled’ as such, express a particular social disapproval (I) and impose substantial burdens on individuals (II) such as the deprivation of liberty, permanent or temporary loss of income opportunities or serious financial hardship.[[97]](#footnote-96) The only sanctions that generally express sufficient moral condemnation among the members of the political community and entail such hardship for individuals that they can be termed as ‘criminal’ sanctions is imprisonment (because liberty is so intensively and universally valued) and sanctions that acts as substitutes[[98]](#footnote-97) for imprisonment.[[99]](#footnote-98) To come within the criminal law definition of art. 83(1) there must therefore be an obligation to impose sanctions that are either labelled as ‘criminal’ or enjoy the characteristics mentioned above (I and II).[[100]](#footnote-99) While the measure can still fall within the remit of art. 83 TFEU if the sanctions are sufficiently serious and entail an element of significant social disapproval, nothing in the Fourth AMLD suggests that this is the case. First, there is little evidence to suggest that the fines imposed in the Directive and the temporary trading prohibitions, are sufficiently dissuasive in practice.[[101]](#footnote-100) Secondly, it is difficult to maintain that the sanctions in the Fourth AMLD express the serious moral condemnation of the political community. In imposing a fine or a disqualification order without a prison term or without a connection to the commission of a criminal offence, the message is that the offenders’ conduct is being priced rather than sanctioned.[[102]](#footnote-101) In light of the above reasons, it appears that the Fourth AMLD cannot be adopted on the basis of art. 83 TFEU.

It also appears that the Commission has put forward a plausible argument in favour of art. 114 TFEU as the legal base for the Fourth AMLD. Without uniform EU rules on money laundering, Member States will adopt measures inconsistent with the internal market, resulting in a fragmentation of the market, seriously jeopardising free movement and damaging the stability of the financial sector. It would also make the organisation of EU cross-border business models more complex and burdensome. The removal of barriers within the internal market may also provide increased opportunities for money laundering if certain coordinating measures are not adopted at Union level.[[103]](#footnote-102) It would appear therefore that the directive falls within the formula of *Tobacco Advertising I*; i.e. it aims at preventing the emergence of future obstacles to trade resulting from the diverging development of national laws.[[104]](#footnote-103)

In short, it appears that the EU legislature’s procedure for adopting its new anti-money laundering package by employing art. 114 TFEU for the general internal market part of the measure and art. 83 TFEU for the criminal law part[[105]](#footnote-104) is legitimate. The Fourth AMLD does not place any explicit obligations on Member States to impose ‘criminal’ sanctions for breach of the relevant provisions of the Directive. Although the use of art. 114 TFEU for the Fourth AMLD measure could be questioned in light of the lack of evidence that criminalisation of money laundering would address any potential or existing market failures,[[106]](#footnote-105) this provision would nevertheless appear to be a more appropriate choice than art. 83 TFEU.

*Other limitations to the use of art. 83(2) TFEU - ‘directives’, ‘decriminalisation’ and the ‘harmonisation’ requirement*

The use of art. 83(2) TFEU is, as follows from its wording, confined to the adoption of ‘directives’, ‘minimum rules’ and measures in areas where the EU already has adopted ‘harmonisation measures’. The reference in art. 83 to ‘directives’ clearly indicates that any criminal law harmonisation measures adopted on the basis of this provision cannot be in the form of a regulation. It is clear from the drafting process of the Lisbon Treaty, as discussed above, that the directive was selected as the exclusive instrument to be used when criminalising conduct under art. 83 TFEU.[[107]](#footnote-106) It is also apparent from art. 83 TFEU and from the inclusion of the concepts of ‘criminal offences’ and ‘minimum rules’, that the Union lacks competence under this provision to adopt instruments in order to ‘decriminalise’ criminal conduct. The EU is only empowered to increase the level of criminalisation and the repressive character of the law in the Member States by the imposition of minimum rules on criminal offences and sanctions.[[108]](#footnote-107) These limitations are significant for the core argument of employing art. 83(2) TFEU as the main legal basis for criminalisation measures. The following example illustrates the point.

Let us assume that the Union considered adopting a regulation which both criminalised and decriminalised certain activities. The hypothetical reason for adopting a regulation, rather than a directive, might be that the Commission considers that the adoption of criminal laws by means of a directive might lead to a fragmented application of Union law by giving too much scope in the implementation phase to Member States. The rationale for including decriminalisation provisions in the regulation is to reverse the current trend amongst the Member States for over-penalisation.[[109]](#footnote-108) Although art. 83(2) TFEU could be interpreted broadly, it is difficult to argue that such a measure would within its scope. Given that the Union has only the power to adopt ‘directives’ pursuant to art. 83(2) TFEU, and given that it can only criminalise (rather than decriminalise) conduct under that provision, a cogent argument could be made that other legal bases outside Title V could be used for such a ‘residual’ measure. It is not reasonable to argue that criminal law ‘regulations’ would altogether fall outside the remit of EU competence.[[110]](#footnote-109) It is clear that the Court’s pre-Lisbon case law in *Environmental Crimes* was not confined to the adoption of directives. By holding that the framework decisions should have been adopted under arts 100(2) and 192 TFEU, both of which prescribed the ‘ordinary legislative procedure’ for the adoption of acts, it seems that the Court accepted that criminal law harmonisation by means of ‘regulations’ was allowed.[[111]](#footnote-110) This follows from the simple fact that the ‘ordinary decision-making’ procedure (if nothing else is expressly stated) allows for harmonisation through the adoption of ‘regulations’.[[112]](#footnote-111) It is also arguable that the Court’s pre-Lisbon case law remains intact, albeit ‘dormant’, to be triggered only when art. 83 TFEU is not available.If the drafters of the Treaties had the intention to reserve criminal law harmonisation to Title V of the Treaties and extinguish the pre-Lisbon criminal law competence, they should have expressed this by more unambiguous wording.[[113]](#footnote-112)  It therefore appears unlikely that the Court’s application of its ‘main aim’ doctrine would accept the presence of an exclusive legal basis for criminalisation measures if the ‘predominant’ component does not belong to the sphere of criminal law.[[114]](#footnote-113) This reinforces the point that criminal law regulation containing decriminalisation provisions, such as that described above, could be adopted under a non-AFSJ legal basis.

Another potentially important limitation to the scope of art. 83(2) TFEU is that it does not cover the criminalisation of conduct in fields that have not been subject to ‘harmonisation’ measures. It is, for example, unclear whether art. 83(2) TFEU would allow for criminalisation where there is no previous harmonisation measure. EU competition policy is an illustrative example. Whilst EU Competition law is one of the most harmonized and integrated areas of EU law’,[[115]](#footnote-114) there are no specific harmonization measures adopted in the field of EU competition law that would provide the necessary foundation for criminal law harmonization under art. 83(2) TFEU. Art. 83(2) TFEU appears to require that prior harmonisation must have taken place through an ‘ordinary’ or ‘special’ legislative procedure. The problem is that harmonization of EU competition law has taken place primarily through the codification of substantive prohibitions contained in arts 101 and 102 TFEU. Given that harmonization of the EU competition rules has taken place by the Treaties,[[116]](#footnote-115) and not by means of a ‘legislative act’ per se within the meaning of art. 289 (1) -(3) TFEU, the Union legislator cannot rely on this harmonisation to trigger the competence in art. 83(2) TFEU.[[117]](#footnote-116) Admittedly, some approximation of EU competition law has also taken place through secondary legislation, particularly based on the sectorial provision in art. 103 TFEU. The problem with this kind of legislation, e.g. Council Regulation 1/2003[[118]](#footnote-117), adopted pursuant to art. 103 TFEU is that this provision does not prescribe the use of the ‘ordinary’ or ‘special’ legislative procedure for adoption of legislation. While it could be argued that in substantive terms art. 103 TFEU must be considered a ‘special’ legislative procedure, the construction of the Treaties’ definitions of ‘legislative acts’ simply does not allow for such a conclusion.[[119]](#footnote-118) Secondary legislation adopted based on art. 103 TFEU cannot thus be used as a ‘harmonisation’ measure for the purposes of art. 83(2) TFEU. In light of these arguments, there is a reasonable case to be made that it must be possible to adopt EU measures criminalising competition law infringements under legal bases other than art. 83(2) TFEU, e.g. art. 114 TFEU.[[120]](#footnote-119)

In short, this section suggests that there are provisos (particularly relating to the limited scope of this provision) to the use of art. 83(2) TFEU for criminalization measures. Whilst these limitations do not challenge the main argument (which is that art. 83(2) TFEU is the preferred option for criminalisation measures) it supports the existence of an implicit criminal law competence under other legal bases of the Treaties when art. 83(2) TFEU is not available.

# **Illustrating the Core Argument- Conflicts between art. 83(2) TFEU and some Selected Legal Bases**

## This section expands on the core argument by discussing legal basis conflicts between art. 83(2) TFEU and the most appropriate alternative legal bases for criminalisation measures, art. 114 TFEU and art. 325 TFEU. It argues that while there is a narrow scope for conflict between art. 114 TFEU (the general legal basis) and art. 83(2) TFEU (given the subsidiary nature of art. 114 TFEU), there is greater potential for struggles between art. 83(2) TFEU and art. 325 TFEU. We first consider the relationship between art. 83(2) TFEU and art. 114 TFEU before addressing the more problematic relationship between arts 82(2) and 325 TFEU.

*Criminalisation for the benefit of the internal market- art. 114 vs art. 83(2) TFEU*

Given its wide scope, art. 114 TFEU is an important potential alternative to art. 83(2) TFEU as a legal basis for criminalisation measures. It has been argued by both scholars and the EU legislator that this provision constitutes a legitimate legal basis for EU criminalization measures[[121]](#footnote-120) and it is true that the case for criminalization under art. 114 TFEU is compelling. Sevenster has explained how concern for ‘Delaware effects’ (i.e. that a state wishing to create favourable conditions for companies may adopt low regulatory standards, triggering a race to the bottom[[122]](#footnote-121)) can justify the harmonization of criminal law. Such effects could also occur if the underlying regulatory provisions were similar but the criminal legislation in Member States diverged significantly. These divergences would create ‘regulatory races’. The assumption is that the Member State with the most lenient penal system would attractmore investment from other Member States who would be obliged to adopt more lenient criminal law measures, triggering a race to the bottom. A further extension of this argument is that Member States will be incentivised to laxly enforce the common EU rules that have been adopted out of a desire to avoid placing their companies at a competitive disadvantage[[123]](#footnote-122), leading to further distortions of competition. In the absence of a common EU standard, firms and individuals will be subject to different compliance costs with different regulatory standards putting firms in jurisdictions with more stringent regimes at a competitive disadvantage. Firms under a criminalised regime may be discouraged to enter into legitimate business activities and they may also incur additional costs, e.g. costs for adopting internal compliance mechanisms and costs for advisors to ensure compliance with the relevant rules.[[124]](#footnote-123) Weak criminal enforcement or loopholes in states’ criminal enforcement systems would on the other hand create ‘safe havens’ because potential perpetrators are provided with an incentive to identify and exploit those jurisdictions.The idea underpinning EU competence in the area is therefore that harmonisation of national criminal law in these areas could help to address some of these collective action problems[[125]](#footnote-124) and reinforce the objective of creating and maintaining the internal market.[[126]](#footnote-125)

Furthermore, legislative and judicial practice would suggest that this provision has been a key tool in promoting EU integration over sensitive national policies more generally. Whilst its scope is limited to the internal market, practice demonstrates that it is viewed by the EU institutions as a more general regulatory power.[[127]](#footnote-126) Art. 114 TFEU has also been given a broad interpretation in the jurisprudence of the Court in the area of legal basis disputes. Early case law suggested that it was only necessary to meet the conditions contained in art. 114 TFEU in order to give that provision priority over alternative, more specific legal bases. If the measure had a link to the internal market by removing either obstacles to trade or distortions of competition, art. 114 TFEU had priority over other legal bases. This same line of case law furthermore found that art. 114 TFEU should be given a wide scope; any legislation that was relevant for the competitive position of economic actors fell within its scope.[[128]](#footnote-127)

*Titanium Oxide* is a good illustration of this body of case law. In *Titanium Oxide* the Waste Directive was challenged on legal basis grounds.[[129]](#footnote-128) In contesting the choice of legal basis, namely art. 192 TFEU, the Commission argued that the directive should have been adopted under art. 114 TFEU on the basis of its characterisation as an internal market measure. The Court initially found that the Waste Directive was equally concerned with environmental protection and the internal market. The normal solution to such a problem would be to adopt the Directive on a dual legal basis. This however was impossible, since arts 114 TFEU and 192 TFEU provided for incompatible decision-making procedures. The Court, having reviewed the aim and the content of the measure, found that environmental protection should be integrated into legislation under art. 114 TFEU and on this basis this provision was the more appropriate legal basis.[[130]](#footnote-129)

It is apparent that the Court interpreted the concept of the internal market broadly in order to give art. 114 TFEU priority over art. 192 TFEU. It is clear that harmonisation of obligations concerning the treatment of waste from the titanium dioxide production process was a measure which was primarily envisaged to enhance environmental protection.[[131]](#footnote-130) The Court, however, emphasised the effect of the measure on the internal market by underlining that harmonisation would equalise competitive conditions for firms in the titanium oxide business.[[132]](#footnote-131) It also invoked art. 11 TFEU as support of this broad understanding of the internal market by holding that the Treaties had provided that environmental protection should be integrated into the policies of the internal market.[[133]](#footnote-132)

Based on this expansive interpretation of the internal market, Herlin-Karnell has proposed that for the purposes of the Commission’s Market Abuse Crimes Proposal (which was proposed under the latter provision) art. 114 TFEU should take precedence over art. 83(2) TFEU.[[134]](#footnote-133) She argues that the use of art. 83(2) TFEU for the Market Abuse Crimes Proposal would undermine the limits imposed on the Union’s criminal law harmonisation competence. This is because, unlike art. 114 TFEU, art. 83(2) TFEU contains no ‘market creation’ condition.She further suggests that the Market Abuse Crimes Proposal is an ‘internal market’ measure aimed at the prevention of market failures in the form of manipulative practices that lead to an inefficient allocation of resources and to prevent future risks associated with integration. Such a measure should, if one follows the Court’s case law on art. 114 TFEU, particularly the *Tobacco Advertising II*[[135]](#footnote-134) judgment, be adopted pursuant to the internal market provision.[[136]](#footnote-135)

Whilst Herlin Karnell’s argument on the broad scope of art. 114 TFEU is compelling, it does not sufficiently explain why this provision should be preferred over art. 83(2) TFEU. Firstly, the *Tobacco Advertising II* judgment is of limited use in demonstrating that art. 114 TFEU should have priority over art. 83(2) TFEU. In *Tobacco Advertising II* no alternative legal basis was proposed, this case did not concern a choice between two alternative legal bases but rather whether the Union had a competence *at all* to adopt the measure under the Treaties.[[137]](#footnote-136) It is well-known that the Court is inclined to give a broad interpretation of art. 114 TFEU if the question relates to whether the Union lacks competence to act in the first place.[[138]](#footnote-137) It appears unlikely that the Court would see the same necessity to give a similarly broad interpretation of art. 114 TFEU when there is no question of whether the Union has competence to act but rather of under which basis the Union has a competence to act.[[139]](#footnote-138)

This brings us to the most important constraint on the exercise of law-making powers under art. 114 TFEU. The expression, ‘save where otherwise provided in the Treaties’[[140]](#footnote-139) seems to indicate that art. 114 TFEU is a subordinate legal basis. The wording suggests that it is to be used only in the absence of another more appropriate, specific legal basis (such as art. 83(2) TFEU).[[141]](#footnote-140) While the *Titanium Dioxide* judgment, as discussed above, raised doubts on the significance of this limitation, subsequent case law on legal basis has reverted to a narrower reading of art. 114 TFEU.[[142]](#footnote-141)

*Commission v Council*[[143]](#footnote-142)is particularly clear in demonstrating the secondary nature of art. 114 TFEU. The Commission argued that the directive on the recovery of indirect taxes,[[144]](#footnote-143) which had been based on arts 113 TFEU and 115 TFEU, should instead have been adopted solely under the provision of art. 114 TFEU, as it was primarily an ‘internal market’ measure. The Court rejected the Commission’s argument, emphasising that the very wording of art. 114 TFEU provided that that article should only be applied if the Treaty does not provide otherwise. If the Treaty contains a more specific provision that can constitute the legal basis for the Directive, it must be based on such a provision. Art. 113 TFEU constituted such a *lex specialis* with reference to harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation. The Court furthermore found that the predominant component of the Directive related to ‘fiscal provisions’, the harmonisation of which was excluded under art. 114 (2) TFEU. Art. 114 TFEU could not therefore constitute the legal basis for the directive.[[145]](#footnote-144)

This judgment and subsequent case law from the Court demonstrates the limited scope of Art. 114 TFEU in legal basis disputes. The Court will not accept art. 114 TFEU as the legal basis for a proposed legislative measure if another, more specific legal basis is available. It will still apply the ‘predominant purpose’ test, which may favour art. 114 TFEU for genuine internal market measures. The Court has, however, taken a step back from *Titanium Dioxide* and its broad interpretation of this provision. It is not inclined to give preference to art. 114 TFEU if it finds that the EU measure is adopted with the primary aim of protecting another Union objective such as the environment, consumer policy or the Union’s common commercial policy. Art. 114 TFEU can only have priority over another legal basis if the proposed measure has a demonstrable connection to the internal market; the link cannot be incidental.[[146]](#footnote-145)

This subsection has argued that art. 114 TFEU is only to be used as a legal basis when other specific legal bases, such as art. 83(2) TFEU, cannot be employed for a proposed EU measure. In addition to the principled arguments discussed above relating to the telos of art. 83(2) TFEU and the structure of the Treaties[[147]](#footnote-146), there is compelling textual support for preferring this provision over art. 114 TFEU for EU directives containing clear ‘criminal law’ obligations.[[148]](#footnote-147)

*The Fight Against Fraud- art. 83(2) TFEU vs art. 325 TFEU*

This subsection considers the legal basis of the recent PIF Proposal on criminalisation of fraud against the EU’s budget. It constitutes a particularly relevant case study as it exposes the divergence in opinion on the changed constitutional landscape of EU criminal law after Lisbon highlighted in the introduction. The Commission has suggested that the PIF Proposal should be adopted under art. 325 TFEU, while the Parliament and the Council Legal Service (CLS) have instead argued in favour of art. 83(2) TFEU as their preferred legal basis.[[149]](#footnote-148) It is clear from its wording that art. 325 TFEU does not explicitly contain a criminal law competence, comparable to that contained in art. 83 TFEU.[[150]](#footnote-149) The question therefore arises of whether it is possible to invoke the Court’s pre-Lisbon case law on implied criminal law competence to employ art. 325 TFEU for criminalisation measures.[[151]](#footnote-150) It seems clear that the PIF Proposal legal basis debate is ultimately a conflict between the Union and the Member States rather than an inter-institutional dispute.[[152]](#footnote-151) The question of legal basis for this proposal thus brings into sharp relief the federal dimension of EU criminal law after Lisbon. The ultimate choice is likely to act as a precedent and contribute to the future division of power between Member States and the Union in the field of criminal law. Choosing art. 83(2) TFEU as a legal basis for the PIF Proposal would reinforce the Member States’ desire to limit criminal law cooperation to Title V of the Treaties.[[153]](#footnote-152) In such a scenario Member States would be able to trigger the emergency brake (in contrast to art. 325 TFEU where the Council decides by qualified majority and there is no possibility to veto legislation). The opt-outs of the UK, Ireland and Denmark would also be applicable if art. 83 TFEU is used as a legal basis while those rights could not be triggered if art. 325 TFEU is used for the proposal. Furthermore, the conditions for using art. 83(2) TFEU, namely that criminal laws must be ‘essential’ and that there must exist previous ‘harmonisation’ measures[[154]](#footnote-153), would not be applicable if art. 325 TFEU was employed.[[155]](#footnote-154)

The EU institutions’ arguments with respect to the legal basis of the proposal must also be understood within this federal context. The EU institutions agreed that the fight against fraud is a key strategic interest for the EU institutions, that the current amounts of fraud were unacceptable and that the current and planned national and EU measures in this field were insufficient to ensure the effective protection of the Union’s financial interests.[[156]](#footnote-155) They could not however agree on what legal basis this measure should be based. The Commission argued for the more centralised and Union-friendly policy-specific competence contained in art. 325 TFEU. It claimed that this provision provided the Union with a broad competence to enact any ‘measure’ (criminal or non-criminal), against illegal activities affecting the Union’s financial interests which ‘act as a deterrent’ and ‘afford effective protection’.[[157]](#footnote-156) In line with this expansive interpretation of art. 325 TFEU, it maintained that the term ‘fraud’ in this provision must also encompass fraud-related criminal offences. It claimed that criminal law, by virtue of its communicative and social dimension, is the ultimate ‘deterrent’ to dissuade offenders from being engaging in illegal activities affecting the Union’s financial interests. More interestingly from a federal point of view, the Commission emphasised the advantages from a Union perspective of using art. 325 TFEU as this provision would prevent the use of the Title V opt-outs.[[158]](#footnote-157)

The CLS and the Parliament took a narrower approach to art. 325 TFEU and instead proposed the more Member State-friendly art. 83(2) TFEU. They argued that that the conditions of art. 83(2) TFEU were satisfied. The PIF Proposal intended to ensure the ‘effective implementation of a Union policy’,[[159]](#footnote-158) i.e. the protection of the EU’s financial interests. Furthermore, the proposal met the ‘harmonisation’ requirement[[160]](#footnote-159) since the policy in question had been subject to harmonisation measures, in particular Regulation 2988/95. They therefore argued that the proposal met the condition that criminal laws must be ‘essential’ for the enforcement of EU policies and in this context referred to the Commission’s persuasive argument to the effect that criminal law would be a necessary deterrent in this policy field.[[161]](#footnote-160) The Parliament and the CLS also rejected the claim that art. 325 TFEU would be a *lex specialis* for criminalisation within the field of fraud. Such a construction could be extended to all other enabling provisions, depriving art. 83(2) TFEU of any practical meaning. Instead, they claimed that art. 83(2) TFEU was a *lex specialis* for a proposal such as the PIF Proposal which tried to define ‘criminal offences and sanctions’ in the field of the EU’s financial interests.[[162]](#footnote-161) This new legal basis was indeed introduced into the Lisbon Treaty with the aim of exhaustively covering all cases where the EU legislature needed to effectively enforce its policies through criminal sanctions.[[163]](#footnote-162) The prominence of art.83(2) TFEU was reinforced by the constraints attached to the exercise of this competence: the ‘essentiality’ condition, the fact that only ‘minimum’ rules could be adopted and the existence of the ‘emergency brake’.[[164]](#footnote-163) To proceed with criminal law harmonisation on a different legal basis would amount to a circumvention of these limits.[[165]](#footnote-164)

The key question is clearly which of art. 83(2) TFEU or art. 325 TFEU should be considered the predominant legal basis for the PIF Proposal, a directive which primarily intends to criminalise offences against the Union’s financial interests. The point of departure for the analysis is the guidelines provided by the Court’s general case law on legal basis.[[166]](#footnote-165) According to the Court’s well-established case law, the choice of the legal basis for a Union measure must be based on objective factors amenable to judicial review, which include the aim and the content of that measure.[[167]](#footnote-166) If a measure then pursues two or more aims or components and one of those aims or components is identifiable as the principal and the other is considered merely incidental, the measure must be founded on the legal basis required by the predominant aim or component.[[168]](#footnote-167) Furthermore, where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision (*lex specialis*).[[169]](#footnote-168)

Based on these very general standards, it follows that making a choice for this proposal is a very delicate task. Art. 325(4) TFEU offers on the one hand a broad competence to adopt ‘measures in the fields of the… fight against fraud affecting the financial interests of the Union with a view to affording effective… protection’. If the EU has been provided with a budget, it is only reasonable that it has the possibility to protect its interests in an effective manner, if necessary by criminal laws.[[170]](#footnote-169) The title of the Directive itself, ‘the fight against fraud to the Union’s financial interests by means of criminal law’, also suggests that it falls within art. 325(4) TFEU, which confers a competence on the EU legislator to adopt the measures deemed ‘necessary’ in this field.

It appears however that there is an equally compelling case for employing art. 83(2) TFEU for the PIF Proposal.[[171]](#footnote-170) This provision confers a wide scope for the EU legislator to adopt measures that are ‘essential’ for the enforcement of an EU policy which has already been subject to ‘harmonisation’ measures. There is a ‘harmonisation’ measure, namely Regulation 2988/95, which was adopted pursuant to art. 114 TFEU by means of the then ordinary legislative procedure contained in art. 251 TFEU (now 294 TFEU).It therefore meets the condition that the previous harmonisation measure must have been adopted through the ‘ordinary’ or ‘special’ legislative procedure.[[172]](#footnote-171) There is also a case for suggesting that criminal sanctions may be ‘essential’ to safeguard the Union’s financial interests. By referring explicitly to recent criminological research, the Commission suggested that the ‘fear of being caught’, ‘certainty of sentencing’ and/or ‘the shaming’ function inherent in criminal sanctioning influences potential perpetrators’ decision as to commit an offence.[[173]](#footnote-172)

It is not particularly easy to select between these two alternative legal bases. Given the fact that the PIF Proposal concerns measures targeting behaviour considered damaging to the EU’s financial interests, it is arguable that the directive is, in a substantive sense, strongly connected to art. 325 TFEU. After all, the title, purpose[[174]](#footnote-173) and content of the proposed directive[[175]](#footnote-174) underline its link to the fraud-specific legal basis in art. 325 TFEU.It nevertheless appears that the sanctions in the directive, the offence descriptions and the criminalisation requirement clearly connect the PIF Proposal to art. 83(2) TFEU, which is the special provision for ‘criminal law’.[[176]](#footnote-175) It has already been observed that art. 325 TFEU does not, in contrast to art. 83(2) TFEU, give the EU an explicit competence to adopt ‘criminal law’ measures. Criminal law furthermore seems to be an independent policy component with reference to the Court’s legal basis test, i.e. not only an enforcement mechanism.[[177]](#footnote-176) It would therefore seem that the proposed directive is as equally concerned with the ‘fight against fraudulent behaviours affecting the EU’s financial interests’ as with a ‘criminal law’ dimension.

The next question is thus whether the measure could be adopted on a dual legal basis. It is apparent from the case law that a measure which simultaneously pursues a number of objectives/components which are inseparably linked without one being incidental to the other and where various legal bases are applicable, can be adopted on those legal bases.[[178]](#footnote-177) However, recourse to a dual legal basis is not possible where the procedures laid down the different legal basis are incompatible (e.g. where there is change in voting rule in the Council or where the rights of the European Parliament are encroached upon).[[179]](#footnote-178) It is also difficult to combine a legal basis with another where it contains a specific decision-making framework and a distinct institutional setting.[[180]](#footnote-179)

Art 83(2) TFEU does not offer a pre-defined legislative procedure but refers to the legislative procedure used for the underlying harmonisation measure.[[181]](#footnote-180) If it is assumed, however, that the procedure to be used under this provision would be the same as that used for the underlying harmonisation measure, namely Regulation 2988/95 that legislative procedure would be the ordinary legislative procedure. There is no apparent difficulty in combining art. 325 TFEU with art. 83(2) TFEU. As those provisions entail the same rights for the Parliament and the Council can act in both cases with qualified majority voting[[182]](#footnote-181), the EU legislative institutions would have the same powers as they would have under the ‘ordinary’ legislative procedure.[[183]](#footnote-182) Having said this, there are serious procedural objections to a combination of art. 83(2) TFEU and art. 325 TFEU. As observed above, the procedures under Title V and art. 83(2) TFEU come with a distinct constitutional framework. Measures adopted under art. 83(2) TFEU could be subject to emergency break objections from Member States under art. 83(3) TFEU. Such a procedure would suspend the ordinary legislative procedure and requires unanimity in the European Council. Similarly,the opt-outs enjoyed by UK, Ireland and Denmark[[184]](#footnote-183) only apply to measures adopted under art. 83(2) TFEU and the participation or non-participation of these Member States will alter the voting thresholds used for calculating whether or not a qualified majority has been reached.[[185]](#footnote-184) The threshold for the subsidiarity control also varies between Title V and art. 325 TFEU; while under art. 83(2) TFEU proposals only require a quarter of all the votes allocated to the national parliaments to trigger the yellow card[[186]](#footnote-185), those made under art. 325 require at least one-third of the votes of all the national parliaments.[[187]](#footnote-186) It would therefore seem that the PIF Proposal cannot be adopted on the dual legal basis of art. 83(2) TFEU and art. 325 TFEU. Given this, a final assessment must be made regarding which is the more appropriate legal basis for the measure. While the Court has not indicated clearly how this choice should be made, it seems that this assessment should be pursued on the basis of the ‘centre of gravity’ test including a renewed review of the aim and content of the measure.[[188]](#footnote-187) Distinguishing between the two legal bases only with reference to the aim of the measure is a delicate task. It may well be argued that art. 83(2) TFEU is only an enforcement provision while art. 325 TFEU is a broader power providing a substantive legal basis for fraud policy. The rationale for this is that the art. 325 TFEU would appear to include a competence to adopt material prohibitions relating to infringements of the rules on the EU budget.[[189]](#footnote-188) The PIF Proposal intends to ensure the effective protection of the Union’s financial interests, an aim that can be pursued by means of art. 325 TFEU. However, the aims of the PIF Proposal can also be pursued by means of the legal basis of art. 83(2) TFEU, which is intended to be used for all criminalisation measures supporting substantive EU policies (such as protection of the EU budget). Since this provision is also explicitly concerned with ‘criminal offences’ and ‘and ‘sanctions’, it is more specific concerning criminalisation of fraud in comparison to art. 325 TFEU.[[190]](#footnote-189)

While the question of whether the PIF Proposal pursues non-criminal aims to a greater extent than criminal aims is open to discussion, the content of the substantive provisions of the proposal does have a much clearer ‘criminal law’ component.[[191]](#footnote-190) The proposal contains no sanctions against natural persons other than criminal sanctions and the criminalisation provisions in fact constitute its main provisions.[[192]](#footnote-191) Nor does the proposal contain any other general substantive provision aiming to safeguard the EU’s financial interests. It therefore seems clear that the specific criminal law aims and content of the PIF Proposal indicate that art. 83(2) is the proper legal basis for this legislative initiative. Furthermore, the ordinary decision procedure will apply if this is the legal basis chosen, such a solution would appear to respect the prerogatives of the Parliament.The Council’s prerogatives will be even enhanced if art. 83(2) TFEU is employed, as the Member States will have access to the ‘emergency brake’. It thus seems that this solution would respect the institutional balance established by the Treaties.[[193]](#footnote-192) The choice of art. 83(2) TFEU for a directive with strong ‘criminal law’ components such as the PIF Proposal is therefore consistent with the teleological, structural and constitutional considerations underlying the core argument in this article.[[194]](#footnote-193)

# **V Conclusions and reflections**

This article examined the question of the correct legal basis for the criminalisation in relation to existing EU policies. The central claim is that art. 83 TFEU has assumed the role of *lex specialis* for measures containing a predominant component of a ‘criminal law’ nature. A critical reading of the post-Lisbon constitutional architecture on criminal law reflects an explicit choice by the Member States to limit criminal law cooperation to Title V. Such a choice reinforces the legitimacy of the EU’s criminal policy by accepting that Member States are still in control of policy-making in this field. It is consistent with the simple idea that criminal law constitutes a nucleus of national sovereignty and that EU involvement in such affairs should be very limited (i.e. to matters relating to the fight against transnational organised crimes and to address serious problems in the EU’s internal market).[[195]](#footnote-194) While the Court’s apparent Union-friendly case law on legal basis opens up the possibility of criminalisation measures being adopted on the basis of provisions outside Title V, it was argued that this case law should not be interpreted too broadly. In fact, the Court has never held explicitly that legal bases outside Title V should take precedence over art. 83(2) TFEU with reference to ‘criminal law’ measures.[[196]](#footnote-195)

There are however several important limitations to this ‘core’ argument.[[197]](#footnote-196) The narrow scope of art. 83(2) TFEU only allows for harmonisation through ‘directives’ and only provides for harmonised ‘criminal’ sanctions in fields where there has already been ‘harmonisation’ measures, suggesting that this provision cannot be used for all criminal law measures. It is clear therefore that alternative legal bases (such as art. 114 TFEU or art. 325 TFEU) could be used for ‘criminal’ law measures that fall outside the remit of art. 83(2) TFEU. The case studies on the Fourth Anti-Money Laundering Directive and EU competition law illustrate this point. The strict limitation in art. 83(2) TFEU to the definition of ‘criminal offences’ and ‘criminal sanctions’ made it inappropriate to adopt the Fourth AMLD on this legal basis as this proposal did not contain ‘criminal law’ rules in a strict sense. Furthermore, the absence of previous ‘harmonisation’ measures (i.e. measures adopted by means of the ‘ordinary’ and ‘special’ legislative procedure) in the field of competition law made criminalisation in this field under art. 83(2) unfeasible.[[198]](#footnote-197)

The core argument was explored in relation to conflicts between art. 83(2) TFEU and art. 114 and art. 325 TFEU. Art. 114 TFEU has been interpreted broadly by the Court of Justice in legal basis disputes and there is also a plausible case that EU criminalisation measures may contribute to fulfilling the objectives of the internal market. Recent case law would however indicate that this provision is indeed a subsidiary legal basis to be used only when other more specific legal bases such as art. 83(2) TFEU are not available. It seems that art. 83(2) TFEU will still normally have priority over art. 114 TFEU in relation to criminalisation measures. The discussion of the PIF Proposal revealed the very delicate choice between art. 325 TFEU and art. 83(2) TFEU for criminalisation measures. While the proposal, as a measure concerned with the fight against fraud, has a strong connection with art. 325 TFEU, the arguments for using art. 83(2) TFEU for the PIF Proposal were more compelling. There are already ‘harmonisation’ measures in the field of fraud and good reasons were provided by the Commission as to why it believed the criminal law response was ‘essential’ for the enforcement of the underlying EU policy. The PIF Proposal also contained extensive rules providing for the ‘definition’ of ‘criminal offences’ and requirements to impose ‘criminal sanctions’, making the ‘criminal law’ component of the proposal clearly ‘predominant’. [[199]](#footnote-198)

In a broader sense, the *lex specialis* argument advanced here is consistent with post-Lisbon legislative practice.[[200]](#footnote-199) The EU institutions rely on a ‘dual approach’[[201]](#footnote-200): measures containing clear criminal law obligations are legislated for under art. 83 TFEU whilst accompanying non-criminal law obligations are provided for under legal bases outside Title V.[[202]](#footnote-201) This practice can be seen in relation to market abuse activities which were from the beginning divided into a regulation under art. 114 TFEU and a directive which was adopted on the basis of art. 83(2) TFEU.[[203]](#footnote-202) The fight against money laundering follows the same trend. The non-criminal provisions of money laundering were implemented through the Fourth Anti- Money Laundering Directive, which was based on art. 114 TFEU. The Commission then suggested employing art. 83(1) TFEU as the basis of a separate proposal on the criminal law dimension of money laundering. This is a legitimate approach on the part of the EU legislator. Not only does it respect the will of the Member States to retain the protective mechanism of Title V, but it is also consistent with the post-Lisbon constitutional framework. The EU legislator’s policy on sanctioning appears to be a sufficient political safeguard of federalism.[[204]](#footnote-203) It is clear however that the EU legislator could choose an alternative and more ‘centralised’ approach to criminalisation by using its ‘dormant’ criminal law competence along the lines described above.[[205]](#footnote-204) Nevertheless, one might hope that the EU legislator will refrain from such a practice as this would compromise the idea behind the special framework in Title V and render art. 83(2) TFEU superfluous.

The discussion of legal basis for criminalization measures therefore underpins the starting point of this article that the principles for delimiting powers and the areas covered by each type of competence are not clearly defined by the Treaties. The Lisbon Treaty has not been able to remedy this problem by establishing a catalogue of competences[[206]](#footnote-205) and by describing the nature of EU powers in certain fields.[[207]](#footnote-206) Since the system of competences is founded on the EU’s objectives and in light of the fact that not all of the EU’s competences are designated to one specific policy (e.g. art. 114 TFEU) and because of the fact some cross-cutting policies such as criminal law may have an impact on different Treaty provisions, there is plenty of scope for legal basis disputes.[[208]](#footnote-207) It remains the case that the ‘scope for exercising the Union’s competences’ is ‘determined by the provisions of the Treaties relating to each area’[[209]](#footnote-208) and the hierarchical and substantive relationship between these provisions.[[210]](#footnote-209) If the Member States wish to draw a clearer demarcation line between the different Treaty competences, they would have to draft the Treaties differently and adopt a wholly different means of identifying and operationalising the competences of the Union. The only clear means of limiting the Union’s criminal law competence to Title V TFEU would be to adopt a provision in the Treaties precisely to that effect.[[211]](#footnote-210)

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2. See for a sample of important contributions: R. Barents, ’The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation’ (1993) 30 C.M.L. Rev. 85; K. Bradley, ‘Powers and Procedures in the EU Constitution: Legal Bases and the Court’ in P. Craig and G. De Búrca, *Evolution of EU Law* (Oxford: Oxford University Press, 2011); H. Cullen and A. Charlesworth, ‘Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States’ (1999) 36 C.M.L. Rev. 1243; M. Klamert, ‘Conflicts of Legal Basis: No Legality and No Basis but a Bright Future under the Lisbon Treaty?’ (2010) E.L. Rev. 497. [↑](#footnote-ref-1)
3. See arts 3-6 of the TFEU. The TFEU more particularly distinguishes distinct types of EU competences: exclusive competences, shared competences, coordinating competences and complementary competences, see art. 2(1)-2(3) and 2(5) TFEU. [↑](#footnote-ref-2)
4. See European Council, ‘Laeken Declaration on the future of the European Union’, 14–15 December 2001, 21-22; European Convention, CONV 47/02, ‘Delimitation of competence between the European Union and theMember States – Existing system, problems and avenues to be explored’, Brussels,15 May 2002, 3-5, 16. [↑](#footnote-ref-3)
5. See E. Herlin-Karnell, *The Constitutional Dimension of EU Criminal Law* (Oxford: Hart Publishing, 2012). [↑](#footnote-ref-4)
6. See furthermore below subs. ‘*The Fight Against Fraud- art. 83(2) TFEU vs art. 325 TFEU’* for a comprehensive analysis of this conflict. [↑](#footnote-ref-5)
7. See for recent and intriguing contributions: J. Ouwerkerk, ‘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’ (2017) 23 Colum. J. Eur. L. (forthcoming); —S. Miettinen, *The Political Constitution of EU Criminal Law – Choices of Legal Basis and their Consequences in the New Constitutional Framework* (Oxford: Hart Publishing, 2017, forthcoming). [↑](#footnote-ref-6)
8. See CONV 426/02, ‘Final report of Working Group X "Freedom, Security and Justice" ‘, Brussels, 2 December 2002, 9-11. [↑](#footnote-ref-7)
9. See P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013); S. Peers ‘EU Criminal Law and the Treaty of Lisbon’ (2008) 33 E.L. Rev. *507*. [↑](#footnote-ref-8)
10. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542; *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625. [↑](#footnote-ref-9)
11. See E. Herlin-Karnell, ‘EU Competence in Criminal Law after Lisbon’, in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law After Lisbon* (Oxford, Oxford University Press, 2012) 334, 340–344; S. Miettinen, ‘Implied Ancillary Criminal Law Competence After Lisbon’ (2013) 2 *European Criminal Law Review* 194. [↑](#footnote-ref-10)
12. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28. [↑](#footnote-ref-11)
13. 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. [↑](#footnote-ref-12)
14. See Commission, ‘Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgement of 13 September 2005’ (Case C-176/03 *Commission v Council*), COM 2005 (583) final, 3, points 6–10; W. P.J. Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117, 157. [↑](#footnote-ref-13)
15. See for a small sample of literature in the US on ’federalism’ and criminal law: R. Barkow, ‘Federalism and Criminal Law: What the Feds Can Learn from the States’, 109 (2011) Mich. L. Rev. 519; S. S. Beale, ‘Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction’, 46 (1995) Hastings L. J. 979 ; T. Stacy and K. Dayton, ‘The Underfederalization of Crime’, 6 (1997) Cornell J.L. & Pub. Pol'y 247; B. L. Bigelow, ‘The Commerce Clause and Criminal Law’, 41 (2000) B.C. L. Rev. 913. [↑](#footnote-ref-14)
16. See *Commission v Council* (C-370/07) EU:C: 2009:590*,* at [46–49]; *General Agreement on Trade in Services* (Opinion 1/08) EU:C:2009:739 at [110]; *Parliament v Commission* (C-403/05) EU:C:2007:624at [49]; *UK v Council* (68/86)EU:C:1988:85 at [6]. [↑](#footnote-ref-15)
17. See P. Craig, ‘The ECJ and Ultra vires action: a conceptual analysis’ (2011) 48 C.M.L. Rev. 395, 396-397. 410; S. Weatherill, ’The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s case law has become a “drafting guide’ (2011) 12 G.J.L. 827, 851; K. Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’, 38 (1990) Am. J. Comp. L. 205, 206. [↑](#footnote-ref-16)
18. See House of Lords’ European Union Committee, *The Treaty of Lisbon: an impact assessment*, 10th Report of Session 2007–08, Volume I: Report, HL Paper 62-I1, London: The Stationery Office Limited, at [6.179–6.189]. [↑](#footnote-ref-17)
19. See S. Miettinen, ‘Implied Ancillary Criminal Law Competence After Lisbon’ (2013) 2 *European Criminal Law Review* 194, pp. 194–196. [↑](#footnote-ref-18)
20. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] [OJ 2017 L 198/29](https://db.eurocrim.org/db/en/doc/2798.pdf). [↑](#footnote-ref-19)
21. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, at [19–21; *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625, at [24–25, 28–39]. [↑](#footnote-ref-20)
22. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, at [26-27]. [↑](#footnote-ref-21)
23. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, at [47–48]. The criminal law competence was conferred on the basis of Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33 (‘EC’), art. 175. [↑](#footnote-ref-22)
24. See *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625, at [66–69]. The Court inferred the competence on the basis of art. 80(2) EC. [↑](#footnote-ref-23)
25. See M. Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’ in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012), p. 90 for this expression. [↑](#footnote-ref-24)
26. See *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625; *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, which could be seen as giving an ’implicit’ criminal law competence. [↑](#footnote-ref-25)
27. See CONV 426/02, ‘Final report of Working Group X "Freedom, Security and Justice" ‘, Brussels, 2 December 2002, 9–10; CONV 727/03, ‘Draft sections of Part Three with comments’, Brussels, 27 May 2003; M. Kerttunen*, Legitimizing the use of transnational criminal law: The European framework* (DPhil, University of Helsinki, 2015), pp. 143–145, 210–211, 225–227, 244–246. [↑](#footnote-ref-26)
28. See Commission, ‘Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C-176/03 Commission v Council)’, COM 2005 (583) final, for a broad interpretation of the EC’s criminal law competence based on the Court of Justice rulings. [↑](#footnote-ref-27)
29. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542. [↑](#footnote-ref-28)
30. See art. 83(3) TFEU. [↑](#footnote-ref-29)
31. See art. 83(1)- (2) TFEU. [↑](#footnote-ref-30)
32. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542 at [48]. [↑](#footnote-ref-31)
33. See P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013), pp.151–52, 163. [↑](#footnote-ref-32)
34. See, however, S. Miettinen *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era*, (DPhil, University of Helsinki, 2015), pp. 499–500, for a different line of argument. [↑](#footnote-ref-33)
35. See House of Lords’ European Union Committee, *The Treaty of Lisbon: an impact assessment*, 10th Report of Session 2007–08, Volume I: Report, HL Paper 62-I1, London: The Stationery Office Limited; CONV 426/02, ‘Final report of Working Group X "Freedom, Security and Justice" ‘, Brussels, 2 December 2002. [↑](#footnote-ref-34)
36. See further below s. ‘Limits to the core argument: The (Narrow) Scope of Article 83(2) TFEU**’**. [↑](#footnote-ref-35)
37. See the German Constitutional Court’s distinctive treatment of ’criminal law’: Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), at [ 226, 231, 237-242]. [↑](#footnote-ref-36)
38. See M. Kerttunen*, Legitimizing the use of transnational criminal law: The European framework* (DPhil, University of Helsinki, 2015), pp. 136–137, 210-211, 244-45; P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013), pp. 76–78; CONV 426/02, ‘Final report of Working Group X "Freedom, Security and Justice" ‘, Brussels, 2 December 2002, pp. 10-11. [↑](#footnote-ref-37)
39. See *Commission v Council* *(Titanium Dioxide)* (C-300/89) EU:C: 1991:244, at [10, 22–25]; *Commission v Council* (C-155/91) EU:C:1993:98, at [7, 19–21]; *Spain* v *Council* (C-36/98) EU:C:2001:64, at [59]. [↑](#footnote-ref-38)
40. See *Ireland v Parliament and Council* (C-301/06) EU:C: 2009:68. [↑](#footnote-ref-39)
41. *Parliament v Council* (C-317/04 and C-318/04) EU:C: 2006:346 was also concerned with whether art. 114 TFEU could be used indirectly to adopt provisions for the benefit of criminal law enforcement. In this case, the Court annulled the ‘adequacy decision’ because it did not fall within the scope of Directive 95/46 EC and thus outside art. 114 TFEU. However, as the case did not concern the annulment of a large legislative scheme it is not important enough to warrant further space in the article. [↑](#footnote-ref-40)
42. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54. [↑](#footnote-ref-41)
43. See Consolidated Version of the Treaty on European Union [2002] OJ C 325/5, arts 30 EU, 31(1)(c) and 34(2)(b) were alleged to constitute the proper legal bases according to Ireland, see *Ireland v Parliament and Council* (C-301/06) EU:C: 2009:68, at [28]. [↑](#footnote-ref-42)
44. See *Ireland v Parliament and Council* (C-301/06) EU:C: 2009:68, at [68-93]. [↑](#footnote-ref-43)
45. See Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54.), art. 1(1) and recitals 5-11, 25 for support of this statement. [↑](#footnote-ref-44)
46. See E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford: Hart Publishing, 2012), pp.104-105. [↑](#footnote-ref-45)
47. See *Digital Rights Ireland and Seitlinger and Others* (C-293/12), EU:C:2014:238, at [ 41-43]. [↑](#footnote-ref-46)
48. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, at [38-53]; *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625, at [52-74]. [↑](#footnote-ref-47)
49. See E. Herlin-Karnell,’ Annotation, Case Comment Case C‐301/06, Ireland v. Parliament and Council’ (2009) 46 C.M.L. Rev. 1667. See furthermore: *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, at [38-40, 53]; *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625, at [52-54, 74]. [↑](#footnote-ref-48)
50. Ex-Article 47 EU read as follows: “Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community……., and to these final provisions, nothing in this Treaty *shall affect the Treaties establishing the European Communities* or the subsequent Treaties and Acts modifying or supplementing them.” [↑](#footnote-ref-49)
51. See *Commission v Council* (C-137/12)EU:C: 2013:675*,* at [70–72]. [↑](#footnote-ref-50)
52. See *Commission v Parliament and Council* (C-43/12) EU:C: 2014:298, at [32–43, 45-49]. [↑](#footnote-ref-51)
53. See *UK v Council* (C-656/11) EU:C: 2014:97, at [65–66]; *UK v Council* (C-81/13) EU:C:2014:2449, at [40–46]. [↑](#footnote-ref-52)
54. See *UK v Council* (C-656/11) EU:C: 2014:97, at [47–66]; *Commission v Council* (C- 377/12), EU:C:2014:1903, at [36–60]; *UK v Council* (C-81/13) EU:C:2014:2449, at [55–69]; *Ireland v Parliament and Council* (C-301/06) EU:C: 2009:68, at [56–92]. [↑](#footnote-ref-53)
55. See *Commission v Council* (C-137/12)EU:C: 2013:675, [at 72–75]; *UK v Council* (C-656/11) EU:C: 2014:97, at [49–50]; *UK v Council* (C-81/13) EU:C:2014:2449, [at 21]. [↑](#footnote-ref-54)
56. This thesis is powerfully argued by S. Miettinen, ‘Criminal competence and the choice of legal basis: space in the margins?’ (2015) 5 *European Criminal Law Review* 222, pp. 235, 241–242. [↑](#footnote-ref-55)
57. See *UK v Council* (C-656/11) EU:C: 2014:97, at [52-63]; *UK v Council* (C-81/13) EU:C:2014:2449, at [40-52]. The decisions in both judgments were properly based on art. 48 TFEU (although art. 217 TFEU had to be added in the Turkey judgment). [↑](#footnote-ref-56)
58. See *Commission v Council* (C- 377/12), EU:C:2014:1903, at [42-59]. [↑](#footnote-ref-57)
59. See R. Schütze, *From Dual to Cooperative Federalism*, (Oxford: Oxford University Press, 2009), pp. 135-150; G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 E.L.J. 2. doi:10.1111/eulj.12079. [↑](#footnote-ref-58)
60. Where the ’ordinary legislative’ procedure (see arts 289, 294 TFEU) applies. [↑](#footnote-ref-59)
61. See above fn 58. [↑](#footnote-ref-60)
62. [1998] OJ 1998 L 320/54; *Commission v Council* (C-137/12)EU:C: 2013:675, at [44-50]. [↑](#footnote-ref-61)
63. See *Commission v Council* (C-137/12)EU:C: 2013:675, at [70-76]. [↑](#footnote-ref-62)
64. European Convention on the legal protection of services based on, or consisting of, conditional access [2011] OJ 2011 L 336/2. [↑](#footnote-ref-63)
65. See *Commission v Council* (C-137/12)EU:C: 2013:675, at [70-74]. [↑](#footnote-ref-64)
66. See above subs. ‘*The core argument- principled, systemic and teleological considerations’* for this argument. [↑](#footnote-ref-65)
67. The Court’s approach could be explained with reference to the need of protecting the Union’s Common Commercial Policy (‘CCP’): See B. Van Vooren and R. A. Wessel, *EU External Relations Law: Text, Cases and Materials*, (Cambridge, Cambridge University Press, 2014) 142-158, 162-169 analysing the case law on the scope of the CCP with regard to legal basis disputes. [↑](#footnote-ref-66)
68. See Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ 2011 L 288/1. [↑](#footnote-ref-67)
69. See *Commission v Parliament and Council* (C-43/12) EU:C: 2014:298, at [32-44]. [↑](#footnote-ref-68)
70. See *Commission v Parliament and Council* (C-43/12) EU:C: 2014:298, at [20, 46-49]. [↑](#footnote-ref-69)
71. See Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ 2011 L 288, recitals 3, 6 and 7. [↑](#footnote-ref-70)
72. See art. 67(3) TFEU. [↑](#footnote-ref-71)
73. See A.G. Bot in *Commission v Parliament and Council* (C-43/12) EU:C: 2014:298, at [71]. [↑](#footnote-ref-72)
74. See art. 87 TFEU stating that police cooperation should involve’ the prevention, detection and investigation of criminal offences’. [↑](#footnote-ref-73)
75. See A.G. Bot in *Commission v Parliament and Council* (C-43/12) EU:C: 2014:298, at [20-68]. AG Bot convincingly referred to the EU institutions’ views on the matter to support his argument: Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ 2005 L 76/16, recital 4, art. 5(1); The Stockholm Programme — an open and secure Europe serving and protecting citizens, [2010] OJ 2010 C 115/1, at [3.1.1]. [↑](#footnote-ref-74)
76. See *Ireland v Parliament and Council* (C-301/06) EU:C: 2009:68, at [83]. [↑](#footnote-ref-75)
77. See *United Kingdom* v *Council* (C‑482/08) EU:C: 2010:631, at [50-51]. [↑](#footnote-ref-76)
78. See for literature supporting more generally that the Court favours the ‘integrationist’ path over protecting Member State prerogatives: (2012) 19 J.E.P.P., Special Issue: ‘Perpetual momentum? Reconsidering the power of the European Court of Justice’; A. S. Sweet, *The Judicial Construction of Europe*, (Oxford: Oxford University Press, 2004); J. H. H. Weiler, ’The Transformation of Europe’ (1991) 100 Yale L.J. 2403, pp. 2433- 2447. [↑](#footnote-ref-77)
79. The Commission has for example reserved its right to challenge the legal basis of the PIF Directive in future litigation before the Court of Justice: Commission, ‘Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council at first reading with a view to the adoption of 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(2017) 246 final , 2-3. [↑](#footnote-ref-78)
80. Money laundering has for a long time been a central policy for the EU legislator: See e.g. V. Mitsilegas, [*Money Laundering Counter-Measures in the EU: A New Paradigm of Security Governance versus Fundamental Legal Principles*](http://www.amazon.co.uk/Money-Laundering-Counter-Measures-European-Union/dp/9041121315/ref%3Dsr_1_2/275-4204799-7731260?ie=UTF8&s=books&qid=1249463539&sr=1-2) (Alphen aan den Rijn: Kluwer Law International, 2003); B. Unger, J. Ferwerda, M. van den Broek and I. Deleanu, *The Economic and Legal Effectiveness of the European Union’s Anti-Money Laundering Policy* (Cheltenham: Edward Elgar Publishing, 2014); 1; European Council,’ The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens’ (2010) OJ C 115/1. [↑](#footnote-ref-79)
81. See E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford: Hart Publishing, 2012) pp. 147–148. See for the debate in the United Kingdom: Letter of Lord Deighton on 4 December 2014 to Lord Boswell; Letter of Lord Deighton on 10 June 2014 to Lord Boswell; Letter from Lord Boswell on 14 January 2015 to Lord Deighton. [↑](#footnote-ref-80)
82. Commission, ’Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law’, COM (2016) 826 final. The Council has reached a general agreement on the text proposed by the Commission: <http://www.consilium.europa.eu/en/press/press-releases/2017/06/08-countering-money-laundering-by-criminal-law/>. See also Council, ‘Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law [First reading] - General approach’, [9718/17, 30 May 2017.](https://db.eurocrim.org/db/en/doc/2733.pdf) [↑](#footnote-ref-81)
83. E. Herlin-Karnell, ’The Fight against White-Collar Crime as European Financial Crisis Rescuer: Regulatory Challenges and the Tough on Crime Approach’ in L. Hinojosa and J. Beneyto(eds.), *European Banking* *Union:* *The* *New* *Regime* (Alphen aan den Rijn: Kluwer Law International, 2015). [↑](#footnote-ref-82)
84. See above fn 81. [↑](#footnote-ref-83)
85. See Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73, art. 58(1). [↑](#footnote-ref-84)
86. See Directive (EU) 2015/849 [2015] OJ L 141/73, art. 58(2). [↑](#footnote-ref-85)
87. See *Commission v Greece* (68/88) EU:C: 1989:339 [1989], at [23–24]. [↑](#footnote-ref-86)
88. See art. 4(3) TEU. [↑](#footnote-ref-87)
89. See E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford: Hart Publishing, 2012), pp. 16–18, 152, 154; M. G. Faure, ‘Effective, proportional and dissuasive penalties in the implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges’ (2010) 19 *European Energy and Environmental Law Review* 256, 266. [↑](#footnote-ref-88)
90. See Directive (EU) 2015/849 [2015] OJ L 141/73) Recitals 1, 2, 9, 11 and 14, 21, 28, 33, 37, 42, 44, 51, 58, 59, 60; arts 1(3)(A)–(C), 3(4), 3(4)(C), 3(4)(F), 6(2)(C), 9(2)(A)(i), 33(1)(A), 35(1), 37, 40(2), 45(8), 47(3), 55(2); 57, 58(2), 62(2). [↑](#footnote-ref-89)
91. See Directive (EU) 2015/849 [2015] OJ L 141/73, art. 1(3) and art. 1(6). [↑](#footnote-ref-90)
92. See Directive (EU) 2015/849 [2015] OJ L 141/73, art. 58(2). [↑](#footnote-ref-91)
93. See *Nunes and De Matos* (C-186/98) EU:C: 1999:376, at [9-14]; *Österreichische Unilever* (C-77/97) EU:C:1999:30, at [36]; *IMM Zwartveld* (C-2/88) EU:C:1990:315. [↑](#footnote-ref-92)
94. See M. Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’ in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012), pp.81–82. [↑](#footnote-ref-93)
95. Council of Europe, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. [↑](#footnote-ref-94)
96. See e.g. Judgment of the European Court of Human Rights of 21 February 1984, *Öztürk v Germany*, Series A no 73[1984] 6 EHRR 409, at [47–49]. [↑](#footnote-ref-95)
97. See P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013), pp. 60–68. [↑](#footnote-ref-96)
98. Conditional sentences, community service orders and probation orders could for example be considered as such substitutes. [↑](#footnote-ref-97)
99. See Opinion of A.G. Mazak in *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625, at [67]; D. M. Kahan, ‘What do alternative sanctions mean?’ (1996) 63 U. Chi. L. Rev. 593, pp. 621–24, 645, 649, 652; J. Öberg, ‘The definition of criminal sanctions in the EU’ 3 (2013) *European Criminal Law Review* 273. [↑](#footnote-ref-98)
100. This also seems to be the view of the Court of Justice; see *Commission v Council* (C-137/12)EU:C: 2013:675, at [72]. [↑](#footnote-ref-99)
101. See Directive (EU) 2015/849 [2015] OJ L 141/73, art. 59 for the list of the relevant sanctions in the directive. The fines, however, amount to at least EUR 5,000,000, which still makes them a significant penalty. [↑](#footnote-ref-100)
102. See above fn 98 for discussion in Kahan and Öberg of this condition. [↑](#footnote-ref-101)
103. See Commission, ‘Proposal for a Directive of the European Parliament of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing’, COM (2013) 45 final, pp. 2, 6, 8, 12, recital 1–2; Commission,’ Commission Staff Working Document, Impact Assessment, Accompanying the document, Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing and Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds’, SWD (2013) 21, pp. 4, 7 16, 21, 26–30, 55, 58–59. [↑](#footnote-ref-102)
104. See *Germany v Parliament and Council (Tobacco Advertising)* (C-376/98) EU:C: 2000:544, at [86]. [↑](#footnote-ref-103)
105. See above fn 81. [↑](#footnote-ref-104)
106. See E. Herlin–Karnell, ‘Is There More to it Than the Fight Against ‘Dirty Money’? Article 95 EC and the Criminal Law’ (2008) 19 E.B.L. Rev. 557, pp. 561–563, 570, 574–575; E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford: Hart Publishing, 2012), pp. 147, 158–159, 185–189 for such compelling criticism. [↑](#footnote-ref-105)
107. See above fn 26 for the relevant references to the Convention documents. [↑](#footnote-ref-106)
108. See P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013), pp. 102-103, 110-125, 127. [↑](#footnote-ref-107)
109. See e.g. D. Husak *Overcriminalization: The Limits of the Criminal Law*, (Oxford: Oxford University Press, 2008) for a compelling account of this topic. [↑](#footnote-ref-108)
110. See art. 5 (1)- (2) TEU. [↑](#footnote-ref-109)
111. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542, at [46-52]; *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625, at [60-74]; M. Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’ in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012), pp.105-111. [↑](#footnote-ref-110)
112. See arts 288 and 289 (1) TFEU. [↑](#footnote-ref-111)
113. See M. Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’ in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012), pp.105-111. [↑](#footnote-ref-112)
114. See above subs. ‘*Constitutional realities- the Court of Justice’s approach in legal basis disputes relating to criminal law’.* [↑](#footnote-ref-113)
115. See J. Steiner, C. Twigg-Flesner and L. Woods, *EU Law* (Oxford: Oxford University Press, 2006) 571; G. Monti, *EC Competition Law* (Cambridge, Cambridge University Press, 2007) 401-404. [↑](#footnote-ref-114)
116. The substantive prohibitions on competition policy were enshrined in Article 85 and Article 86 of the Treaty Establishing the European Economic Community [1957], March 25, 1957, 298 U.N.T.S. 11. [↑](#footnote-ref-115)
117. See M. Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’ in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012), p. 109; J. Öberg, ‘Union Regulatory Criminal Law Competence after Lisbon Treaty’ (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 289, pp. 313-317 for a more comprehensive discussion of this condition. [↑](#footnote-ref-116)
118. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1. [↑](#footnote-ref-117)
119. See M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 C.M.L. Rev. 617, 638-39; A. Türk, ‘Law-Making After Lisbon’ in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law After Lisbon* (Oxford: Oxford University Press, 2012), p. 71 at n 53. [↑](#footnote-ref-118)
120. See below subs. ‘*Criminalisation for the benefit of the internal market- art. 114 vs art. 83(2) TFEU’* [↑](#footnote-ref-119)
121. See Commission,’ Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights’**,** COM (2006) 168 final. For scholarly support for the use of art. 114 TFEU for criminalization of substantive EU policies: P. Whelan, ‘Contemplating the Future: Personal Criminal Sanctions for Infringement of EC Competition Law’ (2008) 19 [*King’s Law Journal*](http://www.ingentaconnect.com/content/hart/klj;jsessionid=7seno21sk5i18.alexandra) 364, 369; M. Zuleeg, ‘Criminal Sanctions to be Imposed on Individuals as Enforcement Instruments in European Competition Law’ in C. D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford: Hart Publishing, 2003), 456-57; [↑](#footnote-ref-120)
122. Denominated after the lenient company regulation in the State of Delaware; see the seminal article by W. L. Cary, ‘Federalism and Corporate Law: Reflections upon Delaware’ (1974)83 Yale L.J. 663, 663-668. [↑](#footnote-ref-121)
123. See H. G. Sevenster, ‘Criminal Law and EC Law’ (1992) 29 C.M.L. Rev. 29; Commission,’ Commission Staff Working Document, Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, Impact Assessment’, SEC (2007) 160, 24; Commission, ‘Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, Reinforcing sanctioning regimes in the financial services sector’, COM (2010) 716 final, 10. [↑](#footnote-ref-122)
124. See *Germany v Parliament and Council (Tobacco Advertising)* (C-376/98) EU:C: 2000:544 at [109]; *Commission v Council* *(Titanium Dioxide)* (C-300/89) EU:C: 1991:244, at [12 and 23]. [↑](#footnote-ref-123)
125. P. Bernasconi, ‘Transborder offences: Terrorism, Narcotics, Trafficking, White Collar Offenses’ in M. Delmas-Marty (ed.) *What Kind of Criminal Policy for Europe* ( Alphen aan den Rijn: Kluwer Law International, 1996), pp. 92-96; H. G. Sevenster, ‘Criminal Law and EC Law’ (1992) 29 C.M.L. Rev. 29; 55-60; G. Grasso, ‘The Harmonization and Coordination of National Dispositions Relating to Penalties’, Commission of the European Communities (ed.) *Legal Protection of the Financial Interests of the Community: Proceedings* *of the Seminar Organised by the Directorate-General for Financial Control and the Legal Service* *of the Commission of the European Communities on the 27, 28, and 29 Nov. 1989 in Brussels,* (1990) Brussels, pp. 250, 254, 260. [↑](#footnote-ref-124)
126. See *Germany v Parliament and Council (Tobacco Advertising)* (C-376/98) EU:C: 2000:544, at [84]; art. 3(3) TEU. [↑](#footnote-ref-125)
127. See D. Wyatt, ‘[Community Competence to Regulate the Internal Market](http://ssrn.com/abstract%3D997863)’ in M. Dougan and S. Currie (eds.), *50 Year of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart Publishing, 2009); G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 E.L.J. 2. doi:10.1111/eulj.12079. [↑](#footnote-ref-126)
128. See R. Barents, ’The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation’ (1993) 30 C.M.L. Rev. 85, 100–101, 107–109. [↑](#footnote-ref-127)
129. Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L 201/56. [↑](#footnote-ref-128)
130. See *Commission v Council* *(Titanium Dioxide)* (C-300/89) EU:C: 1991:244, [22–25]. [↑](#footnote-ref-129)
131. See Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L 201/56, recitals 2-6, arts 3-11. [↑](#footnote-ref-130)
132. Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L 201/56, recital 2 and art. 3. [↑](#footnote-ref-131)
133. See art. 114(3) TFEU; art. 192(2) TFEU. [↑](#footnote-ref-132)
134. The final version of the Directive was adopted under art. 83(2) TFEU: See Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173/79. [↑](#footnote-ref-133)
135. See *Germany v Parliament and Council* (C-380/03) EU:C: 2006:772. [↑](#footnote-ref-134)
136. See E. Herlin-Karnell, ‘White-collar crime and European financial crises: getting tough on EU market abuse’ (2012) 37 E.L. Rev. 481, 485–87. [↑](#footnote-ref-135)
137. See *Germany v Parliament and Council* (C-380/03) EU:C: 2006:772, at [15–24, 45–65, 70–88]. [↑](#footnote-ref-136)
138. See *Swedish Match* (C-210/03) EU:C: 2004:802; *Ireland v Parliament and Council* (C-301/06) EU:C: 2009:68. [↑](#footnote-ref-137)
139. See *Commission v Council* (C-338/01) EU:C: 2004:253. [↑](#footnote-ref-138)
140. See art. 114 (1) TFEU. [↑](#footnote-ref-139)
141. The first paragraph of art. 114 reads as follows: ‘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, acting in accordance with the ordinary legislative procedure …. adopt the measures for the approximation of the provisions laid down by law….in Member States which have as their object the establishment and functioning of the internal market.’ [↑](#footnote-ref-140)
142. See H. Cullen and A. Charlesworth, ‘Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States’ (1999) 36 C.M.L. Rev. 1243, pp.1262–63. [↑](#footnote-ref-141)
143. See *Commission v Council* (C-338/01) EU:C: 2004:253. [↑](#footnote-ref-142)
144. Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties [2001] OJ 2001 L 175/17. [↑](#footnote-ref-143)
145. See *Commission v Council* (C-338/01) EU:C: 2004:253, at [13–14, 17–18, 54–57, 59–62, 67, 70–76]. [↑](#footnote-ref-144)
146. See *Commission v Council* (C-155/91) EU:C: 1993:98, at [19–21]; *Commission v Council* (C-533/03) EU:C:2006:64, at [45- 48]; *Commission v Council* (C‑137/12) EU:C: 2013:675, at [51–76]; *Parliament v Council* (C-187/93)EU:C:1994:265, at [18–28]. [↑](#footnote-ref-145)
147. See above subs. ‘*The core argument- principled, systemic and teleological considerations’.* [↑](#footnote-ref-146)
148. See above s. ‘Limits to the core argument: The (Narrow) Scope of art. 83(2) TFEU’ for a discussion of the limitations relating to the scope of art. 83(2) TFEU. [↑](#footnote-ref-147)
149. The PIF Directive was ultimately adopted under art. 83(2) TFEU. [↑](#footnote-ref-148)
150. Art. 325 TFEU reads as follows in the relevant parts: ‘1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through *measures* to be taken in accordance with this Article, which shall act as a *deterrent* and be such as to afford effective protection in the Member States, and in all the Union’s institutions, bodies, offices and agencies….’ 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests’. …’4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, …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….’. The claimed implicit references to ‘criminal law’ in the provision have been underlined. [↑](#footnote-ref-149)
151. See *Commission v Council* (*environmental sanctions*) (C-176/03) EU:C: 2005:542; *Commission v Council* (*ship-source pollution)* (C-440/05) EU:C: 2007:625. [↑](#footnote-ref-150)
152. It is worth noting, however, that the Parliament has in this case sided with the Council. [↑](#footnote-ref-151)
153. See above subs. ‘*The core argument- principled, systemic and teleological considerations’* for this contention. [↑](#footnote-ref-152)
154. See above subs. ‘*Other limitations to the use of art. 83(2) TFEU - ‘directives’, ‘decriminalisation’ and the ‘harmonisation’ requirement ‘*for a discussion of these conditions. [↑](#footnote-ref-153)
155. See P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013), pp. 129-135; J. Öberg, ‘Union Regulatory Criminal Law Competence after Lisbon Treaty’ (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 289, pp. 313-317 for a discussion of these conditions. [↑](#footnote-ref-154)
156. European Parliament, ‘Resolution on the protection of the Communities’ financial interests—Fight against fraud—Annual Report 2009’ 2010/2247(INI), 04.06.2011, recital 2; Commission, ‘Report from the Commission to the European Parliament and the Council—Protection of the European Union’s financial interests—Fight against fraud—Annual Report 2010’, COM (2011)595 final; 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, pp. 2–5; Commission, ‘Commission Staff Working Paper—Impact Assessment (Part I), Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, SWD(2012) 195 final, pp. 4-6, 10, 14, 18–19, 22, 25. [↑](#footnote-ref-155)
157. See art. 325(1) and (4) TFEU. [↑](#footnote-ref-156)
158. See Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, COM (2012) 363 final, pp. 6-7; Commission, ‘Commission Staff Working Paper—Impact Assessment (Part I), Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, SWD (2012) 195 final, pp. 26-27. [↑](#footnote-ref-157)
159. See art. 83(2) TFEU. [↑](#footnote-ref-158)
160. See above subs. ‘*Other limitations to the use of art. 83(2) TFEU - ‘directives’, ‘decriminalisation’ and the ‘harmonisation’ requirement ‘*for a discussion of this condition. [↑](#footnote-ref-159)
161. See House of Common’ European Scrutiny Committee, ‘Twelfth Report’, Documents considered by the Committee on 12 September 2012, 10.27. [↑](#footnote-ref-160)
162. See Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, COM (2012) 363 final, art. 1. [↑](#footnote-ref-161)
163. See CONV 426/02, ‘Final report of Working Group X "Freedom, Security and Justice" ‘, Brussels, 2 December 2002, p.10. [↑](#footnote-ref-162)
164. See art. 83(3) TFEU. [↑](#footnote-ref-163)
165. See Council Legal Service, ‘Legal Opinion onProposal for a Directive of the European Parliament and of the Council on the fightagainst fraud to the Union’s financial interests by means of criminal law’, 15309/12, 3–7; European Parliament, Committee on Legal Affairs, ‘On the legal basis for the proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, A7-0251/2014, at[31–34]. [↑](#footnote-ref-164)
166. See above fn 1 for the academic contributions analysing this case law. [↑](#footnote-ref-165)
167. See *Commission v Council* *(Titanium Dioxide)* (C-300/89) EU:C: 1991:244, at [10]; *Commission v Council* (C-155/91) EU:C:1993:98, at [7]; *Commission v Council* (C-338/01) EU:C: 2004:253, at [54]. [↑](#footnote-ref-166)
168. See *Commission v Council* (C-155/91) EU:C: 1993:98, at [19 and 21]; *Spain* v *Council* (C‑36/98) EU:C:2001:64, at [59]. [↑](#footnote-ref-167)
169. See *Commission v Council* (C-338/01) EU:C: 2004:253, at [60], *Commission v Council* (C-533/03) EU:C:2006:64, at [45]; *European Parliament v Council of the European Union (EIB Guarantees)* (C–155/07)EU:C:2008:605, at [34]. [↑](#footnote-ref-168)
170. See P. Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice—Part 1* (Stockholm: Jure, 2013), pp. 142–143, 147–148. [↑](#footnote-ref-169)
171. See Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, COM (2012) 363 final, pp. 3-6; Commission, ‘Commission Staff Working Paper—Impact Assessment (Part I), Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, SWD (2012) 195 final, pp. 10–12. [↑](#footnote-ref-170)
172. See above subs. ‘*Other limitations to the use of art. 83(2) TFEU - ‘directives’, ‘decriminalisation’ and the ‘harmonisation’ requirement ‘*for a discussion of this conditions [↑](#footnote-ref-171)
173. The Commission referred to this evidence: A. Ashworth, ‘Sentencing’ in M. Maguire, R. Morgan, and R. Reiner (eds.), *The Oxford handbook of criminology* (Oxford: Oxford University Press, 2002), p. 1079; R. Gassin, *Criminologie*, (6th edn., Paris: Dalloz, 2007) pp. 633–34; U. Eisenberg, *Kriminologie*, (5th edn. ,Munich: Vahlen Franz Gmbh, 2000) at [41], no 4; H. Tröndle and T. Fischer, *Strafgesetzbuch* (München: Verlag CH Beck, 2006) at [46], no 2; Commission, ‘Report from the Commission to the European Parliament and the Council—Protection of the European Union’s financial interests—Fight against fraud—Annual Report 2010’, COM (2011)595 final, p. 10, Table 1. [↑](#footnote-ref-172)
174. See Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, COM (2012) 363 final, recitals 2, 3, 4 and 8. [↑](#footnote-ref-173)
175. See Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, COM (2012) 363 final, arts 1, 3 and 4. [↑](#footnote-ref-174)
176. 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, art. 1, Title II, arts 3, 4, Title III, arts 5, 6, 7, 8, 9,11. The words ‘criminal’ and ‘criminalisation’ are mentioned no less than 56 times in the proposal and its preamble. [↑](#footnote-ref-175)
177. See the German Constitutional Court’s distinctive treatment of ’criminal law’: Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), at [252-253, 352-366]. [↑](#footnote-ref-176)
178. See *Commission* v *Council* (C‑211/01) EU:C: 2003:452, at [40]; Case C‑91/05 *Commission* v *Council* (*ECOWAS*) EU:C:2008:288, at [75]. [↑](#footnote-ref-177)
179. See *Commission v Council* (C-338/01) EU:C: 2004:253, at [57]; *Commission* v *Council* (C‑94/03)EU:C:2006:2at [52]; *Commission* v *Parliament and Council* (C‑178/03) EU:C:2006:4, at [57]. [↑](#footnote-ref-178)
180. See *Parliament v Council* (C-130/10) EU:C: 2012:472, at [79-82]; Case C‑91/05 *Commission* v *Council* (*ECOWAS*) EU:C:2008:288, at [75–77]. [↑](#footnote-ref-179)
181. Art. 83(2) TFEU suggests that the relevant procedure is that ‘directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question’ (the ‘previous harmonisation measure’). [↑](#footnote-ref-180)
182. See *Commission* v *Parliament and Council* (C‑178/03) EU:C: 2006:4, at [57-60]; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (C-402 and C-415/05 P) EU:C:2008:461, at [235]. [↑](#footnote-ref-181)
183. See art. 294 TFEU. [↑](#footnote-ref-182)
184. See Protocol (No 22) on the position of Denmark, OJ C 83/299. Denmark is by means of this protocol excluded from all post-Lisbon AFSJ measures, arts 1 and 2. [↑](#footnote-ref-183)
185. See Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, OJ C 83/295, arts 1 and 3. [↑](#footnote-ref-184)
186. See art. 76 TFEU. [↑](#footnote-ref-185)
187. See art. 69 TFEU; Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality OJ [2010] C 83/206, art. 7(1) and art. 7(2). [↑](#footnote-ref-186)
188. See *Commission v Council* *(Titanium Dioxide)* (C-300/89) EU:C: 1991:244, at [21–25]; *Commission of the European Communities v European Parliament and Council of the European Union (Shipments of waste)* (C-411/06)EU:C:2009:518, at [61–76]; *Parliament v Council* (C-130/10) EU:C: 2012:472, at [47–49, 67–78]. [↑](#footnote-ref-187)
189. See S. Miettinen, ‘Criminal competence and the choice of legal basis: space in the margins?’ (2015) 5 *European Criminal Law Review* 222, p. 234. [↑](#footnote-ref-188)
190. See Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law’, COM 2011(573) final, p. 10. [↑](#footnote-ref-189)
191. See above subs. ‘*The definition of ‘criminal’ law’* on the concept of ‘criminal law’. [↑](#footnote-ref-190)
192. See above fn 175 for all the content references to ‘criminal law’ and ‘criminal sanctions’. [↑](#footnote-ref-191)
193. See art. 13(2) TEU. [↑](#footnote-ref-192)
194. See above subs. ‘*The core argument- principled, systemic and teleological considerations’.* [↑](#footnote-ref-193)
195. See arts 83(1)- 83(2) TFEU. [↑](#footnote-ref-194)
196. See above s. ’The core of the argument: the ‘lex specialis’ nature of art. 83(2) TFEU’. [↑](#footnote-ref-195)
197. The structure of the argument and the use of the expression ’core argument’ is derived from J. Waldron: ‘The Core of the case against judicial review’ (2006) 115 Yale L.J. 1346. [↑](#footnote-ref-196)
198. See above s. ‘Limits to the core argument: The (Narrow) Scope of art. 83(2) TFEU’. [↑](#footnote-ref-197)
199. See above s. ‘Illustrating the Core Argument- Conflicts between art. 83(2) TFEU and some Selected Legal Bases.’ [↑](#footnote-ref-198)
200. The ACTA Agreement is a case in point. It contains criminal law obligations in art. 23 which, has been negotiated on the premise that the Union will not encroach on the Union’s internal competence under art. 83(2) TFEU to criminalize infringements of EU intellectual property rules; see Commission, ‘Proposal for a Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America’, COM(2011)380 final, p. 2. [↑](#footnote-ref-199)
201. See E. Herlin-Karnell, ‘Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law’, Jean Monnet Working Paper 25/14, (2014), pp. 11–15, 21**.** [↑](#footnote-ref-200)
202. See S. Miettinen *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era*, (DPhil, University of Helsinki, 2015), pp. 371–72, 435–36, 483, 487–91, 499–503. [↑](#footnote-ref-201)
203. See Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173/79; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1. [↑](#footnote-ref-202)
204. See E. A Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 N. Y. U. L. Rev. 1612; [R. Schütze](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Robert%20Schütze&eventCode=SE-AU), ‘Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism’ 68 (2009) C.L.J. 525 for a more general discussion of safeguards of federalism within the Union. [↑](#footnote-ref-203)
205. See above s. ‘‘Limits to the core argument: The (Narrow) Scope of art. 83(2) TFEU’. [↑](#footnote-ref-204)
206. See European Convention, CONV 375/1/02, ‘Final Report of Working Group V on Complementary Competencies’, Brussels, 4 November 2002, 2-4. [↑](#footnote-ref-205)
207. See European Council, ‘Laeken Declaration on the future of the European Union’, 14–15 December 2001, 21-22; European Convention, CONV 47/02, ‘Delimitation of competence between the European Union and theMember States – Existing system, problems and avenues to be explored’, Brussels,15 May 2002, 3-5, 11-12, 14-16. [↑](#footnote-ref-206)
208. See S. Weatherill, ‘Competence creep and competence control’ (2004) 23 Y.E.L. 1, 1-20; R. Schütze, *From Dual to Cooperative Federalism* (Oxford: Oxford University Press, 2009) 150–151; European Convention, CONV 375/1/02, ‘Final Report of Working Group V on Complementary Competencies’, Brussels, 4 November 2002, 4–5, 9, 14-15. [↑](#footnote-ref-207)
209. See art. 2(6) TFEU. [↑](#footnote-ref-208)
210. See P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2012) 380, 399; European Convention, CONV 47/02, ‘Delimitation of competence between the European Union and theMember States – Existing system, problems and avenues to be explored’, Brussels,15 May 2002, 10-11, 15. [↑](#footnote-ref-209)
211. See S. Weatherill, ’The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s case law has become a “drafting guide’ (2011) 12 G.L.J. 827, pp. 855–856; S. Miettinen *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era*, (DPhil, University of Helsinki, 2015), pp. 502–03. [↑](#footnote-ref-210)