

Judicial Trust as a Zero-Sum Game in Turbulent Times

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The current European Rule of Law crisis has resulted in a situation of distrust between national and European institutions, which has led to the necessity to reflect about the relevance of trust and its implications for the creation and sustainability of a European legal area. In this regard, [Prof. von Bogdandy](#) has recently stressed in this blog the importance of trust as a crucial element for promoting cooperation in multi-level systems, like the EU, where non-strict hierarchical relationships between national and EU institutions are articulated. In this post, I argue about the importance of trust among judges in the European legal system based on recent empirical findings.

The *Network of the Presidents of the Supreme Judicial Courts of the European Union* has recently [denounced](#) the negative implications of the lack of trust between national judges for cooperating in the Area of Freedom, Security and Justice (AFSJ). Nevertheless, the new [debates](#) about trust as a systemic factor in the construction of the European legal area go beyond the mere functional use of “mutual trust” as a concept in the AFSJ. In this regard, the European legal system as a whole is defined as a multi-level system of mutual enforcement and cooperation between courts, where the CJEU needs to secure the collaboration of national judiciaries, so that they can act as EU decentralized judges in the effective application of EU law.¹⁾Jaremba, U. (2013) “At the crossroads of national and European union law. National judges in a multi-level legal order – legal and empirical perspective.” *Erasmus Law Review*, 3/4, pp. 191–203.

‘Judicial trust’²⁾Mayoral, J. A. (2017). “[In the CJEU judges trust](#): A new approach in the judicial construction of Europe.” *Journal of Common Market Studies*. Vol. 55, Issue 3. Pages 551-568 or trust between judges becomes paramount for enhancing the cooperation and compliance with CJEU rulings, legal mandates and EU law in general. Judicial trust is then defined as a relevant factor for the smooth functioning of the multi-level legal system for several reasons. Judicial trust may be a functional principle that may encourage cooperation in absence of other legal incentives, or, most importantly, when the structural incentives work against collaboration between judicial institutions. This last remark it is very interesting as it refers to the current situation of political and legal clashes in which national judges might play an important role. Here, I refer to conflicts where national judges face opposing mandates coming from the EU institutions, like the CJEU, and their national governments/national high courts regarding application of EU law. The existence of trust in EU institutions may reduce the harmful consequences of these kind of conflicts for the construction for the European legal order, by making national judges warrant the effectiveness of EU law based on their trust in the CJEU.³⁾Mayoral, J. A. (2016) “Assessing the Relevance of Judicial Trust for cooperating with the CJEU”. Paper presented at the conference *Trust, Social Capital and Networks: A different perspective on International Courts*, University of Copenhagen, 31st March- 1st April 2016.

This also implies that the CJEU should be assessed as trustworthy at the eyes of national judges. In this case, the empirical evidence shows⁴⁾See Mayoral (2017) above. how the Court must play its part and promote trust 1) through its decisions, facilitating the application and assimilation of a common legal framework shared by national judges, and, 2) through socialization process of national judges as members of the European judiciary (e.g. networks, meetings and informal connections between national judges and EU judicial staff).

The evidence shows to what extent the Court has already been performing its role as a trust-enhancer. First, the Court has included a certain reflexivity in its decisions that takes into account the differing legal cultures, traditions and identities that underlie the pluralistic EU legal order.⁵⁾Paunio, E. (2010) “Conflict, Power, and Understanding – Judicial Dialogue between the CJEU and National Courts.” *No Foundations: Journal of Extreme Legal Positivism* 4: 5–24. That is, the national judiciary will trust more on the CJEU when they believe that its rulings do not undermine the national legal foundations of their legal system. And, to moderate national judges’ fears the CJEU started to refer

and pay due respect to, for example, the constitutional identities of the Member States.⁶⁾ See Cases C-36/02 Omega Spielhallen; C-208/09 Sayn-Wittgenstein; or; C-391/09 – Runevič-Vardyn and Wardyn, among others.

Secondly, the Court has also been promoting trust through the involvement of CJEU staff in networking activities.⁷⁾ Mayoral, J. A. (forthcoming) “Impact through Trust: The CJEU as a trust-enhancing institution”. In Wind, M. and Follesdal, A. (eds.) *International Courts and Domestic Politics*. Oxford University Press. These participation of, for example, CJEU judges in judicial networks,⁸⁾ Claes, M. and De Visser, M. (2013) “Courts United? On European Judicial Networks”. In Vauchez, A. and Witte, B.D. (eds) *Lawyering Europe: European Law as a Transnational Social Field*. Oxford: Hart Publishing Limited. Pages 75–100. informal meetings with judges from national higher courts⁹⁾ Leron, N. (2104) *La gouvernance constitutionnelle des juges: l’institutionnalisation d’un nouveau mode de régulation du risque de conflit constitutionnel dans l’Union européenne*. Thesis. Science Po. and academic interventions have the virtue of increasing the understanding and knowledge of EU law, the preliminary reference mechanism and the position of the CJEU, and, generate mutual empathy and tolerance to different legal positions which consequently influence national judges’ trust in CJEU.

Additionally, national judges may cooperate with the CJEU on European legal issues more when they believe that their national governments or supreme national judicial authority is not trustworthy. Lack of trust in domestic institutions may be caused, for example, by their poor performance regarding the implementation of EU law, lack of judicial independence, or the extent of disagreement with governments or higher court’s decisions.¹⁰⁾ Mayoral, J. A. (2015) *The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe*. Madrid: Instituto Juan March de Estudios e Investigaciones. Hence, judges might collaborate with CJEU to challenge national judicial institutions whose performance is not considered trustworthy in the effective application of EU law.¹¹⁾ Alter, K. J. (2001) *Establishing the supremacy of European law: The making of an international rule of law in Europe*. Oxford: Oxford University Press. In the current Rule of Law crisis in Poland and Hungary, the fact that national judges are more receptive to create coalitions in contexts where political powers are undermining their independence, can be even interpreted as an opportunity for the CJEU to reach out the national courts in these turbulent times.

This post has briefly showed the relevance of judicial trust and its implications for building and consolidating a European legal area. It is clear that a better and broad understanding of the trust relationships between national judges and the CJEU will improve the scope and quality of national courts’ compliance with EU law and jurisprudence. Most importantly, the process of judicial trust is understood as a zero-sum game in which the CJEU might also gain trust as result of the losses of trust in domestic institutions caused by their misbehavior. In this regard, judicial trust might be crucial for encouraging national judges to effectively apply EU law, fundamental rights and rule of law principles in times of domestic political and legal crisis.

In the light of such developments, we should promote a proper policy and scholarly debate on which are the optimal trust-enhancing solutions for promoting national judges’ involvement in the construction of an effective European legal area together with the CJEU.

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References [+]

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 4. ↑ See Mayoral (2017) above.

 5. ↑ Paunio, E. (2010) “Conflict, Power, and Understanding – Judicial Dialogue between the CJEU and National Courts.” *No Foundations: Journal of Extreme Legal Positivism* 4: 5–24.

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