EUROPEAN CONSTITUTIONALISM AND THE EUROPEAN ARREST WARRANT: IN SEARCH OF THE LIMITS OF “CONTRAPUNCTUAL PRINCIPLES”

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1. Introduction – national constitutional courts and their perspectives on the European constitutional order

1.1. Setting the scene: Problems with the European Arrest Warrant

The European Arrest Warrant Framework Decision (“EAW Framework Decision”)1 is a problematic instrument in an ever growing Area of Freedom, Security and Justice.2 Three constitutional courts in Europe have (so far) found its implementation into national law unconstitutional,3 while the fourth showed that there might be ways to reconcile sometimes rigid constitutional

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provisions with its requirements. Interestingly, the Court of Justice is now deciding on the legality of the EAW Framework Decision itself in a preliminary ruling procedure initiated by the Belgian Cour d’Arbitrage (court with constitutional jurisdiction). The questions referred concern, first, a possible conflict between the abolition of the dual criminality requirement in the case of some criminal offences laid down in the framework decision and fundamental human rights and, second, a question examining the very legal basis of the framework decision. The proceedings before the ECJ therefore tackle some of the issues which were at stake before the constitutional courts. At this moment, only Advocate General Colomer’s Opinion has been delivered relying in some parts on the only constitutional court which was merciful to the EAW – the Czech Constitutional Court (CCC).

This article will put these three decisions into a wider perspective, benefiting from the discussions which have already emerged. It will use the problem of the EAW as a laboratory of European constitutionalism to examine how European courts (with an emphasis on plural) understand their role therein. We will see that the questions arising there do not only concern the relationship between various legal (constitutional) orders. What will not be overlooked is that they also ask where the limits of law are and how far the judicial function in a system of democratic constitutional governance reaches. M. Maduro’s “contrapunctual principles” and M. Kumm’s “principle of best fit” are used as a background for this examination. This article will try to point out some of their problematic aspects.

6. In concrete cases before the CCC and the FCC.
8. See particularly the case comments on the Polish decision, including Leczykiewicz, 43 CML Rev. (2006), 1181–1191; on the German decision. Hinarejos Parga, 43 CML Rev. (2006), 583–595; and Sadurski, “Solange, chapter 3’: Constitutional courts in Central Europe – Democracy – European Union”. Kühn, “Constitutional monologues, Constitutional dialogues or constitutional cacophony? European arrest warrant saga in Germany, Poland and the Czech Republic”, paper not yet published, presented at the “Cross-cutting workshop ‘Integration or absorption? Legal discourses in the enlarged Union’”, Hannover University, 28–30 Sept. 2006, on file with the author, provides a very interesting comparative perspective on the three decisions, focusing at other aspects of them. EUI Working Papers LAW No. 2006/40 available at cadmus.ieo.it/dspace/handle/1814/6420
Before looking specifically at the EAW Framework Decision, it seems appropriate to describe briefly how these three courts view the relationship of their respective constitutions to the constitutional order of the EU.

1.2. European integration viewed by the constitutional courts

There is probably no constitutional court in Europe which is so vigilantly observed as the German Federal Constitutional Court (FCC). Much has been written about its most important judgments in *Solang I*¹¹ and *Solang II*,¹² *Maastricht*¹³ and the *Banana Dispute*.¹⁴ There is no need for repetition here.¹⁵ Essentially, the FCC regards itself as the final arbiter of EU competences viewed from the perspective of the German Constitution (*Grundgesetz*, GG). According to the *Maastricht* judgment, the FCC may ultimately determine whether the actions of the EU institutions remain within the scope of the competences transferred by the Federal Republic of Germany. It also underscores that some competences can never be transferred to the EU because they are part of unassailable principles determined by Article 20 GG. The FCC also reserves the control as to whether the human rights protection standard remains structurally equivalent to that afforded by the German constitution.

The Polish Constitutional Tribunal (PCT) took a more radical approach in its *Accession Treaty Decision*,¹⁶ using much harsher wording.¹⁷ The scope of

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the present article does not allow detailed analysis of the Decision;¹⁸ what is however relevant here is that the PCT expressly stated that two constitutional provisions must be balanced: one establishing the supremacy of the Polish Constitution (Art. 8(1)) and the other stating that Poland shall respect international law binding upon it. The latter is translated by the PCT to be a “requirement to respect and be sympathetically predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland”.¹⁹ This means that the Constitution will be interpreted in a manner sympathetic to EU law. However, this interpretation is limited, since

“[i]n no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions. Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorized by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland’s withdrawal from the European Union.”²⁰

In the last sentence the PCT stresses the importance of the political process for resolving constitutional conflicts. It played an important role in the PCT’s decision concerning the implementation of the EAW Framework Decision, as we will see further.²¹

The Czech Constitutional Court took a somewhat middle-way approach, much closer to the FCC than the PCT. To quote the most recent formulation

¹⁸. For a more detailed discussion of this judgment, see Sadurski, op. cit. supra note 8, pp. 23–28. An earlier version of my article examined the “Accession Treaty Decision” in detail and was published as “Pluralismo constitucional europeo tras la ampliación. Un análisis de la jurisprudencia comunitaria del Tribunal Constitucional polaco”, (16/2005) Revista española de Derecho Europeo (transl. D. Sarmiento).


²⁰. Accession Treaty Decision, PCT cited supra note 16, point 6.4, quote taken from paras. 13 and 14 of the English summary, emphasis added. The summary must be read with great caution since it has a different structure of argumentation from the original decision.

²¹. See section 3.1.2. infra.
of its view on the relationship between the Czech Constitution and European Union law:

“In its judgment no. Pl ÚS 50/04 of 8 March 2006, the Constitutional Court refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law. It stated that the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Understandably that, unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court, guided by the above-mentioned ECJ doctrine, will not review individual norms of Community law for their consistency with the Czech constitutional order.”

In the judgment referred to by the CCC (delivered earlier than this one), the Court formulated the relationship somewhat differently. While here it firmly states that it “refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law”, in the previous judgment, to which this sentence refers, the CCC stated that it was not “obliged to give its view on this ECJ doctrine”. Subsequently it only mentioned other constitutional courts’ practice (Italian, German, Irish and Danish constitutional and supreme courts) without actually denying the ECJ’s version of primacy so openly (although it actually did so implicitly in another part of the judgment). This may suggest that the

22. EAW Judgment, CCC, cited supra note 4, para 53.
23. For a more detailed discussion of this judgment see Sadurski, op. cit. supra note 8, pp. 7–11.
24. Judgment of 8 March 2006, Pl ÚS 50/04, available in English at test.concourt.cz/angl_verze/doc/p-50–04.html, Sugar Quota Judgment, part V, section A. Unfortunately, only recently has the CCC started to divide its judgments into numbered paragraphs. Therefore, more precise reference cannot be provided.
25. Ibid., in part V, section B: “… the delegation of a part of the powers of national organs may persist only so long as [sic!] these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Should one of these conditions for the transfer of powers cease to be fulfilled, that is, should developments in the EC, or the EU, threaten the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law, it will be necessary to insist that these powers be once again taken up by the Czech Republic’s state bodies; in such determination the Constitutional Court is called upon to protect constitutionalism ... As concerns the essential attributes of a democratic state governed by the rule of law, according to Art. 9 para 2 of the Constitution of the Czech Republic, these remain beyond the reach of the Constituent Assembly itself.”
precise formulation of the relationship is not yet settled at the CCC and that particular judges may differ in their views.26

Before turning to these courts’ judgments concerning implementation of the EAW Framework Decision, let us briefly touch the issue of extraditing own nationals, which was at the heart of all the three cases.27

2. The EAW Framework Decision and the problem of extraditing own nationals

The EAW Framework Decision has been regarded as the first and most striking example of the extensive judicial cooperation in criminal matters adopted within the EU Third Pillar.28 It arose from the need to respond to the danger of terrorism and trans-border crime, something that has been felt more acutely after 11 September 2001. Its main purpose is to simplify and expedite procedures for extradition of persons convicted or accused of crimes between the EU Member States. It took the procedure from the hands of politicians and made it a purely judicial matter, whereby only the courts of the Member States cooperate without the need to turn to the executive, which traditionally participated in the process of extradition.29

However, the implementation of the framework decision caused constitutional problems in several Member States, mainly because their constitutions prohibited extraditing their own nationals30 as required by the framework deci-

26. Recently, a current ECJ judge and former CCC justice Jiří Malenovský called on the CCC to change it: Malenovský, “K nové doktríně Ústavního soudu ČR v otázce vztahů českého, komunitárního a mezinárodního práva” [“As to the New Doctrine of the Czech Constitutional Court Concerning the Relationship Between Czech, Community and International Law”], (21/2006) Právní rozhledy, 774–783. As will be seen below, there are other ambiguities in the CCC’s approach; see the text accompanying note 150.
27. For a more comprehensive analysis of the Framework Decision’s constitutional problems, see Mitsilegas, op. cit. supra note 3, 1286–1289.
29. As Douglas-Scott points out (see note 85, at 224), the extradition procedure is political in nature, which was shown e.g. by the case of general Pinochet – see Case R. v. Bow Street Metropolitan Stipendiary Magistrate and Others Ex p. Pinochet Ugarte (No.2), (2000) 1 A.C. 119.
30. For an extensive analysis of this rule in national and international law, see Plachta, “Non-extradition of nationals: A never-ending story?”, 13 Emory International Law Rev. (1999), 77. For a list of European countries which had had this rule in their constitutions before they implemented the EAW Framework Decision, see ibid. at 109.
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It is questionable how deeply this restriction is embedded in constitutional traditions of European States; it has never developed in the Anglo-Saxon legal tradition as opposed to the continent.

As M. Plachta observed, “[t]he justification of the rule of non-extradition of nationals largely derives from a jealously guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment”. Conversely, the criminal justice cooperation within the Area of Freedom, Security and Justice (FSJ) is based on the Member States’ mutual trust in their systems of criminal justice. The CCC’s decision itself contains a comprehensive and quite compelling historical overview of the development of extradition, which is based on the same considerations. While the 1996 Convention on Extradition between the Member States (a measure which preceded the EAW Framework Decision) allowed a refusal to extradite nationals by way of reservations, the EAW Framework Decision did not make this possible any more. Some Member States changed their constitutions in order to be able to fully implement the framework decision, as was the case of Germany. Nevertheless, neither Poland nor the Czech Republic was amongst them. The Polish

31. It has been expressly rejected in the UK in 1878 by a special Royal Commission on Extradition. For the US, see judgment of the Supreme Court in Neely v. Henkel, (1900) 180 U.S. 109, 123. See Plachta, op. cit. supra note 30, at 86–87.
32. This applies with some exceptions: e.g. Nordic countries do not prohibit extradition of own nationals among themselves: Plachta, op. cit. supra note 30, at 99–100.
33. Plachta, op. cit. supra note 30, at 88. The issue of prohibition on extradition of own nationals has also been controversial at the international level and the debate was fueled even more by the establishment of the International Criminal Court. See Deen-Racsmany, “A new passport to impunity? Non-extradition of naturalized citizens versus criminal justice”, 2 Journal of International Criminal Justice (2004), 761. It is also questioned whether the prohibition is a rule of international law: Plachta, op. cit. supra note 30, at 77.
35. EAW Judgment, CCC, cited supra note 4, paras. 68 and 69. A very comprehensive historical overview may be also found in Kühn, op. cit. supra note 8.
37. See the text accompanying note 70.
38. It was expected that it would put the implementation of the EAW Framework Decision in doubt as regards its constitutionality. See Weigend and Görski, “Die Implementierung des Europäischen Haftbefehls in das polnische Strafrecht”, 117 Zeitschrift für die gesamte Strafrechtswissenschaft (2005), 193, at 196–197.
Constitution\textsuperscript{39} states in Article 55(1) that “[t]he extradition of a Polish citizen shall be forbidden”, while Article 14(1) Czech Charter of Fundamental Rights and Basic Freedoms\textsuperscript{40} formulates the prohibition in much more open terms: “No citizen may be forced to leave his homeland”.

The following part of this article provides material for a more abstract analysis of Maduro’s contrapunctual principles and Kumm’s principle of best fit. It takes the decisions one by one, focusing only on aspects which will be relevant for that abstract discussion.\textsuperscript{41}

3. Facing the conflict: Constitutional courts compared

3.1. The Polish Constitutional Tribunal: Taking European commitments seriously?

3.1.1. The limits of a consistent interpretation according to the PCT

It had not taken long for a question of constitutionality of the relevant provisions of the Criminal Procedure Code to arise before the PCT. It was the Regional Court of Gdańsk, which submitted the question to the PCT on 27 January 2005 in connection with a procedure concerning the surrender of a Polish citizen for criminal prosecution against her in the Netherlands.\textsuperscript{42}

When facing the issue, the PCT examined the scope of the constitutional prohibition on extradition. It wondered whether the duty of consistent interpretation exists also within the Third Pillar in case of framework decisions. We must bear in mind that at the time the PCT was deciding the case, the ECJ’s ruling in \textit{Pupino} confirming the PCT’s opinion was yet to be delivered; only Advocate General Kokott’s Opinion had been already published.\textsuperscript{43} The PCT did not find this obligation relevant in the present context, since it held that the obligation was limited by the ECJ itself: “it may not worsen an individual’s situation, especially as regards the sphere of criminal liability”.\textsuperscript{44} Unfortunately, the PCT did not refer to specific ECJ judgments to show on what basis it con-

\textsuperscript{39}. English translation available e.g. at www.trybunal.gov.pl/eng/Legal_Basis/constitution.htm.

\textsuperscript{40}. English translation available e.g. at test.concourt.cz/angl_verze/rights.html.

\textsuperscript{41}. For a more complete discussion of particular decisions, see the comments \textit{supra} note 8; and Komárek, op. cit. \textit{supra} note *.

\textsuperscript{42}. For more information regarding procedural and factual background of the case, see Leczykiewicz, op. cit. \textit{supra} note 8, 1181–1183. See this comment or Komárek, op. cit. \textit{supra} note*, pp. 9–13, also for a more detailed elaboration of some arguments not analysed here.


\textsuperscript{44}. \textit{EAW Judgment}, PCT, cited \textit{supra} note 3, part III, point 3.4.
structured such a limitation to the principle of consistent interpretation. Some counter-arguments may be raised against such a simple conclusion.

Even if the Community principle of consistent interpretation had been applicable, such consistent interpretation, contrary to what the PCT stated, has sometimes led to the “worsening of an individual’s situation” given its application also between individuals and its role in giving full effect to EC law.\(^45\) It is true that the ECJ stated in \textit{Arcaro} that consistent interpretation “reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed”;\(^46\) however, \textit{Arcaro} concerned exactly such a situation.\(^47\) This is related to another counter-argument: surrendering a person does not affect one’s criminal liability. A person is liable under the criminal law of the State issuing the EAW regardless of whether s/he is finally surrendered or not. Cases which prohibited the imposition of criminal liability by way of consistent interpretation\(^48\) did not in any way concern procedural law,\(^49\) to which surrendering pertains.\(^50\) Thus when referring to the exclusion of consistent interpretation imposed by the ECJ, the PCT avoided the question too easily.\(^51\)

However, it would most likely have reached the same conclusion given the limits imposed on consistent interpretation by the Polish Constitution itself. In the Accession Treaty Decision, the PCT limited the effects of consistent interpretation inasmuch as it may in no event lead to a contradiction with the explicit wording of the Constitution where the constitutional standard of funda-

\(^{46}\) Case C-168/95, \textit{Arcaro}, [1996] ECR I-4705, para 42.
\(^{47}\) For arguments supporting the view that consistent interpretation may permit the imposition of obligations on an individual even by public authorities (i.e. amounting to a reverse vertical effect), see Prechal op. cit. \textit{supra} note 45, pp. 214–215.
\(^{49}\) A.G. Kokott in \textit{Pupino} also distinguished between substantive criminal law, determining criminal liability, where consistent interpretation cannot be used, and criminal procedure, where it can. See para 42 of her Opinion.
\(^{50}\) That consistent interpretation is excluded only if it imposed criminal liability (as opposed to rules of criminal procedure) is expressly confirmed by the ECJ in \textit{Pupino}: see paras. 45–46. It may be also added that because the consistent interpretation here concerns conflicting rules \textit{within national law} as opposed to situations when it seeks to remedy missing or incorrect implementation of a Community norm into national law, the limits of the consistent interpretation may be more relaxed. See however FCC’s arguments described in the text accompanying note 76.
\(^{51}\) For a thorough analysis of the limits of consistent interpretation in criminal cases, see Lenaerts and Corthaut, “Of birds and hedges: The role of primacy in invoking norms of EU law”, 31 EL Rev. (2006), 287, at 296–297.
mental rights protection forms a particular “unsurpassable threshold”. Thus the interpretation of the concept of extradition would have had to be made by reference to the Polish Constitution alone anyway.

The PCT did not use yet another chance for an interpretation of the Polish Constitution in conformity with EU law. According to some arguments presented to the PCT, it was possible to find the ground for limiting the scope of constitutional ban on extraditing Polish nationals in Article 31(3) of the Constitution. This provision allows limiting constitutional rights and freedoms by statute when it is necessary for the protection of democracy, public security or public order. Such limitations may nevertheless not violate the essence of rights and freedoms. It was submitted to the PCT that the essence of the right not to be extradited abroad lies in the right to protection afforded by the Republic of Poland. It was also submitted that the Polish State must guarantee the fair and public trial before an independent and impartial court of law in a democratic State based on the rule of law. Extraditing Polish nationals to other EU Member States would therefore not violate that right’s essence. If we put this argument in the light of *Pupino*, where the ECJ held that while the principle of consistent interpretation cannot lead to a *contra legem* interpretation of national law, “[t]hat principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision”, we may safely contend that the PCT could follow the interpretation suggested. The PCT however did not do so, arguing that the essence of the right not to be extradited is that a Polish citizen is prosecuted before a Polish court. Surrendering the citizen would, according to the PCT, amount to violating the essence of his right not to be extradited. This conclusion of the PCT may be supported by another consideration not mentioned by the PCT itself: the ban on extraditing Polish nationals is formulated more as a straightforward rule than as a principle. As such, it cannot be balanced in the same way as other constitutional rights, which are formulated structurally as principles; the ban simply applies in “all or nothing” fashion, it is not a simple optimization command. However, it can still be argued that

52. See supra note 20, and the text accompanying it.
55. *EAW Judgment*, PCT, cited supra note 3, Part III, point 4.2.
57. See Kumm, op. cit. supra note 56, at 579.
the derogation rule contained in Article 31(3) of the Constitution speaks about “the essence of the right”, which must be protected when a legislator limits the scope of the right. Thus, just as with rights structured as principles, also in the case of rights structured as rules what is balanced is the essence of the rule and not the rule itself. And the essence extracted from the rule may then be formulated as a right to be prosecuted before a Polish court or a court in a democratic State observing the rule of law. As we see, this “extracted essence” is in structure much closer to a principle (on which the rule is based) and as such open to balancing.  

Finally, the PCT rejected any relevance of EU citizenship for the outcome of the decision. It admitted that the content of Polish citizenship has changed with Poland’s accession to the EU. The PCT considers that, in general, Union citizenship means that a citizen of any Member State is not, according to Community law, a “foreigner” in the other Member States. However, this cannot change the interpretation of the constitutional ban on extraditing Polish citizens. Citizenship is according to the PCT a fundamental criterion for considering the legal status of an individual. Any weakening of the legal meaning of citizenship when reconstructing the State’s obligations, particularly so categorically formulated as the ban on extradition, would lead to a reduction in the obligations of citizens related to the obligations of the State. A “dynamic interpretation” cannot change the constitutional role of citizenship. In conclusion, the PCT declared the relevant provision of the Criminal Procedure Code unconstitutional.

3.1.2. Temporal limitation of the decision’s effects as a case of balancing competing principles

Up to this point, the decision may be strongly criticized, because the PCT probably had interpretative ways to avoid the constitutional conflict and for some reasons did not use them. However, the efforts it then made in order to avoid an actual conflict and incoherence in the European legal order arising from its decision and the way in which it reasoned to reach this result may serve as an excellent example of what constitutional courts should do in cases of truly irreconcilable conflicts between their constitutions and EU law.

59. EAW Judgment, PCT, cited supra note 3, Part III, point 4.3.
60. Ibid., Part III, point 4.4.
The PCT found that the mere annulment of the conflicting provision was neither equivalent to nor sufficient for conformity of law to the Constitution. To achieve conformity, an action by the legislature was necessary. It referred to Article 9 of the Constitution, which states that “[Poland] shall respect international law binding upon it.” A mere annulment of the provision implementing Poland’s obligations stemming from the EAW Framework Decision would have inevitably led to a breach of this constitutional principle. Therefore a change of Article 55(1) of the Constitution and subsequent reintroduction of the annulled provision into the Polish legal order were considered necessary for attaining the full conformity with the Constitution.

The PCT found a way out: prospective temporal limitation of effects of the decision so that the constitutional legislator could adopt the necessary amendments to the Constitution and subsequently reintroduce the annulled provision into the Polish legal system, while the provision temporarily remains in force. The PCT stressed that such temporal limitation of the effects of the decision “activates a duty of immediate initiation of legislative activities by the competent authorities” and that it also means that courts continue to be under a duty to temporarily apply the annulled provision.

The PCT limited the effects of its decision for a maximum period allowed by Article 190(3) of the Constitution – 18 months. In order to justify the maximum limitation it referred to constitutional values:

“[A]ccording to the Tribunal, above all the constitutional obligation of Poland to observe the international law, which binds it, but also care to assure security and public order, the assurance of which is enhanced by the surrender of indicted persons to other states, so as to make them face trial, and also due to the fact that Poland and other Member States of the European Union are bound by the community of principles of the political system, assuring proper administration of justice and trial before an independent court of law, are constitutionally justifying the prolongation of the application of [the contested provision], even if that is connected with the deprivation of Polish citizens of the guarantees resulting from the prohibition of extradition within the scope, which is necessary for the implementation of the institution of surrender on the basis of the EAW. Argumentation in favour of this is provided additionally by due care to realize the value consisting of Poland’s credibility in international relations,

61. See supra note 19, and the text accompanying it.
63. Ibid., Part III, point 5.3, second paragraph.
64. Ibid., Part III, point 5.5.
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as a state respecting the fundamental principle of such relations, namely that *pacta sunt servanda*.65

Here the PCT put its decision into the European context, seeing the importance of functional cooperation among the Member States. It is submitted that although the PCT probably could escape the constitutional conflict by interpreting the prohibition of extradition in a way which was more open to EU law,66 when it came to the conclusion that the conflict could not be avoided by way of interpretation, it used all its powers to avoid any negative consequences of such a conflict.67 As we will see, the FCC was not so careful about the consequences of its judgment for the European legal order.

3.2. Federal Constitutional Court’s reservations to the mutual trust between Member States

It is ironic that the case before the FCC arose from a constitutional complaint lodged by a person suspected of being an active and important member of a terrorist organization that committed the terrorist attack of 11 September 2001 – which later boosted extensive cooperation of the EU Member States in criminal matters. Mamoun Darkazanli, having both German and Syrian citizenship, was prosecuted in Spain.68 He was suspected of being a key person in the European offshoot of Al-Quaeda. Allegedly, he had financially supported Al-Quaeda’s network and connected its members in Europe. On 16 September 2004, the central local court No. 5 of the Audiencia Nacional in Madrid issued the EAW against him and asked for his surrender from Germany. After an ordinary court had confirmed the EAW, Darkazanli lodged a constitutional complaint with the FCC.

The FCC considered the complaint to be well founded and declared the implementing legislation void. It also reversed the original extradition decision of the ordinary court. The suspected terrorist was therefore not finally surrendered to Spain. Although the FCC did not challenge the framework decision itself, one line of its objections against the implementing legislation undermined the whole approach to the judicial cooperation in criminal matters.

65. Ibid., Part III, point 5.2, first paragraph.
66. See particularly arguments discussed in the text accompanying note 53.
67. See Leczykiewicz, op. cit. *supra* note 8, 1189–1190 for potentially disapproving reactions of ordinary courts (as they may decide to “apply the Constitution directly” and not respect the temporal limitation), and 1191 for a legislative proposal submitted to the Polish Sejm.
within the third EU pillar, based on mutual trust among Member States. The next part of the article will examine it in details.

3.2.1. The purpose of protecting German nationals from extraditing in the view of the FCC – rights stemming from the citizenship

Article 16 GG originally prohibited extradition of German citizens. This provision was amended in 2000\(^{69}\) and now reads: “\([n]o\) German may be extradited to a foreign country. The law can provide otherwise for extraditions to a member state of the European Union or to an international court of justice as long as the rule of law is upheld”\(^{70}\). The law allowing extradition of German nationals must therefore respect the limits imposed by the rule of law. What exactly it means is left to the FCC’s interpretation. The FCC considered that in case of implementation of the EAW Framework Decision\(^{71}\), the German legislator did not use the discretion allowed by the framework decision in conformity with the Grundgesetz, since it had not protected the special link that German citizens have to their domestic legal order, which was established by them. The FCC also upheld another ground for annulment submitted by the complainant, which was the lack of sufficient judicial protection in the surrender procedure\(^{72}\).

From the special association of German citizens with their legal order, the FCC derives the obligation of the German legislator to make extradition of German nationals conditional upon more stringent requirements than those actually made by the German legislator\(^{73}\). The framework decision allows (optional) grounds for refusal, which were not transposed by the implementing act. The FCC particularly stressed the possibility to refuse execution of the EAW if it relates to offences which are regarded by German law as having been committed in whole or in part on German territory or which were committed outside the territory of the Member State requiring extradition and German law does not allow prosecution for the same offence when committed outside the

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\(^{69}\) 47th amendment, Bundesgesetzblatt 2000, part I, p. 1633.


\(^{72}\) For this argument, which will not be analysed here, see Hinarejos Parga, op. cit. supra note 8, 586. See the FCC, op. cit. supra note 3, paras. 102–116.

\(^{73}\) FCC, cited supra note 3, paras. 64–101.
German territory.\textsuperscript{74} In such circumstances, a “significant domestic connecting factor” is established\textsuperscript{75} and the confidence of a German citizen in the German legal order shall be protected. The implementing law does not provide for this ground for refusing to execute the EAW issued by another Member State and the German legislator therefore went beyond the limits of Article 16 GG.

According to the FCC, the implementing act also breached the principle of non-retroactivity of criminal laws, since in view of the FCC, substantive retroactivity of criminal law prohibited by the \textit{Grundgesetz} may be equal to a situation whereby a German citizen, who has so far been absolutely protected from extradition, shall be prosecuted for acts which have no significant connecting factor to another country and which were at the time of their commitment not punishable in Germany.\textsuperscript{76} It is fair to have in mind, however, that on this point the EAW Framework Decision was innocent, as it allowed in Article 34 for certain temporal limitations. Again, it was a failure of the German legislator to use this possibility in a proper way.

If this were the only justification for declaring the implementing act null and void, there could be much less objection to the decision.\textsuperscript{77} Where Member States have discretion in carrying out their obligations under EU law, nothing should in principle prevent constitutional review of the exercise of this discretion.\textsuperscript{78} However, the FCC did not limit itself to this. In its reasoning, it made several objections against the mutual trust which Member States should have in their systems of criminal justice.

\subsection*{3.2.2. FCC’s distrust of other Member States’ criminal justice systems}

According to the FCC, the cooperation based on a limited mutual recognition within the EU Third Pillar, which does not presuppose general harmonization of criminal laws of the Member States, is also – from the point of view of the principle of subsidiarity – a way to preserve national identity and statehood in the uniform European legal space.\textsuperscript{79}

\textsuperscript{74}~Art. 4(7) of the EAW Framework Decision, cited \textit{supra} note 1.
\textsuperscript{75}~FCC, cited \textit{supra} note 3, paras. 85 and 86.
\textsuperscript{76}~Ibid., para 99.
\textsuperscript{77}~Judge Lübbe-Wolff was of a similar opinion in her dissent – see FCC, cited \textit{supra} note 3, paras. 182–184.
\textsuperscript{78}~This is a point on which all constitutional courts concerned concurred: see \textit{EAW Judgment}, PCT, cited \textit{supra} note 3, part III, point 2.4; and \textit{EAW Judgment}, CCC, cited \textit{supra} note 4, para 54. See also Hinarejos Parga, op. cit. \textit{supra} note 8, 589–590.
\textsuperscript{79}~FCC, cited \textit{supra} note 3, para 75. While the majority did not examine this principle in relation to the framework decision, Judge Broß’s dissenting opinion proposes to declare the implementing law void on this basis.
The key word in the previous sentence was “limited”. While the ECJ stated in Gözütok and Brügge 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”, the FCC takes a very different perspective.

The FCC understands the condition that the extradition of German nationals must be made in accordance with the rule of law as “an expectation referring to the requesting Member State ... in terms of structural correspondence, as has also been set out in Article 23.1 of the Grundgesetz. When permitting the extradition of Germans, the legislature must examine in this context whether the prerequisites of the rule of law are complied with by the requesting authorities.” In the following paragraph, the FCC admits that, because every Member State must respect the principles listed in Article 6(1) TEU, a basis for mutual trust exists. However, in the FCC’s opinion, this does not release the legislator from the duty to react if that trust is shaken, regardless of the procedure pursuant to Article 7 TEU. Moreover, according to the FCC, the Grundgesetz requires that in every individual case a concrete review of whether the rights of the person prosecuted are respected should be made. According to the FCC, “the legislature will have to revise the grounds for the inadmissibility of the extradition of Germans and will draft the case-by-case decision on extradition in such a way that it is an act of application of the law which is based on weighing. Admittedly, primary Union law raises the question of the homogeneity of the Member States’ structures in Article 6 of the Treaty on European Union. The mere existence of this provision, of a mechanism for imposing sanctions that secures the structural principles (Article 7 of the Treaty on European Union) and the existence of an all-European standard of human rights protection established by the European Convention for the Protection of Human Rights and Fundamental Freedoms do not, however, justify the assumption that the rule-of-law structures are synchronized between the Member States of the European Union as regards substantive law and that a corresponding examination at the national level on a case-by-case basis is therefore superfluous. In this respect, putting

80. Gözütok and Brügge, cited supra note 34, para 33. See also note 34 supra.
81. See also see Mitsilegas, op. cit. supra note 3, p. 1296.
82. FCC, cited supra note 3, para 78.
83. Ibid., para 119. The case-by-case examination is according to the FCC also necessary for determining whether the extradition would be proportionate. While the FCC allows presumption of proportionality in cases where a “significant connecting factor to a foreign country” exists, “specific weighing of the individual case is required if the act has been committed entirely or partly in Germany but the result has occurred abroad” (see para 88).
Constitutionalism

into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights.”

As a result, in the case of German nationals the whole of the EAW approach must be replaced by a procedure under which all circumstances of the case and also the system of criminal justice of the requesting Member State will be examined. Therefore, although the FCC did not review the obligations stemming directly from the EAW Framework Decision, the decision it reached may have the same or even worse effects. While the Polish Constitutional Tribunal forcefully called on the Polish constitutional legislature to make appropriate changes to the Polish Constitution, the FCC considers the Grundgesetz to be the standard against which all European cooperation in the field of criminal justice must be measured.

3.2.3. Consistent interpretation excluded

Before we move to the last court examining the EAW, we must make just a short note concerning a possibility of avoiding constitutional conflict by way of consistent interpretation, as it is an important point for our more abstract analysis, which follows in section 4.3. In that regard, the FCC was very succinct: “the constitutional prerequisites placed on the extradition of Germans and the principles of legal clarity and legal certainty require that the [implementing Act] is understandable by itself and that it sufficiently predetermines the decisions on applications for the grant of extradition. The expression in concrete terms, which is called for by the constitution, must manifest itself in the text of the statute; this cannot be achieved by interpreting the European Arrest Warrant Act in conformity with the constitution ....”

Although the FCC decided its case after the ECJ delivered the judgment in Pupino, it did not consider its relevance at all, which provoked criticism from one of the dissenting judges.

The Czech Constitutional Court, facing a very similar dilemma, opted for a consistent interpretation. Its decision completes the picture offered by the Polish and German courts in a very interesting manner: it dealt with the very same issues, but in both instances, it found interpretative ways to avoid direct constitutional conflict.

84. Ibid., para 119.
85. Ibid., para 118.
86. Judge’s Gerhardt’s dissent, FCC, cited supra note 3, para 189. For a detailed analysis of the FCC’s avoiding consistent interpretation, see Hinarejos Parga, op. cit. supra note 8, 586–593.
87. See part 3.3.3. infra.
3.3. Saving a (non-diligent?) legislator – The Czech Constitutional Court

The case arose from a petition lodged by a group of Parliamentarians, representing the Civic Democratic Party, which had opposed adoption of the implementing legislation from the very beginning of the legislative process. One head of their petition pointed out the alleged conflict between the possibility to extradite Czech citizens and Article 14(1) Czech Charter of Fundamental Rights and Basic Freedoms, which states that “[n]o citizen may be forced to leave his homeland”.88 Amongst the other claims, important for our analysis here, was the abolition of the double criminality requirement, breaching (according to the petitioners) the principle of legality of criminal sanctions.

3.3.1. The CCC and effects of third pillar law in the Czech legal order

Before the CCC actually reviewed the contested provisions, it made a couple of more general statements regarding the position of EU law in the Czech constitutional order. Apart from the general formula, limiting “the absolutistic claim of primacy made by the ECJ”90 and applying to EU law in a narrower sense as well,91 it stressed that the framework decision, which had to be implemented to the Czech legal order, was not “Community law in the classic sense” and that it lacked direct effect.91 It somehow elaborated on the differences between Community and Union (in a narrower sense) law.92 The CCC recalled that “[t]he consequences of these differences for the current nature and status of such norms in relation to Member State legal orders, has not as yet been definitively and clearly settled in the case-law of the ECJ”.93 From the point of view of the Czech constitutional order this is very important, as the CCC in its Sugar Quota Judgment stated that “[i]f membership in the EC brings with it a certain limitation on the powers of the national organs in favour of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States’ freedom to determine the effect of Community law in their national legal orders ….”94

In a way, the CCC admitted that it would have to “wait” until the ECJ, as ultimate interpretative authority, determines what effects Third Pillar law precisely had in the Czech legal order. While the CCC admitted that in Pupino

88. See note 40 supra.
89. See the text accompanying note 22 supra.
90. This was severely criticized by the dissenting Judge Wágenerová.
91. EAW Judgment, CCC, cited supra note 4, para 55.
92. Ibid., para 57.
93. Ibid., para 58.
94. Sugar Quota Judgment, CCC, cited supra note 24, part V, section B.
the ECJ declared the obligation of consistent interpretation applicable also in the Third Pillar, it did not make clear whether the principle of primacy applies there as well.\textsuperscript{95} The CCC however opined that it did not have to send a preliminary reference to the ECJ, since it found a way to interpret national law in conformity with the EAW Framework Decision. The question of primacy of Union law could therefore be left open.\textsuperscript{96}

3.3.2. \textit{Extraditing Czech citizens: “EU citizenship brings responsibility as well”}

As regards the first argument of the petitioners concerning prohibition to “force to leave one’s homeland”, it has already been mentioned that the CCC had a much easier task than its Polish counterpart. There is not enough space to go into details on the CCC’s reasoning; what is however remarkable was the way in which the CCC posited the EAW in the European context, seeing the EAW’s virtues for the particular Member States as well the Union as a whole:

“If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality, which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The contemporary standard for the protection of fundamental rights within the European Union does not, in the Constitutional Court’s view, give rise to any presumption that this standard for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic.”\textsuperscript{97}

The CCC denied comparative arguments presented by petitioners (referring to some other countries’ constitutional amendments).\textsuperscript{98} The CCC itself stressed that its position is fundamentally different from the Polish Constitu-

\textsuperscript{95} \textit{EAW Judgment}, CCC, cited supra note 4, para 58.
\textsuperscript{96} Ibid., para 60. It is still somewhat unclear under what conditions the CCC would send a reference to the ECJ. Apart from the Sugar Quota Judgment (part V, section B), where the CCC avoided to give a clear guidance, the CCC touched this in the judgment of 25 Jan. 2006, II. US 14/04, where it even seemed to deny that it would consider itself to be a court of last instance in the sense of Art. 234 EC (this judgment was however delivered by a senate, not the plenum of the CCC).
\textsuperscript{97} \textit{EAW Judgment}, CCC, cited supra note 4, paras. 70–71.
\textsuperscript{98} Ibid., paras. 73–78.
tional Tribunal, since “the Polish Constitution leaves no room at all for it to be interpreted in harmony with the state’s obligations towards the EU”.99

Perhaps the most interesting part of the CCC’s reasoning concerning the alleged ban on extradition, dealt with the substance of the protection provided by the Czech Constitution. Contrary to the PCT, the CCC held that its core lay in the protection against surrender “for criminal prosecution to a state where the standards of criminal proceedings do not meet the requirements for criminal proceedings enshrined in the Czech Constitutional order”.100 While the PCT insisted that a prosecution of a Polish citizen must take place before a Polish court,101 the CCC accepted that what sufficed was a fair trial before a court respecting the Czech standards. And in contrast to yet another constitutional court’s opinion, this time the German FCC, the CCC trusted other Member States’ systems of criminal justice, with an express reference to the ECJ’s judgment in Gözütok and Brügge.102 Apart from the safeguard enshrined in the EAW Framework Decision, allowing for suspension of executing the EAW in case of an issuing Member State’s “persistent breach of the principles set out in Article 6(1) EU, determined by the Council pursuant to Article 7”,103 the CCC mentions a possibility enshrined in the Czech law: “Section 377 of the Criminal Procedure Code can be considered as something of a safeguard, guaranteeing on the constitutional law plane the protection of Czech citizens. According to this provision, the request of a foreign state’s organ may not be granted if its granting would constitute a violation of the Constitution of the Czech Republic or such provision of the Czech legal order which must be adhered to without exception, or if the granting of the request would damage some other significant protected interest of the Czech Republic.”

This “safeguard” proved to be crucial when the CCC considered the second major argument submitted by petitioners: the alleged breach of the principle of legality of criminal sanctions.

3.3.3. Legality of criminal sanctions – consistent interpretation employed

Similarly to the implementation in Germany, the Czech legislator did not use the possibility to provide for additional grounds for refusing to execute an EAW, if it relates to offences which were committed in the Czech territory.104

99. Ibid., para 77.
100. Ibid., para 85.
101. See the text accompanying notes 53–55 supra.
102. See note 34 supra.
103. Albeit this safeguard is mentioned only in the Preamble to the EAW Framework Decision.
104. EAW Framework Decision, cited supra note 1, Art. 4 (7).
As we will see, the CCC was much more generous with the legislator, while consistent interpretation was instrumental for saving the constitutionality of the implementing legislation. The CCC denied that a procedural measure of surrendering a person without examining whether his conduct is punishable according to Czech laws would amount to a breach of the principle of legality. When surrendering a person, the Czech Republic does not exercise its own criminal jurisdiction. It only cooperates with other Member States in the exercise of their criminal jurisdiction. The list of offences provided in the EAW Framework Decision does not specify the offences themselves; it only indicates conduct which is criminally punishable in particular Member States. It is only the criminal legislation of particular Member States which specifies the offences, in line with the principle of legality.

Problems may arise, however, if a person commits an offence which is not punishable according to Czech laws on Czech territory, but at the same time is criminal in another Member State, which subsequently issues an EAW against him. This situation is covered by the provisions of the EAW Framework Decision. However, the Czech legislator did not implement this (optional) ground for refusing to execute the EAW. Contrary to the German FCC, which excluded consistent interpretation of the implementing legislation, the CCC stated that

“[a]lthough Article 4 para. 7 of the Framework Decision was not explicitly implemented into the Czech legal order, in accordance with the principle of the constitutionally conforming interpretation, Czech criminal justice organs must pay heed to Czech citizens’ trust in the fact that their conduct within the Czech Republic will be governed by Czech criminal law. If Czech citizens remain within the territory of the Czech Republic, domestic law is applied to their conduct, from which also follows these persons’ constitutionally protected trust that legal consequences laid down in Czech law will be attributed to their legal conduct. The general value of legal certainty finds expression, on the constitutional plane, in the principle formulated in Art. 39 of the Charter, \[105\] and on the sub-constitutional plane is expressed in the general principle of § 377 of the Criminal Procedure Code, ...”. \[106\]

Czech courts, in cases where an execution of the EAW would be constitutionally intolerable, which would be the case mentioned above, may therefore (indirectly) rely on the EAW Framework Decision and refuse to execute the EAW. The CCC also stressed that this protection applies not only to Czech citizens, but also to “other persons, authorized to stay within the territory of

\[105\] Which states: “Only a law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them”.

\[106\] EAW Judgment, CCC, cited supra note 4, para 111.
the Czech Republic”. The Czech implementation of the EAW Framework Decision was therefore upheld.

The preceding paragraphs were not an autotelic comparative exercise. It should have prepared ground for the following test in our constitutional laboratory. To what extent are abstract concepts, formulated by Maduro and Kumm useful for a correct understanding of what actually happens in the European constitutional practice? Maduro’s contrapunctual law principles are designed “to guide the ordinary state of affairs” rather than situations of constitutional collisions. Kumm’s investigation of such situations must therefore be taken as another indispensable framework for the present analysis. We will see that the principles may find their limits in practice as well as on a conceptual level.

4. The decisions in the light of Principles of Contrapunctual Law

4.1. Pluralism, consistency and coherence, universalizability

In Maduro’s view, the courts should firstly subscribe to the idea of pluralism: “any legal order (national or European) must respect the identity of the other legal orders; its identity must not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself”. To apply this principle would therefore mean that no court should assume supremacy of its legal order, be it the constitutional courts on one hand or the ECJ on the other. Pluralism means that no formal hierarchy exists among the applicable legal orders.

Observance of this principle is not actually tested in the cases concerned, since although the PCT and the CCC met the situation of conflict between national constitution and EU law provision, neither of them questioned the identity and autonomy of EU law in their argumentation. The FCC was in an even easier situation since it reviewed the implementing act within the boundaries of discretion left for national legislators by the framework decision. However, all courts are far from accepting that in some cases their constitutions should defer to the unwritten Constitution of the EU.

Secondly, the courts should seek consistency and vertical and horizontal coherence in the whole of the European legal order. This is a very ambitious

107. Ibid., para 113.
108. See Maduro, op. cit. supra note 9, p. 532.
109. Ibid., at p. 526.
110. “Primacy in application” in every case of conflict is therefore not the way towards real pluralism.
111. See note 78 supra.
112. See part 1.2. supra.
claim. Maduro proposes that “[w]hen national courts apply EU law they must do so in a manner as to make those decisions fit the decisions taken by the [ECJ] but also by other national courts”.¹¹³ It may be added that the ECJ too should take national courts’ decisions seriously.¹¹⁴

Thirdly, the courts should reason in universal terms, thus taking into account the European context. “[A]ny judicial body (national or European) should be obliged to reason and justify its decisions in the context of a coherent and integrated European legal order”.¹¹⁵ According to Maduro, this means that courts should use reasons which may be adopted by other courts within the EU. Consequently, under this principle the courts are not allowed to rely on specific provisions of their constitutions as justification because it could lead to “evasion and free-riding”. The second and the third principle may be put together, as they both require that courts should not reason only from the point of view of their own legal order, but that they should take into account the other national courts, primarily the EU and also legal orders of other Member States, which would be an obligation of the ECJ too, apart from its role as an authoritative interpreter of EU law within its own context.

Here the explanatory force of the contrapunctual principles is at its best: although the final outcome of the PCT’s and the FCC’s decisions was the same (annulling national implementation), two very different approaches can be identified. The principle of coherence was probably not satisfied fully with regard to the PCT’s treatment of the principle of consistent interpretation.¹¹⁶ On the other hand, the PCT expressly referred to other Member States, which had to amend their constitutions in consequence of their inconformity with EU law.¹¹⁷ Thus the PCT uses constitutional practice in Europe as a further justifi-

¹¹³. Maduro, op. cit. supra note 9, p. 528, emphasis added. For an even more ambitious claim, envisaging all constitutional actors, see Besson, “From European integration to European integrity: Should European law speak with just one voice?”, 10 ELJ (2004), 257. There is no room to repeat the debate in general jurisprudence on a theory of “law as integrity”, proposed by Dworkin in his Law’s Empire (Cambridge, Mass, 1986), although it would be certainly beneficial; other, more important reservations are made in section 4.2. For a very accessible introduction (not only because it is available on Internet), see Dickson, “Interpretation and coherence in legal reasoning”, Stanford Encyclopaedia of Philosophy available at plato.stanford.edu/entries/legal-reas-interpret.

¹¹⁴. This is a necessary consequence of the non-hierarchical organization of the EU judiciary. See Komárek, “Federal elements in the Community judicial system: Building coherence in the Community legal order”, 42 CML Rev. (2005), 9, particularly at 27–30.

¹¹⁵. Maduro, op. cit. supra note 9, pp. 529–530.

¹¹⁶. See the text accompanying notes 55 and 59.

¹¹⁷. EAW Judgment, PCT, cited supra note 3, Part III, point 5.7, mentioning France amending its Constitution in order to make ratification of the Maastricht Treaty possible, the same case of Spain and finally Germany, abolishing its rule prohibiting women’s service in the armed forces after the ECJ’s judgment in Case C-285/98, Tanja Kreil, [2000] ECR I-69.
cation for its reference to the constitutional legislator, who is obliged to attain conformity of the Polish legal order with its EU commitments. Moreover, the PCT referred to the wider context of the EAW Framework Decision, urging the legislator to take its obligation seriously and to move towards a more advanced level of cooperation in criminal matters with the other Member States: “[T]he system of surrendering persons among judicial bodies created in the [EAW Framework Decision] shall serve not only realization of Union’s aims, which is creation of a common area of freedom, security and justice. The Tribunal stresses again that the institute of the EAW has a far-reaching importance for proper functioning of Polish justice and primarily for strengthening its internal security; thus attainment of its functioning should be the highest priority of the Polish legislator.”¹¹⁸

Conversely, the German FCC took no account of possible consequences of its decision on the European level and annulled the implementing law with immediate effect. The decision brought some confusion into the European legal order. The PCT managed to avoid similar effects without having to sacrifice the autonomy of the national constitution. The FCC’s decision provoked a severe reaction on the part of the Spanish Audiencia Nacional in Madrid,¹¹⁹ whose EAW was dismissed in consequence of the FCC’s decision. The Regulatory Chamber of this court (not deciding on a particular case but giving a decision on a question of principle) decided that because Germany excluded itself from the European system of cooperation in criminal matters the Audiencia Nacional would (in line with the principle of reciprocity) treat German requests for surrender as conventional requests for extradition. Even if this amounts to another breach of EU law, this time committed by the Spanish court, it is a necessary consequence of the absence of proper implementation of the EAW Framework Decision in one Member State.

However, the most serious refusal of the principle of universalizability follows from the FCC’s examination whether the partial abolition of the ban on extraditing German citizens could not in itself breach the Grundgesetz, in particular its unassailable provisions. The FCC came back to its Maastricht judgment and examined the possibility to extradite German citizens to other EU Member States in the light of unassailable structural principles of the Grundgesetz. When reaching the conclusion that the limitation of the protection of German citizens against extradition did not encroach upon these principles, the FCC stressed the role of national citizenship. The FCC considered that

¹¹⁸. EAW Judgment, PCT, cited supra note 3, Part III, point 5.9. So did the CCC (see note 97 supra), which is not expressly analysed here, as it upheld national implementation.

¹¹⁹. Decision of 21 July 2005. I am grateful to D. Sarmiento for providing me with detailed information regarding the reaction of the Spanish High Court.
the EU prohibition of discrimination on grounds of nationality is not widely construed, but limited only to specific areas, particularly in the sphere of fundamental freedoms.\textsuperscript{120} This should have helped the Member States to preserve their national identities, expressed in their fundamental political and constitutional structures, which EU law protects too.\textsuperscript{121}

This statement may have far-reaching consequences. In essence, it means that a degree of differentiation (or even discrimination) based on nationality among EU citizens must be preserved in order not to deprive national citizenship of all meaning. The idea of universalizability orders the exact opposite: no free-riding or evasion should be possible for a particular Member State or its citizens.

It should be pointed out, however, that the PCT did not fully satisfy the principle of universalizability either, since this principle requires that the reasoning used by one court of law should be universalizable by all other EU courts. The PCT could therefore never use the constitutional prohibition concerning exclusively Polish citizens.\textsuperscript{122}

The problem goes to the core of the principles of contrapunctual law: what to do in cases of conflicts, which cannot be avoided by way of interpretation? Maduro’s version of the principle of universalizability would force the court in such a situation to set aside provisions of the national constitution. However, this contradicts the idea of pluralism to a certain extent: EU law would in this case trump the national constitution. Maduro provides no detailed analysis of such an open conflict (although he sees this limitation of national constitutions as a necessary commitment limiting European pluralism).\textsuperscript{123} This is when Kumm’s analysis of constitutional conflicts comes into play because it deals with exactly these kinds of situations.

\textsuperscript{120} Para 74. However, one may add to the FCC’s statement that the construction of the EU citizenship depends largely on the ECJ, which does in no way take such a limited understanding. Dissenting opinion of Judge Lübbe-Wolff mentions the ECJ’s recent ruling in Case C-209/03, \textit{Bidar}, [2005] ECR I-2119, to argue that the ECJ used this provision rather extensively. See Hilson, “What’s in a right? The relationship between Community, fundamental and citizenship rights in EU law”, 29 EL Rev. (2004), 636.

\textsuperscript{121} The FCC refers in this respect to Art. 6 (3) EU and to Art. 1-5 (1) of the European CT.

\textsuperscript{122} On this point, see the CCC, which expressly reminded ordinary courts that the protection provided applies to “other persons, authorized to stay within the territory of the Czech Republic”. See text accompanying note 107 \textit{supra}.

\textsuperscript{123} Maduro, op. cit. \textit{supra} note 9, p. 524.
4.2. **Contrapunctual principles and the constitutional evolution**

What Kumm expects from national constitutional judges is to give up the supremacy of the national constitutions if this is required by the principle of best fit, which guides the interpretation of the national and European constitutions in case of their conflict. In principle, Kumm thinks the court’s shift from national to European supremacy is possible because national constitutional supremacy is not (or is no longer) “a defining feature of national legal practice”. If it were, the national judge trying to admit the supremacy of EU law would not be considered to participate in national legal practice. In Kumm’s illustrative example, he would be like a chess player moving a bishop horizontally instead of diagonally and claiming checkmate after this rules-breaking move. As the rules of moving chess pieces are at the heart of the practice of playing chess, those who do not obey these rules are not considered to be playing chess. Similarly, if national constitutional supremacy were at the heart of national legal practice, shifting to the EU Constitution supremacy would disqualify its perpetrator from national legal practice.

Kumm does not take this view and says that unlike chess players, courts may change the rules of the national legal practice; and therefore, they may finally acknowledge the supremacy of EU law, which “would merely be another step along a path of legal integration that has guided the development of national legal practice for some time”. Thus, Kumm proposes that national constitutional courts give precedence to their specific constitutional provisions only if those provisions are clear and specific and if they reflect the national commitment to a constitutional essential.

Kumm relies on the principle of best fit, which assumes that both national and European constitutional orders are built on the same normative ideals. These ideals are, according to Kumm, liberty, equality, democracy, and the rule of law, which are common to the EU Member States and the EU itself.

According to Kumm, “[T]he task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of best fit. For this purpose, national courts have to give precedence to the specific constitutional provisions of the EU Member States only if those provisions are clear and specific and if they reflect the national commitment to a constitutional essential.”

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124. This is a completely new argument, which complements (not replaces) arguments made in “Contrapunctual Principles in Disharmony” (cited supra note *), pp. 22–25, which are not repeated here. Although it attempts to be a critique of Kumm’s principle of best fit, it does not intend to undermine the significance of his contribution for our understanding of constitutional conflicts. It however suggests that his principle blurs an important distinction.
128. Ibid., 285.
129. Ibid., 298.
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of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realize the ideals underlying legal practice in the European Union and its Member States.130

Kumm’s principle of best fit may be identified as a version of Dworkin’s conception of law as integrity. According to this, “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”131 It has already been mentioned that such accounts of law have long been contested in general jurisprudence.132 The following will make no attempt to repeat the critiques raised; it however seems mostly pertinent to refer to some of them when we explore constitutional conflicts in the European Union.

One of the criticisms raised against law as integrity is that it obscures boundaries between positive law and other, non-legal, considerations which are relevant in adjudication and as such legitimately employed by courts. This distinction is important because only the former are supported by legal authority.133 As J. Raz puts it, “[law as integrity] advocates acting on principles which may never have been considered or approved, either explicitly or implicitly, by any legal authority, and which are inferior to some alternatives in justice and fairness.”134 Opponents to law as integrity do not claim that judges are not required to make non-legal choices. But these are “non-legal considerations” and judges have discretion to opt for a solution.135

Contrary to this, Kumm tries to convince us that the shift from the national constitutional supremacy is a legal choice and that judges do not have an op-

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130. Ibid., 286.
132. See note 113 supra.
133. This is a “positivistic” claim. Before discarding positivism as irrelevant in today’s legal practice, see Gardner, “Legal Positivism: 5½ Myths”, 45 American Journal of Jurisprudence (2001), 199, particularly 214–218, for it is a very good justification why not to do so. But a misunderstanding of legal positivism is not something to blame people outside jurisprudence; even proponents of this tradition of thought do not agree what positivism is.
135. Again, there was (or may be still is) a debate in jurisprudence on the nature of this discretion. But contrary to what Dworkin assumed to be the positivists’ – or at least H.L.A. Hart’s – position, judges “cannot do what they like” (see Raz, op. cit. supra note 134, p. 307, note 85). What opponents to law as integrity insist on is that there is no “one right answer” in these considerations. See Dworkin, op. cit. note 58, pp. 119–145 “Is there really no right answer in hard cases” and its critique, Leiter, “Objectivity, morality and adjudication”, in Leiter (Ed.), Objectivity in Law and Morals (Cambridge, 2001), pp. 66–98.
tion but to pay heed to European Constitutional Supremacy – except to some reservations, which would “fit” European legal practice as a whole, hence satisfying his “principle of best fit”.136 To explore completely what Kumm proposes would require more complex jurisprudential argument than can be made here. But as a starting point for further discussions, which his proposal certainly deserves, some clarifications must be made.

According to at least some versions of legal positivism, courts may change the “defining feature[s] of national legal practice”.137 Hart would call Kumm’s “defining feature of national legal practice” “a rule of recognition”, which, as it only reflects practice of officials, particularly courts, may be changed.138 The problem lies somewhere else: by adopting “integrity” reading of the constitutional conflict in the EU, we leave something in the hands of courts, something we should perhaps be doing ourselves and consciously. That “something” is nothing else than making constitutional revolution.139

On this reading, the “constitutional revolution” indeed just started with the ECJ’s judgment in *Costa*,140 and the rule of recognition has been changing by the constant practice of national courts since then, as Kumm proposes. As a clarification, it would perhaps be more accurate to call this change a constitutional *evolution* instead of a revolution, as it does not occur at one moment of time but is a continual process. A process, which may now be seriously disrupted by the accession of ten new Member States,141 as proven particularly by “radical” reservations made by the PCT in its *Accession Treaty Decision*.142 They may have a very different view on a possible change of the

137. See note 125 supra. See another jurisprudential critique of Kumm by Schilling, based on Kelsen’s version of legal positivism: Schilling, “The jurisprudence of constitutional conflict: Some supplementations to Mattias Kumm”, 12 ELJ (2006), 173. Schilling, with different arguments (not all of which I would embrace), comes to the same conclusions as I do. I believe, although he argues that courts cannot change the fundamental rule of a legal system (instead of Hart’s Rule of Recognition, Schilling uses Kelsen’s Basic Norm, which may lead under his interpretation to different considerations). For a very useful introduction to Kelsen, see Kelsen, *Introduction to the Problems of Legal Theory* (Paulson and Paulson transl.) (Oxford, 1996), which is a translation of the first edition of Kelsen’s *The Pure Theory of Law*.
138. As every jurisprudential concept employed here, also the exact meaning of the rule of recognition is contested in jurisprudence. For an original exposition, see Hart, op. cit. supra note 126, pp. 94–95, particularly at pp. 100–123.
141. For the relevance of the enlargement, see Komárek, op. cit. supra note *, pp. 24–25.
142. Sadurski, op. cit. supra note 8, pp. 39 et seq. He comes with a very interesting (and quite plausible) explanation for post-communist national constitutional courts’ would-be strong gestures towards the ECJ. They may actually empower themselves against political branches of government, as well as against the ECJ. They become actual final arbiters.
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rule of recognition. N. Barber captures this process of a possible change of the rule of recognition in the following words: “The Court of Justice has never claimed that national legal systems are mere subsets of the European. Rather than moving towards a single system, it might be better to say that the two systems overlapped, with the duties and loyalties of those within the German system [which Barber uses as an example of a national legal system] becoming increasingly ambiguous. ...[T]he ultimate resolution of the debate would depend on the loyalty of officials — in particular, but not exclusively, the loyalty of the judges.”

But it does not mean that we should start to think that the change would be legal (determined by positive law as it exists) and inevitable. The change of the rule of recognition cannot be made by definition within law validated by the original rule of recognition. The change would be therefore “illegal”, so to speak, which however does not mean that it cannot be legitimate. Its legitimacy depends on how much we believe that it is legitimate for courts to do this. While the principle of best fit does not leave much room for processes outside courts (by saying it is all a legal choice), contrapunctual principles may have a response.

4.3. Last principle: institutional choice as a way out?

A useful, if not the key, tool in our analysis of the European constitutional conflict (which may be labelled constitutional evolution as well) is Maduro’s last contrapunctual law principle, the principle of institutional choice. According to this, “each legal order and its respective institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community” and that “the importance of institutional choices in a context of legal pluralism only serves to reinforce the need to do adequate comparative institutional analysis to guide courts and other actors in making those choices”.

If the conclusion of the preceding section is correct, then the contrapunctual law principles have their limits corresponding to how far national courts may

143. The concept of the rule of recognition may prove to be more promising for the analysis of constitutional conflicts in Europe than the concept of sovereignty.
145. It may be argued that even the principle of best fit may accommodate criteria for institutional choice within it. However, Maduro’s contrapunctual principles make this choice explicit, which is important for our complete understanding of the practice of constitutional conflicts.
interpret national constitutions consistently with EU law. The question then shifts from who (what court) the final arbiter in the EU legal order is (either the ECJ or national constitutional courts), to what the limits of law and the judicial process are. On the other hand, Kumm’s principle of best fit does not allow this question to be asked. It presupposes that, being legal in nature, the choice pertains to courts.

If we do not subscribe to the principle of best fit, we will have to ask different questions: to what extent can the conflict be decided by the courts (and by their interpretation of law) and what should be left to the other constitutional actors, these actors being not only politicians, but also government officials, the legal/constitutional doctrine and the public at large. This is not to say that the courts should fend off constitutional conflicts and that the question of supremacy is only for politicians to resolve. Of course, the conflicts do and will arise and the courts cannot avoid them. However, the proper role of the courts should be to define the extent in which a conflict may be resolved in law and when it should be left for some extra-legal solution to be made by some other process.147 In this respect Kumm’s contribution is extremely useful for it provides a framework for analysing constitutional conflicts and the role which law and legal process can play. The problem of his analysis, however, is that it does not allow an examination of whether the conflict should be left for another process than the judicial decision-making process.

This may be beneficial for the EU constitutional order in yet another way: it will force the other actors, especially politicians, to take similar concerns more seriously and will show that these issues are not reserved for lawyers (or judges) only. The construction of the EU constitutional order should not be left entirely in lawyers’ hands. Courts’ “passing the buck” to other constitutional processes will lead to the democratization of the European constitutional discourse, which will encompass much more relevant actors. Actually, the proposed control of respecting the principle of subsidiarity, exercised by national parliaments, may be a step in this direction.148

Interestingly, this seems to be embraced by a constitutional court (the Czech Constitutional Court), which adopts on the face of it Kumm’s principle of best

147. In fact, both constitutional conflicts referred to by Kumm were finally resolved by the political process, in the case of Ireland’s prohibition of abortion at the Community level by adopting a special protocol exempting Ireland from certain Community rules (because of the “abortion issue”); in Germany by changing the Grundgesetz after the ECJ’s ruling in Case C-285/98, Kreil, [2000] ECR I-69. See Kumm, op. cit. supra note 10, 270.

148. National parliaments have not given up with the failure of the European CT, and the Conference of Community and European Affairs Committees of Parliaments of the European Union now exercises a pilot project of subsidiarity and proportionality check even without the European CT. See www.cosac.eu/en/info/earlywarning/.
fit to its greatest extent. On the one hand, it rewrites quite radically the Czech legal order’s fundamental rule by saying that in principle it accepts primacy of EU law, even over the Constitution, save for its most fundamental provisions.\textsuperscript{149} On the other hand, there is a troubling part in its EAW Judgment, contradictory to this, which resembles the Polish Constitutional Court’s approach: “[T]he constitutional principle that national law shall be interpreted in conformity with the Czech Republic’s obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text.... If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constitution lawmaker’s prerogative to amend the Constitution.”\textsuperscript{150} 

This passage suggests that the CCC does not feel competent to rewrite the Constitution. But at the same time, it contradicts the more general formulation of the relationship between the Czech Constitution and EU law. In a merely pragmatic manner, it may be explained by the fact that the CCC’s position is not yet settled amongst the judges.\textsuperscript{151} In a principled way, it may illustrate that even courts are not comfortable with Kumm’s principle of best fit and the institutional role it assigns to them.\textsuperscript{152} 

What should also be kept in mind is that the institutional choice is being made as early as the court interprets law and determines its limits. If the court finds it impossible to reconcile an apparent conflict by way of interpretation, it simultaneously defers its decision to the political process, and thus makes the choice. There is an inherent danger in this possibility given to courts: they can escape their institutional role of arbiters in disputes arising in law. Thus, when making institutional choices, courts must reason in a persuasive manner to justify their choice. The FCC’s exclusion of the possibility of consistent interpretation (for which the CCC – in a similar situation – opted) may be an example of such misuse of institutional choice, whereas the PCT, facing much harder conflict, was much more faithful to contrapunctual law principles.

\textsuperscript{149} See the text accompanying note 22 supra.

\textsuperscript{150} EAW Judgment, CCC, cited supra note 4, para 82.

\textsuperscript{151} See the text accompanying note 26 supra.

\textsuperscript{152} Although this does not apply generally; quite the contrary: see Breyer, “Introduction: The ‘international’ constitutional judge”, in Hershovitz (Ed.), Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin (Oxford, 2006), pp. 1–4. On the other hand, one of the most prominent of Dworkin’s critics is Judge Posner of the U.S. Federal Court of Appeal: see e.g. Posner, “The problematics of moral and legal theory”, 111 Harvard Law Rev. (1998), 1637.
5. Conclusion

This article examined recent decisions of three EU Member States’ constitutional courts, which faced constitutional conflicts raised by implementation of the EAW Framework Decision. After a brief discussion of these courts’ reasoning and pointing out some of their questionable elements, the decisions were put into the context of contrapunctual law principles designed by Maduro to guide national courts when applying EU law. This served a twofold aim: firstly to show that some of the decisions’ outcome was the same (annulling implementing acts); each court took a fundamentally different approach in reaching its conclusion. Secondly, the discussion aimed at showing that contrapunctual law principles have their limits that correspond to the limits of constitutional role of courts. Kumm’s principle of best fit was problematized to show that it may hide some important questions, involving institutional choice amongst possible processes to deal with the conflict.

It has been proposed however that since this limitation of contrapunctual law principles can lead to involvement of a broad set of actors – politicians, constitutional doctrine and also the general public – it could be beneficial for building a genuine EU constitution, maybe not written, but not having to mask itself behind the word “Treaty”. 