Universiteit Leiden
The Netherlands

The unresolved tension between the approximation of criminal norms in the EU and the question of national discretion: what is the role of minimum rules in EU criminal law?

Zoumpoulakis, K.

Citation

Zoumpoulakis, K. (2022). The unresolved tension between the approximation of criminal norms in the EU and the question of national discretion: what is the role of minimum rules in EU criminal law? *Boom Strafblad*, *3*(6), 315-318. doi:10.5553/BSb/266669012022005006021

Version: Publisher's Version
License: Leiden University Non-exclusive license
Downloaded from: https://hdl.handle.net/1887/3564391

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

Dit artikel uit Boom Strafblad is gepubliceerd door Boom juridisch en is bestemd voor Universiteit Leiden

Article

The unresolved tension between the approximation of criminal norms in the EU and the question of national discretion

What is the role of minimum rules in EU criminal law?

K. (Konstantinos) Zoumpoulakis LLM, MSc*

1. Introduction

The discussion about the adoption of criminal norms does no longer take place on a purely national level. Indeed, the competence of the European Union to legislate on criminal matters has shifted the traditional paradigm of domestic criminal law. The emergence of EU criminal law as a distinctive field in the intersection between EU law and criminal law brings along the need to define and interpret new concepts, and understand the ways in which supranational criminal law provisions affect the national criminal justice system.

Following the entry into force of the Lisbon Treaty, the European legislator is competent to adopt Directives that seek to approximate substantive criminal norms, procedural rights, and criminal sanctions throughout the Union. The approximation process is fulfilled through the adoption of minimum rules that introduce criminal norms on the EU level and create the obligation for Member States to implement these provisions in their respective jurisdictions. Yet, little is known about the meaning of minimum rules, namely about the particular characteristics that make a rule 'minimum', as well as about the obligations they create and the room for manoeuvre they leave to the national legislator.

This paper seeks to present some of the key ideas that steer my doctoral research project on the use of minimum rules in EU criminal law. While tracing the developments around the vague concept of minimum rules from both a normative and a comparative perspective, the question of national discretion emerged as a fundamental question in need for a clear and comprehensive answer. Hence, this paper will try to highlight the importance of national discretion for safeguarding the internal coherence of domestic criminal justice systems, without however raising disproportionate obstacles to mutual recognition and cross-border cooperation in criminal matters.

2. The rationale behind the adoption of minimum rules in EU criminal law

The traditional link between criminal law and national sovereignty has been discussed on numerous occasions so far. The fact that Member States consider criminal law to be an intrinsic part of their sovereignty was the reason that criminal law was kept outside the initial competences of the EU. It was only when it became

* Konstantinos Zoumpoulakis is PhD Candidate at Leiden Law School, Institute of Criminal Law & Criminology. The hereby presented doctoral research is carried out under the supervision of Professor Jannemieke Ouwerkerk and Judit Altena.

doi: 10.5553/BSb/266669012022005006021

Dit artikel uit Boom Strafblad is gepubliceerd door Boom juridisch en is bestemd voor Universiteit Leiden

apparent that the establishment of a common market without internal borders brings along increased cross-border criminal activities, that Member States decided on the need to adopt rules that would effectively combat crime on a common basis. Under the current legal framework, the competence of the supranational legislator to approximate criminal norms in the EU extends to both substantive and procedural criminal law. Both Articles 82 and 83 TFEU recognize the role of minimum rules as the sole harmonizing tool at the hands of the legislator. Yet, as it will become apparent below, the envisaged approach differs between substantive and procedural criminal law.

Regarding the approximation of procedural criminal law, Article 82(2) TFEU stipulates:

> '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.'[1]

A close reading of the aforementioned provision reveals that the adoption of procedural minimum rules has a clear functional character, since the scope of approximating procedural safeguards in the EU is subordinate to the need to facilitate mutual recognition and cross-border cooperation.[2] As a result, the supranational legislator does not have a self-standing competence to enhance procedural rights throughout the Union.

On the contrary, the legal basis of Article 83 TFEU appears to be broader.[3] More specifically, Article 83(1) TFEU provides:

> '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.'[4]

The lack of an explicit link to further legislative objectives, such as the need to facilitate mutual recognition, implies that the EU enjoys a broad, autonomous competence to approximate substantive criminal norms throughout the Union. A clear example of this broader reading of Article 83(1) TFEU can be found on the recent initiatives of the European Commission to criminalize gender-based violence or hate speech on an EU level.[5]

Despite the different approach, an overarching question seems relevant in both cases: why *minimum* rules though? The answer to this question lies on the aforementioned link between criminal law and national sovereignty. The adoption of EU-wide minimum rules demonstrates the effort of the European Union to create the common legal language for Member States, without however being too invasive and disrespectful to the different legal traditions in the EU.[6] In that sense, the concept of minimum rules represents a compromise between the need for an effective common response to crime and the need to respect the sensitive character that criminal law has for national sovereignty.

Following the research on the use of minimum rules in EU (criminal) law, which included the systematic study of almost 12,000 legal and policy documents relevant to this ambiguous concept, it was possible to dismantle the concept of minimum rules into three constituent elements: (i) scope of adoption; (ii) temporal application; (iii) national discretion. For the purpose of this paper, the emphasis will be given to the element of discretion, which raises the greatest interpretative challenges and has significant implications for domestic criminal law. Before moving to the question of national discretion though, a few words will be offered regarding the remaining two elements of the concept of minimum rules, which, together with national discretion, form the analytical tool that guides the discussion in the doctoral thesis.

To begin with, the adoption of minimum rules supports either a functional or an autonomous legislative objective, with both these objectives being relevant for the justification of minimum rules in the first place. On the one hand, the functional character of minimum rules suggests that the adoption of minimum harmonization provisions seeks to support and facilitate a different legislative or policy aim than the mere approximation of criminal norms.[7] In other words, functional minimum rules constitute a means to an end. On the contrary, the autonomous character of minimum rules suggests that EU-wide criminal provisions may be adopted for self-standing reasons, supporting *inter alia* the expres-

1 Art. 82, para. 2 TFEU.

2 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', *European Journal of Crime, Criminal Law and Criminal Justice* 27(2), p. 89-96.

3 A. Klip, *European Criminal Law: An Integrative Approach*, Intersentia, Antwerp 2016; p. 181.

4 Art. 83, para. 1 TFEU.

5 See, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 final; and Communication from the Commission to the European Parliament and the Council, 'A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime', COM/2021/777 final.

6 See also Art. 67, para. 1 TFEU, which provides: '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.'

7 The most prominent example is the adoption of Directives on procedural rights, since their functional character is already grounded on the text of Art. 82 TFEU.

doi: 10.5553/BSb/266669012022005006021

Dit artikel uit Boom Strafblad is gepubliceerd door Boom juridisch en is bestemd voor Universiteit Leiden

sive dimension of EU criminal law.[8] Finally, the temporal application of minimum rules is less relevant to the context of criminal law, since it refers to the possibility of paving the way towards maximum harmonization provisions; a possibility that is not foreseeable under the current legal framework.

3. Minimum rules and the question of national discretion

It should be clear by now that the question of national discretion is essential for our understanding of the extent of the EU's competence to approximate criminal norms throughout the Union. What should be understood as 'national discretion' is the degree of 'freedom' that national authorities enjoy when implementing minimum rules in their respective jurisdictions. Determining whether Member States are able to deviate from EU-wide rules and adopt criminal provisions that go beyond the common minimum standards is crucial for comprehending the interplay between national and supranational criminal law.

Following a close reading of Articles 82 and 83 TFEU, it becomes apparent that the text of the Treaty does not limit the discretion of Member States to go beyond minimum rules. Indeed, the textual interpretation of minimum rules cannot support any argument for limiting national discretion. On the contrary, in the case of procedural criminal law, the Treaty seems to favour the discretion of Member States to adopt higher procedural safeguards.[9] Hence, minimum rules provide the common ground upon which Member States can build their criminal justice system. However, affirming that Member States should be *in principle* able to go beyond minimum rules does not mean that their discretion does not have concrete limits.

It was mentioned above that the supranational legislator follows a different approach between substantive and procedural criminal law. The key difference is highlighted by the last segment of Article 82(2) TFEU, which provides that the adoption of minimum rules 'shall take into account the differences between the legal traditions and systems of the Member State', and it 'shall not prevent Member States from maintaining or introducing a higher level of protection for individuals'. At this point, the text of the Treaty introduces clear guidelines for the supranational legislator and acknowledges that the adoption of minimum rules constitutes a one-directional requirement without upper limits.[10] However, when it comes to substantive criminal law, such an explicit reference to the discretion of Member States to go beyond minimum rules is missing.

Although the academic debate that focuses on the use of minimum rules in criminal law is limited and sporadic, it has rightly highlighted the question of national discretion as an important one. Most of the contributions discuss the use of minimum rules in relation to substantive criminal law, whereas it appears to be a consensus regarding the use of the concept *vis-à-vis* procedural rights. Briefly, the main viewpoints can be summarized into three distinctive categories. On the one hand, there are those who argue that minimum rules should be understood literally, therefore entailing nothing more than what the word 'minimum' suggests, and allowing Member States to surpass them.[11] On the other hand, it has been argued that minimum rules should be interpreted as *de facto* maximum rules, prohibiting Member States from adopting more far-reaching provisions.[12] Finally, a more moderate interpretation of minimum rules suggests that, although a first reading confirms that there are indeed minimum provisions that can be supplemented, there are other factors that come into play and limit the discretion of Member States to go beyond them.[13]

Despite the academic consensus on the fact that minimum rules in the field of procedural criminal law should allow Member States to implement higher procedural standards, this conclusion does not seem to take into account all the relevant factors that may indeed limit national discretion. Briefly, these limits arise from the functional character of minimum rules in the context of procedural criminal law, as well as from their position within the overall constitutional architecture of the European legal order. As a result, any higher procedural safeguards have to fulfil the same objectives as the ones that justified the adoption of minimum rules in the first place and, therefore, cannot raise disproportionate obstacles to the facilitation of mutual recognition and cross-border cooperation. Indeed, this becomes highly relevant in the context of EAW proceedings, where divergent national provisions can hinder the effectiveness of the procedure.[14] Finally, when it comes to substantive

8 On this matter, see T. Elholm & R. Colson, 'The Symbolic Purpose of EU Criminal Law'; in: R. Colson & S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*, Cambridge University Press, 2016, p. 48-64.

9 Art 82, para. 2 TFEU provides: '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.'

10 Most scholars seem to agree that minimum rules in the field of procedural criminal law should be interpreted as establishing a common set of procedural safeguards, which allows Member States to exceed them in order to award a higher level of protection. See, *inter alia*, H.G. Nilsson, 'How to combine minimum rules with maximum legal certainty', *Europarättslig Tidskrift* 2011(14), p. 665-677.

11 P. Asp, *The Substantive Criminal Law Competence of the EU*, Skrifter utgivna av juridiska fakulteten vid Stockholms universitet, 2012 [79], p. 111.

12 H.G. Nilsson 2011 (see footnote 10).

13 A. Klip 2016 (see footnote 3).

14 See, *inter alia*, V. Franssen, 'Melloni as a Wake-up Call: Setting Limits to Higher National Standards of Fundamental Rights' Protection', 2014. Available at: europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/.

Dit artikel uit Boom Strafblad is gepubliceerd door Boom juridisch en is bestemd voor Universiteit Leiden

criminal law, the matter appears even more perplexed, since it is not always clear what it means to 'go beyond' substantive criminal norms. Even if we could agree on the discretion of Member States to go beyond minimum rules in substantive criminal law, then strict limits should apply, arising from the need to respect the fundamental principles of criminal law.[15]

4. Concluding remarks

The concept of minimum rules plays a pivotal role in the harmonization of substantive and procedural criminal law in the European Union. Yet, more light needs to be shed on the matter in order to understand the extent to which the adoption of minimum rules can succeed in approximating divergent national provisions, while respecting at the same time national legal traditions. The lack of consensus about the meaning of minimum rules gives rise to the unavoidable dissensus as to whether Member States can go beyond minimum rules and implement more far-reaching provisions in their respective jurisdictions. This paper sought to present some of the core ideas that steer my research on the use of minimum rules in EU criminal law, while at the same time summarizing the discussion that surrounds the adoption of minimum rules and uncovering the implications of implementing EU-wide criminal provisions into national legislation. Finalizing this research project will add the necessary clarity on a central piece of the Union's approximation competence in criminal matters, clarity that is still missing from the normative foundations of EU criminal law.

15 In substantive criminal law, the discretion of Member States can be also limited by the wording of the adopted EU rules. For instance, the text of Directive 2011/36/EU on preventing and combating trafficking in human beings seems to introduce broad criminalization provisions that do not leave any reasonable room for discretion, without possibly breaching the principle of proportionality.

doi: 10.5553/BSb/266669012022005006021