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The Political Psychology of Vertical Trust Between the European Union and the Member States

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Mutual trust in European Union law traditionally refers to a horizontal relationship between Member States, requiring them to consider ‘all the other Member States to be complying with EU law’, as the European Court of Justice has repeatedly stated. This Article considers a new perspective: is it possible to detect the existence of trust between Member States on one hand and the European Union’s institutions on the other hand? If so, what are its legal manifestations? And what light does trust shed on the cooperation between the peoples of Europe? To answer these questions, the Article seeks to offer a synthetic vision of the case law, selecting legal issues of European integration as examples of ascending (from Member States to the EU) and descending (from EU to Member States) trust. It then discusses reasons why the Court of Justice of the European Union may want to create a relationship of trust with Member States, drawing from the fruitful insights of political psychology.

Keywords: EU law, mutual trust, political psychology, vertical trust, supremacy, internal market

1 INTRODUCTION

Mutual trust is a structural principle of European Union (EU) law, in the sense that it provides a legal obligation which informs and regulates the relationship between Member States.¹ It ‘requires, particularly with regard to the area of freedom, security and justice, each [EU Member State], save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law’.²

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¹ For the concept of structural principle see M Cremona, *Structural Principles and Their Role in EU External Relations Law*, 69(1) *Current Legal Probs.* 35, 46 (2016).

² Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, para. 191 and the case-law cited.

This can be termed ‘horizontal’ trust. It has received substantial attention,³ including criticism in scholarly literature.⁴

Mutual trust is both the means and end of European integration. As an alternative for full harmonization that respects the different laws and practices of the Member States (MSs), the legal principle of mutual trust is instrumental to European integration: it assumes that Member States are complying with a hierarchically superior and centralized law,⁵ it works as a presumption in favour of that centralized and hierarchically superior system, and it imposes extra costs for non-compliance. It is only partially overlapping with the principle of mutual recognition in the internal market.⁶ In sum, it contributes toward a supra-nationalist, and indeed federalist, objective while facilitating cooperation between European states. (More) mutual trust between the people of Europe – here it is ‘actual’ trust, as defined below, not the legal principle – is also the goal of European integration, the implicit objective in the project of cooperation in an ever closer union.⁷ The achievement of that kind of horizontal mutual trust in Europe required and requires, among other things, a sophisticated edifice of legal engineering: the EU. It is through the vertical, functional,⁸ and so to speak instrumental connection between Member States on one hand, and a supra-national EU on the other hand, that Europe manages the horizontal, final,⁹ *dixerim* eschatological cooperation between the peoples inhabiting it.¹⁰

³ Auke Williams, *The Court of Justice of the European Union’s Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, 20 *German L. J.* 468–495 (2019); Koen Lenaerts, *La Vie après l’Avis: Exploring the Principle of Mutual (Yet not Blind) Trust*, 54 *Common Mkt. L. Rev.* 805 (2017); Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, 2(1) *Eur. Papers* 75 (2017); P. J. Martín Rodríguez, *La emergencia de los límites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldaru*, 55 *Revista de derecho Comunitario Europeo* 859 (2016); Evelien Brouwer, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts*, 1(3) *Eur. Papers* 893 (2016).

⁴ Gert Vermeulen, *Flaws and Contradictions in the Mutual Trust and Recognition Discourse. Casting a Shadow on the Legitimacy of EU Criminal Policy Making & Judicial Cooperation in Criminal Matters?*, in *Legitimacy and Trust in Criminal Law, Policy and Justice* 153 (N. Persak ed., Ashgate 2014); Ermioni Xanthopoulos, *Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust*, 55 *Common Mkt. L. Rev.* 489, 500 (2018).

⁵ A compliance mandated by the principle of primacy of EU law.

⁶ Sandra Lavenex, *Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy*, 14(5) *J. Eur. Pub. Pol’y* 762 (2007). Mutual recognition, as Schütze rightly notes, is not ‘federalist’. R. Schütze, *Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?*, 41(6) *Eur. L. Rev.* 826 (2016).

⁷ As is recalled in the second paragraph of Art. 1 TEU, Member States are engaged in a ‘process of creating an ever closer union among the peoples of Europe’.

⁸ Article 1 TEU, first paragraph.

⁹ This special horizontal relation is a distinctive feature of the EU, as Opinion 1/13 *Accession to ECHR* makes clear (see e.g., para. 191).

¹⁰ This is perhaps one of the most well-known philosophies of EU law, N. Walker, *The Philosophy of European Union Law*, in *The Oxford Handbook of European Union Law* 10 (A. Arnall & D. Chalmers eds, OUP 2015).

The vertical relationship between Member States and the EU also requires a degree of trust. This article considers precisely this perspective: what role does ‘vertical trust’,¹¹ i.e., trust between the Member States’ governments and the EU’s institutions, play in the cooperation between Member States? For the purposes of this article, ‘actual’ trust is defined as ‘refraining from taking precautions against an interaction partner, even when the other, because of opportunism or incompetence, could act in a way that might seem to justify precautions’.¹² The article asks whether there is such a thing as vertical trust, and, if so, what its legal manifestations are in EU law. The focus will not be so much on substantive analysis of legal issues (already dealt with by a rich scholarship), but will situate itself, so to speak, at a more abstract level, illustrating general points by reference to classic authorities on the principle of supremacy, to the case law of the Court of Justice of the European Union (CJEU) in areas such as the internal market, Area of Freedom Security and Justice, Banking Union, as well as to cases concerning the ‘rule of law crisis’ or the UK’s withdrawal from the EU.

Section 2 maps the terms on which this article seeks to interpret the case law. It briefly introduces the field of political psychology and perspectives on trust. Section 3 considers ‘ascending’ vertical trust, from Member States to the EU. It presents and defends the view that two key legal developments may be conceptualized as a manifestation of a duty, for Member States, to trust the EU: primacy and the protection of fundamental rights as a general principle of the EU are premised on a requirement that Member States (MSs) trust the EU’s capacity and motivation¹³; the limits put by reticent national supreme or constitutional courts to the primacy of EU law, as well as the action for annulment,¹⁴ are structural counterweights to ascending trust. Section 4 is dedicated to descending vertical trust, from EU (Courts) to Member States (governments). Its key contention is that the legal manifestation of descending (dis)trust are the duty of sincere cooperation and the varying degree of deference shown, through the general principle of proportionality, by the CJEU to Member States. Section 5 draws together the strands of case law to reflect upon them.

¹¹ A concept usually overlooked in the literature. But see Mayoral, ‘In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe’ (2017) 55(3) *JCMS* 551 for trust between MSs’ and EU’s judiciary; and a mention in Tridimas and Lonardo, *When can a National Measure be Annulled by the ECJ? Case C-202/18 Ilmārs Rimšēvičs v. Republic of Latvia* and Case C-238/18 *European Central Bank v. Republic of Latvia*, 45 *Eur. L. Rev.* 731, 734 (2000).

¹² J Elster, *Explaining Social Behaviour* 335. Conversely, trust may be ‘the mutual confidence that no party to an exchange will exploit another’s vulnerability’.

¹³ Capacity and motivation to protect, e.g., fundamental rights.

¹⁴ Article 263 TFEU.

2 MAPPING THE CONCEPTS: POLITICAL PSYCHOLOGY AND TRUST

Political psychology is a set of hypotheses¹⁵ concerning the psychology of social and political actors, and it is fit to shed light on their political behaviour.¹⁶ With the name of ‘political psychology’, the field is well-established in North America, and is gaining traction in Europe.¹⁷ Insights from psychology – including experimental psychology and so-called behavioural economics – have been applied with interesting results to the behaviour of states, by scholars of either international relations or of international law.¹⁸ Building on this background, this article attempts an application to EU law. Considerations of political psychology come into play when discussing the concept of trust as possible explanation for the behaviour of states. This is because ‘trust’, albeit figuring with a technical meaning in EU law,¹⁹ carries broader, extra-legal significance in everyday language: if law is the *explanandum*, trust may be an interesting lens to understand it. In particular, social psychology and personality psychology (and, outside psychology, sociology) offer a useful outlook on the nature of trust as they contribute to an understanding of human behaviour and human nature. Other concepts such as emotions may, in the future, be explored with the same objective of explaining European integration. A less humble way to place this article in the context of previous literature would be to situate it in the tradition of ‘genealogy’ that holds an important place in modern Western thought. The origins of (for example) legal terms or practices can be ferreted out more or less fruitfully in the psychology of the relevant actors. Hence, Nietzsche’s enlightening insights (for their psychological perceptiveness if not for their philological accuracy) on the origins of the concepts of ‘*bonum et aequum*’ (which filtered into Roman law) as derived from a transmutation of the (extra-legal and indeed extra-moral) feelings of pleasure, anger, or guilt of the aristocracy.²⁰ It is a key contention of this article that the notion of trust helps shed light on legal principles and their application by the CJEU. Less ambitiously, political psychology or a reflection on certain aspects of human nature can at least shed some light

¹⁵ Similarly, J. Elster, *Political Psychology* (CUP 1993).

¹⁶ Of direct relevance for the EU, see I. Manners, *Political Psychology of European Integration*, in *The Palgrave Handbook of Global Political Psychology* 263 (P. Nesbitt-Larking et al. eds, 2014).

¹⁷ P. Nesbitt-Larking, Catarina Kinnvall, Tereza Capelos & Henk Dekker, *Introduction*, in *Palgrave Handbook of Global Political Psychology* 4 (id ed., 2014).

¹⁸ On which see A. van Aaken, *Experimental Insights for International Legal Theory*, 30(4) *Eur. J. Int’l L.* (2020) and literature there discussed.

¹⁹ As a legal principle in the case law of the CJEU.

²⁰ F Nietzsche, *On the Genealogy of Moral* (CUP 2006) second essay: ‘Guilt’, ‘bad conscience’ and related matters; in the same sense, for a genealogy of law, Aldo Schiavone, *Ius. L’invenzione del diritto in occidente* (Einaudi 2017) Ch. 12, fn. 8. On the extra-legal origin of *aequitas*, Mantovani, *L’equité. Histoire romaine du désir de justice* (Class at College de France 2020–21).

on the nature of the problem: cooperation between Member States. A clear picture of the nature of the problem is necessary to try and explain such cooperation.

More analytically, with reference to interaction between individuals, several definitions of trust have been proposed.²¹ As mentioned, for the purposes of this article, a behavioural definition – that is, independent from mental states – is adopted. Schematically, distrust could be either for someone's ability or for someone's motivation.²² In principle, the discussion should be limited to individual actors: to say that a collective entity such as a state or an organization 'trusts' is to use a metaphor. Throughout this article, collective entities will be the focus of analysis, but this is a second-best option. The behavioural definition leads to a broad understanding of the concept in EU law. Michael Schwarz wrote that 'The Court conceives of trust as a three-part relation, where one Member State (trustor) trusts another Member State (trustee) to observe the pertinent provisions of EU law (object of trust)'.²³ Yet, as this article discusses, it is also true that, for example, the Member States ought to trust the EU to observe human rights; or that the EU has to trust the Member States not to place disguised restrictions on trade. It is also worth stating that, in general, reasons for trustworthiness derive from past behaviour, features, incentives, and signals.²⁴

3 ASCENDING TRUST: MEMBER STATES SHALL TRUST THE EU

A relationship of trust may be envisaged 'vertically', between the Member States and the EU. While the trust of Member States in the EU (one might call this 'ascending trust') has legal manifestations that were key in shaping the process of European integration, trust in the opposite direction ('descending trust', discussed in the next section) is not as straightforward. Granted, neither the Treaties nor the Court refer to the bond between Member States and EU as one of 'trust' – even less so 'mutual trust' – so conceptualizing it as such is a heterodox choice. It is undeniable, however, that the behavioural relationship between the MSs and the EU, regardless of its legal qualification, does nonetheless require trust in the sense of 'automatic recognition' or 'absence of precautions'.²⁵ This section proposes to read as such two intertwined key

²¹ Just one example: Luhmann, *Trust and Power* 32 (John Wiley & Sons 1979): an actor willingly surmounts a deficit of information leading to uncertainty regarding the success of an operation.

²² Elster, *supra* n. 15, at 336. Sociologists propose more analytical categories of trust, e.g., in organizations, political systems, families, etc. Barbara Misztal, *Trust and Cooperation: The Democratic Public Sphere*, 37(4) *J. Sociology* 371, 372 (2001).

²³ M. Schwarz, *Let's Talk About Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice*, 24 *Eur. L. J.* 124, 130 (2018).

²⁴ Elster, *supra* n. 15, at 338 discusses a fourth one: signs. For a sociological perspective, Diego Gambetta & Heather Hamill, *Streetwise, How Taxi Drivers Establish Customer's Trustworthiness* (Russel Sage Foundation 2005). Jane Austin's *Pride and Prejudice* is a literary treatment of the subject.

²⁵ Thus Juan A. Mayoral, *Judicial Empowerment Expanded: Political Determinants of National Courts' Cooperation with the CJEU*, 25 *Eur. L. J.* 374 (2019) conceptualises it.

developments of EU law: the supremacy of EU law and human rights protection as general principle of the EU. Similarly, the duty of sincere cooperation is another legal manifestation of ascending trust – whereas the reticent acceptance of the supremacy of EU law by national (supreme) courts, as well as the action for annulment, act as structural counterweights.

In a broad sense the very transfer of competences to the EU and its predecessors implied a degree of trust (trust in Member States as well as trust in the supranational institutions). In addition to that conceptual point, very early on in the history of European integration, Member States were required to ‘trust’ the EU, in the sense that they were expected not to ‘take precautions against’ possible abuses by the Community (or to disapply the domestic law which, even though adopted before joining the Community, could now constitute a ‘precaution’ against the Community). Even though *Costa* was not phrased in terms of preventing MSs from guarding themselves against potential abuses (indeed, primacy was justified mostly on functional grounds²⁶), that decision did imply a requirement for Member States to trust EU law. The primacy of EU law is a legal manifestation of trust by Member States in the EU. Further, that line of case law developed so as to clarify that no ‘defence mechanism’ against EU law is possible, *because none is necessary*: as the Court would later explain in *Internationale* and *Nold*.²⁷ A possible reading of *Internationale* is that the decision offers reassurance for Member States that they can ‘lower the guard’: not even a national constitution can be used as precaution against the primacy of EU law. In that case, a German administrative court referred a question for preliminary ruling arguing that the primacy of EU law may result in a detriment to the German constitution if the former does not respect human rights. To be sure, it was not the primacy of EU law in and of itself that was at issue, it was rather EU legislation (possessing the characteristic of primacy) which infringed upon fundamental rights protected by the German constitution. European law, in other words, could not be blindly trusted. The European Court of Justice (ECJ) disagreed. In the famous paragraph four of that decision, the Court explained why a domestic court ought not to distrust either the motivations or ability of the EU to protect fundamental rights: EU law can enjoy primacy even over the constitutions of Member States, and this is justified because ‘fundamental rights form part of the general principles of law protected by the Court of Justice’ (motivation) and because

²⁶ Case 6/64 *Costa v. Enel* ECLI:EU:C:1964:66: ‘The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty’. In Case C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114 para. 3 the rationale for primacy was again avoiding an ‘adverse effect on the uniformity and efficacy of Community law’ or avoiding calling into question ‘the legal basis of the Community itself’.

²⁷ For the difficulties of this approach, reference shall be had to the analysis provided by J. H. H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 Wash. L. Rev. 1103, 1125 (1986).

the protection of those rights is ‘inspired by the constitutional tradition of the Member States’ (this could relate to the EU’s ability).²⁸ The tension resurrected in a landmark decision involving also mutual horizontal trust, *Melloni*.²⁹ A Spanish court asked the ECJ whether the execution of a European Arrest Warrant could be refused on the grounds that the issuing Member State had violated, according to Spanish law, the right to fair trial of the person to be surrendered, because he was tried *in absentia*. The Court restated that the supremacy of EU law means that rules of national law – including the respect for human rights – cannot be allowed to undermine the effectiveness of EU law. To the need to trust the EU, it then added the need to trust other Member States as derived from the interaction between Article 53 Charter and the fact that this specific concern of convictions in absentia seemed to have been dealt with exhaustively by the legislator in the European Arrest Warrant framework decision.³⁰

Despite this reassurance, the reaction by the highest courts of many Member States has been a rejection of the unconditional primacy of EU law. A prime example is the defiant judgment of the German Constitutional Court in *PSPP*, declaring an ECJ’s decision to be *ultra vires*.³¹ In that case, the precaution taken by the German court was to strike down a decision of the ECJ, an unprecedented move signalling, among others, distrust in the CJEU’s (legal reasoning) ability.³² Constitutional courts of Member States evince a similar attitude. The Italian Constitutional Court adopted the doctrine of ‘counter-limits’ to the supremacy of EU law.³³ These (counter)limits are the situations in which EU law would not prevail over Italian law, according to the case law of the Italian constitutional court.³⁴ Similar ‘defence mechanisms’ (that is, conditional trust) are in place in other domestic legal systems, as a result of the case law of supreme or constitutional courts: reference can be had, *en passant*, to classic authorities such as the *Solange II* decision of the Bundesverfassungsgericht,³⁵ or the

²⁸ Similar reassurance in Case C-4/73 *Nold* ECLI:EU:C:1974:51, para. 13, ‘In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law’.

²⁹ Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

³⁰ Paragraph 63.

³¹ BVerfG, Judgment of the Second Senate of 5 May 2020–2 BvR 859/15.

³² See para. C.II.1.a.bb of the BVerfG judgment, titled ‘Methodological deficits rendering the Judgment [of the CJEU] untenable’.

³³ M. Cartabia & M. Gennusa, *Le Fonti Europee e il Diritto Italiano* (Giappichelli 2011).

³⁴ They are ‘counter’ limits because EU law is a limit to Italian law.

³⁵ *Re Wünsche Handelsgesellschaft* (22 Oct. 1986) BVerfGE 73, 339. In fact, the limitations to the principle of (horizontal) mutual trust have been called a, horizontal *Solange*. I. Canor, *My Brother’s Keeper? Horizontal Solange: ‘An Ever Closer Distrust Among the Peoples of Europe*, 50(2) *Common Mkt. L. Rev.* 383 (2013).

Lisbon judgments in Germany,³⁶ Poland,³⁷ the recent *Ajos* saga,³⁸ the House of Lords's Lord Denning reaction to the *Conegate* judgment,³⁹ etc.⁴⁰ As Tridimas put it, the relationship between national courts and CJEU is still full of 'circumspection'.⁴¹ One may now add downright collision, in addition to circumspection. The position of national constitutional courts shows clear limits to ascending trust. Lingering suspicion is harboured, not only implicitly, in these decisions. The object of distrust seems to be the ability of the EU – see for example the direct attack against the reasoning *skills* of the ECJ by the German Constitutional Court in *PSPP*.

In addition, another legal manifestation of vertical trust is plausibly the duty of sincere cooperation. As it has been consistently pointed out in the literature, the duty of sincere cooperation enshrined in Article 4(3) Treaty on the European Union (TEU) shall be considered as binding for all Member States as well as for the EU institutions.⁴² Such duty of cooperation entails a more general principle of loyalty, which operates both in the horizontal dimension (among Member States) and in the vertical one (between Member States and EU institutions),⁴³ and includes not only a prohibition to act in bad faith or contrary to EU rules, but also a positive obligation to take all appropriate measures to ensure the effective application of EU law.⁴⁴ Such principle(s) does not in any case entail 'blind trust' from the Member States. There are also structural counterweights, placing a limit to the trust between Member States and EU: the action for annulment and more specifically the boundaries that the principles of conferral, proportionality and subsidiarity place on the extent and the exercise of EU competence. The action for annulment – in so far as it foresees that Member States are privileged applicants – is the quintessential example of measure that can be taken against the behaviour of the interacting partner (it is in fact an instrument that may lead to the neutralization of the EU's action). The clause in

³⁶ Lissabon-Urteil 30 June 2009 2 BvE 2/08.

³⁷ Judgment of 24 Nov. 2010 – Ref. No. K 32/09.

³⁸ R. Holdgaard, D. Elkan & G. Krohn Schaldemose, *From Cooperation to Collision: The ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply*, 55 *Common Mkt. L. Rev.* 1 (2018).

³⁹ The House of Lords debate of 3 June 1986 is most instructive on the point, with Lord Denning questioning 'are we not entitled to go by the Treaty of Rome itself and to ignore, if you please, the wrong decisions of the European Court, or can we not tell our courts to cock a snook at the European Court?'. The judgment is discussed in s. 3 below.

⁴⁰ P. Eleftheriadis, *The German Constitutional Court's Weiss Judgment Is a Failure of German Constitutionalism* (Hellenic Foundation for European and Foreign Policy, 116/2020).

⁴¹ T. Tridimas, *The ECJ and the National Courts: Dialogue, Cooperation, and Instability*, in *The Oxford Handbook of EU Law* (D Chalmers & A Arnulf, OUP 2015).

⁴² See P. Eeckhout & E. Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, 54 *Common Mkt. L. Rev.* 695, 696 (2017); Streinz, 'Cooperative Brexit: Giving Back Control Over Trade Policy', 15(2) *Int'l J. Const. L.* 271 (2017).

⁴³ Klamert, *The Principle of Loyalty in EU Law* 22 (OUP 2014).

⁴⁴ J. P. Jacqué, *Droit institutionnel de l'Union Européenne* 578 (6 ed., Dalloz 2010).

Article 4(2), providing for the respect for national identities may also be read in the same sense – as last bastion against the supremacy of EU law.⁴⁵

4 DESCENDING TRUST: SHALL THE EU TRUST ITS MEMBER STATES?

There is no textual basis for concluding that trust between MSs and EU is mutual, if not a reference in Article 287(3) Treaty on the Functioning of the European Union (TFEU): ‘The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence’. The Court’s case law, instead, can be read as providing some ‘descending’ trust, a legal manifestation of which is, again, the duty of sincere cooperation. An authority that supports this is *IMM – Zwartveld and Others*.⁴⁶ On that occasion, a Dutch judicial authority had requested the European Commission to produce certain reports, which the former needed for the purposes of carrying out successfully a criminal investigation. Since those documents formed part of a file on legal matters pending in the Commission, the institution refused to produce them. The Court ordered the Commission to cooperate, and found that this duty derived from the constitutional principle of loyal cooperation.

Another legal manifestation descending trust is the *deference* that the CJEU may show to Member States. In EU law, the word is often associated to the Court’s respect for the discretion of other EU institutions (discussed below in this section),⁴⁷ but deference for Member States, arguably and crucially, is *proportionate to the trust toward that state* (and in particular, toward that Member State motivation on a specific occasion – it is not suggested that the CJEU breaches the principle of equality between Member States). In particular, deference may take the form of an expectation that Member States act in good faith; or of a relaxed proportionality test.

Arguably, the CJEU is required to trust a Member State’s motivation, in the sense that it has to assume the MS is in good faith. A recent example in support of this proposition is offered by the Court’s decision in *Wightman*,⁴⁸ on the right for a withdrawing Member State to revoke the notification given under Article 50 TEU. On that occasion, the question did not exclusively revolve around the relationship between the EU and a MS, but rather between the withdrawing MS and the European Council – i.e., all the other Member States as represented in a European

⁴⁵ Klamert, *Article 4*, in *Commentary on the EU Treaties and the Charter of Fundamental Rights* 39 (Kellerbauer, Klamert & Tomkin eds, OUP 2019).

⁴⁶ Case C-2/88 *IMM - Zwartveld and Others* ECLI:EU:C:1990:440.

⁴⁷ J. Mendes, *Discretion, Care, and Public Interest in the EU Administration: Probing the Limits of Law*, 53 *Common Mkt. L. Rev.* 419 (2016); J. Mendes, *Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU*, 80(3) *Mod. L. Rev.* 443 (2017).

⁴⁸ Case C-621/18 *Wightman* ECLI:EU:C:2018:999.

Union institution. The distinction between the EU and the Member States, when they act within the European Council, is blurred.⁴⁹ The Court mentioned the premise which, according to settled case law, ‘implies and justifies’ mutual trust between the MSs, namely that ‘the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that those Member States share with it, those same values’.⁵⁰ Similarly, the Court pointed, on that occasion, to the importance of respecting the choices of a Member State who wishes to withdraw or who changes her mind. It did so by considering the drafting history of Article 50 TEU: the withdrawing MS can neither be forced to withdraw against its will,⁵¹ nor can it be punished for its decision.⁵² Here the element of trust for the Member State comes into play: the revocation of the notification is not an abuse but simply a change of intention, and as such results in the end of the withdrawal process and the confirmation of ‘the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State’.⁵³ The recognition of the status is indeed automatic (in the sense that the EU is not allowed to suspect manipulation or abuse or further motives) as long as the revocation is ‘unequivocal and unconditional’.⁵⁴ No further defence mechanism is put in place by the EU – contrary to what had been proposed at the Convention for drafting a Constitutional Treaty, when there were talks of making the withdrawal of a Member State more difficult,⁵⁵ so as to protect the EU against possible abuses.

At the same time, there may exist a degree of distrust when the EU scrutinizes the *motivation* of Member States’ measures to ensure compliance with EU law. This is especially obvious in some of the cases where the Court assesses the proportionality of a MS’s measure: it is not uncommon that the Court declares national law incompatible with EU law by uncovering the ‘true motives’ behind the national legislation. The Court does so by means of a ‘triangulation’ between the submissions of the Member States, their behaviour, and the objective consequence of their action. The recent case *Commission v. Poland (Supreme Court independence)*⁵⁶ is telling

⁴⁹ In *NM*, the General Court was asked to adjudicate on the validity of a statement adopted by the Heads of State and Government, but it declined jurisdiction on the grounds that the statement could not be attributed to the European Council, but only to the Heads of State and Government. Case T-257/16 *NM* ECLI:EU:T:2017:130, T-192/16 *NF v. Council* EU:T:2017:128 and T-193/16 *NG v. Council* EU:T:2017:129.

⁵⁰ *Wightman*, *supra* n. 48, para. 63.

⁵¹ *Ibid.*, para. 65.

⁵² *Ibid.*, para. 68.

⁵³ *Ibid.*, para. 75.

⁵⁴ *Ibid.*, para. 74.

⁵⁵ Eeckhout & Frantziou, *supra* n. 42, at 706.

⁵⁶ Case C-619/18 *Commission v. Poland (Supreme Court independence)* ECLI:EU:C:2019:531.

in that regard: in 2017, Poland adopted a law lowering the retirement age of judges of its supreme court. The Court suspected that the Member State reformed its Supreme Court for motives *other* than those stated in its submissions, where Poland contended that the law had been adopted to standardize the retirement age of all the workers in its territory.⁵⁷ The Court thought otherwise. It noted that the explanatory memorandum to the Polish law contained ‘information that is such as to raise serious doubts as to whether the reform of the retirement age of serving judges of the Supreme Court was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court’.⁵⁸ Other factors in the law’s operation also raised doubts as to the intention of Poland – for example, the retirement age would not be standardized (it is submitted that this element, in itself, is not evidence of further motives). In sum, the combination of factors was ‘also such as to reinforce the impression that in fact their aim might be to exclude a pre-determined group of judges of the Supreme Court’.⁵⁹

This step is, in itself, not sufficient to establish that the EU did not trust Poland. The lack of trust is shown by the Court taking precautions, namely, declaring that the contested law is in breach of the TEU, against what it considered to be Poland’s lie. The breach was established because the Court found that the measure was not necessary for the purpose of standardizing the retirement age in Poland.⁶⁰ Moreover, the court found it was disproportionate, as it did not introduce transitional measures for managing the legitimate expectations of the persons concerned.⁶¹ Since, traditionally, the requirement of necessity is part of the proportionality assessment,⁶² the emphasis on the lack of appropriateness of the measure in addition to its being disproportionate may be read as confirmation of the element of distrust of motivation.

This is a recent and generally well-known instance of a lack of trust in the Member States’ motivation when proportionality is assessed. A similar point has often arisen in the context of free movement rights, where one may go as far as to say that the EU ring-fences against possible lies of Member States.

In free movement of goods, Article 36 TFEU clarifies that the national measure’s *effect* is not the only criterion the Court should assess: the motives should also be considered. The effect of a national measure is, indeed, necessary but not a sufficient condition for such measure to be contrary to EU law. The other necessary condition is the fact that the measure is not justified on the grounds provided for by

⁵⁷ *Commission v. Poland*, paras 67 and 80.

⁵⁸ *Ibid.*, para. 82.

⁵⁹ *Ibid.*, para. 85.

⁶⁰ *Ibid.*, para. 90.

⁶¹ *Ibid.*, para. 91.

⁶² AG Maduro Opinion in Case C-434/04 *Ahokainen and Leppik*

Article 36 TFEU or other mandatory requirements. While the effect of a measure may be more or less objectively ascertained, the grounds for its adoption are more easily contested. It is easier for a Member State to hide the reason for adopting a measure than to hide the effect of the measure itself. Hiding effects is possible but it is more costly in terms of time and energy because it would involve also hiding the true motives. It may also involve negative (for the Member State's) externalities. A Member State may want to favour private schools of a given religion and do so by adopting an indistinctly applicable measure that has, among others, the desired effect, and which is justifiable on a certain objective ground (say, the size of the schools). An external observer may not even notice the effect of such measure on the religious schools in question. The lack of trust by the EU, however, is evident in the very last sentence of Article 36 TFEU and it finds application in the Court's case law: Member State's measures shall in no case 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. The word 'arbitrary' and 'disguised' suggest that the Court has to be weary of Member State's motivations – and declare incompatible with EU law unjustified measures which have negative effects, regardless of what the Member State says about its motivation for those measures.⁶³

In *Henn and Darby*,⁶⁴ the ECJ declared the compatibility with EU law of UK legislation that, while prohibiting import of 'articles of an indecent or obscene character', did not criminalize its possession inside the UK. In particular, the Court found that such rules were justified on grounds of public morality; and that they did not constitute disguised discrimination, because 'these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character': the rules were thus compliant with Article 36 of the Treaty.⁶⁵ Seventeen years later, in *Conagate*,⁶⁶ the Court declared a UK law prohibiting the import of sex dolls incompatible with EU law. It did so because, while the UK prohibited imports of such products, there was no such prohibition in place for goods produced domestically. In its reasoning, the Court did not explicitly refer to Article 36 TFEU, but it implicitly considered that the UK was arbitrarily discriminating – at least potentially – between domestic and foreign goods.

The difference between the two rather entertaining cases can be conceptualized, as a matter of law, in the degree of deference that the Court showed to the Member State; as a matter of behavioural difference, it was also a question of trust. The

⁶³ Since Art. 36 was drafted by the Member States, it may also be a signal of horizontal distrust. I am grateful to Dr Harvey for making this explicit.

⁶⁴ Case 34/79 R. v. Henn and Darby.

⁶⁵ *Ibid.*, para. 21.

⁶⁶ Case C-121/85 *Conagate* ECLI:EU:C:1986:114.

reasoning in *Conegate* had to encompass a distrust for the UK's stated motivation that the prohibition was to protect public morality – even though, admittedly, the Court did not phrase it as such, i.e., it did not present it as a disagreement on the motivation. The Court limited itself to stating that:

the fact that goods cause offence cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member State concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory.⁶⁷

Needless to say, the decision by the ECJ in *Conegate* elicited a strong reaction in the House of Lords.⁶⁸

A degree of distrust in Member States' motivations, which results in reduced deference toward them, can also be found in other cases within the internal market.⁶⁹ This is ultimately permitted by the 'protean nature' of the principle of proportionality.⁷⁰ To take two classic examples, in *Jany*,⁷¹ a Dutch immigration authority's decision not to grant residence permits to the applicants, who were self-employed prostitutes of third countries, was found to be an unjustified restriction of their freedom of establishment. Prostitution, the Court explained, is a service provided for remuneration and is therefore covered by such freedom. This is so despite the objection of the Netherlands that the activity in question may be restricted on grounds of public policy. The Court overcame that objection by stating that prostitution cannot be a serious threat to the public order of a Member State, if that country does not adopt similar measures against the same activity carried out by its own nationals.⁷² This may be contrasted with *Schmidberger*, where the Court took the opposite approach instead, and merely considered that Austria could restrict free movement of goods to protect the fundamental right of freedom of expression. Since Austrian authorities were entailed to broad discretion in view of the worth of the objective pursued, the Court was satisfied that Austria's restrictions were 'reasonable' (without further, stricter scrutiny).⁷³

Finally, another instance signalling, perhaps, a degree of distrust of national authorities is the trend of judicial centralization observable in so-called composite administrative procedures, which are decision-making processes involving, at

⁶⁷ *Ibid.*, para. 15.

⁶⁸ See the rather amusing debate of the House of Lords on the ECJ's decision, <https://api.parliament.uk/historic-hansard/lords/1986/jun/03/importation-of-goods-conegate-ltd> (accessed 12 July 2021).

⁶⁹ In addition to the case discussed in this section, see Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665. The Article returns on this point in the final paragraph of this section as well as in s. 4.

⁷⁰ The scrutiny of proportionality triggers 'constitutional dialogue'. Takis Tridimas, *The General Principles of Law: Who Needs Them?*, 1 *Cahiers de Droits Européen* 419, 422 (2016).

⁷¹ Case C-268/99 *Jany* ECLI:EU:C:2001:616.

⁷² *Ibid.*, para. 61.

⁷³ Case C-112/00 *Schmidberger* para. 93.

different moments and with different intensities, both EU and national authorities.⁷⁴ Under EU law, legal orthodoxy has it that EU courts may annul only acts attributable to the EU, and national courts of Member States may annul only acts attributable to national authorities. Yet, that legal orthodoxy has been either criticized or was overturned, leading to the exclusive jurisdiction of the CJEU to interpret and annul a certain act – regardless of the author. In recent decisions, the CJEU has curtailed national courts’ power to interpret national law,⁷⁵ or has even annulled national law. The latter case, *Rimsevics*,⁷⁶ is particularly revealing. The Latvian authorities had suspended the governor of the Central Bank of Latvia, who, by virtue of this suspension, was also automatically removed from the board of governors of the European Central Bank. Article 14(2) of the Statute of the European System of Central Banks (ESCB Statute) states that a decision to remove a governor from office ‘may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application’.⁷⁷ The CJEU was then invested with the question whether the ambiguously worded Article 14(2) ESCB Statute empowered it to annul the decision of the Latvian authorities, or simply to declare it incompatible with EU law. The Court annulled the Latvian authorities’ measure, justifying this result with the need to ensure the effectiveness of EU law and the protection of the independence of central bank governors.⁷⁸

The degree of distrust – and the ensuing little deference – that the CJEU has on occasion shown toward Member States stands in rather stark contrast with the deference that the CJEU shows toward other EU institutions. Several recent high profile cases, both in the field of economic governance⁷⁹ (*Pringle*,⁸⁰ *UK v Parliament and Council (ESMA)*,⁸¹ *Gauweiler*⁸²) and of external relations (*Rosneft*⁸³) have shown the Court’s tendency of endorsing executive choices of EU institutions. The phenomenon is well documented,⁸⁴ and it is possibly an unintended consequence of the

⁷⁴ M. Eliantonio, *Judicial Review in an Integrated Administration: The Case of ‘Composite Procedures’*, 7 Rev. Eur. Administrative L. 65 (2014).

⁷⁵ Judgment of 19 Dec. 2018, C-219/17, *Silvio Berlusconi and Finanziaria d’investimento Fininvest SpA (Fininvest) v. Banca d’Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*.

⁷⁶ Joined cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia* ECLI:EU:C:2019:139.

⁷⁷ Protocol (No 4) to the TEU and the TFEU Treaties on the Statute of the European System of Central Banks and of the European Central Bank.

⁷⁸ Paragraphs 47 and 74 of the judgment.

⁷⁹ On which see the discussion in Mendes, *supra* n. 47.

⁸⁰ C-370/12 *Pringle* ECLI:EU:C:2012:756.

⁸¹ C-270/12 *United Kingdom v. Parliament and Council* ECLI:EU:C:2014:18.

⁸² C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400.

⁸³ C-72/15 *Rosneft* ECLI:EU:C:2017:236.

⁸⁴ J Mendes, *Discretion, Care, and Public Interest in the EU Administration: Probing the Limits of Law*, 53 Common Mkt. L. Rev. 419 (2016).

bewildering complexity of an EU regulatory architecture built not with a strategic systemic vision but through subsequent, event-driven addition (i.e., to respond to crises). While the trust placed by the CJEU in EU institutions may thus be understandable on functional grounds, it can nonetheless be criticized as it may ultimately imperil individual rights.⁸⁵

More generally, it has been maintained that the malleable nature of the principle of proportionality allows the Court to apply that principle with various degree of intensity, depending on the interests pursued (by the Member States, by EU institutions, or by a rule of law in general⁸⁶).⁸⁷ The worthier the goal (in the Court's opinion), the more relaxed the proportionality test can be. Yet, when it comes to proportionality, the CJEU does not apply the 'presumption of compliance with EU law', or certainly not in the way MSs are required to do with one another. Here the notion of 'horizontal' mutual trust that binds MSs comes into play: while Member States must trust each other, the CJEU does not have to (and rightly so: would it not be pointless for a court that is called on to decide on the legality of a state's actions to systematically just presume that the state acted legally?). Two legal manifestations of mutual trust are relevant here. Perhaps the most obvious manifestation is the principle of mutual recognition established in *Cassis de Dijon* and its progeny. Mutual recognition entails the duty to recognize, in principle and unless there are positive mandatory countervailing arguments, that the measures of other EU Member States meet a state's non-economic (health or environmental or animal welfare etc) objectives. Needless to say, the presumption that a measure in a given state is valid only works for some *other* Member States – from the CJEU's perspective, such measure would be, *prima facie*, a breach of EU law.

There is perhaps something sinister in the 'asymmetry of trust' required by the Court. Trust must flow from Member States to the EU, and horizontally from Member State to Member State, but it is not as strong from the CJEU to Member States. If sinister, this is warranted. The asymmetry results from the nature of the EU as supranational organization to which tasks have been entrusted for the attainment of certain objectives. It is entirely appropriate that the CJEU should decide cases via a proportionality test even when national courts did not do so: the CJEU has a

⁸⁵ T. Tridimas, *Indeterminacy and Legal Uncertainty in EU Law*, in *EU Executive Discretion and the Limits of Law* 40 (J. Mendes ed., Hart 2019).

⁸⁶ Consider e.g., a rule establishing non-contractual liability for breaches of an obligation. See case 83, 94/76, 4, 15, 40/77 *HNL v. Council and Commission* [1978] ECR 1209: 'in a legislative field in which one of the chief features is the exercise of a wide discretion, the Community does not incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers'.

⁸⁷ AG Maduro Opinion in Case C-434/04 *Ahokainen and Leppik*, para. 26; Tridimas, *supra* n. 70; N Reich, 'How Proportionate Is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ', *Oslo Conference on 'The Reach of Free Movement'*, 18–19 May 2011.

nomophilactic function, ensuring the observance of the law in the application of the Treaties. The Court's approach is a form of exercise of authority: it is not bound by (in a sense, it is above) the trust between Member States. Indeed, as recalled it is possible to read the entire process of European integration precisely in the sense that vertical (ascending) trust is necessary to ground horizontal trust.

5 TRUSTING TRUST

The phrase 'mutual trust' is nowhere to be found in the Treaties, but the concept is founded, in the words of the President of the CJEU,⁸⁸ on the principle of equality of Member States before the law (Article 4(2)). It is also found in EU secondary law, at least as 'mutual recognition'. Empirically there is, if anything, a level of mutual *distrust*. In fact, the principle of 'horizontal' mutual trust in EU law presents an issue that affects its credibility.⁸⁹ In its simplest form, the puzzle may be stated as follows: the CJEU establishes an obligation of mutual trust between Member States in cases that show there was *no* trust.⁹⁰ The *distrust* appears from casual⁹¹ and systematic observation,⁹² and from the consideration that in many cases the legal dispute would not have arrived at the CJEU (or would have not even risen in the first place) had there been mutual trust. It is the Court itself that introduces the notion (as it appears also in communications from the Commission⁹³).

A similar 'nudging' toward trust is present in the vertical dimension between MSs and EU. Granted, one may conceptualize primacy as requiring trust: but it is so true that there was no express consent for such legal manifestation trust in the Rome Treaty, and that the Court had to reassure Member States about its own motivation and ability to protect fundamental rights.

Trust is based on incentives: in fact, the signal sent by the CJEU in *Internationale* is only one of the incentives for MSs to trust the EU. As

⁸⁸ Writing extra-judicially, *supra* n. 4, at 807.

⁸⁹ Gert Vermeulen, *Flaws and Contradictions in the Mutual Trust and Recognition Discourse: Casting a Shadow on the Legitimacy of EU Criminal Policy Making & Judicial Cooperation in Criminal Matters?*, in *Legitimacy and Trust in Criminal Law, Policy and Justice* 153 (N. Persak ed., Ashgate 2014).

⁹⁰ As, e.g., the facts giving rise to the *LM* judgment show. See also E Xanthopoulos, *Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust*, 55 *Common Mkt. L. Rev.* 489, 500 (2018).

⁹¹ The cases discussed by Vermeulen, *supra* n. 89.

⁹² Asif Efrat, *Assessing Mutual Trust Among EU Members: Evidence from the European Arrest Warrant*, 26(5) *J. Eur. Pub. Pol'y* 656 (2019) offers systematic evidence to this effect, considering the British and Irish record. Similar conclusions in *The Future of Mutual Recognition in Criminal Matters in The European Union / L'avenir de La Reconnaissance Mutuelle en Matière Pénale dans l'Union Européenne* 20 (Gisèle Vernimmen-Van Tiggelen, Laura Surano & Anne Weyembergh eds, 2009); and Ulrich Sieber, *Die Zukunft des Europäischen Strafrechts* 121 *Zeitschrift Gesamte Strafrechtswissenschaft* 1, 33–34 (2009).

⁹³ Communication from the Commission to the Council and the European Parliament: Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, COM (2005) 195 final.

mentioned, the behaviour of the CJEU, its ability to protect human rights, and its motivations (assumed to be exclusively the respect of the application of the law pursuant to Article 19 TEU) are incentives for Member States' governments to base their choice to trust.⁹⁴ However, the reaction from the national courts is so strong that it shows, if anything, that there is still some lingering distrust – both in courts and, perhaps exacerbated, in the public opinion on political institutions, by the economic policies of the Eurozone in the decade that has just come to an end.

Between EU and MSs, it was shown how there are instances of overt distrust of Member States' motivations. Moreover, Article 36 TEU gives rise, for this reason, to a conceptual problem: if it is correct to state that a measure is lawful if justified on certain grounds, Member States are encouraged to misrepresent the grounds on which such measures are adopted, or give other signs for their trustworthiness. This is a huge problem, conceptually, as it is not clear how an incentive to misrepresent a position can contribute to a system based on mutual trust. In particular, asymmetric information⁹⁵ might entail that states who do not misrepresent their motivations would suffer the negative externality of the Court's closer scrutiny (since at least one Member State has not been trustworthy). Alternatively, it could become a 'self-fulfilling prophecy'.⁹⁶ There is also another problem: false positives are also caught, namely, all the measures that objectively advance an EU interest for the 'wrong' motives are struck down. Indeed, the fact a national measure has equivalent effect to a quantitative restriction is necessary but is not a sufficient condition for the measure to be prohibited under Article 34 TFEU. For it to be a lawful measure, the reason for its adoption must also be one of the interests pursued by the EU. In any case, it cannot be a 'disguised restriction on trade': a requirement that confirms that the motive behind the national measure must be 'clean'. The ascertainment of the motivation behind the adoption of domestic law is a necessary step to establish the validity of such measure. As the pivotal role played by the explanatory memorandum in *Commission v. Poland (Supreme Court independence)* shows, uncovering the true motives of a Member State may lead to the breakdown of trust. Conceptually, if

⁹⁴ It is not mere obedience because obedience would be induced by threats, but the EU cannot issue sufficiently serious threats so as to coerce a Member State into submission. It might be acquiescence, for lack of better alternatives. In a similar sense D Dinan, *Europe Recast 2* (Red Globe Press 2014).

⁹⁵ The notion comes from the classic paper by M. Rothschild & J. Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q. J. Econ. 629–649 (1976).

⁹⁶ See R. J. Fisher, H. C. Kelman, & S. A. Nan, *Conflict Analysis and Resolution*, in *The Oxford Handbook of Political Psychology* 497 (2d ed., L. Huddy, D. Sears & J. Levy eds, OUP 2013): 'Expectancies that one group holds of another group – e.g., as untrustworthy – are communicated through behaviour, such as cautiousness and skepticism. These behaviours may then be reciprocated by the target group members – e.g., through unwillingness to trust and cooperate – thus confirming the initial views of the first group. In this way, stereotypes are not only confirmed, but strengthened for the next round of interactions'.

not practically, this gives rise to a difficulty: it might never be possible to ascertain the real motives of a national measure, and in any case, a measure that has the objective consequence of advancing an interest of the EU, but does so for the ‘wrong’ motives would be struck down.

The integrationist value of the principle may explain its recurrent recourse in the Court’s case law (a recourse that is explicit in the horizontal dimension, implicit – under the interpretation offered in this article – in the vertical dimension). Vertically, ‘descending’ trust translates into doctrines allowing the effective functioning of the EU. *Costa*, as recalled, justified the primacy of EU law on functional grounds. Horizontally, mutual trust appears to ground a preference for the system rather than for the individual (a preference which may, naturally, be overturned in case the high thresholds of risk are met). The balancing, in other words, is overwhelmingly in favour of mutual trust, for whose sake human rights may be limited, as long as just their essence is preserved. The Court thus offers robust foundations to the European Union legal system as a whole, while allowing the protection for the essence of fundamental rights. There is, of course, no way to definitively prove that the objective consequence of reinforcing the system of the EU – or any other conjecture mentioned below – is what motivates the Court (as this reason is never stated in the decisions, and the deliberations of the judges are secret). This assertion will have to remain a conjecture, but not an unsubstantiated one. That objective consequence of reinforcing the EU as a system would be in itself sufficient to motivate the Court’s belief that Member States trust each other. In a paradigmatic example of motivated belief, the Court would hold that belief because it is desirable to hold it. In particular, mutual trust between States would – very indirectly – be beneficial to a good relationship between the peoples of Europe because people are more willing to cooperate with someone they trust.⁹⁷ If this reconstruction is correct, mutual trust can be conceptualized as a legal tool that contributes to the merging of the cultures of the Member States who decided to opt for membership in the European Union, thus subscribing to a project *encore en chantier* of an ever closer union, in which national political preferences have to be increasingly set aside,⁹⁸ unless they are grounded in an actual fact of the matter that justifies the lack of trust.

Moreover, even though horizontal trust is not the object of this article, the call for mutual trust might an incentive for MSs to trust each other. Yet, it is

⁹⁷ T. Tyler, *The Psychology of Cooperation. Implications for Public Policy*, in *The Behavioral Foundations of Public Policy* 80 (E. Shafir ed., Princeton University Press 2012); See also D. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, in *Economic Learning and Social Evolution: Moral Sentiments and Material Interests: The Foundations of Cooperation in Economic Life* 339 (H. Gintis, S. Bowles, R. Boyd, & E. Fehr eds, 2005 MIT Press).

⁹⁸ An obvious example being *C-673/1 – Coman and Others* ECLI:EU:C:2018:385, in which the CJEU dismissed, Romania’s argument that Belgium’s recognition of gay married was contrary to Romania’s national identity.

licit to wonder whether trust (as a behaviour) is something that can be imposed⁹⁹ (it can); or if (as a belief) it is not, rather, a state that is ‘essentially a by-product’ (and it is). States that are ‘essentially by-products’¹⁰⁰ are those obtained only as a consequence of an action, but which cannot be directly brought about by wanting them (such as being credible¹⁰¹): arguably, trustworthiness cannot simply be obtained by an action directed to that aim, neither by the one who wants to be trusted, nor by an external actor. In fact, the obligation of mutual trust might be rather self-defeating because it is bound not to create the very trust it seeks to obtain. In the simplest possible words, an explicit invitation to be trusted does not make one trustworthy.¹⁰²

The desirability of the concept may not derive exclusively from its consequences for EU integration, but also from the belief, indeed widely shared by both communitarian and republican political theorists, that mutual trust is healthy for societies and democracies.¹⁰³ According to some, trust fosters cooperation¹⁰⁴ as it reinforces, between parties, expectations about reciprocity (the final paragraph of this section shall return on this assumption and weaken it).¹⁰⁵

Mutual trust might also be desired in light of the ‘sunk cost fallacy’. In the simple terms, ‘once we have taken a position, we tend to act in a manner consistent with it, even when the subsequent actions are not in our own or society’s interests’.¹⁰⁶ Both vertically and horizontally, there has been some cooperation in the past, which implied significant effort in terms of energy (and money). The Court might reason, then, not only in the light of future consequences, but also in view of past action.

It should be added that mutual trust is also seen – by the CJEU – as a distinctively EU feature, which grounds the autonomy of EU law.¹⁰⁷ It is the ‘constitutional principle that defines the legal structure of the EU as a *Union of values* that are commonly shared by its Member States’.¹⁰⁸ It is necessary to trust both abilities and motivations of other Member States in order to guarantee equality, lest one country feel *better* or more capable than another, because ‘[t]here is nothing more repugnant to the values on which the EU is founded than to assert that some EU

⁹⁹ Schwarz, *supra* n. 23.

¹⁰⁰ J. Elster, *Sour Grapes. Studies in the Subversion of Rationality* (CUP 1983) Ch. II.

¹⁰¹ See generally Paul Veyne, *Le pain et le cirque. Sociologie historique d'un pluralisme politique* (Points 1995).

¹⁰² It might indeed attract suspicion (‘timeo Danaos et dona ferentes’).

¹⁰³ Misztal, *supra* n. 22, at 372 and following for an overview of the works of political theory on the topic.

¹⁰⁴ Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* 27 (Free Press 1995).

¹⁰⁵ J. C. Scott, *Geographies of Trust, Geographies of Hierarchies*, in *Democracy and Trust* (M. E. Warren ed., CUP 1999).

¹⁰⁶ P. Brest, *Quis Custodiet Ipsos Custodes? Debiasing the Policy Makers Themselves*, in *The Behavioral Foundations of Public Policy* 490 (E. Shafir ed., Princeton University Press 2012). See also the classic H. R. Arkes & C. Blumer, *The Psychology of Sunk Cost*, *Org. Behavior & Hum. Decision Processes* 35, 124–140 (1985).

¹⁰⁷ Opinion 2/13 paras 193–194.

¹⁰⁸ Lenaerts, *supra* n. 3.

citizens are superior to others (...) The EU is thus precluded from considering that some national democracies and the choices that they make are better than others'.¹⁰⁹ This is another hint that points to the direction that mutual trust is indeed a motivated belief, held not because it reflects a fact of the world, but because the actor wants to hold it because it is instrumental to the achievement of the ever closer union between the peoples of Europe. It is conceived as a positive, indeed noble value, which, one might venture to say, *is held precisely because it is evidence* not only the Member States', but also Union citizens' cognitive and behavioural attitude.¹¹⁰

Is it so good to 'trust trust and distrust distrust'? In EU legal scholarship, there seems to be an underlying assumption on the a priori desirability of trust – with opinions diverging on the wished degree thereof.¹¹¹ A degree of trust is desirable, but as Gambetta states, '[a] priori, we cannot always say whether greater trust and cooperation are in fact desirable'.¹¹² When it comes to the protection of human rights, indeed, we may wish for something other than trust (and cooperation) – competition. For reason of space, it is not possible to even sketch here an argument to persuade the reader of possible positive externalities of competition in the level of protection afforded to human rights. Suffice it to state it as a relevant conceptual alternative to trust, because trust is not per se – and certainly not at any given fixed degree – always desirable. But the Court appears very well aware of this. The case law finds – to steal once again an expression Gambetta used in a different context – 'the optimal mixture of cooperation and competition'.¹¹³

6 CONCLUSION

This article was dedicated to trust between Member States and the EU as an attempt to shed light to an aspect of the issue of cooperation between Member States. It did so by considering the notion of vertical (dis)trust implicit in several areas of case law of the CJEU – and its legal manifestations.

¹⁰⁹ *Ibid.*, at 807.

¹¹⁰ For the proposition that political beliefs are adopted to satisfy one's cognitive attitudes, John Jost, Christopher M. Federico & Jaime L. Napier, *Political Ideologies and Their Social Psychological Functions*.

¹¹¹ H. Battjes & E. Brouwer, *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and the European Court of Human Rights by National Courts*, in *Rev. Eur. Administrative L.* 183 (2015); V Mitsilegas, *Conceptualising Mutual Trust in European Criminal law: the Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union*, in *Mapping Mutual Trust. Understanding and Framing the Role of Mutual Trust in EU Law* (E. Brouwer & D. Gerard eds, EUI Working Papers, MWP 2016/13). But see Rizcallah, *The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration*, 25(37) *Eur. L. J.* 37 (2019).

¹¹² Gambetta, *Can We Trust Trust?*, in *Trust: Making and Breaking Cooperative Relations*. Blackwell 213–237, at 214 (*ibid.* ed. 1988).

¹¹³ *Ibid.*, at 215.

Perhaps some distrust – be it the vertical or horizontal dimensions – is justified. Distrust by Member States courts appears to be limited to distrust in the CJEU, a phenomenon perhaps inevitable, since judicial interpretation is a second-best option, necessary to fill the gaps between ‘the language of the constitution and the conduct to which it applies’.¹¹⁴ In any case, a bit counterintuitively, *some* degree of mutual distrust is acceptable and perhaps even a physiological sign of a healthy European Union. Warren even went so far as to state that ‘politics does not provide a natural environment for trust’, and Misztal that ‘because democracy is about controlling, distributing and limiting power, healthy distrust is essential for democratic progress’.¹¹⁵ The presence of some distrust, if there is cooperation, may still mean the system is beneficial. If Member States really distrusted one another and believed they had nothing to gain, they would not cooperate at all. Similarly, one might suspect that complete trust, especially if ‘imposed’, would in the end simply hide genuine dissent or act as incentive to deception.¹¹⁶ Finally, it goes without saying that the culture of cooperation and bargain, even if based on distrust, is still better than another alternative: ‘with enough military force a country may not need to bargain’.¹¹⁷

The article has shown that while it possible to interpret the case law of the CJEU as evincing distrust for Member States action, whereas the Court appears to give more discretion to EU institutions. In the case of Member States action, particular distrust appears, in the legal manifestation of strict proportionality, in sensitive areas of the internal market and in relation to the application of EU values such as the rule of law, whereas acts by EU institution are not subject to a scrutiny of the same intensity.

The existence of some distrust, and especially distrust on the abilities of other Member States, as seems prevalent in the case of the EU,¹¹⁸ does not lead to the absence of cooperation. Even when the lack of trust is over the motivation of the other actor, the issue could be reconducted, through a dialogue fostered by the judiciary, under the realm of political decision-making. The distrust does not reach the intensity of ‘timeo Danaos et dona ferentes’ (which led Laocoons to suggest no cooperation whatsoever, but to continue fighting instead). Future works might draw from political psychology to apply game-theoretical insights to explain cooperation between Member States.

¹¹⁴ Weiler, *supra* n. 27, at 1103.

¹¹⁵ Misztal, *supra* n. 22, at 374.

¹¹⁶ Gambetta, *supra* n. 112, at 219.

¹¹⁷ T. Schelling, *Arms and Influence* 1 (Yale University Press 2008).

¹¹⁸ A reading compatible with the data in Efrat, *supra* n. 92.

