Union Regulatory Criminal Law Competence after Lisbon Treaty

Jacob Öberg*
PhD researcher, European University Institute, Florence, Italy

1. Introduction

This article analyses the scope of the Union’s regulatory criminal law competence subsequent to the ratification of the Lisbon Treaty. The article is primarily focussed on examining what legal limitations that can be imposed on the Union’s competence to impose criminal penalties under the new legal basis in Article 83(2) TFEU. The examination will also analyse and scrutinize the scope of the Union’s criminal law competence in the light of the principle of democracy.1

In particular, the article will examine in detail whether criminal sanctions are “essential” for the effective implementation of Union policies. It will be discussed if the “essentiality” requirement implies that the ECJ should review EU criminal law legislation in the light of the principle of proportionality in Union law. In this regard, it will be analysed what standard that the ECJ should adopt in relation to judicial review of EU criminal law enactments. This implies that the article will particularly scrutinize whether the principle of proportionality can provide an

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1) *Nulla poena sine lege parlamentaria.* The democratic principle is in this respect concerned with input legitimacy and implies that EU criminal law shall be adopted through the ordinary legislative procedure pursuant to Article 294 of the Treaty of the Functioning of the European Union (TFEU). Only the ordinary legislative procedure can provide the necessary democratic legitimacy for EU criminal law legislation since it provides for dual legitimacy; direct legitimacy through the elected representatives of the European Parliament (EP) and indirect legitimacy through the indirectly elected governments of the Member States.
argument against conferring a criminal law competence to the European Union. The article will as a case study discuss whether criminal sanctions are “essential” for effective implementation of Union competition policies. In this regard it will be considered whether criminal sanctions are suitable and necessary for the effective implementation of Union competition policies.

Finally, the article will discuss the procedural requirements for adopting criminal law legislation. In particular it will be analysed how much harmonisation is needed for the adoption of Union criminal law legislation and whether the Union need to adopt a prior harmonisation measure in order to enact criminal law measures on the basis of Article 83(2) TFEU.

It is firstly submitted in the article that the “essentiality” requirement in Article 83(2) TFEU includes a strict proportionality requirement. Further, when the proportionality test is applied to the case of criminal sanctions in Union competition law it is claimed that criminal sanctions are not “essential” for the effective implementation of Union competition policy. It is finally contended that the Union could not use the previous harmonisation measure in Regulation 1/2003 to justify the use of Article 83(2) TFEU given that Regulation 1/2003 had been adopted on the basis of Article 83 EC (now 103 TFEU) which only provides for the consultation procedure. In order to respect the democratic principle, the Union therefore needs to adopt two directives in order to enact criminal law legislation on the basis of Article 83(2) TFEU.

In order to articulate the core issue of the article, i.e., the scope of Article 83(2) TFEU, it is appropriate to commence the analysis with a close examination of the wording of this provision:

(I)f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question….

As can be seen from a glance of the provision, there are essentially three requirements which have to be satisfied for the adoption of a criminal law directive; two procedural and one substantial. The substantial requirement is that criminal sanctions shall be ‘essential’ for the effective implementation of Union policies. The first part of this article will comprehensively analyse this question.2

2) Section 3.