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From the Ground up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States' Discretion

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Citation

Zoumpoulakis, K. (2020). From the Ground up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States' Discretion. *European Papers*, 5(3), 1289-1303. doi:10.15166/2499-8249/426

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

edited by Araceli Turmo

FROM THE GROUND UP: THE USE OF MINIMUM RULES IN EU PROCEDURAL CRIMINAL LAW AND THE QUESTION OF MEMBER STATES' DISCRETION

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ABSTRACT: The concept of minimum rules is inextricably linked to the approximation of criminal norms in the European Union. In the field of procedural criminal law, the adoption of minimum rules supports the need to facilitate mutual recognition and police and judicial cooperation in criminal matters. This *Article* seeks to introduce the reader to the world of minimum rules. In order to understand what it means to have minimum rules in a criminal law context, it is necessary to discuss about the origins, the development, the use and the role of minimum rules within this particular context. Following a complete depiction of the way in which minimum rules function in the field of procedural criminal law, the question arises: can Member States go beyond minimum rules? This *Article* attempts a comprehensive answer to the question of national discretion, arguing for the existence of different limits that can confine the discretion of the national legislator to go beyond minimum rules, and advocating the need for an *ad hoc* assessment of Member States' discretion.

KEYWORDS: EU criminal law – minimum rules – minimum harmonisation – Art. 82 TFEU – police and judicial cooperation – national discretion.

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I. A BRIEF JOURNEY TO THE WORLD OF MINIMUM RULES

Despite constituting for many years *terra incognita* for the European Union, the area of criminal law has known a flourishing legislative production over the past years. The efforts of the European legislator to approximate criminal norms in the EU have given rise to a substantial body of legislation that signals a shift from the initial reluctance of Member States to confer the relevant competence to the EU.¹ In this context, the concept of minimum rules has become central to the harmonisation of both the substantive and procedural criminal law in the EU, as well to the approximation of criminal sanctions.²

Minimum rules are part of the efforts to create the common legal language of the European Union. In the field of EU criminal law, they have known a life of more than twenty years, but still it remains unclear what it means to have minimum rules in a criminal law context. This *Article* seeks to introduce the reader to the world of minimum rules, focusing predominantly on procedural criminal law. As a point of departure, the emergence of minimum rules in the field of procedural criminal law is being discussed, offering an overview of the different functions that they fulfil within this particular context. From there, the focus is shifted towards the question of the discretion of Member States to go beyond minimum rules. Answering the question of national discretion and revealing the limits that apply to the discretionary powers of the national legislator is a necessary step towards the better understanding of the vague concept of minimum rules that guides the criminal law competence of the EU.

I.1. THE ORIGINS OF MINIMUM RULES

The concept of minimum rules is inextricably linked to the European integration process. Originating from the early days of the internal market, minimum rules are frequently adopted in all different areas of EU law.³ In the context of EU criminal law, minimum rules represent the youngest member of the family, as their first treaty-based appearance can be traced in the text of the Treaty of Amsterdam.⁴ Since then, the use of minimum rules has gained a central position in the criminal law competence of the

¹ J. ÖBERG, *EU Procedural Criminal Law after Lisbon*, in J. OUWERKERK, J. ALTENA, J. ÖBERG, S. MIETTINEN (eds), *The Future of EU Criminal Justice Policy and Practice*, Leiden: Brill, Nijhoff, 2019, p. 228.

² In this *Article*, the terms “harmonisation” and “approximation” are used interchangeably. Despite the subtle differences between these two terms, the EU legislator does not seem to acknowledge different connotations. See further, A. KLIP, *European Criminal Law, An Integrative Approach*, Cambridge: Intersentia, 2016, p. 38.

³ The use of minimum rules originated in the internal market context. In fact, the first traces of the concept of minimum rules date back to the 1960s, when the adoption of common minimum provisions sought to establish a common market for fruits and vegetables. Subsequently, the use of minimum rules spread quickly to all different areas of EU law before entering the field of criminal law.

⁴ Art. K.3 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

European Union, constituting the steering wheel for the harmonisation of both substantive and procedural criminal law.

Since the first days of the competence of the EU to intervene in the sphere of criminal law, the need to ground a common understanding among Member States and thereby facilitate mutual recognition and judicial and police cooperation in criminal matters was seen as an essential step.⁵ To that end, bringing forward a certain degree of harmonisation of national norms was perceived as the necessary prerequisite for mutual recognition.⁶ However, the reluctance of Member States to confer the relevant competence to the EU and the concerns about preserving the national identity of criminal law,⁷ resulted in limiting the competence of the EU to the adoption of minimum rules.⁸

Following the adoption of the Treaty of Maastricht that provided the necessary legal basis for the Union's competence to legislate in criminal matters,⁹ the first initiatives that referred to the concept of minimum rules appeared in the mid-1990s.¹⁰ Despite the fact that the concept of minimum rules was not explicitly mentioned in the text of the Treaty, the European Commission already acknowledged since that time the need to establish a "set of minimum rules for the establishment of direct and efficient judicial collaboration".¹¹ This statement constitutes one of the first references to the concept of minimum rules in the field of criminal law, representing an attempt on behalf of the European Commission to push Member States to proceed with the development of cross-border judicial cooperation in criminal matters.

Subsequently, the Treaty of Amsterdam codified the adoption of minimum rules as regards the definition of criminal offences, leaving however out of the picture the rele-

⁵ European Council, conclusions of the Presidency, Tampere European Council, 15-16 October 1999.

⁶ M. KLAMERT, *What We Talk About When We Talk About Harmonisation*, in *Cambridge Yearbook of European Legal Studies*, 2015, p. 360 *et seq.*

⁷ See J. OUWERKERK, J. ALTENA, J. ÖBERG, S. MIETTINEN (eds), *The Future of EU Criminal Justice Policy*, cit.

⁸ On the relation between European criminal law and national identity, see M. HILDEBRANDT, *European Criminal Law and European Identity*, in *Criminal Law and Philosophy*, 2007, p. 57 *et seq.*

⁹ Art. K.1 TEU, 1992. However, this was not the first time that the European authorities decided to intervene in the sphere of criminal law. References to the need for cross-border cooperation in criminal matters date long before the entry into force of the Treaty of Maastricht, and can be traced back to the TREVI group, which put in 1975 on the agenda the need for cross-border cooperation to effectively combat crime.

¹⁰ For instance, in 1996 the European Commission issued a communication with regards to the illegal and harmful content on the internet, where the non-territorial nature of the offence called for a solution that would go beyond the borders of Member States. The Commission underlined the necessity for Member States to define certain minimum common standards in their criminal legislation, in order to "avoid loopholes for criminal activities". See Communication COM(1996) 487 final of 16 October 1996 from the Commission on Illegal and harmful content on the Internet.

¹¹ The Commission's annual report for the year 1994 notes that there is a need for a "minimum platform of basic principles" that would efficiently protect the Community's finances. See Commission, Annual Report COM(1995) 98 final of 29 March 1995, *Protecting the Community's financial interests. The fight against fraud*, p. 18.

vant competence for procedural criminal law.¹² Hence, despite the fact that the criminal law competence of the EU was narrower at that time, the European authorities acknowledged the need for a common response to crime. Regardless of this nuance, the entry into force of the Treaty of Amsterdam signals major developments in the field of EU criminal law, with the establishment of the Area of Freedom, Security and Justice, and the codification in the text of the Treaty of the previous legislative practice with regards to the adoption of minimum rules. Since then, the proliferation of EU documents that deal with matters of criminal law is indisputable, while the concept of minimum rules is being widely used as the main legislative tool towards the harmonisation of criminal norms and therethrough the effective combat of crime.¹³

1.2. THE CURRENT LEGAL FRAMEWORK

The current legal framework is shaped by the provisions of the Treaty of Lisbon, which was meant to beckon a new era for criminal legislation in Europe.¹⁴ In particular, Arts 82 and 83 TFEU dictate that the harmonising competence of the EU in the field of substantive and procedural criminal law can be exercised only through the adoption of minimum rules, making, thus, minimum rules the sole harmonising tool at the hands of the European legislator.¹⁵ Focusing on procedural criminal law, the competence of the European legislator to adopt minimum rules that approximate criminal procedural norms and seek to harmonise procedural safeguards in the EU, constitutes a novelty in relation to the previous EU Treaties. Therefore, it is crucial to have a closer look at the legal basis of Art. 82 TFEU, in an attempt to pave the way towards a better understanding of the use of minimum rules in this particular context. Additionally, reciting the provisions

¹² Indeed, the criminal law competence of the European Union was much narrower under the provisions of Art. K.3 of the Treaty of Amsterdam, allowing only for the establishment of minimum rules in the field of substantive criminal law and only in relation with specifically mentioned crime areas. In particular, Art. K.3 was referring to “progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking”.

¹³ See, for instance, the 1999 Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, where it is noted that criminal behaviour should be approached in an “equally efficient way throughout the Union” and that major criminal areas “should be subject of minimum common rules relating to the constituent elements of criminal acts and should be pursued with the same vigour wherever they take place”. See Council and Commission Action Plan of 23 January 1999 on how to best implement the provision of the Treaty of Amsterdam on an area of freedom, security and justice.

¹⁴ Among the most important structural changes that the Treaty of Lisbon brought forward in this field, was the abolishment of the complex cross-pillar character of EU criminal law. See E. HERLIN-KARNELL, *EU Competence in Criminal Law after Lisbon*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *European Union Law after the Treaty of Lisbon*, Oxford: Oxford University Press, 2012, p. 329 *et seq.*

¹⁵ Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community. In particular, Arts 82 and 83 TFEU provide the legal basis for the harmonisation of substantive and procedural criminal law in the EU.

of Art. 82, para. 2, TFEU allows us to pinpoint the components that are essential to answering the question about the discretion of Member States to go beyond minimum rules. Art. 82, para. 2, TFEU reads as follows: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States”,¹⁶ whereas the last fragment of Art. 82, para. 2, TFEU adds that: “Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals”.¹⁷

The first thing that becomes apparent is that the envisaged approach towards the harmonisation of procedural criminal law in the EU is limited to the adoption of minimum rules, which may only be adopted to the extent necessary to facilitate mutual recognition and cooperation. This means that the scope of adopting minimum rules in the field of procedural criminal law is being significantly narrowed down by the text of the Treaty, which attributes a supportive role to minimum rules.¹⁸ In other words, with the primary objective in the field of procedural criminal law being the facilitation of mutual recognition and cross-border cooperation, the use of minimum rules has an auxiliary purpose to fulfil. The exact role and the position of minimum rules within this particular context will be discussed further below.

II. ORCHESTRATING THE HARMONISATION OF PROCEDURAL CRIMINAL NORMS IN THE EU

The use of minimum rules in the context of procedural criminal law reflects the need for a common set of procedural safeguards that would be equally respected throughout the Union. By creating a common legal language, minimum rules build the ground that supports the elimination of obstacles in mutual recognition and cross-border cooperation in criminal matters. Bearing this in mind, there is a tight relationship between minimum rules and mutual recognition, with the former being justified in light of the latter. In fact, minimum rules were initially conceived as a tool that would merely remove the obstacles in cross-border cooperation that could arise from the divergences

¹⁶ Art. 82, para. 2, TFEU.

¹⁷ *Ibid.*

¹⁸ The use of minimum rules in procedural criminal law is further limited by the Treaty, given that the adoption of minimum rules may be pursued only with regards to three legislative areas: *i)* the mutual admissibility of evidence between Member States; *ii)* the rights of individuals in criminal proceedings; *iii)* the rights of the victims of crime. Despite the fact that an additional, all-embracing area, allows the adoption of minimum rules with regards to “any other specific aspects of criminal procedure”, this has not been invoked yet.

in national law.¹⁹ However, throughout the development of EU criminal law, minimum rules were soon transformed into a harmonising tool that seeks to bring forward an “ever closer Union” and strengthen procedural guarantees in the EU.²⁰

It stems from the above that the adoption of minimum rules in the field of procedural criminal law has a strong functional character.²¹ More specifically, this functional character means that the European legislator adopts minimum rules in relation to further objectives of the EU, which in the case of procedural criminal law is primarily the facilitation of mutual recognition and cooperation. As a result, the harmonisation of procedural norms through the adoption of minimum rules does not represent an autonomous, self-standing objective of the European Union.²² On the contrary, it is justified only to the extent necessary to facilitate mutual recognition and cross-border cooperation, as Art. 82, para. 2, TFEU clearly dictates.

Acknowledging that minimum rules constitute a key harmonising tool in the legislator’s toolbox, with a strong functional character, is essential in order to understand what it means to have minimum rules in a criminal law context. Overall, the establishment of minimum rules in the field of procedural criminal law seeks to close the gap between diverse national provisions and establish an equal level of protection throughout the European Union, guaranteeing that a minimum set of procedural safeguards are respected in all the Member States. This need to guarantee a level-playing field in the EU is essential to the functioning of the Area of Freedom, Security and Justice.

Furthermore, the adoption of minimum rules satisfies a series of ancillary objectives that are adjunct to their primary role as a harmonising tool. For instance, having common minimum standards across the EU impedes the creation of safe-havens and delimits the risk of forum-shopping phenomena.²³ Most importantly, the adoption of minimum rules in the field of criminal law showcases the desire to preserve the national character of criminal law, which, as already mentioned, is considered a sensitive issue of national sov-

¹⁹ J. ÖBERG, *Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure*, in *European Constitutional Law Review*, 2020, p. 33 et seq.

²⁰ European Council Resolution of 30 November 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

²¹ J. OUWERKERK, *EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-Standing Approximation of Procedural Rights and their Progressive Effect on the Charter’s Scope of Application*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2019, p. 89 et seq.

²² Ouwerkerk argues that despite some recent developments in the field of EU criminal procedural law that indicate the tendency of the EU legislator to adopt minimum rules also for autonomous reasons, “a self-standing body of EU procedural rights cannot legitimately be realized under the too limited functionalist scope of Article 82(2) TFEU”. See *ibid.*, p. 94.

²³ Although this aspect might seem more relevant to the harmonisation of substantive criminal law, it is equally important for procedural norms. Within the borderless Area of Freedom, Security and Justice and due to the non-territorial character of several offences, it is crucial to avoid circumstances where various forms of criminal behaviour can benefit from loopholes in the national criminal justice system and take advantage of the differences in local legislations, in an attempt to, *inter alia*, avoid prosecution.

ereignty. The need for a balanced and respectful approach towards the harmonisation of procedural criminal law is enshrined in the text of the Treaty of Lisbon, which notes that the establishment of common minimum rules “shall take into account the differences between the legal traditions and systems of the Member States”.²⁴ In that sense, minimum rules are able to compromise the need for the establishment of a borderless Area of Freedom, Security and Justice, while at the same time preserve national identity and the fundamental aspects of domestic criminal law.²⁵ The adoption of minimum rules is a way to acknowledge the fact that national diversity is a reality that often calls for different solutions. In fact, the concept of minimum rules constitutes the sole harmonising option that allows for the preservation of national identity.²⁶ Contrary to the rest of the aforementioned functions, which in theory could be also pursued through the adoption of maximum harmonisation provisions, the establishment of minimum rules is the only available option that ensures respect for the diversity in national penal traditions. Hence, the adoption of minimum rules establishes a common level of understanding within the European Union, without burying national differences in the sand.

III. MINIMUM RULES AND THE QUESTION OF NATIONAL DISCRETION

Following a closer look at the concept of minimum rules, it is now time to focus on the question of national discretion, namely the question of whether Member States can go beyond EU wide minimum rules.²⁷ National discretion is here understood as the amount of freedom that the national legislator has – or should have – when implementing minimum rules in domestic legislation.²⁸ Indeed, during the implementation of minimum rules in national criminal law, the national legislator is able to go beyond the common minimum provisions and exceed the wording of the Directive, in an attempt to

²⁴ Art. 82, para. 2, TFEU.

²⁵ See also Art. 4, para. 2, TEU that establishes the need to respect national identities and, therefore, national penal traditions as well. In particular, Art. 4, para. 2, TEU states that “the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional”. Additionally, in the field of procedural criminal law, the significance of preserving national identity is further enshrined in Art. 83, para. 3, TFEU that provides for an “emergency break”, in cases where Member States consider that a proposed draft affects fundamental aspects of their criminal justice system.

²⁶ The establishment of minimum rules is the least intrusive option available, especially in relation to the alternatives of maximum harmonisation and the unification of national laws.

²⁷ Following Arts 82 and 83 TFEU, read together with Art. 288 TFEU, minimum rules in the field of EU criminal law may be adopted only in the form of directives that are binding to the result to be achieved, but leave to national authorities the choice of forms and methods.

²⁸ A second level of national discretion refers to the discretion of national judicial authorities to interpret minimum rules and grant them a broader (or narrower) content than the one intended by the European legislature. This *Article* discusses only the first level of national discretion, *i.e.* legislative discretion, and not judicial discretion.

enhance procedural safeguards. This kind of legislative discretion, which is inherent to the concept of minimum rules, should not be confused with the leeway that the legal instrument of the directive awards in any case to the national legislator to adapt the transposition of EU law into national legislation.²⁹

It is crucial to identify the element of national discretion in all the instruments that introduce minimum rules, in a sense that we cannot talk about the existence of minimum rules without discussing about the amount of discretion they award to Member States. As already mentioned, minimum rules provide the common ground upon which Member States are able to build. Hence, without being able to imagine, *at least in principle*, the fact that Member States have the discretion to go beyond minimum rules, then we are no longer talking about minimum rules, but instead we are referring to maximum rules. In other words, if the rule adopted by the European legislator does not allow the national legislator to exceed it, then it is not a minimum rule, but a maximum one, setting both the regulatory floor and ceiling at the same time. What would be the point of differentiating between minimum and maximum rules, if we strip the first ones of the element of national discretion, *i.e.* if we deprive the national legislator of the possibility to go beyond the minimum common ground?

Additionally, it is worth reminding that the term “minimum” does not refer to the content of the rule, but to the fact that the adopted rule sets the common ground for all Member States. In other words, the word “minimum” serves as a reminder of the discretion of Member States to build upon this common ground, which represents the least that should be done, without imposing *a priori* an upper limit.

The argument in favour of the discretion of Member States to go beyond minimum rules has its strongest foundation in the Treaty of Lisbon. A close reading of Art. 82, para. 2, TFEU suggests that the discretion of Member States is granted by the text of the Treaty itself. More specifically, Art. 82, para. 2, TFEU makes it clear that the establishment of minimum rules “shall not prevent Member States from maintaining or introducing a higher level of protection for individuals”.³⁰ This is a clear-cut provision that introduces a one-way requirement, a unidirectional obligation.³¹ It obliges Member States to establish the prescribed minimum level of protection, but at the same time it provides the possibility to exceed that minimum level and introduce higher standards. This grammatical interpretation of the text of the Treaty constitutes the first line of interpretation and provides an initial answer to the question of national discretion.

²⁹ J. HARTMANN, *Discretion in EU Directives: Enhancing Political Legitimacy Within the EU's Multi-Level Legal System*, presented at the Sixth Pan-European Conference on EU Politics, 13-15 September 2012, available at ssrn.com.

³⁰ Art. 82, para. 2, TFEU.

³¹ P. ASP, *The Substantive Criminal Law Competence of the EU*, Stockholm: Skrifter utgivna av juridiska fakulteten vid Stockholms universitet, 2012, p. 117.

Moreover, the wording of Art. 82, para. 2, TFEU differentiates between “maintaining” and “introducing” a higher level of protection. The first instance acts as a confirmation of the non-regression clause, which reminds to Member States that the implementation of EU law cannot serve as an excuse for lowering the national standards of protection, and, at the same time, allows Member States with higher procedural safeguards to preserve those higher standards. In other words, Member States that provided for a high level of procedural rights before the adoption of the common minimum rules, they cannot lower their established level of protection in the excuse of streamlining their legislation with the EU-wide minimum rules. Hence, the text of the Treaty acknowledges the fact that existing national procedural safeguards may be higher than the common minimum rules and, therefore, recognizes implicitly the discretion of Member States to deviate in that direction. However, the second instance, *i.e.* the possibility of “introducing” a higher level of protection, is an explicit confirmation of the discretion of Member States to go beyond minimum rules, even when there is no prior national legislation on the matter. The text of the Treaty notes loud and clear that the adoption of minimum rules should not impede the desire of the Member States to guarantee a higher level of procedural safeguards and defence rights in their respective jurisdictions.

The above viewpoint that understands minimum rules as allowing Member States to go beyond them in the field of procedural criminal law is widely accepted by several authors in the field of EU criminal law. Indeed, it seems that there is an agreement about the possibility of Member States to go beyond minimum rules in this particular context.³² Specifically, most contributions seem to agree that minimum rules in the field of procedural law should be interpreted as establishing a common set of procedural safeguards that allows Member States to exceed them in order to award a higher level of protection. For instance, according to Hans Nilsson, “real minimum rules” exist in the field of procedural criminal law,³³ allowing for a higher level of procedural safeguards to be adopted by the Member States. Accordingly, Valsamis Mitsilegas places himself on the same side of the debate, advocating for the freedom of Member States to adopt higher provisions in the field of procedural criminal law.³⁴

All in all, minimum rules in the field of procedural criminal law are commonly interpreted as allowing Member States to go beyond them and introduce higher procedural safeguards in their respective jurisdictions. However, is the question of national discretion in the field of procedural criminal law such a straightforward case?

³² The question of national discretion has troubled EU criminal law scholars mostly with regards to substantive criminal law, where antipodal points have been supported. See, *inter alia*, the contributions of H.G. NILSSON, *How to Combine Minimum Rules with Maximum Legal Certainty*, in *Europarättslig Tidskrift*, 2011, p. 665 *et seq.*; V. MITSILEGAS, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford: Hart, 2016, pp. 62-63; P. ASP, *The Substantive Criminal Law Competence*, cit., p.110 *et seq.*

³³ H.G. NILSSON, *How to Combine Minimum Rules with Maximum Legal Certainty*, cit., p. 675.

³⁴ V. MITSILEGAS, *EU Criminal Law after Lisbon*, cit., p. 63.

IV. RAISING BARRIERS TO NATIONAL DISCRETION

The uncertainty about what constitutes a minimum rule inevitably gives rise to the uncertainty about whether Member States can go beyond them. The lines around the question of national discretion seem to be thin and urge us to approach this topic with cautiousness. One may reasonably ask whether the aforementioned textual interpretation of the concept of minimum rules is enough to provide a definitive answer to the question of national discretion. Accordingly, the question arises whether there are any factors that tend to limit the discretion of Member States to go beyond minimum rules in EU criminal procedural law.

Alas, providing an answer to the question of national discretion has to penetrate several lines of interpretation that go well beyond the text of the Treaty. In general, the grammatical interpretation is only one way of reading and understanding a legal document. Although it serves as the first line of interpretation, what needs to be added here is the scope of the adoption of minimum rules in the field of procedural criminal law, i.e. a teleological interpretation of the concept of minimum rules.

If one departs from the text of the Treaty and takes a closer look at the rationale behind the adoption of minimum rules, alongside the way they function within the context of procedural criminal law, then it becomes apparent that the discretion of Member States to go beyond minimum rules is not without certain limits. These limits arise from the functional character of minimum rules in the context of procedural criminal law,³⁵ and their position within the overall architecture of the European legal order.

As already discussed, the adoption of minimum rules under the legal basis of Art. 82 TFEU does not have an autonomous character; it is justified only when it serves the purpose of the facilitation of mutual recognition and cross-border cooperation in criminal matters. As a result, the functional character of minimum rules introduces a first limit to the discretion of Member States to unequivocally surpass the common minimum provisions. Although Member States remain *in principle* free to go beyond minimum rules, any supplementary provisions have to fulfil the same objective as the one that justified their adoption in the first place. Indeed, when the reason for the adoption of minimum rules is the facilitation of mutual recognition, it would be odd to advocate for the right of Member States to go beyond minimum rules in a way that would undermine mutual recognition and cooperation. Hence, *a contrario sensu*, the discretion of Member States needs to be confined within the limited scope defined by minimum rules and, thus, any supplementary national provisions may not raise disproportionate obstacles to the facilitation of mutual recognition and cooperation. In other words, the *raison d'être* of a given rule dictates how far the rule can go and how far Member States can exceed the wording of that rule.

³⁵ See *supra*, section II.

The conclusion that the rationale behind the adoption of minimum rules dictates the limits to national discretion reflects the position of the Court of Justice. In illustration of the position of the Court of Justice, two cases are discussed here, in an attempt to show how the Court weights the scope and the extent of national discretion against the forum where minimum rules are going to be applied.

In *Melloni*,³⁶ the Court of Justice issued a judgement that sparked a lot of debate and generated abundant commentaries in the field of EU law.³⁷ Dealing with the question of the relation between EU standards and higher national (constitutional) standards, the *Melloni* case has a role to play in answering this *Article's* question: Can Member States go beyond minimum rules in the field of procedural criminal law? Spoiler alert: the Luxembourg Court argued against the higher national standards of protection.

The *Melloni* case is significant for the constitutional architecture of the European Union as it provides a firm answer in favour of the primacy of EU law.³⁸ In particular, the Court was asked to judge whether the higher standards of protection provided by the Spanish Constitution with regard to the right to a fair trial and *in absentia* judgements, were compatible with the common standards of the EU, or whether they were raising obstacles to mutual recognition and judicial cooperation, vis-à-vis the execution of a European Arrest Warrant. In other words, the question referred to the Court was, *inter alia*, a question about the primacy of EU law, asked this time in the context of mutual recognition and judicial cooperation in criminal matters.³⁹

The decision of the Court of Justice was pretty straightforward: the existence of higher national standards of protection cannot violate the effectiveness of EU law, by raising obstacles that undermine the efficiency of judicial cooperation and thereby undermine the principle of supremacy of EU law.⁴⁰ Leaving aside the constitutional implications of the judgement, it becomes clear that the Court does not see with a friendly eye the discretion of Member States to deviate from minimum rules, even when such deviation consists in maintaining prior constitutional standards. In fact, the significance that the Court of Justice attributes to the primacy of EU law and the desire to circumscribe any higher standards that might raise obstacles to the effective application of EU law, reflects a move from an intergovernmental way of government to supranational-

³⁶ Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni* [GC].

³⁷ See, *inter alia*, V. FRANSEN, *Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection*, in *European Law Blog*, 10 March 2014, europeanlawblog.eu; N. DE BOER, *Addressing Rights Divergences under the Charter: Melloni*, in *Common Market Law Review*, 2013, p.1083 *et seq.*

³⁸ L.F.M. BESSELINK, *The Parameters of Constitutional Conflict after Melloni*, in *European Law Review*, 2014, p. 531 *et seq.*

³⁹ L. BACHMAIER WINTER, *Bypassing or Intensifying the Dialogue between Courts? The impact of Melloni at the National Level*, in V. MITSILEGAS, A. DI MARTINO, L. MANCANO (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*, Oxford: Hart, 2019, p. 404 *et seq.*

⁴⁰ *Melloni* [GC], cit., para. 55 *et seq.*

ism, this time in the field of criminal law, with new principles and obligations coming in to play that inevitably limit the margin of national discretion.

On a different occasion, in the *Covaci* case,⁴¹ the Court was asked to interpret the provisions of Directive 2010/64/EU⁴² and Directive 2012/13/EU.⁴³ More specifically, the questions referred to the Court of Justice were relevant to the conformity of the German legislation with the requirements of Directive 2010/64/EU on the right to interpretation and translation vis-à-vis the language of the proceedings. Additionally, under the German law, a person without a fixed address in Germany was obliged to appoint someone with a German address in order to receive formal documents, and the referring court was in doubt about the conformity of this particular provision with the requirements of Directive 2012/13/EU on the right to information.⁴⁴

In examining the case at hand, the Court of Justice was called to determine whether Arts 2 and 3 of Directive 2010/64/EU allow the German legislator to provide that the filing of written objections can be done only in the German language, excluding thus the possibility for foreigners to lodge a complaint in another language. Although such a restriction was permissible under Art. 3 of the Directive,⁴⁵ the Court took a step further and referred to the broader context and the objectives that the Directive seeks to fulfil, namely the establishment of high procedural safeguards throughout the EU.⁴⁶ According to Advocate General Bot,⁴⁷ the concept of minimum rules should not be understood as meaning “minor rules”, namely rules that enclose low regulatory levels and have a minimum content. In his view, what minimum rules actually mean is that they constitute rules that encapsulate the fundamental principles of procedural criminal law and reflect the shared values that should be equally respected throughout the European Union.⁴⁸ Following the same line of reasoning, the Court explicitly noted that the provi-

⁴¹ Court of Justice, judgment of 15 October 2015, case C-216/14, *Covaci*.

⁴² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

⁴³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

⁴⁴ For a detailed analysis of the case, see S. LAMBERIGTS, *Case C-216/14 Covaci – Minimum Rules, yet Effective Protection?*, 13 November 2015, available at europeanlawblog.eu.

⁴⁵ Art. 3 of Directive 2010/64/EU, cit., mainly refers to the right of the suspects or accused persons to receive a written translation of the documents that are essential to the criminal proceedings and therefore crucial for the effective application of the right to a fair trial. On the contrary, Art. 3 does not make any reference to the possibility to file a complaint in a different language than the language of the official proceedings.

⁴⁶ *Covaci*, cit., para. 29.

⁴⁷ Opinion of AG Bot delivered on 7 May 2015, case C-216/14, *Covaci*.

⁴⁸ *Ibid.*, para. 55: “First, the expression ‘minimum rules’, to which I personally prefer the expression ‘non-derogable rules’, must not be interpreted, as is too often the case, and not without ulterior motives, in a simplistic manner as referring to minor rules. As has just been explained, they are in fact an essential foundation for procedural principles which, in criminal proceedings, ensure the application of and re-

sions of Directive 2010/64/EU – which is adopted under Art. 82, para. 2, TFEU – contain only minimum rules and, therefore, Member States are free to go beyond those rules. In the Court's own words: "Directive 2010/64 lays down only minimum rules, leaving the Member States free, as recital 32 in the preamble to that directive states, to extend the rights set out in that directive in order to provide a higher level of protection also in situations not explicitly dealt with in that directive".⁴⁹

In light of the above, although Mr. Covaci was not *in principle* entitled to the right to file an objection in a language other than German, the need for high procedural safeguards in the EU that would truly safeguard the right to a fair trial, asks for a broader interpretation of the minimum provisions of the Directive. Nonetheless, the Court avoids to provide a definitive answer to the question of higher national standards, leaving the final word to the national judge.⁵⁰

In comparing the two cases, what seems to matter the most for the Court of Justice is the forum of application of minimum rules, and most importantly, the forum of application of any higher national provisions. In particular, it is important to examine whether there is a risk in threatening the principle of mutual recognition and the smooth cooperation between national authorities. In the *Melloni* case, the request for a preliminary ruling is located in the heart of a European Arrest Warrant proceeding, which is the cornerstone of judicial cooperation in criminal matters. According to the Court, the effective application of EU law and the need to respect the principle of mutual recognition render any higher national standards inadmissible, as they raise disproportionate obstacles to the fulfilment of the Union's objectives.

On the contrary, in the *Covaci* case, the question asked to the Court of Justice did not entail any elements of mutual recognition or cross-border cooperation. The preliminary question was focused on the interpretation of EU law in light of existing national provisions, and whether the latter were compatible with EU law. Therefore, the risk to undermine the principle of mutual recognition or impede police and judicial cooperation was non-existent. As a result, the Court of Justice considered that Member States are free to go beyond minimum rules and provide for higher procedural safeguards, given the fact that the purpose of the Directive is to enhance the protection or procedural rights in the EU.

Building on the *Melloni* judgement, it becomes apparent that there are certain limits that inevitably hold back Member States from exercising their discretion to go beyond

spect for fundamental rights which are the underlying shared values that make the European Union a system founded on the rule of law".

⁴⁹ *Covaci*, cit., para. 48.

⁵⁰ *Ibid.*, para. 50: "It is therefore for the referring court, taking into account in particular the characteristics of the procedure applicable to the penalty order concerned in the main proceedings, which were noted in paragraph 41 of this judgment, and of the case brought before it, to establish whether the objection lodged in writing against a penalty order should be considered to be an essential document, the translation of which is necessary".

minimum rules. Apart from the teleological interpretation of minimum rules, which narrows down significantly the discretion of Member States, the discretionary powers of the national legislator can be eventually circumscribed by a series of factors that arise from the position of minimum rules within the European legal order. More specifically, the Court of Justice, by referring to the effectiveness of EU law in the *Melloni* case, refers to a set of limits that do not have their foundation in the wording a particular EU instrument, but they relate to the position of minimum rules within the broader constitutional architecture of the European Union. This category of limits represents the “external” limits to the discretion of Member States. The term “external” should be understood in relation to the source of these limits, as it refers to limits that exist outside the wording of a specific instrument.

Under the category of external limits, one may include all those factors that derive from the broader EU law obligations of the Member States. Apart from the aforementioned need to respect the effectiveness of EU law, limits to the discretion of Member States arise from the need to respect the fundamental principles and values of the European Union, as well as the need to respect the Charter of Fundamental Rights. Especially since the entry into force of the Treaty of Lisbon and the “constitutionalisation of EU criminal law”, the general principles of EU law have a much stronger and influential role to play in the field of criminal law.⁵¹ For instance, the principle of proportionality and the adherence to the Charter, point towards the direction that Member States can take when they exercise their discretion, meaning that any higher standards can neither contradict the provisions of the Charter, nor disrespect the principle of proportionality.

Subsequently, the discretion of Member States may be subjected to another set of limits, which may be called “internal” limits. What should be understood by internal limits is that the text of a particular instrument contains factors that tend to restrict the discretion of Member States. To put it in another way, the internal limits refer to situations in which the text of a directive delimits the discretion of Member States, without the need to rely on the aforementioned teleological interpretation, not even to invoke the general principles of EU law. This can be done either by *de lege* limitations, or by *de facto* limitations. The former refers to specific textual provisions that could impede the discretion of Member States to go beyond minimum rules. The latter derives from the possibly broad and vague wording of a directive that makes the possibility to go beyond minimum rules theoretically possible, but practically unrealistic. In that case, Member States remain *in principle* free to exercise their discretion to go beyond minimum rules, but they cannot do so, simply because there is nothing that is not already captured by the broad and all-embracing content of that particular directive.

⁵¹ V. MITSILEGAS, *EU Criminal Law after Lisbon*, cit., p. 4 et seq.

V. CONCLUSION

The world of EU minimum rules in the field of criminal law is a small, yet unexplored one. The concept of minimum rules has a central role to play in the harmonisation of procedural criminal law in the EU, constituting a useful and versatile tool at the hands of the European legislator. Unfortunately, despite the fast-growing body of literature in the field of EU criminal law, minimum rules and the question of national discretion have gained little attention over the years. This *Article* thus tried to answer one of the fundamental questions about the concept of minimum rules, namely the question of the discretion of Member States to go beyond them.

In procedural criminal law, minimum rules seek to bring forward the approximation of procedural safeguards in the EU and, thereby, facilitate mutual recognition and police and judicial cooperation in criminal matters. The moment minimum rules are being introduced, they seek to build a solid common ground. Upon this common ground, Member States can build their own set of procedural safeguards and go higher than the minimum EU standards. Nonetheless, things are not as clear and straightforward as they seem to appear at first sight. In fact, the most appropriate answer to the question of national discretion seems to be cagey: Member States should be *in principle* able to exercise their discretion to go beyond minimum rules and adopt provisions that establish a higher level of procedural safeguards in their respective jurisdictions. This conclusion does not only follow from the wording of Art. 82 TFEU, but it is justified by the core characteristics of the concept of minimum rules.

The key word in the above answer is the word *in principle*. Member States should be *in principle* awarded the envisaged discretion, but they cannot exercise it unequivocally and in all cases. Even though the concept of minimum rules fails to introduce in itself an upper limit, it does not mean that such a limit is not there. In fact, the ceiling that delimits the discretion of Member States is a rather robust and solid one. The broader context within which minimum rules are being adopted, the rationale behind their adoption, and the overall constitutional architecture of the European Union are factors that draw some unbreakable lines. Depending on the instrument at hand and the purpose that minimum rules are called to fulfil in each particular case, the final assessment of whether Member States can go beyond minimum rules should be made *ad hoc*. As Sir Arthur Conan Doyle used to say, there is nothing more deceptive than an obvious fact. Despite the initial intuition that urges us to answer the question of national discretion in the affirmative, based primarily on the clear wording of Art. 82 TFEU, this *Article* showed that such an answer should be offered with excessive care.

