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Abstract

The era when criminal law was solely a matter of national legislation is long gone. In the European Union, the approximation of substantive criminal norms and procedural rights has not escaped the attention of the European legislator. Inevitably, the move towards supranational criminal law has affected the field of sentencing and criminal sanctions. This paper seeks to discuss the changes that the development of EU criminal law brings on sentencing. The focus lies on the approximation of criminal sanctions within the EU, in an attempt to understand the scope and the added value of the EU's approach in the field. First, the legal basis of article 83 TFEU is presented and analyzed, in order to define the limits of the Union's competence in the field of sentencing. Subsequently, the approach of the European legislator when adopting minimum rules on the approximation of criminal sanctions is unravelled, and the relationship between functional approximation and mutual recognition is discussed. Finally, this paper concludes with some critical reflections upon the approximation of criminal sanctions in the EU, with an eye towards the future of Europe's Area of Freedom, Security and Justice (AFSJ).

Keywords

EU criminal law, criminal sanctions, article 83 TFEU, substantive criminal law, minimum harmonization, approximation, mutual recognition

Introduction

The power to inflict criminal sanctions upon individuals – the *ius puniendi* – has been traditionally considered a state privilege, intricately linked to the nation state's monopoly of power and the

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exercise of national sovereignty. The determination of the appropriate penalty for a specific offence substantiates the weight that a given society awards to certain norms and values.¹ Although *in principle* this remains the norm, the era when criminal law was solely a matter of national legislation is long gone.²

The approximation of substantive criminal norms and procedural rights has not escaped the attention of the EU legislator.³ In this context, the move towards supranational criminal law inevitably affected the field of sentencing and criminal sanctions. Hence, this paper seeks to discuss the changes that the development of EU criminal law brings on sentencing. The focus lies on the approximation of criminal sanctions within the EU, in an attempt to understand the scope and the added value of the EU's approach in the field.⁴ First, the legal basis of article 83 TFEU is presented and analyzed, in order to define the limits of the Union's competence in the field of sentencing. Subsequently, the approach of the European legislator when adopting minimum rules on the approximation of criminal sanctions is unravelled, and the relationship between functional approximation and mutual recognition is discussed. Finally, this paper concludes with some critical reflections upon the approximation of criminal sanctions in the EU, with an eye towards the future of Europe's Area of Freedom, Security and Justice (AFSJ).

The EU's competence in the field of criminal sanctions

What started reluctantly with the adoption of the Treaty of Maastricht, namely the acknowledgement of the need for cooperation in criminal matters,⁵ was further developed by the entry into force of the Treaty of Amsterdam, which formally created the competence for the EU to adopt minimum rules regarding the definition of criminal offences and sanctions.⁶ The creation of an Area of Freedom, Security and Justice beacons the new era for supranational criminal law, with major developments being noticed thereafter. As the integration process was deepening and the EU was expanding its borders, the Union's competence in the field of criminal law started to expand accordingly. It soon became apparent that the creation of a common market without internal borders that was based on the freedom of movement was also bringing along the free movement of criminal activities, highlighting, therefore, the need for a common response to crime.⁷ Already in 2004, the European Commission adopted a Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions that underlined the need to discuss about the national differences in criminal

1. Erik Luna, 'Sentencing', *The Oxford Handbook of Criminal Law* (OUP, 2014).

2. Even before the emergence of the discipline of European Criminal Law, the question of the non-state imposition of criminal sanctions had captured the attention of international legal scholars. See, Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33, *Oxford Journal of Legal Studies*, 293.

3. Despite the nuances in the notions of 'approximation' and 'harmonization', this paper employs the two terms interchangeably.

4. This paper focuses explicitly on the adoption of criminal sanctions. Therefore, the discussion that surrounds similar, yet distinctive measures, such as administrative or international sanctions, falls outside the scope.

5. Article K.1 of the Treaty on European Union [1992].

6. Consolidated Version of the Treaty on European Union [1997] OJ C 340. Article K.3 of the Amsterdam Treaty was providing that 'common action on judicial cooperation in criminal matters shall include: (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'.

7. Council of the European Union, 15-16 October 2019, *Presidency Conclusions: The Tampere milestones*.

sanctions and the extent to which they might hinder cross-border cooperation and impede the objective of achieving a high level of protection in the AFSJ.⁸

The current legal framework regarding the approximation of criminal sanctions is shaped by article 83 of the Treaty on Functioning of the European Union (TFEU).⁹ Specifically, article 83 (1) TFEU provides that:

‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’.¹⁰

The first paragraph of article 83 TFEU creates the primary legal basis for the approximation of criminal sanctions in the EU. Subsequently, article 83(2) TFEU stipulates that criminal sanctions may be adopted in cases where the approximation of criminal norms is ‘essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures’.¹¹ Hence, the second paragraph of article 83 TFEU provides an ancillary legal basis for the approximation of criminal sanctions in the European Union.

The minimalistic wording of the Treaty does not provide enough information on the precise extent of the EU’s competence. Indeed, based on a close reading of the abovementioned provisions, one can only extract very limited information. In fact, what article 83(1) TFEU tells us is that criminal sanctions may be adopted (i) by means of directives; (ii) in accordance with the ordinary legislative procedure; (iii) only minimum rules may be established; (iv) criminal sanctions may be adopted only in relation to the so-called euro-crimes. Although the first two elements present little to no challenges to the interpreter of the Treaty, the latter two provide the ground for an interesting discussion. These two elements, namely the link between criminal sanctions and EU-wide criminalization, and the reliance on the concept of minimum rules, introduce significant limits to the approximation of criminal sanctions in the EU and, therefore, delineate the extent of the relevant competence.

It is evident that the competence of the EU to approximate criminal sanctions is tightly attached to the harmonization of substantive criminal norms. The close link between the adoption of criminalization provisions and sanctioning underlines that the competence of the EU legislator regarding criminal sanctions does not constitute a self-standing or autonomous competence.¹² In other words, the European legislator cannot introduce rules on sentencing that exceed the mere definition of the type and length of the envisaged penalty for a specific offence. Although this assumption does not pop-out immediately when reading the text of the Treaty, it will become apparent below that it constitutes the preferred interpretation of the European legislature, when adopting minimum rules on sanctions. This close link between the approximation of criminal offences and the adoption of minimum rules on sanctions excludes a broader and more general competence to harmonize sentencing law in the EU.¹³

8. Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. COM/2004/0334 final.

9. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326.

10. Article 83 (1) TFEU.

11. Article 83 (2) TFEU.

12. See *infra* section IV.

13. See, Petter Asp, ‘Harmonisation of Penalties and Sentencing within the EU’ [2013] Bergen Journal of Criminal Law & Criminal Justice 53.

Furthermore, the approximation of criminal sanctions can only be effectuated through the adoption of minimum rules. The concept of minimum rules constitutes a versatile tool at the hands of the European legislator that delineates and delimits the relevant each time legislative competence. Unfortunately, the question on the meaning of minimum rules and the implications they have for the harmonization of domestic (criminal) legislation has gained little attention by EU criminal law scholars.¹⁴ In the context of sentencing, minimum rules are understood as limiting the competence of the EU solely to the approximation of the type and level of penalties for specific offences. According to the European Commission, minimum rules may entail ‘requirements of certain sanction types (e.g. fines, imprisonment, disqualification), levels or the EU-wide definition of what are to be considered aggravating or mitigating circumstances’.¹⁵ Hence, the introduction of (minimum) rules that seek to approximate any other element of sentencing than those described above exceeds the limits of the EU’s competence. Although Klip argues that the legal basis of article 83 TFEU is rather broad,¹⁶ in practice the European legislature follows a narrower interpretation when adopting minimum rules on sanctions, which is reflected in the instruments that have been adopted so far.¹⁷

Before going deeper into the discussion about the meaning of minimum rules, it is necessary to clarify the connotations that accompany two conceptually related, yet normative different concepts: minimum rules on sanctions and minimum sanctions *stricto sensu*. In other words, it is essential to understand what the adoption of minimum rules on sanctions means and, most importantly, what it doesn’t. The principal idea behind the concept of minimum rules is that the European legislator partially harmonizes a certain legislative area, leaving the rest to the discretion of Member States.¹⁸ The question arises then how far beyond the EU-wide minimum rules can a Member State go? As Klip rightly notes, the answer to this question must be given ad hoc, considering the ‘spirit’ and the purpose of the adopted each time instrument.¹⁹ Indeed, the level of national discretion that Member States enjoy should be determined in line with the legislative field where minimum rules are being introduced.²⁰ What should be clear though, is that the concept of minimum rules does not refer to the *content* of the rule, but rather to the fact that Member States should *in principle* enjoy a certain degree of manoeuvre to go beyond the minimum.

In the context of criminal sanctions, the concept of minimum rules points to various elements. The adoption of minimum rules on sanctions may include rules on the level or the type of criminal penalties. The European legislature is competent to determine the minimum level and type of the envisaged punishment for a specific offence, namely that a certain criminal activity should be punishable by *at least* a fine, or *at least* so many years of imprisonment. Beyond these minimum

14. See, inter alia, Hans G. Nilsson, ‘How to Combine Minimum Rules with Maximum Legal Certainty’ [2011] *Europätslig tidskrift* 670; Petter Asp, *The Substantive Criminal Law Competence of the EU* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, 2012; 110-127).

15. ‘Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law’, COM(2011) 573 final, p. 8.

16. André Klip, *European Criminal Law: An Integrative Approach* (Intersentia, 2016; 181).

17. See *infra* section III.

18. Klip (n 15) 182.

19. *Ibid.*

20. For instance, the level of discretion that Member States enjoy in the field of substantive criminal law differs significantly from the corresponding level in the field of procedural criminal law. For an elaborate discussion on the question of national discretion, see Konstantinos Zoumpoulakis, ‘From the Ground Up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States’ Discretion’ (2020) 5 *European Papers - A Journal on Law and Integration* 1289.

levels, Member States should be able to implement harsher penalties in their domestic criminal legislation. With minimum rules setting the lowest threshold for a penalty, the question is who determines the upper limit. The answer here is clear: the principle of proportionality is the one that sets the upper limit for harsher penalties.

Going back to the letter of article 83 TFEU, there is nothing there suggesting that the adoption of minimum rules on sanctions should be limited to the mere determination of the type and length of specific penalties, let alone suggesting that the supranational legislator may only introduce minimum-maximum penalties. Why the adoption of minimum-minimum penalties should be excluded, based on the reading of article 83(1) TFEU?²¹ This question brings us to the second concept that was identified above: minimum sanctions *stricto sensu*. At first sight, the text of the Treaty cannot be interpreted as precluding the adoption of minimum sanctions. Nonetheless, the Commission has emphasized that the European legislator is competent to prescribe only the minimum level of the maximum penalty for specific offences, casting away any doubts as to what the use of minimum rules on sanctions entails.²² Even before the entry into force of the Lisbon Treaty, it was acknowledged that the approach towards the approximation of criminal sanctions ‘has not been so much to determine effective, proportionate and dissuasive penalties as to set minimum levels for maximum penalties’.²³ The answer to this dissonance should be offered by reference to articles 4(2) TEU and 67(1) TFEU, namely by reference to the need to respect national identity. With the concept of minimum sentences not being unequivocally embraced throughout the European Union, it is considered that the introduction of minimum penalties would interfere brutally with national autonomy, going thus against the binding need to respect the national legal traditions of the Member States.²⁴

Now that it is somewhat clearer what the concept of minimum rules means, a few final words are necessary in order to complete the picture of the EU’s competence in the field of criminal sanctions. Alongside the limits that stem from the legal basis of article 83 TFEU, the extent of the Union’s competence and the obligations of Member States when implementing EU minimum rules on sanctions are further delineated by additional EU principles. On the national level, Member States need to respect the general principles of EU law that impose restrictions on what they can legitimately do *vis-a-vis* the imposition of criminal sanctions. For instance, the principles of non-discrimination and assimilation are relevant in this context:²⁵ Member States are required to impose the same level of penalties to similar offences, regardless of the international or national elements of the committed offence, while they also need to protect EU interests in a similar way as they protect their corresponding national interests. Additionally, Member States are required to provide for ‘effective, proportionate and dissuasive sanctions’ in their respective jurisdictions. Stemming from the case law of the Court of Justice,²⁶ the so-called *Greek Maize* criteria constrain the discretion of

21. Klip notes that the adoption of minimum rules under article 83 TFEU could include minimum and mandatory penalties. See, Klip (n 15) 181.

22. COM/2004/0334 final (n 7).

23. Ibid.

24. European Commission, Directorate-General for Justice and Consumers, *Study on minimum sanctions in the EU Member States: Final Report*, Publications Office, 2016. Available at: doi/10.2838/596957.

25. Klip (n 15) 75. See also, Fabio Giuffrida, ‘68/88 – Commission v Greece: Effectiveness, Dissuasiveness, Proportionality of Sanctions and Assimilation Principle: The Long-Lasting Legacy of the Greek Maize Case’ in Valsamis Mitsilegas, Alberto di Martino, Leandro Mancano (eds), *The Court of Justice and European Criminal Law* (Bloomsbury Publishing, 2019; 107-121).

26. Case 68/88 Commission v Hellenic Republic (‘Greek Maize’) [1989] ECR 2979.

national authorities when adopting (criminal) sanctions.²⁷ Nonetheless, the fact that national penalties should be effective, proportionate and dissuasive does not mean that the EU legislator has the competence to harmonize the substantive criteria of what constitutes an effective, proportionate and dissuasive penalty, neither did so the Court in the first place. As a result, this remains an issue to be determined at the national level and in line with national criminal justice policies.²⁸ Finally, to complete the picture of the principles that circumscribe the competence to define criminal sanctions on the national level, the fundamental principles of legality and proportionality are of obvious relevance in this context.²⁹

On the supranational level, the European legislature needs to respect similar general principles. The principles of legality and proportionality are again the obvious examples here, while the principle of subsidiarity is relevant to draw the line between the competence of the Member States and the EU.³⁰ What is really important for the supranational legislator though, is the need to respect the national legal traditions of the Member States and, in this context, the sensitive character that criminal legislation has for national sovereignty. The need to respect national identity stems from article 4(2) TEU, read in accordance with article 67(1) TFEU, which provides that ‘the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’.³¹ Based on the above, the elements that ought to guide the supranational legislator when adopting measures on criminal sanctions are nicely summarized by Irene Wieczorek, who argues that EU rules on sentencing should adhere to three key aspects: legitimate aim, respect for fundamental rights, proportionality with regards to national autonomy.³²

To conclude, it stems from the above that the adoption of minimum rules on sanctions should not be understood as merely referring to the definition of penalty levels for specific offences. No matter how limited the competence to approximate penalties is, it entails streamlining certain key characteristics to which criminal sanctions should adhere.³³ All in all, EU law – may that be primary, secondary, or case law – establishes specific criteria for the sanctions that should be provided under national law. In that sense, the notion of minimum rules on sanctions constitutes a broader concept – an umbrella term – that should not be confused with the adoption of *stricto sensu* minimum sanctions or minimum-maximum sanctions. The European legislator adopts minimum rules that are primarily addressed to the national legislator, who is responsible to ensure that the envisaged penalties for the common EU offences are *at least* at the same minimum level with the rest of the Member States.

The approximation of penalties under article 83 TFEU: A cookie-cutter approach

Following the textual interpretation of article 83 TFEU and the depiction of the EU’s competence in the field of criminal sanctions, what needs to be done next is to explore the strategy of the European

27. For an elaborate analysis of the Greek Maize case, see Fabio Giuffrida (n 23) and Rosaria Sicurella, ‘The Greek Maize case: From Sincere Cooperation to Criminal Law Integration in the EU’ in Valsamis Mitsilegas et al. (n 23); 122-135.

28. Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (n 7).

29. Article 49 of the EU Charter of Fundamental Rights.

30. Article 5(3) TEU.

31. Article 67(1) TFEU.

32. Irene Wieczorek, ‘EU constitutional limits to the Europeanization of punishment: A case study on offenders’ rehabilitation’, *Maastricht Journal of European and Comparative Law* [2018] 655.

33. In this context, the work of Jacob Oberg on the definition of criminal sanctions in EU law is highly relevant. See, Jacob Oberg, ‘The definition of criminal sanctions in the EU’, *European Criminal Law Review* (2013) 3: 273.

legislature towards the approximation of criminal sanctions. In the post-Lisbon era, eleven substantive criminal law instruments have been adopted under the legal basis of article 83 TFEU,³⁴ with nine of them incorporating provisions that seek to approximate criminal sanctions in the EU.³⁵

A systematic analysis of these Directives reveals that the approach followed by the European legislator is nearly identical in all cases. Leaving momentarily aside the level of penalties,³⁶ the legislator defines criminal sanctions as follows: after the first article of each Directive that defines its subject matter and reaffirms that the purpose of the adopted instrument is to establish ‘minimum rules concerning the definition of criminal offences and sanctions’, the EU legislator dedicates a separate article to the definition of criminal sanctions, which usually bears the title ‘penalties for natural persons’.³⁷ The first paragraph often codifies the *Greek Maize* criteria, namely the requirement for ‘effective, proportionate, and dissuasive’ penalties. The remaining paragraphs are reserved for the definition of the specific level of penalties that Member States are required to adopt in response to the offences being criminalized under the same Directive. Finally, a separate article provides for the liability of legal persons, which may or may not include the imposition of criminal sanctions.

In all these cases, the definition of criminal sanctions takes the form of establishing minimum-maximum penalties. As it was already discussed, this slightly confusing pun means that the legislator determines the lowest threshold of the maximum penalty for a specific offence, while leaving the upper limit open to the discretion of the national legislator. The formula of the EU legislator is usually captured by the use of the phrase ‘punishable by a maximum term of imprisonment of *at least* xx years’.³⁸ With the key word here being the word ‘at least’, the EU legislator limits the approximation of criminal sanctions to the determination of the lowest possible upper limit of the envisaged penalty for a specific criminal offence. This approach means that when the supranational legislator establishes a minimum-maximum penalty of *n*-years of imprisonment, Member States are required to prescribe *at least n*-years of imprisonment for the same offence,

34. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ L 101 [2011]; Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, OJ L 335 [2011]; Directive 2013/40/EU on attacks against information systems, OJ L 218 [2013]; Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127 [2014]; Directive 2014/57/EU on criminal sanctions for market abuse, OJ L 173 [2014]; Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting by criminal law, OJ L 151 [2014]; Directive 2017/541/EU on combating terrorism, OJ L 88 [2017]; Directive 2017/1371/EU on the fight against fraud to the Union’s financial interests by means of criminal law, OJ L 198 [2017]; Directive 2017/2103/EU amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of ‘drug’, OJ L 305 [2017]; Directive 2018/1673/EU on combating money laundering by criminal law, OJ L 284 [2018]; Directive 2019/713/EU on combating fraud and counterfeiting of non-cash means of payment, OJ L 123 [2019].

35. With the exception of Directive 2014/42/EU and Directive 2017/2103/EU, all the remaining instruments establish minimum rules on the definition of criminal sanctions.

36. For an overview of the different levels of penalties in the EU, see Athina Gianakkoula, ‘Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted: Future Perspectives and Proposals’ (2015) European Criminal Law Review 5: 133.

37. Although the wording of article 83 TFEU refers to criminal sanctions and the same wording is followed when defining the subject matter of a Directive, the EU legislator prefers in most cases the use of the term ‘penalties’ when defining the minimum-maximum sentence for a specific offence. Apparently, the terms ‘criminal sanctions’, ‘penalties’ and ‘sentences’ are used interchangeably by the EU legislature and the same approach is followed in this paper.

38. Indeed, similar phrasings can be found in all the relevant instruments that are being discussed here. See, for instance, the wording of article 15 of Directive 2017/541/EU that refers to ‘a maximum sentence of *not less than* 15 years’ (emphasis added).

whereas the adoption of a maximum sentence of $n+1$ is possible, contrary to the adoption of a maximum sentence of $n-1$ years that goes against the will of the supranational legislator.

A closer look at the adopted Directives confirms the above conclusion, with all the relevant instruments introducing minimum-maximum penalties. A slightly nuanced approach was followed by the legislator in Directive 2014/62/EU,³⁹ where article 5(2) mentions that certain offences criminalized in the Directive ‘shall be punishable by a maximum sanction which provides for imprisonment’, without specifying however the term of imprisonment.⁴⁰ Finally, noteworthy is the fact that in all cases the European legislator has opted for making imprisonment the to-go penalty for the basic offence that is being criminalized in a Directive. For instance, Directive 2014/62/EU is very elucidating on this matter, as the legislator highlights the strong symbolic and deterrent effect of imprisonment, which should be taken into account when choosing the optimum sanction for cross-border offences. In particular, it is noted that ‘although intentionally passing on counterfeit currency which has been received in good faith *could be sanctioned with a different type of criminal sanction, including fines*, in the national law of the Member States, those national laws should provide for imprisonment as a maximum sanction’, based on the assumption that ‘imprisonment sanctions for natural persons will serve as a strong deterrent for potential criminals, with effect all over the Union’.⁴¹

Studying the Directives that have been adopted under article 83 TFEU reveals some interesting insights about the rationale behind the approximation of criminal sanctions in the EU. Among the main underlying principles lies the assumption that the approximation of criminal sanctions will close the gaps between diverging national provisions that hinder cross-border cooperation or favour the creation of safe-havens within the Union.⁴² With the end goal being the creation of a ‘trust-building’ environment in the borderless AFSJ,⁴³ the adoption of common minimum rules on sanctions is seen as a way to enhance the effective cooperation among Member States. Interestingly, the adoption of minimum-maximum penalties is also seen as a way to support the need for effective and dissuasive penalties. This was noted, for instance, in the Market Abuse Directive, where it is mentioned that ‘in order for the sanctions for the offences referred to in this Directive to be effective and dissuasive, a minimum level for the maximum term of imprisonment should be set in this Directive’.⁴⁴

The standardized approach followed by the European legislator sets clear limits on how far we can go with the approximation of criminal sanctions in the EU. Albeit there is nothing on the text of the Treaties that dictates the confinement of the approximation of criminal sanctions to the boundaries of minimum-maximum sentences, this approach is considered as the golden standard

39. Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting by criminal law [2014] OJ L 151.

40. The same approach is followed in Directive 2017/1371/EU, where article 7(2) dictates that: ‘Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 are *punishable by a maximum penalty which provides for imprisonment*’ (emphasis added).

41. See, recital 17 on the preamble of Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting by criminal law, [2014] OJ L 151.

42. See, for instance, recital 7 on the preamble of the Market Abuse Directive: ‘The absence of common criminal sanction regimes across the Union creates opportunities for perpetrators of market abuse to take advantage of lighter regimes in some Member States. The imposition of criminal sanctions for market abuse will have an increased deterrent effect on potential offenders’. Directive 2014/57/EU on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173.

43. See, Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Bloomsbury Publishing, 2021).

44. Market Abuse Directive (n 41) recital 16.

that reconciles two contradicting objectives: on the one hand the need for a certain degree of harmonization that would facilitate mutual recognition and cross-border cooperation in criminal matters, and on the other hand the need to respect national identity and the importance of criminal sanctioning for national sovereignty. Inevitably, with the determination of the minimum-minimum penalty or the maximum-maximum penalty falling outside the scope of Union's competence, this begs the question to what extent the discretion of Member States to determine those minimum and maximum levels might affect the de facto approximation of criminal sanctions and thereby impede mutual recognition and cross-border cooperation in criminal matters.⁴⁵

From mutual recognition to functional approximation: A two-way street

The discussion around the harmonization of criminal norms in the EU includes a significant segment about the motivational forces behind the Union's competence in the field, namely an interest in discovering the underlying rationale that dictates the EU's approach. Given that a complete overview of the reasons that justify Union-wide harmonization in criminal matters goes well beyond the purpose of this paper, the focus will fall on the distinction between the functional approximation approach and the autonomous or self-standing approximation, which has risen into prominence over the last years.⁴⁶ In brief, the term 'functional approximation' implies that the competence of the EU legislator to adopt minimum rules is guided by the need to achieve a broader EU objective in a given field, and therefore any approximation measures appear as a means to an end. On the contrary, by referring to the idea of 'self-standing' or 'autonomous' approximation, what should be understood is that the supranational legislator may proceed with the approximation of criminal norms for autonomous reasons, namely for reasons that are not justified by the need to attain a different objective, but instead rely predominantly on the symbolic functions of criminal law. In the field of substantive criminal law, the distinction between functional and self-standing approximation was introduced by Mitsilegas, who distinguishes between the legal bases of article 83(1) and 83(2) TFEU and argues that article 83(1) TFEU 'reflects the securitised criminalization approach', contrary to the second paragraph of article 83 that illustrates a 'functionalist view of criminal law'.⁴⁷

Based on the above, the competence in the field of criminal sanctions appears slightly paradoxical. Although article 83(1) TFEU constitutes a broad legal basis for the approximation of substantive criminal norms and in that sense embraces the self-standing criminalization approach, the adoption of minimum rules on sanctions remains of functional character. More specifically, it

45. At this point, it is worth mentioning that the element of discretion is inherent to sentencing. As already discussed, sentencing represents the part of the criminal process that entails great individualization and therefore a certain degree of discretion in the determination of sentencing is inevitable. For instance, Wendy de Bondt distinguishes between *in abstracto* and *in concreto* sanctions, with the former referring to the level of penalties provided in the criminal code, and the latter to the sanction imposed ad hoc by the court. Under EU law, there are not any rules that can determine the latter. See, Wendy de Bondt, 'The Missing Link between Necessity and Approximation of Criminal Sanctions in the EU' *European Criminal Law Review* (2014) 4: 147.

46. For an elaborate account of this distinction, see Jannemieke 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', *European journal of crime, criminal law and criminal justice* [2019] 89.

47. Valsamis Mitsilegas, *EU criminal law after Lisbon: rights, trust and the transformation of justice in Europe* (Bloomsbury Publishing, 2016, 58-62).

was already discussed how the adoption of minimum rules on sanctions is intricately linked to the approximation of substantive criminal norms and the criminalization of certain behaviours. In that sense, the European legislator does not enjoy the competence to introduce general rules on sanctions that exceed the mere definition of the level of punishment for a specific offence. This becomes apparent both from the reading of the Treaties, as well as from the systematic analysis of the relevant instruments that have been adopted under article 83 TFEU. As a result, the approximation of criminal sanctions is always complimentary to the criminalization of certain behaviours on the EU level.⁴⁸ The functional character of criminal sanctions becomes even more apparent under the legal basis of article 83(2) TFEU, which enables the legislator to approximate criminal laws and adopt minimum rules regarding the definition of offences and sanctions in order ‘to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures’.⁴⁹ With the *raison d’être* being the need to guarantee the effective implementation of EU law, criminal sanctions adopted under article 83(2) TFEU will always have an instrumental or functional character, wielding criminal law as a sword to ensure the effective implementation on non-criminal legislation.⁵⁰

Asserting the functional character of the approximation of criminal sanctions allows us to further support the argument for the limited scope of the EU’s competence in the field. Based on the distinction between the general and the special part of sentencing,⁵¹ with the former referring to rules applicable to any offence, whereas the latter to rules applicable to specific offences, the competence of the supranational legislator is clearly limited to the special part of sentencing.⁵² Indeed, the EU legislator can introduce minimum rules for the approximation of the special part of sentencing, which take the form of specific minimum and maximum levels of punishment, lacking however a general competence to approximate any other element of sentencing that could include, for instance, the approximation of rules on the execution of sentences.

Would it be an ill-founded assumption to argue that any measure adopted under article 83 TFEU has a subtle functional character that is inherent to the role of mutual recognition as ‘the cornerstone of judicial cooperation criminal matters’? In other words, is it wrong to argue that the scope of approximating criminal provisions is subordinate to the need to facilitate and enhance mutual recognition in the AFSJ? It was already mentioned above how the approximation of criminal norms in the EU is necessary in order to create a ‘trust-building’ environment and facilitate mutual recognition, with the approximation of criminal sanctions being unable to escape this pattern.⁵³ The relationship between minimum harmonization and mutual recognition has gone through various phases before reaching the current state of affairs. In brief, what was initially regarded as two opposing approaches towards cross-border cooperation in criminal

48. Nonetheless, it could be argued that the adoption of criminal sanctions is inevitably instrumental in nature. More specifically, the functional character of criminal sanctions derives from the fundamental principle *nulla poena sine lege praevia*, which dictates that there can be no punishment without a previously adopted law that prohibits certain behaviours. In that sense, the adoption of criminal sanctions will always be annexed to the introduction of specific criminalization provisions.

49. Article 83 (2) TFEU.

50. The adoption of Directive 2014/57/EU on criminal sanctions for market abuse constitutes a prime example of this approach.

51. This distinction is similar to the one described above between *in abstracto* and *in concreto* sanctions (n 44).

52. Asp (n 12).

53. Willems (n 42).

matters has grown into becoming a dialectical ensemble.⁵⁴ It is now acknowledged that a certain degree of approximation of national legislation is necessary – with minimum approximation being the to-go approach – in order to facilitate mutual recognition in criminal matters.

However, the aims and rationales that support mutual recognition and approximation do not coincide entirely. On the one hand, the aim of mutual recognition is to facilitate cross-border cooperation in criminal matters, by ensuring that the flow of judicial decisions in the borderless AFSJ will not hit any obstacles that arise from the differences among the criminal justice systems of the Member States. In other words, the principle of mutual recognition acknowledges, yet overlooks the differences that exist among Member States.⁵⁵ On the other hand, the scope of approximating substantive criminal norms is far more intrusive, as it seeks to eliminate to a certain degree the aforementioned differences. By harmonizing criminal norms throughout the Union, the purpose of the legislator is not merely to ensure smooth cross-border cooperation between Member States, but instead to signal the EU's common response to crime. In that sense, the approximation of criminal offences and sanctions has a strong symbolic and ideological function that is absent from mutual recognition.⁵⁶

Approximation of criminal sanctions in the EU: A lost cause or a wrong cause?

According to Asp, the approximation of penalties in the EU should not only be pursued with extreme cautiousness, but it also needs to be considered as the last step in a long harmonization process.⁵⁷ The present paper attempted to paint the landscape around the EU's competence to approximate criminal sanctions in the European Union. After unravelling the approach of the supranational legislator in the field, it was argued that the functionalist character of the adoption of minimum rules on sanctions precludes a wider competence to approximate sentencing in the EU. Hence, the adoption of minimum-maximum penalties proves to be lopsided and shortsighted, failing to account for substantive factors that shape the sentencing regime on the national level.

Even though the canned approach of the EU legislator appears tried-and-true, this does not mean that it is shielded from any criticism. In the remaining paragraphs of this study, the EU's approach towards the approximation of criminal sanctions will be examined through a reflective lens. The main points of concern unfold around the justification of the practical added value of the current approach,⁵⁸ as well as around the unintended consequences that the implementation of minimum rules on sanctions has on domestic criminal law.

54. For a discussion on the relationship between harmonization and mutual recognition, see Annika Suominen, 'The Sensitive Relationship Between the Different Means of Legal Interpretation: Mutual Recognition and Approximation' in Chloe Briere and Anne Weyembergh (eds.), *The Needed Balances in EU Criminal Law* (Bloomsbury Publishing, 2018: 165-184).

55. Klip (n 15) 26.

56. The European Commission is very clear on the matter: 'By defining common offences and penalties in relation to certain forms of crime, the Union would be putting out a symbolic message. The approximation of penalties would help to give the general public a shared sense of justice, which is one of the conditions for establishing the area of freedom, security and justice. It would also be a clear signal that certain forms of conduct are unacceptable and punished on an equivalent basis' See, COM(2004)334 final.

57. Asp, n 12.

58. However, demonstrating the exact effect that the adoption of common minimum rules on sanctions has on curbing cross-border criminal activities is an extremely difficult task that goes well beyond the scope of this paper. See, similar remarks on Peter Csonka and Oliver Landwehr, '10 years after Lisbon. How "Lisbonised" is the Substantive Criminal Law in the EU?' (2019) *Eucrim* 4: 261.

The insistence of the EU legislator in adopting minimum-maximum penalties gives rise to consequences that often go unnoticed, despite the fact that they might disturb the coherence of the national criminal justice system. More specifically, the implementation of EU sanctions can affect the internal logic of domestic criminal legislation and lead to the fragmentation of domestic codifications. In this context, the implementation of minimum-maximum penalties messes significantly with the proportionality of sentences and offences on the national level.⁵⁹ This is particularly evident in Member States that in general provide for lower sentences than the ones adopted on the supranational level.⁶⁰ Inevitably, this leads to a subsequent increase in punitiveness across the EU.⁶¹ Although the establishment of minimum rules on sanctions and the adoption of common minimum-maximum penalties should not result in an EU-wide increase of the level of penalties, unfortunately this is not always the case.⁶²

Considering the side-consequences that the adoption of minimum-maximum sentences brings along, one may reasonably wonder what the alternative is. To date, the most elaborate counter-proposal has been provided by the European Criminal Policy Initiative (ECPI).⁶³ In their study, the ECPI scholars confirm that the approach followed by the EU legislature fails to ensure the desired degree of approximation of criminal sanctions, while it is also hard to measure the effectiveness of this approach.⁶⁴ Building on this conclusion, the research group suggests an alternative that seeks to mitigate the disadvantages of the current system. The key idea behind the so-called ‘new approach’ lies in the pursuit of approximation through the definition of categories of offences. More specifically, the supranational instrument will not introduce a concrete sentence for a specific offence, but instead it will classify specific offences into a predetermined list according to their severity, and Member States would enjoy the discretion to determine the ‘range of penalties’ that should apply for each class of offences.⁶⁵

According to the advocates of this alternative, the added value of this ‘category model’ is that it ensures coherence in sentencing throughout the European Union, while at the same time it shows respect for national sovereignty and for the Member States’ legal traditions.⁶⁶ Although this remains to be seen, it is certainly positive to broaden the discussion and critically reflect upon the current situation regarding sentencing in the EU. For instance, it is vital to consider alternatives that go beyond the mere approximation of the years of imprisonment and nudge the EU legislature to unhinge from the idea of imprisonment as the sole response to crime.⁶⁷

59. According to Satzger, the approximation of criminal sanctions causes in general great implementation problems for the national legislator. See, Helmut Satzger, ‘The Harmonisation of Criminal Sanctions in the European Union: A New Approach’ (2019) *Eucrim* 2:115.

60. Gianakkoula (n 35); Satzger (n 58).

61. See, inter alia, Thomas Elholm, ‘Does EU Criminal Cooperation Necessarily Mean Increased Repression?’ (2009) *European Journal of Crime, Criminal Law and Criminal Justice* 17(3) 191.

62. COM/2011/0573 final (n 14). Instead, according to the Commission, the purpose should be to limit any severe discrepancies among national sentencing regimes and to ensure that the applied sanctions fulfil the requirement of being effective, proportionate and dissuasive.

63. Helmut Satzger (ed), *Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union: Harmonisation of Criminal Sanctions in the European Union* (Nomos Verlag, 2020).

64. Satzger (n 58).

65. Ibid.

66. Ibid.

67. According to Wendy de Bondt (n 44), the EU legislator predominantly understands sanctions as meaning deprivation of liberty.

Even if we insist on the strong deterrent effect of imprisonment, then the discussion on the approximation of sanctions should take into serious consideration an additional variable: detention conditions. The great disparity regarding detention conditions in the EU has proven to raise obstacles to mutual recognition in the AFSJ, hinders cross-border cooperation and, most importantly, threatens the prisoner's fundamental rights.⁶⁸ For instance, in the context of the transferring of prisoners in the EU, the non-harmonized rules regarding the execution of a sentence and the discrepancies in detention conditions raise serious concerns. From the point of view of the approximation of criminal sanctions, detention conditions are also a decisive variable.⁶⁹ To put it simply, albeit the length of a given sentence might be similar in numerical terms, the execution of the sentence and the associated pains of imprisonment depend enormously on detention conditions. The assumption here is simple: serving five years of imprisonment in a detention facility that respects fundamental rights and guarantees high standards is quite different from serving exactly the same years in a facility that fails to provide fair and acceptable detention conditions. In that sense, the approximation of criminal sanctions in the EU, and especially the approximation of sanctions that involve deprivation of liberty, stops at the prison gate.

Although these thoughts remain somewhat abstract and go well beyond the normative framework of the Treaties, it is necessary to introduce such considerations to the public discussion about the approximation of criminal sanctions in the EU, with an open eye to the future developments in the Area of Freedom, Security and Justice. Eduardo Galeano used to refer to Utopia as the force that urges us to move forward, to advance. In the same sense, no matter how far-fetched some of these thoughts might sound, we should be able to listen to them, if we want to move towards a more fair and respectful criminal justice system – national or supranational – that will disengage from the idea of increased securitization and will reinstate justice and fairness as the core elements between freedom and security.

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68. See, Leandro Mancano, 'Storming the Bastille: Detention conditions, the right to liberty and the case for approximation in EU law' (2019) *Common Market Law Review* 56(1):61.

69. For an overview of the discussion regarding detention conditions in the EU and the possible ways to mitigate national differences on that matter, see Christos Papachristopoulos, 'Shaping the Future of Europe in Prisons: Challenges and Opportunities' (2021) 1 *European Papers - A Journal on Law and Integration* 311.