The aim of this thesis is to analyse the EU approach to the question of the legitimacy of criminal law. In particular, it enquires into what theoretical justifications does the EU legal order acknowledges as legitimating the resort to harmonized criminal law as a regulatory instrument. Moreover, it enquires if the selected approach is consistent with the identity the EU has set for itself, as a ‘fundamental rights sensitive’ kind of supranational organization, as established at Article 2 TEU, which includes the respect of fundamental rights as one of EU founding values.

This research aims at complementing the existing literature theorising on harmonisation of substantive criminal law as a strategy for integration, which has to date primarily focused on the extent of the EU competences, and on the relation between harmonisation and other strategies of integration, such as mutual recognition. The aspect of the impact of the exercise of these EU competences on individuals and of what are the envisaged justifications for that has been to date underexplored. This thesis aims at filling this gap. In doing so it aims at contributing to the systemic understanding of EU criminal law testing its developments against a EU constitutional law benchmark.

In terms of methodology, the thesis relies on a criminal legal theory framework, which distinguishes between a normative, value-based approach to the justifications for criminal law, and an instrumental, mainly enforcement-based approach. It tailors these concepts to the supranational level, by combining criminalisation theory concepts with theories on harmonisation. In terms of sources, when enquiring the EU approach to the criminal law, the thesis looks at EU primary law (principles of subsidiarity and proportionality, and EU competences to harmonise substantive criminal law); EU policy documents (multi-annual programs and ad hoc EU criminalisation policy documents) and EU secondary law (especially the Racism and Xenophobia Framework Decision on Racism and Xenophobia and on the 2014 Market Abuse Directive).

In terms of structure, the thesis devotes the first two chapters to the delineation of the theoretical framework, discussing criminal legal theories on the subject of the legitimacy of criminal law, and theories on harmonisation of criminal norms. This part is aimed at identifying the analytical tools through which EU primary law, EU secondary law and EU policy documents are analysed in the following 5 chapters. A final chapter draws the relevant conclusions as to the consistency of the EU approach to the legitimacy of criminal law with the EU constitutional law framework.

The findings of the thesis illustrate how the EU has not been consistent in its approach to the legitimacy of EU criminal law and it identifies a number of micro-ruptures between the approach in different historical phases; but also between different layers (EU primary and secondary law as well as policy documents) during the same period; and between different policy areas (e.g. EU criminal law was used to protect the security of EU citizens, and when to secure the achievement of EU policies). The thesis nonetheless identifies a macro-synchrony, which sees an historical progressive acknowledgement of a normative approach in a previously pre-existing instrumental context. This progress was positively evaluated as it contributed to increase the coherence of EU criminal law with EU constitutional law benchmarks.