Bachelor Thesis

Constitutional Assessment of EU Criminal law

The role of National Constitutional Courts between European Integration and the protection of domestic standards of fundamental rights

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CC	Constitution of the Czech Republic
CCC	Czech Constitutional Court
CCFR	Czech Charter of fundamental Rights and Freedom
EUCFR	Charter of fundamental rights of the European Union
EAW	European Arrest Warrant
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FCC	Federal Constitutional Court of the Federal Republic of Germany
GG	Basic Law of the Federal Republic of Germany
PC	Constitution of the Republic of Poland
PCT	Polish Constitutional Tribunal
TEU	Treaty Establishing the European Union
TFEU	Treaty of the Functioning of the European Union

Contents

1.) Introduction

Constitutional traditions of the Member States and the ongoing European legal integration are in a constant state of tension, how to proceed with this process and how to define its boundaries. This becomes extremely relevant in EU Criminal Law within the Area of Freedom, Justice and Security[1] .Acts, based on Criminal Law provisions represent one of the most severe intrusions into the personal sphere of an individual, a sphere protected notably by fundamental right regimes of National Constitutions[2]. Criminal Law was determined as a primary domain of the individual national state, as it has been explicitly stated for example by the German Federal Constitutional Court in its Lisbon Judgment[3].
Therefore, the adequate protection of fundamental rights of European Criminal law comes under scrutiny by National Constitutional Courts as well[4].

The existence of these tensions is quite astonishing, if one takes into account the founding features of the EU legal order. Under the doctrine of supremacy of EU law, EU Law is supposed to prevail in the case with domestic legal acts and provisions, even if they are on the level of the constitution, leading to the non- application of those domestic acts[5]. However the reality is more nuanced than this and, while acting in a more integrationist manner in some occasions[6], the constitutional courts of a number of member states have constantly challenged the aforementioned doctrine, especially in relation to some aspects, causing tensions with national constitutional orders. This is because national courts have always been concerned about potential fundamental rights violations due to the assumed lack of an adequate level of protection on the European Level[7].
In the field of criminal law, fundamental right protection forms a central element of the rule of law including the criminal law related principles of legality and the fair trial principle[8]. In this respect, the treaty of Lisbon[9] incorporated the European Charter of fundamental rights in the framework of primary EU Law next to the ECHR[10].
However, it remains to be seen whether this added protection can guarantee sufficient standards of protection in this field, demanded by national courts or if the Unions conception is so different from the national level that a sufficient protection cannot be guaranteed[11]. This study tries to investigate

[1] Massimo Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?" *European Law Journal* 15/1 (2009): 82; Christina Eckes, "A European Area of Freedom, Security and Justice: A Long Way Ahead?" *In Uppsala Faculty of Law Working Paper* 2011: 6b (2011):8.http://www.jur.uu.se/Forskning/Publikationer/WorkingPapers/tabid/3159; Komarek, J. "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contra punctual Principles." *Common Market Law Review* 44 (2007): 9-14.; Matthias Herdegen. *Europarecht* (München: Beck, 2010), 355-358.
[2] Bodo Pieroth and Bernhard Schlink. *Grundrechte.*(Heidelberg: CF Müller, 2003), 284 -291.; Valsamis Mitsilegas." The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006):1286-1289.
[3]BVerfG, 2BvE2/ 08 (30.6.2009) para. 253, accessed 10.05.12 http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html
[4] Matthias Herdegen. *Europarecht* (München: Beck, 2010), 248-259.
[5] See for the relationship between EU and national legal order Cases: 6/64 [1964] ECR 585 and 106/77 (1978) ECR 629 Both cases accessed 01.05.2012 http://curia.eu/juris
[6] Juliane Kokott. "The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration." *German Law Journal* 11/1 (2010): 99-114. ; Anneli Albi." From the Banana Saga and Beyond: Could the Post-Communist Constitutional Courts Teach the EU A Lesson in the Rule of Law?" *Common Market Law Review* 47 (2011): 791-829.
[7] As an example it is possible to mention the "Solange" Jurisprudence of the FCC
[8] These principles will be further evaluated in Section 2.1.1
[9] European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01,
[10] Art.6 TEU
[11] Even after the latest revision of the legal framework through the Treaty of Lisbon, which included for example the EUCFR into the legislative framework of the EU

potential differences between the conceptions of the EU and the Member States to improve the perception of this sensitive field of policy.

1.1) Research question

This study will analyze the perception of fundamental right protection between Constitutional Courts and the ECJ in relation to criminal matters, investigating the standard of the particular fundamental right protection systems on both levels. Therefore the following research question will be addressed:

To what extent are the tensions between constitutional courts towards EU criminal law justified in relation to human right protection?

The question rests on the assumption that national constitutional courts influence the European Legal Order, due to the emphasis of national sovereignty issues in the context of the transfer of national competences to the EU level. National Constitutional Courts occupy a position within the domestic legal order that enables them to review domestic legal acts concerning their compliance to national constitutional standards. In the case of a non- compliance, when a violation of constitutional provisions is assumed by the court, the particular legal acts might be declared void by the specific court[12]. Within this context the protection of fundamental rights, codified in the particular national constitutions, plays an important role. National Constitutional Courts evaluate legal acts under review on the basis of these provisions. The scope of review is extended up to every kind of constitutional activity, also including aspects, like the transfer of sovereign rights to a supranational entity like the EU[13]. Therefore Constitutional courts act as the highest and last judicial instances in this aspect, often establishing through their case law effective systems of judicial protection. However, these domestic developed protection regimes are also capable of finding their way up to the EU Level, which can be seen in Art.6 of the TEU. Art. 6 (3) recognizes constitutional traditions of the Member States as sources of EU Law, leading to the fact that Constitutional Courts, which played essential roles in the development of these traditions, might influence for example through domestic jurisprudence the further development of the EU Legal order. This inclusion within the European Legal system might be seen as an indication of an integrated system of EU Law, which would make the existence of constitutional tensions even more remarkable.

1.2) Case Selection

In the context of the study, the European Level is described via the analysis of the relevant legal case law of the ECJ within the European Union framework, whereas the national system is represented via an analysis of national constitutional courts jurisprudence.

The ECJ cases have been selected under the aspect of application of instruments of European Criminal Law like the European Arrest Warrant[14] as the most relevant instrument in this context[15].
The selection of constitutional courts for the illustration of the Member States protection level is based on the importance of Constitutional courts in the shaping of national fundamental right

[12] See for example §78 of the German Federal Constitutional Court Act as a codification of this principle.
[13] See for example Art.23 GG
[14] 2002/584/JHA OJ L190, 18/07/2002 P.0001-0020
[15] The relevance is caused by the fact that the EAW introduced the principle of Mutual recognition for the first time within an actual instrument of European Criminal Law and still forms one of its major fields of application.

protection regimes[16]. This has taken into consideration three courts that have recently discussed the topic. The German federal constitutional court represents one of the most active and influential Courts in today's legal context, due to its prominent role as a custodian of domestic fundamental rights and its sometimes controversial case-law on EU Integration[17]. The Czech and the Polish Constitutional Courts as representatives of Eastern European Constitutional activism, being influenced in the institutional set-up by the German system[18], became active participants in this discussion as well, emphasizing in particular the importance of newly acquired sovereign rights for these countries.

Therefore it is interesting to observe the degree of judicial activism and the reasoning behind of it in the field of criminal law from the point of view of a Court with a long established Constitutional review tradition and two courts from countries, where Constitutional review was installed recently.

1.3) Thesis outline

The following study investigates the status quo of the fundamental right protection regimes[19] in Criminal matters within the European Union to clarify, if the existing regimes form a coherent European system or if they differ in substantial terms, leading towards a more fragmented approach. To measure the scope of the these protection regimes, concepts essential for criminal law, like the legality principle or the fair trial principle will be applied on the two perceptions of fundamental rights to investigate the aforementioned potential differences between the particular courts conceptions of fundamental right protection. This question is answered via a cross-sectional study to identify possible differences and similarities in the conception of the ECJ in contrast to national constitutional courts. The study will analyze the relevant provisions of the legal framework and the corresponding case law of the ECJ to determine the status quo of fundamental right protection on the European Level on the other hand and the most important cases of three European Constitutional Courts to illustrate the fundamental right protection regime on the Member State Level. The activism of these courts is compared in the light of the decisions concerning the European Arrest Warrant and the Treaty of Lisbon, which are essential verdicts for the field of European Criminal Law. Due to the sensitivity of this area, the study is relevant to determine if there is a lack of coherence in fundamental right protection within the European Union. A potential incoherence in this regard could limit the further development of European Criminal Law. Constitutional Courts, evaluating the EU provisions as not sufficient enough in relation to domestic protection standards might give up their actual reluctance to review EU legal acts and change to a more participatory role, resulting in a possible de facto mitigation of further EU legal integration. Hence, these courts would move from a mere function of a "Watchdog" to a more active player in legal questions. Consequently the application of a common standard of fundamental right protection within the EU would become even more difficult.

[16]Daniel Halberstam and Christoph Möllers, "The German Constitutional Court says "Ja zu Deutschland!" *German Law Journal* 10/8 (2009): 1-13.

[17] In this context, it is possible to mention the mixxed reactions, caused by the Lisbon Judgment of the Court.

[18] Michal Bobek, "The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance." *European Public Law* 16/2 (2010): 251 -270.; Rainer Wahl, "Das Bundesverfassungsgericht im europäischen und internationalen Umfeld." *Aus Politik und Zeitgeschichte* (2001): 45-54.

[19]In this context, this means the multi-level fundamental right protection system in Europe (cited in Art.6 of the TEU), consisting of the ECHR framework, the fundamental right protection within the EU in the Charter of fundamental rights and the fundamental right protection system on the level of the Member States

To determine the scope of the fundamental right protection status quo on the European Level, as a first step an analysis of the Primary legislative framework will be conducted. This analysis will lay its focus on the relevant provisions of the Treaty of the European Union, the Treaty of the functioning of the European Union, the European Union Charter of Fundamental rights and the European Charter of Human rights. In a second step, relevant case law of the European Court of Justice and the European Court of Human rights will be correlated to the analysis of the primary legislative framework, due to its importance in the forming process of the European Legal order. As a result the analysis will construct a picture of the relevant provisions of the European Union's fundamental right protection regime in criminal matters.

For the determination of the national protection standard, a comparative case study of the jurisprudence of three Constitutional Courts of EU Member States will be conducted. Due to the importance of Constitutional Courts within the protection and development of fundamental rights in national constitutional set-ups, a comparison of the reasoning of these courts will identify patterns, valid for the description of the subject.
After the description of the national protection standard, the two standards will be set in contrast to each other to illustrate potential points of tensions on the one hand and consistencies on the other.

2.) Problem Statement

Initially focusing on predominantly economic issues, the European Legal Integration process advanced into other policy areas during the course of the transition from the ECSC to the present European Union. One of these areas that have been added to the European policy portfolio is the field of criminal law within the EU Area of Freedom, Justice and Security[20].

Criminal Law has always been a domain of the sovereign national state as the only suitable bearer of the monopoly of force within the particular state under the conception of the rule of law[21]. Acts based on criminal law provisions, issued by governmental authorities, represent the most severe potential infringement of an individual's sphere of rights. Therefore it is an essential requirement for the relationship between the state and its citizens that these acts are founded on legal basis, created in democratic legislative procedures. Legal basis developed in such a procedure guarantee legal certainty for the citizens and represent the highest degree of legitimization for governmental acts in Criminal Law[22]. A non-existence of this kind of democratic legitimization for Criminal Law competences on the EU-level was always been brought forward as a critic against a further expansion of EU competences in this field[23]. Through the introduction of the treaty of Lisbon, this critic is actually no longer valid. Legislative powers of the European Parliament, as the most democratic institution[24] of the EU, were increased in the field of criminal law[25], creating a comparable degree of legitimacy on the EU level.

[20] The foundations of this policy area were introduced with the Treaty of Maastricht in 1992
[21] BVerfG, 2 BvE 2/08 vom 30.6.2009, para.253. accessed 10.05.12 http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html
[22] The Legitimization of EU Criminal Law remains a contested issue on the national level, despite the changes in this context by the Lisbon treaty.
[23] See for example: Valsamis Mitsilegas," The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006):1309 -1312.
[24] Due to the direct elections of the Members of the European Parliament
[25] See Art.82 TFEU: The EP is involved in the adoption of measures in Criminal Law through the ordinary legislative procedure of Art.289,294 TFEU

The European legal integration process created new challenges in this relationship between effective criminal law provisions and rights of the suspected. Instruments in the field of European Criminal Law came under scrutiny of national constitutional courts, claiming that those instruments might violate national constitutional guarantees[26]. Concerns were explicitly mentioned in terms of potential fundamental right violations of defendant's rights, disregarding central elements of criminal law like the principles of fair trial or the principle of legality[27]. Critics of EU Criminal Law argue that the fundamental right protection guarantees of the EU might not fulfill, demands issued by national constitutional courts, causing questions of the substantive legality of EU criminal actions itself[28].

Before evaluating the tensions that might arise out of the two potential different perceptions of fundamental rights, the relevant concepts behind the EU and the national fundamental right protection level will be presented.

2.1) The Area of Freedom, Justice and Security

Besides the EU internal market project, the creation of the AFSJ became a further cornerstone of European Integration, due to the fact that the creation of an economic area of free movement must not lead to the abuse of these rights[29]. The Treaty of Lisbon abolished the former pillar structure and included Justice and Home affairs law[30], now officially retitled as the Area of Freedom, Justice and Security, under the former Community pillar. All topics[31] related to the AFSJ have been regrouped in the Treaty of the functioning of the European Union. This relocation from an intergovernmental oriented type of policy towards a more supranational approach opened up the full jurisdiction[32] of the European Court of Justice, a feature not existent under the former pillarization[33].

Within the AFSJ, a special focus shall be laid on the coordination and cooperation in judicial matters, especially in the field of Criminal Law[34]. Moreover this coordination focus is stressed in Art 72 TFEU, assigning the responsibility for the maintenance of the domestic public order to the Member states. Although the review competences of the ECJ had been increased through the Lisbon treaty, a direct review of domestic criminal law enforcement is still not possible[35], limiting the de facto influence of the ECJ in the review of criminal matters.

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[26] In particular the European Arrest Warrant, which led to Case Law concerning its constitutional validity in front of several Member States Constitutional Courts

[27] See for example: Valsamis Mitsilegas, " The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1277-1311.

[28] Sandra Lavenex and Wolfgang Wagner, "Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice." *European Security* 16 (2007): 234 -237. In this context the perception of the EU activities in Criminal law differs between the European level, which sees the EU activities more like a kind of legal forum and the Member State level, were concerns are being brought forward that the expansion of EU criminal Law competences are at the expense of the Member States.

[29] The importance of the AFSJ project can be seen in a reference to the primary legislative framework of the EU, where it is stated in Art.3 (2) of the TEU that it is a major goal of the EU to provide its citizens an area of freedom, justice and security. It is noticeable that the wording and the systematic context of Art.3 TEU implies that provisions of the AFSJ are mentioned before the aim of the single market or the monetary union, underlining the importance for the whole conception of the European Legal order.

[30] As introduced in the treaty of Maastricht as first codification of Justice and Home affairs law

[31] Asylum law, judicial cooperation in civil and criminal matters and police cooperation

[32] Nevertheless , Art. 276 TFEU still limits the jurisdiction of the ECJ in certain areas, regarding measures of internal security on the Member State level

[33] Before the Treaty of Lisbon, Justice and Home Affairs Law formed the intergovernmental governed third pillar, which was not part of the full jurisdiction of the ECJ. ; see also Steve Peers. *EU Justice and Home affairs Law.* (*Oxford*: OUP, 2011.)

[34] Art.67 (3) TFEU

[35] Art. 276 TFEU

Focusing in this study on criminal law[36], the new AFSJ institutionalization assigned additional competences in relation to criminal matters to the EU with the result of increasing the number of potential tensions with national courts.[37] For the first time the European Union is granted in Art.83 (1) TFEU an explicit competence in criminal matters. Together with the codified principle of mutual recognition in Art.82 (1) TFEU and the corresponding competences to harmonize procedural measures for the mutual acceptance of decisions in criminal matters in Art.82 (2) TFEU, this competence expansion of the EU affects areas of national constitutional guarantees. In this context it is important to clarify that the status quo of EU criminal law regulates in its majority cooperative measures. Substantive elements of criminal Law are still regulated on the Member State level[38]. Measures based on Art.82 TFEU further regulate rather minimum standards in criminal law cooperation. Therefore Member States still have the possibility to implement measures as for example in procedural law, which might exceed measures adopted on the EU Level[39]. Moreover, it is necessary to mention that the scope of the EU Criminal law competences can be further limited. Art.82 and Art.83 TFEU include a so called emergency brake, which can be invoked by Member States if they fear that fundamental guarantees of the national criminal legal order are jeopardized by EU measures[40]. These provisions can be interpreted in a way that the EU legislator recognized the potential of tensions within Criminal law and tried to exclude further accentuation of tensions via the application of a rather incremental approach towards the topic[41].

Nevertheless the Europeanization of Criminal Law not only affects the EU – Member State relation, but also poses within the EU the issue of the balance between considerations of security versus the conservation of fundamental rights of the Individual. And while the EU tends to meet security concerns, caused by the cross border capacity of criminal judgments without adequate judicial review[42], rights of the rights of the individual concerning criminal charge, trials and sentences remained the domain of the national level[43]. It also remains doubtful if the necessary degree of mutual trust as a precondition for mutual recognition exists between the Member States[44]. Therefore the issue of an effective protection of individual fundamental rights, especially in relation to defendants' rights still continues to be a controversial topic between promoters of a further expansion of the AFSJ and European Criminal Law and the more reluctant point of view, issued especially by national constitutional courts, being in fear of a mitigation of national standards.

Following the impact of EU Criminal law on the national level, a general conception of the implication of fundamental rights in relation to criminal law will be presented.

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[36] Art.82 pp. TFEU

[37] Especially in the relation to the perpetuation of fundamental rights; Steve Peers, "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon." *Common Market Law Review* 48 (2011): 661 – 693.

[38] Especially the procedural elements or the amount of detention in criminal judgments; Steve Peers, "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon." *Common Market Law Review* 48 (2011): 661 – 693.

[39] Art.82 (2) TFEU

[40] In the Lisbon judgment, the FCC explicitly stated that these rights must be invoked, when demanded by the German parliament, representing a safeguard on the national level.

[41] Which is in contrast to a straight forward approach of complete harmonization of substantive and procedural law at the expense of the individual Member States

[42] Sandra Lavenex and Wolfgang Wagner, "Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice." *European Security* 16 (2007): 234 -237

[43] Valsamis Mitsilegas, " The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1277-1311.; Steve Peers, "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon." *Common Market Law Review* 48 (2011): 661 – 693.

[44] As seen in various proceedings in front of constitutional courts in relation to the EAW framework decision.

2.1.1) Fundamental rights as rights of the individual against the state in relation to criminal law

Fundamental rights in relation to criminal law often receive special attention at constitutional level. These rights have often been codified in specific catalogues of fundamental rights, incorporated into the national constitutional context[45]. Governments are bound and limited in their actions by those provisions granted by the specific fundamental right, caused by the fact that those rights are being considered as a superior legal source than the ordinary law[46]. Infringements of these constitutionally granted rights are only possible in states acting under the rule of law if the essential content of the right in question is going to be preserved and the constraint is based on a constitutional law as well[47].

Many of the specific rights have been deduced out of certain fundamental principles of constitutional importance, often being part of a fundamental right concordant interpretation by Constitutional courts. The first relevant principle is the so called principle of *Legality*. Being central under the rule of law, the principle of legality requires that every piece of law has to be clearly formulated, from a non-retro perspective and has to establish legal certainty for the concerned subjects of the particular legal act[48]. Subjects to the law must have the possibility to rely on established legal environments, without living in fear that this environment will be altered in a retrospectively way, which leads to a renunciation from the prior established law. In the context of criminal law, the legality principle is expressed via the phrases "*Nullem crimen, nulla poena sine praevia lege poenali*" (No crime and no punishment without a pre-existing penal law), "*Nulla poena sine lege*" (no penalty without law) and "*nullem crimen sine lege*" (no crime without law). A breach of any of these phrases would therefore constitute a violation of the principle of legality[49].

A second important concept, relevant for fundamental right protection in relation to criminal matters is the so called *fair trial* principle, codified for example in Art.6 of the European Convention on Human rights or Art.20 (3) GG. The main aim of the fair trial principle is to ensure the guarantee of a certain standard in criminal proceedings to rule out any possibility of fundamental right violation of the involved parties. Examples of fair trial rights include inter alia the right of legal protection and legal remedies against state interference or the claim for the legally competent judge. To summarize it, a fair trial should ensure an adequate administration of judicial activities[50].

Many legal scholars issued questions if comparable criminal law standards could be guaranteed all over the EU. A nonexistence of these standards would pose further questions regarding the existence of a coherent EU system of criminal law[51], especially in terms of the question of the potential legitimization of an application of such differing standards. Indeed this potentially non-existence of common standards would de facto jeopardize concepts like mutual recognition or the application of judicial cooperation instruments like for example the EAW.

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[45] See Art. 1-19 of the German basic law

[46] See "Lüth" decision of the FCC for an explanation of this relationship (BVerfG 1 BvR 400/51) for the relation between constitutional guaranteed fundamental rights and other sources of law.

[47] See for example Art.19 (2) GG – the so called "Wesensgehaltgarantie" of fundamental rights

[48] Armin von Bogdany and Jürgen Bast. *Principles of European Constitutional Law* (München: Beck, 2008.)

[49] Esther Herlin – Karnell," EU Criminal Law Relocated – Recent Developments." *In Uppsala Faculty of Law Working Paper 2011:* 6b (2011). Accessed 28.04.2012 http://uu.diva-portal.org/smash/get/.../FULLTEXT01

[50] D. Chalmers, G. Davies and Giorgio Monti. *European Union Law*. (Cambridge: Cambridge University Press, 2010.); Bodo Pieroth and Bernhard Schlink. *Grundrechte.*(Heidelberg: CF Müller, 2003.)

[51] See for example: Jan Komarek, "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contra punctual Principles." *Common Market Law Review* 44 (2007): 9-40.

2.2) Fundamental right protection regimes in relation to criminal law

Fundamental right protection within the European Union is regulated on a multi-level scale.

The first protection regime individuals can rely on, is formed by the European Charter of Human Rights. Despite the fact that the Charter was not drafted by the European Union itself, individuals can rely on the rights guaranteed by the charter, due to the fact that each of the European Member States became subject to the legal regime of the charter via accession. Furthermore the European Union recognized the provisions of the charter in the primary legal framework as a general principle of European Law, constituting an obligation for every kind of legal act to fulfill demands of the charter[52]. Individuals can invoke these rights in front of the European Court of Human rights in the case of a potential violation via any kind of governmental act. Additionally to the charter, the Lisbon reform treaty included, the in the year 2000 adopted, Charter of Fundamental rights of the European Union[53]. This Charter was mainly modeled after the European Charter of Human Rights in the scope of its application. In addition to these codified provisions of fundamental right protection, the general principles of the EU Law are further referencing to the constitutional traditions of the Member States as sources for evocable rights. This rather unspecified provision requires a highly degree of legal interpretation in the Courts case law.

Owed to the fact that at the beginning of the European integration process, sensitive policy areas like fundamental right protection on the EU level had been not included within the more economic approach, it took till the 1960s and the famous "Stauder[54]" and "Internationale Handelsgesellschaft[55]" decisions of the ECJ, to put the tensions between the then European Community legal framework and fundamental rights on the agenda for the first time. As a result fundamental right protection began to find its way into the jurisprudence on the European Level[56]. This fact was also supported by the self-perception of the ECJ and the corresponding European Legal order. Caused by the fact that the European Legal order as an autonomous legal order, was established by the ECJ furthermore through its case law[57], based on the doctrines of supremacy and direct effect, this European Legal order became the relevant legal level to judge about the constitutionality of European Law itself, excluding the possibility of legal review conducted on the national level[58].

Through the expansion of the European Union's policy portfolio into more sensitive fundamental right related areas, the question of fundamental right protection emerged on a broader basis. Consequently this seems to be recognized on the European level through the inclusion of the Charter of Fundamental rights into the EU legislative framework and the planed accession of the EU itself to the protection regime of the ECHR.

[52] See Art.6 TEU
[53] Art. 6 TEU
[54] 29/69 [1969] ECR 419 Accessed 01.05.2012 http://curia.eu/juris
[55] 11/70 [1970] ECR 1125 Accessed 01.05.2012 http://curia.eu/juris
[56] Emphasizing the role of the ECJ in this development through its jurisprudence
[57] 26/62 [1963] ECR 1 and 6/64 [1964] ECR 585 Both cases accessed 01.05.2012 http://curia.eu/juris
[58] As stated by the ECJ in the aforementioned cases in note 46

2.2.1) The protection regime of the European Charter of Fundamental Rights

One of the major changes for fundamental right protection occurred via the in-cooperation of the EU Charter of Fundamental Rights through the Treaty of Lisbon in 2009. Art.6 (1) of the TEU states that the Charter will have the same legal value than the founding treaties of the Union. Consequently all actions and legislative acts of the EU Institutions and the Member States, while dealing with the implementation of EU Law, are bound by the provisions of the Charter[59] and have to be evaluated on the specific articles of it.
In addition the scope of the Charter is limited within the competences of the Union Law itself[60], respecting the principle of conferral of Art.4 (1) TEU[61].

The Charter represents the first formal codification of fundamental rights on the European Level, establishing legal certainty concerning this context on the European Level. Due to the legally binding character of the Charter, every infringement of specific provisions of the charter by European Institutions or individual Member States can be challenged in front of the ECJ[62], which simplifies the possibility to take legal actions in disputes with fundamental right relevance.

Judicial rights in relation to criminal matters found their way into the charter as well[63]. These rights have been codified in Art. 47 – Art.50 EUCFR.
Art. 47 EUCFR guarantees the right of access to an effective legal remedy and the guarantee of fair trial. Art. 48 EUCFR includes the presumption of innocence and the right of defense into the European legal framework.
Fundamental principles of criminal law have been further implemented into Art.49 EUCFR as the principle of legality and in Art.50 EUCFR as the principle of *ne bis in idem*. As mentioned before any kind of European legal act has to be evaluated in the light of these newly established standards, opening the way for its application into the AFSJ framework. Nevertheless Art .52 EUCFR allows a restriction of those rights under specific mandatory requirements. Those requirements have to fulfill a test of proportionality[64] before their application.

Consequently the Charter aims to work in accordance to the standards of the European Convention for the protection of human rights[65]. The scope of this harmonization process has to be observed in further proceedings. Despite the fact that the charter certainly represents a step towards the right direction in relation to a European system of fundamental right protection, some critical aspects remain in place. As previously mentioned, the application of the charter is valid in terms of implementation of EU legal acts, binding those acts to the provisions and limitations of the charter.

Therefore it would be quite logic to assume that all Member States are bound to the regime of the charter. Unfortunately this is possibly going to be jeopardized via the opt-out protocols of certain

[59] Art.51 (1)EUCFR
[60] Art.51 (2) EUCFR
[61] This means that there will be no extension of the application of the Charter in relation to Legal acts of the Member States, not being part of the EU Legal framework itself or even the creation of new EU competences in this field. Therefore only legal competences conferred to the Union by the Member States can become subject of legal review.
[62] See: Art. 7 TEU
[63] See for comparison to the national level the procedural guarantees of the German Basic Law ("Justizgrundrechte"): Art.19 (4), 101,103,104.
[64] Proportionality Test acc. Art.52(1) EUCFR
[65] Matthias Herdegen. *Europarecht*. (München: Beck, 2010), 173-174.

Member States[66]. Those opt-outs prevent the full application of the scope of the charter in the signatory Member-States and have been subject of controversial discussion within legal scholarship. One direction argues that the opt-outs constitute a non-application of the whole charter within the particular Member States[67], whereas other scholars tend to assign a mere declaratory character towards the opt-out protocols, resulting in a limited or even no real legal consequence[68]. Nevertheless the existence of the protocols might prevent the establishment of a coherent European space of fundamental right protection. At least it creates potential for mistrust in the existence of a common European standard concerning the topic, relevant for the application within the field of criminal law.

As mentioned before the EUCFR was largely modeled after the conception of the ECHR. Therefore in a next step the regime of this convention in relation to the European fundamental right protection regime and Criminal Law will be presented.

2.2.2) The protection regime of the European Convention on Human Rights

The second important institution for the protection of fundamental rights on the European Level is the European Convention for the protection on human rights.

As mentioned before the EUCFR has been largely modeled after the Convention. The European Union itself is not a party to the ECHR yet, which means that the EU legal order is not directly bonded by the provisions of the ECHR legal framework at the moment.

Nevertheless, the provisions of the Convention unfold its effect in an indirect way onto legislative acts. Firstly, all Member States of the European Union had already become subjects of the regime of the Convention via the signing of bilateral accession agreements and are therefore bound to it. This means that every part of national legislation has to fulfill criteria's of the Convention and must be evaluated in the light of it. Secondly, article 6 TEU affirms that the EU will accede to the Convention in the future, which opens the direct applicability of the conventions provisions regarding EU Law and might eventually lead to the challenge of EU legal acts in front of the ECHR Court.

Consequently, not only the EU is supposed to respect the Convention by virtue of article 6 TEU, but also the Member States when implementing European Law are therefore bound to respect the convention and are in principle amenable to the law in front of the European Court for the Protection of Human rights for the way in which they have implemented and (or) enforced EU law provisions.

It remains questionable in how far the relationship between the ECJ order and the ECHR court will change after the accession of the Union. At the moment it can be concluded that the ECJ, due to its conception of the European Legal order as an autonomous order including the EUCFR, treats the two protection regimes as separate, despite its compliance in substantive legal terms[69]. As a result, national authorities are faced with the application of two fundamental right protection systems, while implementing legal acts.

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[66] UK, Poland , CZ

[67] Jan Jirásek, "Application of the Charter of Fundamental Rights of the EU in the United Kingdom and Poland According to the Lisbon Treaty." Accessed 30.04.2012 http://www.law.muni.cz/sborniky/cofola2008/files/pdf/evropa/jirasek_jan.pdf

[68] Ingolf Pernice, Stefan Griller; Jaques Zllers, eds., "The Treaty of Lisbon and Fundamental Rights." (2008) Accessed 30.04.2012 http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/Pernice%20Fundamental%20Rights.pdf

[69] Andreas Haratsch, "Die Solange Rechtssprechung des Europäischen Gerichtshofs für Menschenrechte." *ZaöRV* 66(2006): 927-947.

It remains to be observed how the institutional set-up is going to change with the accession and if the ECHR Court is going to become the leading authority in relation to fundamental rights protection on the European Level.

2.2.3) The European Arrest Warrant

Adequate fundamental right protection in relation to criminal matters on the European level came into the focus with the introduction of the European Arrest Warrant framework decision[70]. The EAW represents the first functional instrument of criminal law on the European Level. Its scope is defined in Art. 1(1) of the framework decision: An EAW is a judicial decision, issued by a Member State with a view to arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order[71]. Moreover the EAW institutionalized the principle of mutual recognition in criminal matters for the first time[72] within an actual legal instrument, causing some concerns, issued by national constitutional courts, which are going to be evaluated later on.

With the introduction of the EAW, a further step to the realization of the EU AFSJ was taken[73] and the rationale behind the EAW was that it would contribute to the AFSJ via a simplification of extradition procedures within the EU. An increase of the effectiveness of a European wide extradition procedure can be justified with the fact that the conception behind the free movement rights of the internal market should not be misused for conducting criminal offences. Analogue to this the rationale behind the EAW was also described as free movement of judicial decisions[74]. Correspondingly people being accused of having committed a crime in a foreign country should not have the possibility to hide behind national provisions, preventing extradition.

Consequently, the EAW can be seen as a modification of traditional extradition regimes. Whereas pre-EAW extradition systems were based on mostly bilateral agreements between countries that had been negotiated on the political level, the EAW introduced a direct applicable European wide system of extradition, decoupled from the political level. Under the new system the task of issuing and checking the reasons for an EAW are assigned to judicial authorities[75], simplifying the administrative work[76] in this context. In addition the effectiveness of the whole procedure is fastened as well. Art.17 of the framework decision allows an extradition with the consent of the suspected within 10 days and without the consent of the suspected within 60 days. In this context, the EAW framework limits the possibility to refuse the extradition of a suspected person. Any requested judicial authority in the extraditing state has got the obligation to execute an issued EAW. Only the enumerated and limited exceptions, foreseen in Art.3[77] and Art.4[78] of the Framework Decision, would prevent a refusal to surrender. Despite the focus to provide an effective system for extradition within the EU, the EAW Framework recognizes the potential implication of the Arrest Warrant onto fundamental rights conceptions. In order to balance the effects of the EAW in relation to fundamental rights, the preamble included in paragraph 10 and 12 references to Art.6 of the TEU which obliges the EAW

[70] 2002/584/JHA OJ L190, 18/07/2002 P.0001-0020
[71] Art.1(1) 2002/584JHA
[72] See paragraph 5 of the preamble of the framework decision
[73] See paragraph 5 of the preamble of the framework decision
[74] See paragraph 5 of the preamble of the framework decision
[75] Art.1(1) 2002/584JHA
[76] The simplification takes part due to the fact that the political level, which had to deal with the final decision under the former extradition regimes is now excluded
[77] Mandatory grounds of non-execution of the EAW
[78] Optional grounds of non-execution of the EAW

framework to respect fundamental right standards of the EU and due to the scope of Art.6 TEU, the sometimes even higher national standards of the Member States, forming as constitutional traditions an integral part of the EU protection regime.

Nevertheless the EAW decision caused concerns as well. The most controversial element is the abolition of the requirement of double criminality in Art.2 (2) of the framework decision for the enumerated offences, applicable to the EAW. Double criminality implies that an extradition of a suspected person could only be possible in the case that the crime, which is the subject of the procedure, is recognized as a criminal offence within the legal order of the issuing state, as well as the extraditing state. The Application of mutual recognition further makes the application of double criminality unnecessary. Judicial acts concerning criminal law, issued in one state thus have to be recognized in the other Member States.

The abolition of double criminality was brought forward as a major concern against the legality of the EAW framework decision. Besides the jurisprudence of national constitutional courts, which are going to be evaluated on a later stage of this study, the question of the compliance of the EAW with fundamental principles like the principle of legality in criminal matters was brought in front of the ECJ in the "Advocaten voor de Wereld" case[79]. In this case, the ECJ decided in a preliminary ruling procedure, initiated by the Constitutional Court of Belgium about the validity of the EAW. In this context the rather general formulation of the catalogue of the possible criminal offences of the EAW of Art2 (2) were considered to be a violation of the principle of legality[80]. As a result of the proceeding, the ECJ acknowledged the validity of the EAW framework.

The Court justified the compliance with the principle of legality via referencing to the commitment of the EAW to fundamental right protection. According to the ECJ it was stated, that: "The principle of legality implies that legislation must define clearly offences and the penalties which they attract." That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable[81]. Therefore the Court continued in its ruling that even in the case that the Member States reproduce word-for-word the list of the categories of offences set out in Art. 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'. The Framework Decision does not seek to harmonize the criminal offences in question in respect of their constituent elements or of the penalties which they attract[82]. Furthermore as a consequence, any kind of national measure in this context is also bound via Art.1 (3) of the framework decision to Art.6 TEU, opening up the application of fundamental right protection enshrined in the primary legislative framework. This application would therefore also imply fundamental principles like the principle of legality, incorporated in the EU protection regimes[83]. Consequently the Court declared the ECJ framework decision valid.

The EAW still represents the most important instrument of European Criminal Law so far. Nevertheless it is necessary to annotate that the ECJ did not discuss further issues, which had been brought forward by national constitutional courts within their domestic decisions. A discussion of

[79] C-303/05 (2005) Accessed 15.05.2012 http://curia.europa.eu/juris/liste.jsf?language=de&num=C-303/05
[80] In this context the principle of legality demands a clear and understandable formulation of the scope of criminal offences
[81] C-303/05 paragraph 50
[82] C-303/05 paragraph 52
[83] C-303/05 paragraph 53

these issued complaints would have been interesting. Furthermore the ECJ recognized the existence of a European System of fundamental right protection, which scope is defined via Art.6 of the TEU. Beside the guarantee of a kind of *de minimis* standard via the provisions of the CFR, Art.6 further includes higher standards of protection, derived from constitutional traditions of the Member States. Thus and to the commitment of the EAW decision to this regime it is possible to say that a total undermining of developed standards via an instrument of mutual recognition would be virtually impossible. However, to get a deeper understanding of the position of national constitutional courts in this context, concerns issued by the courts will be analyzed in the following sections.

The aforementioned examination clearly identifies the existence of a codified fundamental right protection system on the European Level with direct references to provisions essential for criminal law[84]. These provisions guarantee the principle of legality and especially the right for a fair trial. Nevertheless it still remains to be clarified in how far these guaranteed rights can be invoked in a sufficient and effective way in front of the responsible courts. In this context, the scope of protection offered by the ECHR seems to be more promising at first hand, due to the existence of the individual complaint as a legal remedy, representing an instrument against infringements or potential infringement into fundamental rights, which is available to everyone. This kind of remedy is not foreseen at the EU Level at this point, where fundamental rights have to be invoked through a more complicated procedure[85]. Complaints can be brought in front of the ECJ via the indirect way of the preliminary ruling procedure, which implies a complaint in front of a domestic court concerning a potential violation of an individual right through a particular legislative act. To clarify the compatibility of this provision, the domestic court asks the ECJ for the compliance with EU Law, which would include the compliance with fundamental right standards as well.

3.) Analysis of conflict areas between the National and European Union protection regime in relation to current objectives of European Criminal law

The following section shall identify potential obstacles in current EU Criminal Law, which might lead to the aforementioned potential clash between national constitutional orders and the EU legal order in relation to criminal law. In this context, the principle of mutual recognition and its implications on the principles of legality and fair trial represents the most severe potential problem for the legal relationship, especially in terms of fundamental right protection. These trouble spots shall be identified in the following.

3.1) The principle of Mutual recognition in Criminal matters in relation to fundamental rights

Mutual recognition can be regarded as the most central founding principle of the system of European Criminal Law. The treaty of Lisbon incorporated this principle into the primary EU legal framework[86], constituting the legal basis for the existing and future measures in relation to EU criminal law[87]. Mutual recognition implies the immediate recognition and execution of court decisions by judges in

[84] In this context it is necessary to keep in mind that EU Criminal Law regulates in its majority cooperation measures instead of substantial elements, which means that those cooperative measures would become subject of a potential trial.
[85] Preliminary ruling acc. Art.267 TFEU
[86] Art.82 TFEU
[87] Art.82(1) TFEU

order to primarily facilitate the movement of judicial decisions across the EU territory[88]. In addition, measures established under Mutual recognition would be directly applicable and enforceable throughout the EU.

Mutual recognition, as expressed by the European Commission[89]should be seen as a more effective and certain instrument to substitute former procedures of Member state cooperation in the field of Criminal law. The principle can be seen as an analogue application of the mutual recognition principle, deriving from the internal market. Nevertheless this application of a fundamental principle underlying the EU-Internal market poses some serious concerns with the potential of creating conflict with domestic constitutional orders. The biggest concern lies in the potential incompatibility of a principle derived from the internal market environment[90] with the demands of a system of criminal law[91]. This incompatibility is caused by the nature of the subject itself. Determining the relationship between individuals and the state has always been the rationale behind the conception of criminal law.

Consequently, one of the most central elements is the balancing between the states goal of effective criminal prosecution on the one hand and the preservation of the individual rights, especially in the case that the individual occupies the defendant's position during a criminal procedure. Furthermore this kind of balancing acts as a kind of limitation for an unlimited use of state intervention, recognizing the superior position of the state as the executing authority in criminal proceedings against the individual. This balancing procedure is always being carried out in front of the particular court, responsible for criminal jurisdiction, where this procedure forms an essential part of a state, acting under the rule of law. Therefore the abundance of the possibility of scrutinizing judicial decisions by courts, caused by the obligation to unconditionally accept judicial decisions issued by another Member State would simply jeopardize long established constitutional traditions of criminal proceedings. In addition, the acceptance of mutual recognition would require a kind of specific trust in the functioning of the criminal justice system of the other Member States. Decisions issued by court in criminal law may pose severe limitations on the individual personal right sphere, requiring a special justification for these infringements. The existence of this particular degree of trust into criminal law systems of other Member States was already denied by the FCC in the EAW decision[92].

A further problematic issue, arising from Mutual recognition is the lack of a common European Standard of procedural and substantive criminal law at the moment[93]. This lack has not been resolved by the introduction of the Treaty of Lisbon, because the treaty did not lead to a harmonization of 27 individual criminal justice systems. Therefore mutual recognition implies the acceptance of decisions, issued by individual national states, challenging concepts of national

[88] Massimo Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?" *European Law Journal* 15/1 (2009): 70 -73; Valsamis Mitsilegas, " The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1283-1286.
[89]Valsamis Mitsilegas, " The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." Common *Market Law Review* 43 (2006): 1283.
[90] Which means economical motivated
[91] Valsamis Mitsilegas, *EU Criminal Law* (Oxford and Portland, Hart, 2009): 118-119.
[92] BVerfGE 2 BvR 2236/04 (2005) paragraph 1-201
[93] TheTreaty of Lisbon did not introduce further measures in this context

statehood and sovereignty. Interestingly, the FCC and its fellow constitutional courts emphasized the importance of national statehood in the aforementioned series of decisions[94].

Based on these grounds, it can be assumed that a total unconditional acceptance of the mutual recognition principle by all the Member States can be excluded. In this context, as mentioned before, the EAW played a significant role, due to its role as the first instrument based on mutual recognition. Any EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order[95]. As a result a system based on effectiveness and speed was established. As described above the implementation of the EAW posed a lot of constitutional-related question, which were brought forward against the system.

Besides the primacy debate concerning EU Law, the guarantee of fundamental rights came into the focus. The EAW abolished the so called principle of dual criminality[96], which means that in the case of extradition of an accused person, the committed crime must be punishable in both, the home and the issuing state[97] . Critics of this abolishment classified it as a breach of the principle of legality, due to the perception that it is unconstitutional to prosecute a crime within a state, where this particular crime is not even being regarded as a crime[98]. In addition, this problem was tightened through the nonexistence of a common EU standard of offences, due to the fact that only a certain number of substantive crimes have been harmonized on the EU Level, whereas other crimes are still being defined on the national level[99].

A further conflict concerning the principle of legality can be best described with the term of legal certainty. It is a necessary characteristic of a state acting under the rule of law and holding up the principle of legality that citizens being subject of the jurisdiction of the state and therefore eligible to be confronted with the system of criminal justice, are well informed about the scope of this system. This principle of legal certainty is undermined by the system of the EAW. It cannot be demanded that national citizens are experts in 27 national legal, owed to the fact that they might become subject of one of these jurisdictions. Therefore it is possible to speak of a criminal jurisdiction without limitations, standing in contrast to the principle of legality.

A subsequent problem in this context is the guarantee of fundamental rights in the issuing state. The system of the EAW might lead to the case that a subject is being excluded from a well-developed system of fundamental rights with essential provisions of fair trial and headed into a system without the same scope of rights. To prevent such an unwanted case the EAW framework decision[100]already issued possible grounds for a refusal of extradition. Nevertheless the adequate protection was not included into this framework, causing specific questions in relation to the principle of fair trial. As mentioned before the right of fair trial includes the guarantee of certain procedural rights during

[94] In this context, the practical consequences of this non-harmonization needed to be further evaluated to determine if the either a harmonization would be necessary or if the protection regimes already provide sufficient legal safeguard provision in this field

[95] Art 1(1) EAW framework decision (2002/584/JHA)

[96] Valsamis Mitsilegas," The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1286-1290.

[97] Valsamis Mitsilegas," The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1286-1290

[98]Nevertheless, when being confronted with the question of the legality of the framework decision itself in the Advocaten von de Wereeld case, the ECJ refused any complaint against a possible violation of the principle of legality.

[99] Art.2 EAW framework decision (2002/584/JHA)

[100] Art 3,.4 EAW framework decision (2002/584/JHA)

criminal proceedings[101]. To counter criticism against the system of mutual recognition, the EU attempted to introduce as a safeguard against potential misuse a minimum standard of procedural rights[102]. Unfortunately the attempt was not successful up to this point, due to the reluctance of certain Member States to accept a competence of the Union even in procedural law, which also did not change via the reform of the treaty of Lisbon.

3.2) Conclusion

The aforementioned discussion showed the existence of several unsolved problematic issues concerning fundamental right protection in EU criminal matters. These issues still poses the potential to involve national constitutional courts within the discussion. It remain to be seen if the struggle between the expansion of EU competences and the Member States reluctance to accept new EU competences will be settled in the future or potentially escalates.

3.3) Constitutional Fundamental right protection regimes in relation to criminal law on the Member State level

Besides the aforementioned European Level of fundamental right protection, constitutional orders of the Member States provide a further level of protection as well. This has also been recognized within the EU Legal framework, where it is codified in Art.6 (3) TEU that constitutional traditions of the particular Member States[103] are forming an essential part of the Unions law and have to be taken into account.

Those constitutional traditions include especially a dynamic interpretation[104] of fundamental rights as limitations to governmental actions. A constitutional catalogue of fundamental rights has been a major characteristic of European states bound to the rule of law, establishing a specific national level of protection through the inclusion of these catalogues into the Constitutional order of the particular state. It is important to mention that most of these right catalogues include essential provisions concerning criminal law, guaranteeing for example rights like the fair trial principle of the principle of legality in criminal matters. As a result, every national legal act has to be evaluated in the light of these constitutional provisions and may be even declared void by the courts. This delimitation of state actions represents a specific feature of the rule of law. Furthermore a defining feature of the national protection regime can be seen in the aspect that violations and even potential violations of fundamental rights can be invoked by individual persons in front of the courts[105].

In this context, national Constitutional courts played a pivotal role in the establishment of those regimes, often acting as the final[106] and highest legal authority. Consequently this kind of constitutional activism can be best observed in Member States, who include a strong Constitutional Court within the judicial institutional set-up[107]. Constitutional Courts defined through legal interpretation of fundamental rights the essential content of the provisions of the catalogues, which lead to the clarification of potential guarantees, limitations of these guarantees and the scope of justification of intrusions into these rights. Nevertheless the sole review standard for the actions of

[101] Valsamis Mitsilegas," The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1304-1307

[102] See for comment on procedural rights: Valsamis Mitsilegas," The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *Common Market Law Review* 43 (2006): 1277-1311.

[103] Which also includes Jurisprudence concerning fundamental right protection in this context

[104] Especially through case law of the particular courts in this context

[105] See for example the individual constitutional complaint, according to Art.93 GG

[106] According to the doctrine of Subsidiarity, legal protection has to be sought in front of ordinary courts first

[107] Which means a court with the specific task of constituional review

the court is represented by the particular national constitution[108]. Therefore it is possible to support the statement that constitutional courts act like the custodian of national constitutional provision or fundamental rights via the construction of binding national standards. In addition it is argued that the Courts often fulfill the function of a mediator between the national constitution and the European legal order through its jurisprudence[109].

Consequently it remains to be seen in how far the courts react to the emergence of the European protection regime and if those European standards are evaluated in a different light as the national standards. This becomes extremely relevant in policy areas that have always been regarded as sensitive parts of national sovereignty, including especially criminal law. It can be argued that EU Member States with strong constitutional activism show a much higher degree of reluctance for an unconditionally acceptance of the new EU competences and measures[110]. Within this context the link leading to a potential conflict between the EU level and the Member States is caused by the differentiating perception of fundamental rights, igniting the discussion if this will lead to a clash of the constitutional orders or to a manifestation of a multilevel cooperation of the European constitutional courts[111].

4.) Constitutional Challenges to European Union criminal law

The previously discussed institutional set-up of the EU – National Constitutional Court relationship identified the possibility of tension in fundamental right sensitive areas. These tensions have been present over the whole duration of the EU integration process, a fact which could be explained by the reluctance of those Courts, holding a strong position within the domestic constitutional order, to accept unconditional transfer of sovereign rights from the National state to the European Level. In this context it is often being discussed, if due to this court activism, Constitutional Courts play a role as antagonist of the European integration process, even going as far as to assign them a role as a 'co-legislators' on the national level[112] or at least as valuable contributors to the shaping of the multi-level European legal order.

Consequently the Constitutional Courts used their verdicts to determine and clarify their position concerning this institutional change and the limits of further integration[113]. So it is possible to point-out the importance of these particular decisions for the fundamental foundations of European Law and especially criminal law. Furthermore it will be argued that the central element behind the concerns of the courts is the protection of fundamental rights in criminal matters. Consequently, a prevention of any kind of conflict would require the existence of an adequate level of protection on the European Level according to the standards, developed by the courts. Unfortunately the existence of these standards seemed to be taken into doubt by the Courts occasionally within their decisions, raising possible further questions to the relationship with the European order. These further

[108] See Art.93 GG

[109] Andreas Voßkuhle, "Multilevel Cooperation of the European Constitutional Courts Der Europäische Verfassungsgerichtsverbund. " *European Constitutional Law Review* 6 (2010): 179–180.

[110] See for the case of the EAW: Jan Komarek, "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contra punctual Principles." *Common Market Law Review* 44 (2007): 9-40.

[111] Andreas Voßkuhle, "Multilevel Cooperation of the European Constitutional Courts Der Europäische Verfassungsgerichtsverbund. " *European Constitutional Law Review* 6 (2010): 175–198.

[112] Gunnar Beck," The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor." *European Law Journal* 17/4 (2011): 473–475.

[113] Especially via referencing to the so called Constitutional Integrity test within the Lisbon verdict of the FCC

questions would imply, if those national constitutional courts use their potential level of influence for a de-facto challenge of essential fundaments of EU Law or if the courts recognize the consequence of a too tension-prone attitude and retreat to a more cooperative position towards the EU Level.

Therefore the subsequent sections shall evaluate the positions and potential tensions of the constitutional courts in relation to European Criminal Law.

4.1) The German perspective

The following section shall examine the role of the Federal Constitutional Court particularly with regard to the development of the relationship with the European Legal Integration process. Due to the notably activism in this field, the FCC became one of the most influential and well observed Courts within the European Constitutional Court landscape[114]. Verdicts of the Court are often being recognized as crucial elements for the further determination and procedures of the integration process, caused by the mere possibility that a negative decision of the Court concerning a crucial EU law related topic could pose a halt to the EU legal order[115]. Therefore in the next step, a short overview of the relevant jurisprudence shall be given to illustrate the sometimes tensed relationship between the FCC and the ECJ to show, why there is a possibility that a EU Member States national Constitutional Court, despite the existence of the obviously governing doctrine of the Supremacy of EU Law, declares itself competent to judge upon legal acts of European Law.

4.1.1) The European Arrest Warrant

The extradition system, established under the European Arrest Warrant framework decision[116]changed the system of extradition within the European Union[117]. As previously mentioned, this new approach caused concerns of the compatibility of the provisions of the framework decisions with national constitutional standards and provisions. This became relevant in the context of national implementation laws, which should transpose framework decision into the domestic legal order.

These concerns were brought in front of the FCC in 2005[118], when an individual constitutional complaint was issued against an EAW by Spain, demanding the extradition of a German citizen, being accused of membership in a terrorist organization. Due to the legal character of an EU framework decision, the national legislator of Germany was obliged to implement the framework decision via a German implementing law[119]. This domestic legal act[120] was declared unconstitutional and therefore void by the FCC on the 18th of July 2005[121]. Within its judgment the FCC based its justification of the annulment on the violation of several fundamental rights, protected by the German basic Law[122].

The first fundamental right in question of the complainant, which might have been infringed by the EAW, was the guarantee of Art.16 (2) GG to protect German citizens against extradition to a foreign

[114]Juliane Kokott, "The Basic Law at 60 – From 1949 to 2009: The Basic Law and Suprantional Integration." *German Law Journal* 11/1 (2010): 99-114.
[115] The FCC has got the legal capacity to strike down any law, which could violate standards of the basic law
[116] EAW framework decision 2002/584/JHA OJ L190, 18/07/2002 P.0001-0020
[117] See para. 2.2.3 of this thesis for further explanation
[118]BVerfGE 2 BvR 2236/04 (18.07.2005) paragraph 1-201 Accessed 01.05.2012 http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html
[119] Gesetz über den Europäischen Haftbefehl Accessed 01.05.2012 http://www.bgbl.de
[120] The framework decision itself was not the declared void in the court's decision; additionally the court issued no doubts against the framework decision. Subject of the decision was the German implementation act and the failure of the German legislator to implement the EAW in compliance with German Constitutional standards.
[121] BVerfGE 2 BvR 2236/04 (2005) paragraph 1-201
[122] Especially in this context: Art.16 (2)/ 19(4)/ 101 GG

country. The FCC ruled that this provision was violated through the German implementation, due to the fact that the legislator failed to comply with the requirements of the qualified proviso of legality of Art.16 (2) GG[123]. This qualified proviso enables interference into the right against extradition under certain requirements, leading to the fact that extradition of Germans are only possible if the essential foundations of a state under the rule of law, which means the preservation of the principles of legality and fair trial, can be guaranteed during the extradition procedure.

Therefore the court demanded the German legislator to examine carefully if those standards are being followed in the issuing countries of the particular EAW in the concrete case. In the case of such an examination, the claim that the fundamental rights of the person in question are protected via Art. 6 of the ECHR, is not sufficient enough according to the FCC[124]. A further emphasis was put on the principle of proportionality[125], forming an essential concept in fundamental rights related cases, prohibited any inappropriate restriction of fundamental rights. Consequently a general application of the EAW system, without checking every individual case should be limited, posing concerns to the system of mutual recognition behind the EAW in this context. With the compliance to these demands an extradition of a German citizen would become possible. To specify the application of the EAW, the FCC developed particular case-groups under the proviso of the principle of proportionality. With its ruling the FCC interpreted the scope of Art.16 GG up to that point that one part of the essential core of Art. 16 is the guarantee of a kind of safeguard for German citizens not to be removed from the legal order in which they might have confidence and are familiar to its procedures and rules[126]. According to the FCC, this degree of confidence into the legal order establishes a special relationship between the German Citizens and their domestic order, which is essential to be taking into account when discussing the potential extradition of a German citizen[127].

Therefore Citizens cannot be excluded from this legal order without any proper justification, a fact which had not been recognized and included properly by the German authorities into the implementation law of the EAW, whereby the framework decision would have allowed inserting more stringent refusal grounds against extradition of national citizens in the case of the EAW[128]. In this context the FCC emphasized especially the possibility of crimes, which are regarded as being committed in whole or in part on German territory, as potential refusal grounds that had not been taken into account properly by the German legislator, establishing a special bond between the citizens and their trust into the German legal order[129]. However this concern clarified the position of the court in criticizing the failure of the German legislator to implement the EAW in a constitutionally acceptable way, while the rationale behind the EAW system was recognized as being constitutionally acceptable by the court in general. Therefore any kind of extradition would be illegal and inappropriate according to the standards of the Basic Law[130]. Nevertheless this would only be valid in the cases with domestic background. Cases with a clearly foreign background, like international terrorism, were regarded by the FCC as rather unproblematic, so that an extradition of a German

[123] BVerfGE 2 BvR 2236/04 (2005) paragraph 62
[124] FCC: The court recognized the existence of a particular European Standard, but this standard does not justify the assumption of a synchronized rule of law structure, which would made any kind of national scrutiny obsolete
[125] BVerfGE 2 BvR 2236/04 (2005)paragraph 83,84
[126] BVerfGE 2 BvR 2236/04 (2005)paragraph 85
[127] BVerfGE 2 BvR 2236/04 (2005)paragraph 85
[128] Specific: Article 4 (7)(a) and (b) of the Framework Decision
[129] Offences by Germans committed abroad are subject of prosecution according §§ 5-7 of the German penal code
[130] BVerfGE 2 BvR 2236/04 (2005) paragraph 82-84, 96-98.

national would be made possible[131]. Besides the interpretation of Art.16 GG, a further concern was issued against Art.19 (4) GG. In this context, Art.19 (4) GG guarantees the access to the courts in any case of the infringement of fundamental rights via the action of a governmental authority.

One aspect of the EAW framework decision included the exclusion of the avoidance of extradition towards the issuing state. Therefore it would not have been possible for the individual to use legal remedies in front of the domestic court or even gain access to the legally competent judge, which would represent an additional violation of Art.101 (2) GG[132]. Problematic in this context is the fact that the foreseen implementation of the EAW failed to recognize the character of the EAW as a judicial decision. Therefore to comply with the demanded standards of the basic law, the German legislator would have been obliged to include the use of sufficient legal remedies against an issued EAW. These potential consequences had not been taken into account in a sufficient way by the German legislator[133].

As a consequence the FCC obliged the German legislator to include the possibility of access to the Court system. Besides this presented reasons, leading to the annulment of the German Law and therefore the non-implementation of the framework decision, the FCC limited through its decision as mentioned before the essential principle of European Criminal law of mutual recognition, through emphasizing that those mutual recognition can only take place in a limited space and that those limitation was a way to preserve national identity in this place[134].That limitation, issued by the FCC was clearly set in contrast to the jurisprudence of the ECJ. In the Gözütok and Brügge case, the ECJ already stated that there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied[135].

In its judgment, the FCC exactly questioned mutual trust via the introduction of the obligation for the possibility of a concrete judicial review in each individual case, concerning an issued EAW. Interestingly this domestic preservation disobeyed further ECJ case law. In the Pupino case[136], the ECJ stated that MS are obliged to respect the principle of loyal cooperation in terms of implementing framework decisions in the area of judicial cooperation[137]. Therefore a domestic interpretation in contrast to the conception of the EAW, potentially foreseen by the FCC via its reasoning, would simply violate this principle. As a result it is possible to state that the FCC applied a doctrine of a primacy of the constitution within the EAW verdict, which contradicts principles of the application of EU law. Despite the fact that the German legislator was obliged to issue a new implementation law, including the complaints of the FCC, the EAW decision illustrates the tensions in the conception of the FCC towards the European Level in relation to fundamental rights protection in criminal matters. While focusing on a mere domestic legal approach, the FCC introduced once again the German Basic Law as the standard for its judicial review, expanding it on provisions deriving from EU Law with the result of a contradiction towards the prevailing doctrines governing European Law. In this context the FCC assigned a primacy of application towards the fundamental rights of the basic law,

[131] BVerfGE 2 BvR 2236/04 (2005)paragraph 86
[132] Art.101GG represents a fundamental right in this context as well.
[133] BVerfGE 2 BvR 2236/04 paragraph 102 -109.
[134] Nevertheless, with the acceptance of the Treaty of Lisbon, the FCC accepted Mutual recognition as an integral part of the EU legislative framework (Art.82 TFEU)
[135] joined cases C-187/01 (Gözütok) and C-385/01 (Brügge) Accessed 01.05.2012 http://curia.eu/juris
[136] Case C-105/03 (2003) Accessed 01.05.2012 http://curia.eu/juris
[137] Now principle of sincere cooperation acc. to Art.4(3) TEU

corresponding to a non-acceptance of an adequate standard on the EU Level. It is worthwhile to mention that safeguard-provisions foreseen in the EAW framework decision[138], which should guarantee the compliance with fundamental rights, were not taken fully into account by the Court in its reasoning[139].

While the EAW gave the occasion to the FCC to issue a first judgment on a substantive criminal law related case, the FCC discussed in the Lisbon decision the constitutionally impact of criminal law in a more institutionalized way.

4.1.2) The Lisbon judgment

Besides the aforementioned decision concerning the implementation of the EAW, a further important decision governing the relationship between the FCC and the European Level regarding fundamental right protection in criminal matters can be seen in the "Lisbon" decision[140] of the FCC from the 30th of June 2009. Within this decision, the FCC was confronted with the question if the ratification of the Treaty of Lisbon by Germany would be in accordance to the provisions of the German Basic Law[141]. In the end the FCC acknowledged the compliance under the requirement to the German legislator to draft a new implementation law[142], including the concerns issued by the FCC[143]. Nevertheless the judgment further determined the relationship of the German Basic Law towards the European Integration process. In this context explanations to the further development of European criminal law were also given by the FCC[144]. Generally speaking the FCC repeated many facts of its former jurisprudence in the Lisbon decision[145].

One discussed issue was the so-called implied powers doctrine[146] within the flexibility clause of Art.352 TFEU. Through the Treaty of Lisbon, the Union is granted the competence to become active in every policy field, codified in the legislative framework, in the case that the already foreseen measures in this framework are not sufficient enough to guarantee a fulfillment of the goals of the treaty. From the standpoint of the FCC, this clause was defined in a far too general and broad way, granting too much potential power to the Union to potentially affect the codified division of competences[147] at the expense of the individual Member States[148]. In this context the Court once again emphasized the importance of areas being sensitive to fundamental right protection which directly leads to the field of criminal law. According to the Court[149], the field of criminal law is one of the tasks which are essentially sensitive for the ability of a constitutional state to democratically shape itself. The Court stressed that via Criminal Law, a legal community gives itself a code of conduct that is anchored in its values, and whose violation, according to the shared convictions on

[138] This means the reference in the preamble of the framework decision to constitutional traditions (Art.6 TEU) of the Member States as guarantees for an effective system of fundamental rights.
[139] Which might be interpreted as a more domestic orientated approach, despite the possibility to interpret the German implementation in a more EU friendly manner
[140] BVerfG, 2 BvE 2/08 vom 30.6.2009, paragraph 1 - 421
[141] Constitutional Complaint against the treaty of Lisbon 2BvE 2/08 Gauweiler v. Treaty of Lisbon
[142] Due to the dualist German approach, international legal acts require a national implementation law to come into force on the domestic level.
[143] German Implementation Law of the Treaty of Lisbon Accesed 30.04.2012 www.bgbl.de
[144] BVerfG, 2 BvE 2/08 vom (30.6.2009), paragraph 352 - 367
[145] BVerfG, 2 BvE 2/08 vom (30.6.2009), paragraph 1 - 421
[146] BVerfG, 2 BvE 2/08 (30.06.2009), paragraph 324 - 329
[147] Which would include Criminal Law in this context
[148] BVerfG, 2 BvE 2/08 vom (30.6.2009), paragraph 324 – 329; See also Daniel Halberstam and Christoph Möllers, "The German Constitutional Court says "Ja zu Deutschland!" *German Law Journal* 10/8 (2009).
[149] BVerfG, 2 BvE 2/08 (30.6.2009), paragraph 355

law, is regarded as so grievous and unacceptable for social co-existence in the community that it requires punishment. These values can only be derived from the national legal order.

Consequently the FCC stresses the fundamental meaning of Criminal Law for the sovereign state. According to the FCC this fundamental area of the state activity cannot be excluded from the judicial authority of the particular state[150], limiting the interference possibility of EU Law. Nevertheless the Court recognized the increase of the EU competences in the field of criminal law. Germanys membership in the EU requires that the discretionary power of the domestic legislator might be restricted by the obligation to enforce supranational law in the own domestic legal sphere, which is especially the case in the AFSJ. Consequently the Court demanded that in such a sensitive area the criminal provisions of the EU have to be interpreted in a strict manner to prevent extensively use of this measures and that every use of the measures requires particular justification[151].

Furthermore the court stated that the Treaty of Lisbon recognized the sensitivity of the criminal law area, which would be in compliance to the narrow interpretation of the Basic Law in relation to this subject[152]. An additional argument for the national discretion in criminal law is presented by the FCC with the fact that the definitions of crimes within the TFEU in Art.83 (1) contain crimes related to cross border elements. In this context the court emphasized that the Member States discretion in this subject would be affected in a particularly sensitive manner where a legal community is prevented from deciding on the punish ability of conduct, or even the imposition of prison sentences, according to their own values[153]. In these areas only a limited extent to transfer competences to the EU is admitted by the basic law and therefore necessary to become subject of a national transformation statute according to Art.23 (1) GG. This requirement would once again open the possibility of judicial review by the FCC like in the aforementioned EAW case.

In Conclusion it is possible to say that the FCC in the Lisbon Decision still regards itself as the last authority in fundamental rights protection in relation to further European Integration. While the court accepted the expansion of the EU competences in criminal law and the Provisions of the Lisbon Treaty, it refused accept an unconditional use of these competences. The FCC, justified itself through its conception of criminal law as one of the most central elements of the sovereign state, retained the possibility for itself to review any acts concerning criminal law. In addition a total harmonization of EU criminal law at the expense of the national state was declared as impossible by the Court. This leads to a remarkable situation. On the one hand the court admitted that the status-quo of the EU integration process failed to comply with constitutional standards, whereas on the other side an expansion of the integration process would collide with the safeguards of the German Basic Law. As a final consequence this conflict might lead to the question if the integration process would come to a stop or if the Basic Law would ultimately step behind the EU order once and for all. Therefore the influence of national Constitutional Courts cannot be simply put aside in this case.

4.2) The Czech and the Polish case

After the evaluation of the legal foundations of the Federal Constitutional Courts activism in regard to fundamental right protection in European Criminal law, the role of the Czech and Polish Constitutional Court will be presented to investigate if the rationale behind the FCC partially

[150] BVerfG, 2 BvE 2/08 (30.6.2009), paragraph 358,359
[151] BVerfG, 2 BvE 2/08 (30.6.2009), paragraph 352-367
[152] A further safeguard is been recognized in the emergency brake clause of Art.83(3) TFEU
[153] BVerfG, 2 BvE 2/08 (30.6.2009), paragraph 358,359

reluctance concerning EU Legal integration can be transformed to other Constitutional Courts in the European Constitutional landscape. In this context the evaluation of the jurisprudence of two courts, descending from a different legal tradition will try to identify patterns in the relationship between the National Constitutional level and the European Level.

4.2.1) The Czech perspective

Similar to the FCC, the Czech Court upheld the implementation of the EAW into the domestic legal order as well[154]. A first point of concern was represented by the question of the relation between this EU legal instrument and the Czech Constitution. The CCC solved this problem via referencing to the obligation to interpret national law, including the Constitution according to the standards of the EU[155].

Additionally this point of view was also supported through a reference to the ECJ Pupino case[156], which especially opened the way for an EU-conform interpretation of framework decisions out of the former Justice and Home affairs pillar. This means that the instrument of interpretation has to be chosen in the way to guarantee the fulfillment of the obligation posed by the specific EU Legal act[157]. Besides this rather structural element, a second point of concern, being brought forward was the question of the legal status of extradition of Czech nationals under the EAW regime. In this context Art.14 (4) of the Czech Charter of fundamental rights and freedoms was identified as the central norm. The Court ruled that in general Art.14 (4) does not prevent the extradition of Czech nationals to other Member States of the EU. An argument similar to the FCC argument that an obstacle to the extradition might rest in the special relationship between the citizens and the state, was rejected by the CCC[158]. Furthermore the Court argued that the standards set up by the national legislator concerning the implementation of the EAW did match constitutional requirements. Thus the complaint that fundamental right standards would be violated was unjustified[159].

Next to this, the court developed a theory of a citizen obligation, deriving from the membership of the Czech Republic to the EU, which implies that someone who is enjoying the benefits of the European Integration has to accept a certain degree of responsibility while acting in a another Member State[160]. Therefore it might be possible to become a subject of this countries jurisdiction. All in all the essence of the decision can be seen as rather EU friendly once again, due to the acceptance of the EAW Provisions through the CCC.

Contrastingly to the FCC, its Czech Counterpart did not challenge the conception of mutual trust in the judicial systems of other EU Member states and assumed that in the current European judicial landscape, fundamental right standards are present that matches the demand of the Czech Constitution[161]. Only in the most exceptional case that the issue of an EAW would seriously threaten the basic values of the Czech Constitutional order, an EAW might be refused by the court.

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[154] Decision Pl. ÚS 66/04 (2006) Accessed 01.05.2012 http://www.concourt.cz/view/pl-66-04
[155] Art.1(2) Czech Constitution in conjunction with Art.10 of the former EC Treaty
[156] ECJ C105/03 Accessed 01.05.2012 http://curia.eu/juris
[157] The Czech Republic's accession to the EU posed a further obligation to act in compliance with EU Law
[158] Pl. ÚS 66/04 (2006)
[159] Pl. ÚS 66/04 (2006)
[160] This implies that someone has to recognize the legal order in this particular state and that any misbehavior might be prosecuted by criminal authorities. A free movement of person, as granted by the EU legislative framework correspondingly demands the obligation to accept foreign jurisdiction. The possibility to hide behind domestic jurisdiction would jeopardize this conception.
[161] Pl. ÚS 66/04 (2006)

In conclusion it is possible to say that the Czech Court through its use of the consistent interpretation doctrine avoided similar conflicts between the national Constitutional level and the EU Legal order. More fundamentally the Court issued its trust in the judicial systems of the other Member States as well, a fact which was denied by the German Court. Nevertheless, despite the fact that it seems more like an ultimo ratio, the CCC also reserved in this case a right for itself to review EAW related measures with the potential to infringe core constitutional values.

4.2.2) The Lisbon judgment

In the Czech context the question of transferred competences and a potential loss of Czech Sovereignty came into the focus of the discussion. The Court rejected its responsibility to define a certain catalogue of state functions that could not be transferred to the European Union[162], representing a different approach to the FCC, which emphasized the importance of several areas like criminal law as core elements of the national state. Furthermore the supervision of this transfer of competences cannot be assigned to the Court itself[163].

Concerning the argument of a potential loss of sovereignty, the Court argued that the possibility of a shared sovereignty between the Czech Republic and the European Union was already accepted with the opening of the accession negotiations in 1995. Therefore it could be expected that an increase of European competences might happen[164]. Thus the compliance of the Treaty of Lisbon with the Czech Constitution was assumed.

4.3.1) The Polish perspective

Within the EAW case, the PCT was faced for the first time with a measure of EU criminal law. In particular the Court examined if the conception of the EAW infringed the constitutional guaranteed right of the protection of extraction of Polish citizens[165]. In the end the Tribunal declared the implementation of the EAW into the domestic legal order void, due to a potential breach of fundamental national constitutional obligations. This declaration of the PCT posed further questions on the relationship between EU-Law and the Polish constitution. Once again the Tribunal did not accept and recognize the existence of the doctrine of consistent interpretation[166]. Already in the Accession treaty case, the PCT limited the application of this doctrine in relation to Polish Constitutional provisions, which lead to the exclusion of consistent interpretation in cases of conflict with essential guarantees, provided by the Constitution.

This doctrine was applied by the PCT in the EAW case via focusing on the essence of the right of protection of extradition[167]. In this context the essence of this right was interpreted in the way that the prohibition of the extradition of polish citizen shall fulfill the purpose that Polish citizens would be prosecuted in front of a Polish Court[168]. Therefore the extradition to the jurisdiction of a foreign

[162] Pl. ÚS 19/08 (2008) Accessed 01.05.2012 http://www.concourt.cz/clanek/pl-19-08
[163] Pl. ÚS 19/08 (2008)
[164] As the Court stated: "The transfer of certain competences to the state, which arises from the free will of the sovereign and will continue to be exercised with its participation in a pre-agreed, controlled manner, is not a sign of the weakening of sovereignty, but, on the contrary, can lead to strengthening it in the joint process of an integrated whole."
[165] Art.55 Polish Constitution
[166] Wojciech Sadurski, "Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union." *European Law Journal* 14/1 (2008): 1-35.
[167] PCT P 1/05 (27.4 2005) Part III, point 4.1 Accessed 01.05.2012 http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf
[168] PCT P 1/05 (27.4.2005) Part III point 4.1

court would violate this essence of the right[169]. Consequently the PCT remained on its position to abandon the doctrine of consistent interpretation in this case. Furthermore the PCT also neglected the relevance of an EU-Citizenship for its decision, stating that consequences derived from the Polish membership to the EU and the consequences for the national citizens cannot be used as a justification for a different interpretation of the Polish constitution[170].

In addition this interpretation can be supported by a further argument, which was not explicitly formulated by the Tribunal. As Komarek stated[171], the ban on extraditing Polish citizens is formulated within the Constitutional context as a strict rule, instead of a general legal principle. Therefore the basis for a balancing of this right in contrast to provisions, demanded by the EAW was already excluded. It is interesting to observe that the PCT did not put any effort to prevent this clash between the national constitution and the European Legal order. Any extradition under the EAW regime is only possible if the EAW issuing state fulfills the requirement of a state acting under the rule of law with the guarantee of a fair trial[172]. Therefore an extradition of Polish citizens would not have violated the essence of the constitutional right, if the PCT could have guaranteed that standards analogue to the Polish protection regime are maintained in the issuing country. Nevertheless this possibility to prevent the legal order conflict via a more European –friendly interpretation was not used by the Tribunal. Instead of this the PCT found another option to prevent the total nullification of the EAW regime. In referring to Art.9 of the Polish Constitution, the Court accepted the obligation of Poland to respect international law, which prohibited the total annulment due to constitutional reasons. By this, the court recognized the importance of a functioning cooperation between the EU Member states and expressed its respect for the Polish obligations, derived from the accession to the EU. Due to this use of a constitutional backdoor, the Court avoided in the end a serious clash of the two legal orders. Despite as being declared unconstitutional at first hand, the doubtful provisions of the EAW Implementation were modified by the Polish legislator and finally accepted in the end.

In conclusion it is possible to say that the PCT followed a two-way approach, dealing with the EAW regime. On the one hand the Tribunal clearly stressed the importance of the national constitutional order, which must not stand back behind European obligations, leading to a retaining of its position as the last instance of constitutional review. On the other hand it became visible that the Tribunal, despite the existence of the constitutional conflict and the availability of other ways to prevent this conflict, tried to guarantee the functioning of the European Legal order without giving up its initial position. In the next step, the Polish decision, concerning the Treaty of Lisbon will be evaluated to identify the Polish position towards the institutional change, provided by the Treaty.

4.3.2) The Lisbon judgment

In its decision, the Tribunal once again emphasized its point of view of the EU as a traditional International Organization; which legitimacy derives from the conferred competences of the individual Member States as the contracting parties. The Tribunal further accepted the implemented safeguards of the EU Legal order as sufficient enough to guarantee a non-violation of the Polish

[169] PCT P 1/05 (27.4.2005) Part III. point 4.2 Accessed 01.05.2012 http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf

[170] PCT P 1/05 (27.4 2005) , the court stressed the importance of citizenship for the relation between the state and the individual citizen concerning the legal status of the individual

[171] Jan Komarek, "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contra punctual Principles." Common Market Law Review 44 (2007): 16-21.

[172] Backed up by the protection fundamental right protection regime of the EU

Constitutional integrity[173]. Furthermore the Court stressed the importance of Art.90 of the Constitution, which requires constant scrutiny in any case of transfer on national sovereignty rights. This provision is even regarded by the PCT as a normative anchor for the guarantee of the national sovereignty and determines the limit of potential transfer of competences[174]. According to the PCT, this limit is constituted out of the constitutional identity of Poland[175]. The tribunal still classified the EU as a traditional International Organization with all the legal consequences. Nevertheless it recognized safeguard procedures on the European level which would prevent an excessive use of EU competences at the expense of the Member States. Furthermore the Court stressed the importance and the preservation of the national sovereignty of Poland through the definition of certain sensitive areas.

4.4) Conclusion

After evaluating the system of two fundamental decisions of three European Constitutional courts, capable of affecting the conception of fundamental rights in relation to criminal matters, it was possible to identify certain patterns. The most distinctive pattern can be seen in the dichotomous approach concerning obligations derived from the membership within the EU and the preservation of national standards. All of the aforementioned courts tried to prevent as a result of their rulings a serious clash between the domestic legal order and the European order[176], via accepting the existence of obligations, which derived from the membership of the respective countries in the EU. The major difference lies in the perception of how to interpret these obligations. For example the FCC used a more "Basic Law-centred" approach to limit the impact of EU Law on the domestic order, being followed by the PCT with its conception of the Polish Constitution as the decisive instrument for the review of any legal act. The Polish and German Court also disobeyed the obligation and possibility to dismantle a potential conflict between different legal orders with the help of the doctrine of consistent interpretation of national law, which was used more or less as a moderate approach by the Czech Court in the EAW case.
In any case, it seems that the doctrine of supremacy of EU law is not fully accepted by the three courts because they all maintain a certain degree of national discretion in relation to the constitutional review of EU measures. Indeed, all courts emphasized the existence of this review possibility in the case of a threat of certain core areas of activity of the particular state. In this context, the FCC explicitly mentioned the structure of the national criminal system as one of these elements, which essential content could not be transferred to the European Union.

A further common ground, identified in the jurisdiction of the courts is the focus on domestic fundamental right protection. Those national developed standards are an integral part of the respective domestic constitutional order, which are protected by the respective court. Therefore it is possible to classify the relationship between national courts and the EU-level as driven be a doctrine similar to the "Solange" jurisprudence of the FCC. As long as the on-going European legal integration does not threat the existence of the sovereignty of the individual national state and the European

[173] PCT K 32/09 (2010) Accessed 01.05.2012. http://www.trybunal.gov.pl/eng/summaries/documents/K_32_09_EN.pdf
[174] PCT K 32/09 (2010), paragraph 1,2
[175] This included fundamental values like the respect for the principles of Polish sovereign statehood, democracy, the principle of a state ruled by law, the principle of social justice, the principles determining the bases of the economic system, protection of human dignity and the constitutional rights and freedoms[175]. A transfer of competences, derived from these principles would only be accepted, if this transfer would not infringe the polish constitutional foundation.
[176] The implication of the latest Czech decision might to be observed in the future. See: PL. US 5/12 Accessed 01.05.2012. http://www.concourt.cz/view/pl-05-12 for possible implications of a Czech Ulta Vires control

standards match the national constitutional conceptions, the Courts will resist to use their potential power to review EU Legal Acts on the domestic level to prevent a jeopardizing of the governing principles of the EU legal order. But at the same time the Courts won´t give up their possibility for a review.
On the contrary to this explanation, it seems that the Courts failed in their verdicts to recognize the existence of an already sufficient EU protection regime, consisting of the EUCFR, the provisions of the ECHR and protection principles, derived from the constitutional traditions of the Member States[177]. Whereas the EUCFR provides a minimum standard of fundamental right protection, an exclusion of the application of higher standards of the Member States is not necessary.

To prevent escalation in this context, the EU legislator should be obliged to take the possibility of a national constitutional interference into account when designing any kind of legislative act, especially in relation to sensitive areas like fundamental rights. A potential interference cannot be ruled out definitely. The reluctance of courts to use their review power in one case, do not prevent them to use their power in another one, which would ultimately be the case if the European Integration process collides with the limitations of the national constitutions.

Therefore it might be even possible to speak of the Courts as a kind of "co-legislator" on the national level, which potential influence has to be taken into account when designing legislation. After the evaluation of the institutional set-up of constitutional jurisdiction and the identification of the possibility for conflict, the findings will be transferred to aspects of EU criminal law in the next step.

5.) Overall Conclusion

The discussed involvement of national constitutional courts in the debate concerning European criminal law and the corresponding protection of fundamental rights clearly shows specific patterns.
Constitutional Courts, occupying a fundamental position within the national constitutional context tend to use a certain degree of activism to manifest their positions as the custodians of the respective legal order. Despite the introduction of EU-wide standards for the protection of fundamental right and the upcoming accession of the EU to the regime of the ECHR, the national states still reserve themselves the right for constitutional review as a last instance using national fundamental right protection regimes and concepts.

Therefore a total transfer of national states sovereignty to the EU level is excluded under the current national constitutional status quo. In this respect then, not only constitutions confer the mandate to translate sovereign powers to the EU, but they also constitute the boundary of the European integration process. Thus, the controversy appears to be in the balance between rigid interpretations of national constitutions in issues regarding sovereignty with constitutional clauses allowing the participation in the European integration process[178]. With the existence of these clauses, the particular national constitution recognizes the possibility of a transfer of competences to a

[177] Art.6 TEU
[178] As mentioned before, Art.23 GG can be seen as an example for such an integrationist clause, enabling the German legislator to transfer national competences up to a certain degree towards the European Union. This transfer could only take part within the boundaries set up by the Basic law itself.

supranational authority[179]. Thus it is possible to conclude that a transfer within the given limitations of the particular constitutions[180] should be acceptable from the point of view of constitutional courts.

Nevertheless the analysis of the activism of the aforementioned courts showed the incidental tendency to challenge the doctrine of the primacy and supremacy of the European Legal order through their jurisprudence[181], which would establish a possibility to undermine the whole conception of EU Law in a worst case scenario[182]. Also the threat of the use of the ultra vires control was brought back to memory by the courts at constant points of time when being faced with questions in relation to EU Law. In this context, the protection of fundamental rights always formed a central element of the rationale of the courts.

However, besides this tendency to create tensions at several occasions, a constraint of the courts to transform these tensions to a serious conflict can be observed as well. It seems that the Courts recognized their potential to harm the EU order and therefore resigned to use their review ability[183]. In summary the courts lately shifted their position more towards a kind of constitutional "watchdog", acknowledging the obligations of a membership within the EU and accepting measures, being taken on the supranational level[184] as sufficient enough to match national standards in general. Therefore the abandoning of this position, which is still possible due to the reluctance of the courts to abstain from their self-assigned right of review as the final instance, could only take place in serious disputes, which threatens the existence of the national constitutional order in its foundations. So far this scenario has not been realized.

To prevent such a scenario, especially in the context of the tension prone field of criminal law, the EU legislators and the ECJ should try to include the positions of the National Constitutional level in a more cooperative way into the discussion of how to proceed with the development of the EU AFSJ. A reluctance of national courts activism at one point of time might be not the case at the next time. Despite the abdication of the National Courts of the use of their self-assigned potential "Ultra- Vires" review power[185] in the recent EU Law related jurisprudence, the de-facto possibility of such an control still exists and neither the FCC, nor its two eastern European counterparts seem to consider to give up this potential power for the case of a serious clash between the EU legal order and the Member States level. In this context the definition of such a case lies at the hand of the domestic judges. As previously mentioned, Art 6 TEU includes constitutional traditions of the Member States as sources of EU Law in relation to fundamental right protection. Within the development of these traditions, Constitutional Courts acted as a shaping factor via their jurisprudence.

[179] The existence of this transfer-possibility can be also seen as being in correspondence with the accession to an entity like the EU, which is founded on exactly the assigned competences from the Member States.
[180] Demanding that essential elements for the functioning of the state must remain on the level of the Member State; see for example the Lisbon Decision of the FCC
[181] Explainable through the strong Constitutional position of these courts
[182] Possibility of the Ultra Vires control
[183] See BVerfG 2 BvR 2661/06 2006 Accessed 01.05.2012 http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html
[184] Including the expansion of the scope of European fundamental right protection for example, as well as the existence of the aforementioned safeguards clauses in EU criminal law that should prevent an shift of fundamental competences in criminal matters to the EU at the expense of the particular Member State.
[185] Only applicable in the case of a fundamental threat to a domestic legal order by a measure of EU Law

Therefore it is essential important that the opinions of national courts will be taken into account while designing future EU legislation, going hand in hand with the question of the future development of the question if the EUs increase of security goes hand in hand with a potential decrease of personal fundamental rights or not. This task of taking the possibility of a differing perception by the particular courts into account has to be assigned to the particular legislators on both, the domestic and the EU level, while designing new legislative acts.

In the case of a decrease of protection standards, it can be guaranteed that National Constitutional Courts will step up in the case of a collision between essential constitutional rights and the European Legal order to protect the essence of the national constitutional order. These potential tensions between the two levels could be dispelled with the establishment of a kind of judicial dialogue between the ECJ and the national constitutional courts[186]. Within this dialogue the two court levels could benefit from in a reciprocal manner. Through an abandonment of a restrictive interpretation of national constitutional provisions up to an attitude of openness towards the EU level, courts could participate in this dialogue[187]. On the other hand, as less stringent application of doctrines concerning the direct effect of EU Law by the ECJ might encourage national judges to participate in a more often way on the constitutional level of the EU[188]. Cartabia stated: "The ECJ should start to include the constitutional courts as qualified judges of the European System[189]". Consequently the existence of such a pluralist and cooperative model would dismantle the mere possibility of tensions, growing to substantial conflicts about judicial questions. Furthermore this kind of judicial dialogue would enable the construction of a more coherent European framework of fundamental right protection within the European Union. In addition, the existence of this coherent legal framework would simplify the work for legislators, which could prevent drafting legislation, capable of causing judicial concerns.

However, before the realization of such a complete cooperative judicial environment, it is possible to conclude that the National Constitutional Courts, despite their generally EU-friendly attitude[190], can be regarded as an additional indirect legislator on the national level. Nevertheless it remains to be observed how this relationship develops in the future; either to a multi-level constitutional cooperation between the national courts and the EU courts or a preservation of a subordination relationship that might eventually lead to a strengthening of national reluctance against the EU integration process[191].

[186] See: Marta Cartabia, "Europe and Rights: Taking Dialogues Seriously." *European Constitutional Law Review* 5 (2009): 5-31.
[187] Marta Cartabia, "Europe and Rights: Taking Dialogues Seriously." *European Constitutional Law Review* 5 (2009): 24.
[188] Marta Cartabia, "Europe and Rights: Taking Dialogues Seriously." *European Constitutional Law Review* 5 (2009): 31
[189] Marta Cartabia, "Europe and Rights: Taking Dialogues Seriously." *European Constitutional Law Review* 5 (2009): 31.
[190] Explicitly stated by the president of the FCC in this context
[191] In this context it is interesting to mention that the German FCC acknowledges that the creation of an EU Constitutional Court, equipped with the same judicial possibilities like the national courts might be a solution to prevent further conflict.

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