

On EU law supremacy: The relevance of judicial trust for the governance of multi-level legal systems

Abstract: The literature, in the last couple of decades, has developed diverse justifications for explaining *why* national courts accept EU law supremacy and its importance for legal integration. However, new scholarship on the role of individual attitudes and judges' profile remarked the relevance of judicial trust for the acceptance and compliance by national judges with their duties imposed by the CJEU as EU decentralized courts. This study takes this novel approach for the judicial governance and construction of Europe and proposes that the judges' grasp of supremacy is also influenced by their individual attitudes towards the CJEU, which created and promoted this principle within the national legal orders. By analysing original survey data, the findings confirm how EU law supremacy support is affected by judges' trust in supranational and national judicial institutions.

Keywords: Judicial trust; Supremacy; EU law; national judges; Court of Justice of the European Union, European Union.

Since the proliferation of International Courts (ICs), one of the most important tasks challenges for ICs' authority as a new institution is the creation of an effective supranational or international legal regime, which in case of legal conflict will stand above other national, regional and/or international legal orders¹. This purpose entails the difficult task of changing the ideas and preferences or persuade national actors to accept the supremacy of the international legal order over their national law, always under the delegation of powers and competences made by the Treaties creating such a new legal regime and court. "Doing so is especially challenging because ICs operate in a context of multiple authoritative decision-makers. Formally, most ICs are the highest judicial interpreters of the international rules within their respective jurisdictions. In practice, however, other international and domestic legal and political actors may compete over their respective jurisdictions and over the meanings of legal texts."² For that purpose, ICs promotes principles/doctrines that might establish a clear hierarchy between international/regional and national regimes that can guide the behaviour of national courts when finding conflictive legal situations, leading as a result to the creation of common rules and integration of national courts in a sort of supranational judiciary.

In this regard, the map of ICs offers a lot of attempts to build on the supremacy of their legal regimes, which variation on its success across ICs and legal regimes. Among these cases, the Court of Justice of the European Union (hereinafter: 'CJEU' or 'the Court') represents the most successful example in building a supranational legal regime which takes precedent over national law.³ The success in the legal construction and constitutionalization of supranational regimes standing above the domestic legal order was attributed to the capacity of the Court to partner with domestic courts, which allowed the Court to establish

¹ Alter, Helfer and Madsen, 'How Context Shapes the Authority of International Courts', 79 *Law & Contemporary Problems* (2016) 1: 4.

² *Ibid.*: 5.

³ C-6/64 *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] ECR 585, 593; C-106/77, *Simmenthal II* [1978] ECR 629; C-106/89 *Marleasing* [1991] ECR I-7321.

its authority⁴. In exchange, the CJEU through the doctrine of supremacy, in conjunction with the preliminary reference systems⁵ and other doctrines, like direct effect, empowered the position of national courts vis-à-vis high courts and political powers. Following the European example, other regional economic courts, like the Andean Court of Justice⁶, the East African Court of Justice⁷ or the Caribbean and Central American Court of Justice⁸ had stated the supremacy of their regional law over conflicting national law.

The scholarship has developed diverse legal, political and socio-historical explanations to account for *under which circumstances* national courts accept the supremacy of the EU legal order and the use of EU law supremacy as a relevant doctrine to intervene in their domestic legal systems. In this regard, recent developments have stressed the potential relevance of trust of national judges in the CJEU for enforcing and complying with EU law and with CJEU rulings⁹. Building on these theoretical developments, this article innovates by also advocating for the potential of trust for strengthening national judges' acceptance and, subsequently, enforcement of CJEU legal doctrines and mandates imposed by the Court like EU law supremacy, which governs the functioning of the EU legal and judicial system.

This article emphasizes the fundamental significance of trust for the European legal and judicial integration, constitutionalization and governance. This salience of trust arises

⁴ K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001).

⁵ According to article 267 TFEU (Treaty on the functioning of the European Union), national judges might request the Court of Justice of the European Union to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

⁶ K. J. Alter and L. R. Helfer, *Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice* (2017), available at <https://books.google.dk/books?id=-v1KDgAAQBAJ>.

⁷ Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy', 24 *Duke Journal of Comparative & International Law* (2013) 249.

⁸ Caserta, 'Regional Integration through Law and International Courts – the Interplay between De Jure and De Facto Supranationality in Central America and the Caribbean', 30 *Leiden Journal of International Law* (2017) 579 2017/06/05, available at <https://www.cambridge.org/core/article/regional-integration-through-law-and-international-courts-the-interplay-between-de-jure-and-de-facto-supranationality-in-central-america-and-the-caribbean/4AA5F9640DA67911E5050389DFF9F118>.

⁹ Mayoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe', 55 *Journal of Common Market Studies* (2017).

due to the cooperative and interdependent nature of the EU legal system, similar to federal ones, where the CJEU needs to secure the collaboration of national judiciaries for enforcing EU law supremacy when acting as EU decentralized judges. Despite trust is being acknowledge as a salient structural factor in the functioning of the EU legal system¹⁰, the scholarly debate has not devoted rigours and systematic analysis of its ‘real’ impact and ‘empirical’ implications. The attention to this mechanism has recently become necessary for institutions as it enables actors to enhance legitimacy¹¹ and complement institutional efforts in judicial cooperation and compliance with EU law¹² and with other international legal and judicial systems¹³. In fact, recently the Commission and the Court pointed to the need of trust-based mechanisms both for compliance with EU law as well as for the public legitimacy of the EU institutions, like the CJEU.¹⁴

This study, using original survey data, aims to offer a first empirical test of the importance of trust for affecting the acceptance of EU law supremacy. The findings offer a

¹⁰ Lenaerts, 'In the Union We Trust': Trust-Enhancing Principles of Community Law', 41 *Common Market Law Review* (2004) 317; La Vie Après l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust', 54 *Common Market Law Review* (2017) 805; Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition', 14 *Journal of European Public Policy* (2007) 682, available at <http://www.tandfonline.com/doi/abs/10.1080/13501760701427847N>. Peršak, *Legitimacy and Trust in Criminal Law, Policy and Justice Norms, Procedures, Outcomes* (2014); Wischmeyer, 'Generating Trust Through Law? – Judicial Cooperation in the European Union and the ‘Principle of Mutual Trust’', 17 *German Law Journal* (2016) 339, available at <https://ssrn.com/abstract=2627647>.

¹¹ Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy', 36 *Fordham International Law Journal* (2013) 1302; Voeten, 'Public Opinion and the Legitimacy of International Courts', 14 *Theoretical Inquiries in Law* (2013) 411.

¹² Mayoral, *supra* note 9.

¹³ van Aaken, 'Trust, Verify, or Incentivize? Effectuating Public International Law Regulating Public Goods Through Market Mechanisms', 104 *Proceedings of the ASIL Annual Meeting* (2010) 153 2017/02/28, available at <https://www.cambridge.org/core/article/trust-verify-or-incentivize-effectuating-public-international-law-regulating-public-goods-through-market-mechanisms/401D77268D7B92A5885215CE675365D5>; 'Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources', 112 *American Journal of International Law* (2018) 67 2018/03/16, available at <https://www.cambridge.org/core/article/behavioral-aspects-of-the-international-law-of-global-public-goods-and-common-pool-resources/3CAC8110079E9CD914C504D71722AE2AB>; Ballin, 'Introductory Remarks by Ernst Hirsch Ballin at the Closing Plenary on “Building Trust in International Law and Institutions”', 111 *Proceedings of the ASIL Annual Meeting* (2017) 325 2018/03/28, available at <https://www.cambridge.org/core/article/introductory-remarks-by-ernst-hirsch-ballin/24C5E159441B149769E06C6308B8B2D8>.

¹⁴ The EU institutions has underlined the necessity of ‘mutual trust’ for strengthen the Rule of law (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>); See Commission’s press release on the issue (http://europa.eu/rapid/press-release_IP-14-233_en.htm) and the CJEU joined cases C-404/15 *Aranyosi* and C-659/15 *Caldararu* [2016] where mutual trust is suggested as a governance principle crucial for the implementation of EU law.

new piece to the puzzle by identifying trust between national judges and the CJEU as a new mechanism as a crucial element for reinforcing the authority and effectiveness of multi-level legal and judicial systems¹⁵. As main conclusions, the article contributes to the theory on judicial trust by also showing to what extent trust in national higher courts influences national judges' opinions towards the supremacy of the EU legal order and doctrine. What it is here called as 'judicial compensation' effect is observed when national judges, distrusting their Constitutional/Supreme Courts and satisfied with the CJEU, are more likely to accept the supremacy.

Having this in mind, the article introduces trust as an extension of the aims of the European and global scholarship for understanding the creation and regulation of international and regional multi-level legal orders. The arguments offered here would encourage international and comparative scholars from different disciplines to add a new layer to the theoretical understanding of the judicial governance of multi-level legal regimes, and more specifically of the EU legal system and the power of the CJEU.

This article is organized as follows: the next two sections offer a brief review of the literature explaining EU law supremacy acceptance, followed of a description of the principal theoretical contribution and innovations coming from judicial trust theory for the study of the acceptance of EU law supremacy. The following sections discuss the research design and frames empirically the issue of EU law supremacy by mapping judges' preferences towards EU law supremacy using survey data. The subsequent section investigates and discusses the empirical results testing the impact on trust on judges' attitudes towards EU law supremacy. The article is closed with the conclusions.

¹⁵ Alter, Helfer and Madsen, *supra* note 1 Helfer, 'The Effectiveness of International Adjudicators', in C. P. R. Romano, K. J. Alter and C. Avgerou (eds.), *The Oxford Handbook of International Adjudication* (2013) 464 Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century', 79 *Law & Contemp. Probs.* (2016) 117.

Explaining the acceptance of EU law supremacy: A review

Scholars of European studies have put a great deal of effort into explaining how the supremacy principle, formulated in a set of decisions of the CJEU¹⁶, contributed to the legal integration and constitutionalisation of the EU legal system and enhanced the judicial cooperation. In the last couple of decades, the literature has developed diverse legal, political, socio-historical explanations to account for how national judges' preferences, legal rules and institutional incentive structures encouraged the acceptance of supremacy of EU law and boosted the legal integration of Europe¹⁷.

While strictly legal accounts mostly emphasized how that national courts have been persuaded by the content and quality of the legal argument of the importance of the supremacy of EU law over national law for the internal logic of the EU legal order¹⁸, interdisciplinary political-legal explanations have focus on the incentives provided by the CJEU to national judges to accept supremacy. One of the first institutional explanations was offered by Joseph H. H. Weiler¹⁹ who pointed out that supremacy, in conjunction with direct effect, provided courts with a new mechanism for reviewing the acts of the executive and the legislative and empower their position vis-a-vis the other branches of government. Under these motivations, national courts and the CJEU, through the mechanism of preliminary references, gradually promoted the acceptance of the constitutionalisation of the European legal order by adopting the doctrine of supremacy, among others (e.g. direct effect, and implied powers). This motivation has been also connected with the idea of a pre-existent

¹⁶ C-6/64 *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] ECR 585, 593; C-106/77, *Simmenthal II* [1978] ECR 629; C-106/89 *Marleasing* [1991] ECR I-7321.

¹⁷ M. Claes, *The National Courts' Mandate in the European Constitution* (2006), available at <https://books.google.dk/books?id=Hp0mvAfdVtYCMattli> and Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints', in *The European Courts and National Courts. Doctrine and Jurisprudence. Legal Change in Its Social Context* (1998) 253.

¹⁸ Matej, 'Supremacy or Primacy of EU Law—(Why) Does It Matter?', 17 *European Law Journal* (2011) 744, available at <https://doi.org/10.1111/j.1468-0386.2011.00560.x>.

¹⁹ 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', 26 *Comparative Political Studies* (1994) 510, available at <http://cps.sagepub.com/content/26/4/510.abstract>.

²⁰ Weiler 1999 and 1994.

legal cultures and tradition of judicial review powers as a contextual factor that conditions the preferences of national judges to review national acts under EU law mandates ²¹.

In a similar vein, Karen Alter ²² developed an inter-courts competition explanation that assumes diverse institutional incentives for each type of court: while lower and intermediate courts use EU law supremacy to increase their prestige and power in relation to high courts, which defend the prevalence of the national legal system to safeguard their power. Therefore, national courts via the preliminary references mechanism were able to play the higher courts and the CJEU off against each other to influence legal development in the direction they prefer. As a result, high courts have gradually accepted supremacy, pressured by the cooperation of national courts together with the CJEU, by enforcing its rulings.

In opposition to neo-functionalists' point of view, inter-governmentalist explanations have defended the acceptance of supremacy, together with direct effect doctrines, by national courts considering national authorities' preferences or/and public opinion towards the EU ²³. In these sense, Mary L. Volcansek ²⁴ affirmed that national interpretations and acceptance

²¹ Claes, *supra* note 17F. Fontanelli, G. Martinico and P. Carrozza, *Shaping Rule of Law Through Dialogue: International and Supranational Experiences* (2010), available at <https://books.google.dk/books?id=pA6JRM8GoykCvanLeeuwen>, 'On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms 'Towards' Europe', 21 *Contemporary European History* (2012) 357 2012/06/13, available at <https://www.cambridge.org/core/article/on-democratic-concerns-and-legal-traditions-the-dutch-1953-and-1956-constitutional-reforms-towards-europe/FF4DA5DAFABCAB692F3CA54EA601466Rytter> and Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms', 9 *International Journal of Constitutional Law* (2011) 470, available at <http://icon.oxfordjournals.org/content/9/2/470.abstract>.

²² Alter, *supra* note 4.

²³ Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market', 46 *International Organization* (1992) 533 2009/05/01, available at <https://www.cambridge.org/core/article/international-cooperation-and-institutional-choice-the-european-communitys-internal-market/06BB4C571BF6253539B3DC06C5EF2117> 'The Politics of Legal Integration in the European Union', 49 *International Organization* (1995) 171 Garrett, Kelemen and Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union', 52 *International Organization* (1998) 149 2003/08/01, available at <https://www.cambridge.org/core/article/european-court-of-justice-national-governments-and-legal-integration-in-the-european-union/CADA86B2D646F4A7F00586C4E2C40B5BKelemen>, 'The Limits of Judicial Power', 34 *Comparative Political Studies* (2001) 622, available at <https://doi.org/10.1177/0010414001034006002>.

²⁴ *Judicial Politics in Europe: An Impact Analysis* (1986), available at <https://books.google.dk/books?id=N6iQAAAAMAAJ>.

of EU law supremacy mirrored national authorities' preferences towards EU political and legal integration. By correlating the timing of changes in high courts' jurisprudence with changes in the national governments' enthusiasm for legal integration, she asserts that national courts accepted EU law supremacy as a consequence of the national governments' positive attitudes towards EU law.

In contrast to these approaches, we had some interesting contributions from several other disciplines, sociology and history, stressing out the relevance of networks and socialization. These studies refer to the role played by European advocates²⁵, like Euro-law associations, pro-European transnational networks and *fora*, and their members and participants (lawyers, judges, politicians or EU officers), who supported the constitutional practices of the Court, such as the acceptance of the EU law supremacy practice²⁶. For instance, Bill Davies²⁷ pointed out to the relevance in the period 1963 until 1969 of meetings were as much driven by the work of the supranationalist scholars as by the successful lobbying of the CJEU, the Commission's Legal Service and the FIDE organization that advocated for the penetration and acceptance of EU law supremacy at the national arena.

In this direction, scholars also talked about the impact of CJEU judges and staff for the acceptance of EU law supremacy at the national level²⁸. In this regard, it has been suggested the importance of these former members to change the position of national high courts towards the supremacy of EU law. Mr. Galmont was nominated to serve as a CJEU judge: "After his tenure in Luxembourg, he returned to the *Conseil d'État*. One short year

²⁵ Bernier, 'Constructing and Legitimizing: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–70', 21 *Contemporary European History* (2012) 399B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (2012) Vauchez, 'The Making of the European Union's Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks', in W. Kaiser, B. Leucht and M. Gehler (eds.), *Transnational Networks in Regional Integration Governing Europe 1945-83* (2010) 108.

²⁶ Rasmussen, 'Rewriting the History of European Public Law: The New Contribution of Historians', 28 *American University International Law Review* (2013) 1187.

²⁷ , *supra* note 25: 89.

²⁸ Claes, *supra* note 17 Nyikos, 'Courts', in P. Graziano and M. Vink (eds.), *Europeanization: New Research Agendas* (2008) 182.

later, the “renegade” supreme court ended its 15 –year isolationism and publicly accepted the supremacy of EU law in the *Nicolo case*”²⁹.

In this regard, recent developments have stressed the potential relevance of trust of national judges in the CJEU for the legal and judicial construction of Europe³⁰. As we will see in the next section, this theory advocate for the potential of trust for encouraging and strengthen judges’ cooperation. This article proposes how trust between judges might also affect the acceptance of CJEU legal doctrines and mandates imposed by the Court that govern the functioning of the EU legal system.

Judicial trust and its relevance for EU law supremacy

Mayoral³¹ has offered a new theory and evidence of the existence of trust between national judges and the CJEU and its implications for judicial cooperation either through the use of preliminary references and compliance with CJEU rulings. ‘Judicial trust’ is defined as the *subjective belief or judgment that national judges make about the likelihood of an international court or body, in that case the CJEU, following through with an expected and valued action under conditions of uncertainty.*

Judicial trust in the CJEU is theorized as a construct that is 1) diverse from citizens’ trust in judiciaries due to its professional corporativism grounded on group-identification, legal knowledge and expertise, and, 2) different from national judges’ trust in their own national judicial institutions where the conflicts between international and national courts and legal systems are not present. Having this in mind, the theory and empirical evidence that national judges are more likely to trust and cooperate with the CJEU emphasizes the Court’s capability to promote trust through its decisions, by rendering decisions, which: 1) offer a clear guidance for the judicial enforcement of EU law, and, 2) will not conflict with their

²⁹ Nyikos, *supra* note 28: 191.

³⁰ Mayoral, *supra* note 9.

³¹ *Ibid.*

national legal order. Lastly, trust in the CJEU is positively affected by national judges' identity as European citizens. Figure 1 offers a picture of the cross-country variation on judicial trust in the CJEU and in national higher courts from the data of analysis.³²

[Figure 1 about here]

Even if it is a very complex exercise, this mid-ranged theory has provided a new approach to the relationship of national courts with the CJEU distinct from the current accounts reviewed above. Nevertheless, we should question to what extent is trust relevant for the EU judicial system. The CJEU is inserted in a federal judicial system where the Court is at the apex of this federal network³³. On the one hand, this system is sustained by the EU mandates that the Court developed for national courts for the proper functioning of the EU legal system. On the other hand, national courts, mainly constitutional ones, established some conditions which should be respected by the Court when acting as supreme EU federal Court (e.g. human rights, rule of law, constitutional identities, etc.). However, despite national courts mostly follow and apply interpretations of EU law provided by the CJEU to them, national courts still evade or did not comply with the ruling and mandates given by the CJEU³⁴ or showed sceptical attitudes towards the Courts' doctrines and authority³⁵. This created an interdependent federal system which "rest upon the respect that national courts

³² Detailed information about the survey data might be found in the section below devoted to the research design and in the appendix.

³³ A. Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (2009), available at <https://books.google.dk/books?id=lbUkVZImUMAC>.

³⁴ Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistance', 4 *European Union Politics* (2003) 397, available at <http://eup.sagepub.com/content/4/4/397.abstract>.

³⁵ Dyevre, 'Domestic Judicial Defiance and the Authority of International Legal Regimes', *European Journal of Law and Economics* (2016), available at <https://doi.org/10.1007/s10657-016-9551-2> 'Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?', 35 *Yearbook of European Law* (2016) 106, available at <http://dx.doi.org/10.1093/yel/yew001>.

are willing to grant to the Court of Justice and this, in turn, rests upon their conception of what the proper role of the Court of Justice as a constitutional federal court should be”³⁶.

The consequence is a multi-level or federal judicial system of mutual enforcement and cooperation between national courts and the CJEU, where the CJEU needs to secure the collaboration of national judiciaries when acting as EU decentralized judges. This system is in part sustained by the CJEU supremacy doctrine, which requirement that national courts to enforce EU law despite national legislation, causes an intermingling of the national judicial systems. Despite trust is a salient structural factor in the functioning of federal system³⁷, it is still disregarded in the context of the legal and judicial federal systems and integration. The attention to this mechanism has recently become necessary for institutions as it enables actors to overcome collective action problems and enhances the legitimacy of governance actors³⁸ and within and between federal systems, institutions and networks³⁹. In this regard, and in connection with EU judicial governance, current EU debates underline the relevance of trust-enhancing solutions for addressing some of the challenges the Court of Justice of the European Union and the EU project as a whole are facing. Particularly important, the multi-level structure of the EU legal system opens up the possibility for national courts to oppose the authority of the CJEU. This authority has been repeatedly challenged by national

³⁶ Hinarejos, *supra* note 33: 6-7.

³⁷ Kent, 'Political Trust and the Roots of Devolution', in V. Braithwaite and M. Levi (eds.), *Trust and Governance* (1998) 218.

³⁸ Börzel and Risse, 'Dysfunctional State Institutions, Trust, and Governance in Areas of Limited Statehood', 10 *Regulation & Governance* (2016) 149, available at <http://dx.doi.org/10.1111/rego.12100>.

³⁹ Kincaid and Cole, 'Citizen Evaluations of Federalism and the Importance of Trust in the Federation Government for Opinions on Regional Equity and Subordination in Four Countries', *Publius: The Journal of Federalism* (2015), available at <http://publius.oxfordjournals.org/content/early/2015/10/15/publius.pjv039.abstract> Lubell, Henry and McCoy, 'Institutional Collective Action in an Ecology of Games', in *Self-Organizing Federalism: Collaborative Mechanisms to Mitigate Institutional Collective Action Dilemmas* (2009) 229.

courts in charge of implementing its mandates⁴⁰, and aggravated in the context of the current rule of law backsliding.⁴¹

Hence, trust is widely recognized as a factor that may enhance legitimacy and complement institutional efforts in judicial cooperation and compliance with EU law and the CJEU jurisprudence⁴². In the same vein, this article advocates for the impact of trust on the acceptance of EU law mandates the supremacy of the EU legal order (see figure 2).

[Figure 2 about here]

Accordingly, it is hypothesized that:

***H₁**: The more national judges trust the CJEU the more likely national judges accept that the EU legal order stands above their national legal order.*

Furthermore, it is also suggested the relevance of a judicial compensation mechanism that refers to what extent judges' attitudes towards supremacy would depend on the trust they have about the other judicial actors involved in the development of the integration of

⁴⁰ Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century.(Symposium: The Variable Authority of International Courts)', 79 *Law and Contemporary Problems* (2016) 117; Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII', 8 *European Constitutional Law Review* (2012) 323 2012/09/11, available at <https://www.cambridge.org/core/article/czech-constitutional-court-playing-with-matches-the-czech-constitutional-court-declares-a-judgment-of-the-court-of-justice-of-the-eu-ultra-vires-judgment-of-31-january-2012-pl-us-512-slovak-pensions-xvii/E109B13C472AM>; Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash.(Symposium: The Variable Authority of International Courts)', 79 *Law and Contemporary Problems* (2016) 141.

⁴¹ The European Commission has underlined the necessity of 'mutual trust' between justice authorities from different Member States for the application of EU instruments such as the European Arrest Warrant or rules on conflict of laws issues between Member States. "While the EU has laid important foundations for the promotion of mutual trust, it needs to be further strengthened to ensure that citizens, legal practitioners and judges fully trust judicial decisions irrespective of in which Member State they have been taken". http://europa.eu/rapid/press-release_IP-14-233_en.htm

⁴² Mayoral, *supra* note 9.

the EU legal order at the national level (e.g. Supreme and Constitutional Courts). Accordingly, national judges might agree with EU legal order supremacy or value the EU law supremacy doctrine more when they do not trust their highest national judicial authority due to, for instance, their performance as regards EU law and lack of judicial independence⁴³. For instance, the EU law supremacy doctrine might serve as an authoritative argument to challenge the decisions made by a distrusted court. This strategic relationship strengthens when national judges have a trust in the CJEU. The main rationale refers to an individual calculus whereby national judges, displeased with the functioning of national judicial institutions—like the Constitutional Court—, and satisfied with the performance of the CJEU rely on the EU law supremacy to empower their national position against distrusted higher courts. In this sense, the idea that judges' may empower themselves using CJEU jurisprudence to challenge national judicial institutions whose performance is not well-evaluated or trustworthy as regards the application of EU law connects with the claims coming from the inter-competition theory⁴⁴.

Accordingly, I hypothesize:

H₃: The higher the trust in the CJEU, and the lower their trust in the national highest court, the more likely national judges accept that the EU legal order stands above their national legal order.

Mapping National Judges' Preferences Towards EU law Supremacy

As we have seen in the literature review above, the question on judges' preferences formation has attracted a lot of interest of scholars who developed several theories and assumptions accounting for these preferences. Normally, it is addressed by analysing the *ex-post* opinions

⁴³ *Ibid.*

⁴⁴ Alter, *supra* note 4.

expressed in the seminal national courts' decisions as regards EU law⁴⁵, the institutional position of national judges⁴⁶ or reflected in the public opinion⁴⁷. The fact is especially important because although preferences have been part of the theories explaining the judicial integration, until now, scholars devoted to EU law and politics inferred motivations from their decisions (induction) or derived on the basis of pre-existing theories of judicial behaviour (deduction). Nevertheless, we cannot be sure that the behaviour observed might perfectly represent judges' preferences, because it might be influenced during the process of judicial decision-making by other institutions or strategic settings⁴⁸. However, and thanks to interview and survey methodology, despite they also obvious limitations, we are able to put some empirical flesh on the structure of preferences and incentives built by these theories on judicial behaviour. Subsequently, this study, despite the methodological difficulties and limitations for running surveys indicated in the literature⁴⁹, attempts to complement these previous efforts by mapping national judges' preferences towards EU law by asking judges to reveal them. As we will see next, surveys on judges' profiles offers, for the first time, a unique opportunity to cover this field from a new point of view where judges reveal their preferences, position and attitudes towards EU law supremacy and trust in the CJEU, allowing to test whether trust in the CJEU is crucial for the acceptance and application of EU law supremacy.

⁴⁵ There are, however, good reasons to distrust that decisions from the court really matched with the sincere preferences of the justices. When, for example, justices seek to keep their position or to please their appointing authorities, may lead them to make strategic decisions far from their individual preferences. See Epstein and Mershon 'Measuring Political Preferences', 40 *American Journal of Political Science* (1996) 261, available at <http://www.jstor.org/stable/2111702>.

⁴⁶ For a strategic analysis of preference formation based on institutional strategic interactions see Alter, *supra* note 4. and Castillo *EU Treaties and the Judicial Politics of National Courts: A Law and Politics Approach* (2015), available at https://books.google.dk/books?id=6_ZWCgAAQBAJ, among others.

⁴⁷ See, for example, Mattli and Slaughter, *supra* note 17.; and Carrubba and Murrah 'Legal Integration and Use of the Preliminary Ruling Process in the European Union', 59 *International Organization* (2005) 399..

⁴⁸ Frieden, 'Actors and Preferences in International Relations', in D. A. Lake and R. Powell (eds.), *Strategic Choice and International Relations* (1999) 39.

⁴⁹ To learn about the potentials and limitations of survey methodology see de Leeuw et al. *International Handbook of Survey Methodology* (2008), available at <https://books.google.es/books?id=x2ljAmf4NcUC>, among others.

Considering this new approach to explain how judges' value the CJEU doctrine on EU law supremacy, it is presented a description of *how do judges look upon the EU legal order?* That is, how do judges from the sample consider the relationship between the EU and national legal system, by asking whether *they think that EU legal order stands above the national one?* The following figure⁵⁰ shows the several positions towards the supremacy of the EU legal order over the national legal system of the judges surveyed. In figure 3, we can observe to what extent national judges 'strongly agree' or 'agree' with the idea that EU law stands above national law. As we can appreciate, the picture is diverse, with respect to the acceptance of the supremacy of European Union law. For Dutch judges, the acknowledgement of supremacy of the EU legal order is less problematic than for the rest of nationalities. In this case, the precedence of EU law over national law is less challenging, as the Dutch Constitution solved the issue, recognizing the supremacy of international law over national law⁵¹. For the rest of countries, the supreme status of EU law remains uncertain, although national judges seem receptive, and European Union law supremacy came as part of the *acquis communautaire*.

[Figure 3 about here]

In the light of the evidence discussed above, we might question whether and to what extent do trust in the CJEU effectively impact national judges' attitudes towards the EU law supremacy.

⁵⁰ Detailed information about the survey data might be found in the section below devoted to the research design and in the appendix.

⁵¹ Alter, *supra* note 4; Claes, *supra* note 17.

Research Design: Survey, Variables and Methods

The dataset used for this article was collected in countries such as Germany (131 judges), the Netherlands (127), Spain (112) and Poland (111) between 2011 and 2013 by Tobias Nowak⁵² and Juan A. Mayoral⁵³. According to the authors, the data was gathered among judges from district and regional courts working in different jurisdiction in cooperation with several national judicial authorities. Additional information on the survey procedure might be found in the appendix provided by the data owners.

Variables of interest:

- *Supremacy of EU legal order (dependent variable)*: The variable measures whether judges consider European law to be a legal order standing above national law and its intensity, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

- *Trust in the Court of Justice of the European Union (CJEU) (Explanatory variable)*: The variable measures the intensity of trust in the CJEU, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

- *Trust in the highest national court (Explanatory variable)*: The variable measures the intensity of trust in the German, Spanish and Polish Constitutional courts and the Supreme Court in the Netherlands, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

Control variables:

⁵² *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (2011), available at <https://books.google.dk/books?id=PCcIywAACAAJ>.

⁵³ 'The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe' (2013) (available at European University Institute).

- *Type of Court*: The variable adopts the value of 0 when the judge belongs to a district court or similar, 1 if they belong to a regional or appeal court, and 2 if the judge works in a Supreme Court (only available for Poland and Spain).

- *Type of jurisdiction*: Classifies the jurisdiction in which the judge serves: ‘Civil and commercial’ (0), ‘Criminal’ (1), ‘Labour and Social law’ (2) and ‘Administrative’ (3).

- *Knowledge of EU law*: A 5-point scale measuring their subjective evaluation of their knowledge of European Union law. The variable ranges from ‘Poor’ to ‘Very good’ knowledge of EU law.

- *Country*: This variable identifies national judges’ country: 0: The Netherlands, 1: Germany; 2: Poland, 3: Spain.

- *Gender*: It is coded as 1 or 0 for male or female respondents respectively.

- *Age*: The variable codes the age of the respondents from 24 to 66.

Method: For the analysis of the dependent variable, I estimate an ordered logit model that is adequate for ordinal variables. The analysis will take into consideration the influence, as independent variables, of several factors such as knowledge of EU law, trust in the CJEU and in the national highest court (Constitutional or Supreme), type of court, and others. The variables used in the analysis are summarized in the following table 1.

[Insert Table 1 here]

Empirical Analysis:

The following section is devoted to the empirical testing of the impact of trust in national judges’ attitudes to EU law primacy over national orders. Two models will be tested, where the second one will include judges’ gender and age as additional control variables. The

decision of including these two sociological control variables in a separate model was taken due to the reduction of observations (more or less around 60) that their inclusion implies. Hence, two models are tested to check the robustness of the results regardless the diverse control variables included.

In the first place I will test the influence of trust in the CJEU in their opinions or acceptance of whether EU legal order stands above their national one. According to these hypotheses presented above, the results in table 2 show how judges acceptance of EU law supremacy is higher when they 1) trust the CJEU and 2) distrust the national highest court.

[Insert Table 2 here]

[Insert Table 3 here]

[Insert Figure 5 here]

The effects of the institutional judicial trust on EU law supremacy are reported in table 3 generating predicted probabilities for different scenarios using model 1 as a reference due to higher amount of observations. There are substantial differences in the probability of ‘that EU legal order stands above national law’ between categories. We observe in table 3 that this probability increases as ‘trust in the CJEU’ increases.⁵⁴ While the acceptance of the

⁵⁴ I decided to show the result for "agree" category as the majority of changed probabilities suggested by the predicted effects occur in these categories. On consideration, such results are not surprising: the overwhelming percentage of respondents chooses these categories (around 40%). As such, the baseline probabilities for being in this extreme category are very small, meaning that any changes as a function of the covariates will be correspondingly small. Which, again, is not to say such extreme categories do not occasionally exhibit

EU law supremacy is lower at high levels of support for the national highest court. Mostly, it seems that highly trusted and well-performing national institutions hinder the acceptance of this EU constitutional principle. Hence, the crucial question of who decides the limits of EU law application, or supremacy in this case, is not only a question for the CJEU or for the highest national court: it is also a task for the national judges who have to solve, within the system, by refereeing the subjective evaluation of these two competing institutions.

Finally, it will be taken a closer look to other variables and its effects. First, knowledge in EU law. It seems that judges obviously accept EU law supremacy as they are more aware of how EU law functions. Second, the institutional variation across countries and their relevance for the acceptance of EU law primacy over national law. For that purpose, it has been included one variable per country, leaving the Netherlands as a category of reference, assuming that Dutch judges will have fewer incentives for accepting the supremacy of EU law due to the higher openness of their system compared to the other countries⁵⁵. Indeed, the results show how judges in contexts with conflictive legal systems accept less the supremacy of EU law. I should remind that the legal contexts considered as conflictive in this analysis are constitutional pluralistic, where national Constitutional courts have established counter-limits or reservations to European doctrines⁵⁶, in order to preserve the autonomy and primacy of their national constitutional and legal order. Lastly, we observe how in model 2 judges serving in criminal law are less likely to accept EU law supremacy as they work in the least Europeanized and legally integrated areas compared to administrative or social law, for instance.

The empirical analysis has manifested how trust in the CJEU and its national

statistically significant differences as the covariates are allowed to vary, but rather that even when I observe such the substantive implications are not as important as for the other categories

⁵⁵ Despite they are not reported, interactions between country dummy variables and trust in national high courts and the CJEU have also been tested with no significant results.

⁵⁶ Fontanelli, Martinico and Carrozza, *supra* note 21.

counterparts might affect the attitudes and preferences towards the supremacy of the EU legal order. In this regard, judicial trust is presented as another factor that may enhance the enforcement of legal doctrines created by the CJEU and, hence, improve the functioning of the EU legal and judicial system. For example, in those complex cases depending on the discretion of the judge about the compatibility of national law with EU law, confidence in the CJEU might play an important role by shaping the position of the national judges towards the pre-eminence of the EU legal order over the national one and then also encourage the application of the EU law supremacy to strike the balance between both legal systems. On the other hand, this supremacy is also mediated by national judges' trust in the guardians of their domestic legal systems. The evidence shows how instead of reinforcing their preferences towards EU law supremacy, trust in national higher courts enters in competition with the CJEU by diminishing the positive attitudes towards supremacy. This is the so-called 'compensation mechanism' in EU multi-level institutional politics⁵⁷, where low levels of trust in national institutions will lead individuals to higher levels of support for the EU. Accordingly, I argue that a kind of judicial compensation mechanism occurs where national judges living in a country with highly trusted and well-performing institutions hinders support for EU law supremacy.

In addition, the analysis expands on empirical evidence the theory on judicial trust, by offering a complementary explanation for understanding national judges' acceptance and application of EU law supremacy. First, judicial trust might be considered a relevant functional principle that encourages and, most importantly, strengthens EU constitutional principles, like supremacy. In a similar vein, we expect trust in the CJEU to affect some other relevant doctrines relevant for the legal structure and functioning of the EU legal and judicial

⁵⁷ Muñoz, Torcal and Bonet, 'Institutional Trust and Multilevel Government in the European Union: Congruence or Compensation?', 12 *European Union Politics* (2011) 551, available at <http://eup.sagepub.com/content/12/4/551.abstract>.

system such as direct effect, effectiveness, etc. Second, we should emphasize that the findings suggest how trust might be articulated with other explanations. Judicial trust as a relevant factor for implementing CJEU legal mandates reinforces and complements national judges' duty to refer (based on their knowledge on EU law) or competition with domestic judicial authorities (based on their position within the judicial hierarchy).

Conclusions

This article has explored a new way of accounting for EU law supremacy, by providing a new approach based on the impact of trust to explain its acceptance and potential enforcement by national judges. The research offers some interesting findings concerning this question; it opens new venues in the field of regional legal integration and the role of international courts. First, even if the evidence is still limited in representativeness, it is found a powerful connection between trust in supranational courts and the attitudes towards the principles and doctrines stated by them. This remark the importance of trust as a meaningful factor to increase CJEU's authority for engaging national courts in pushing towards giving full effect of legal mandates and principles and promoting the legal integration. In second instance, it is shown that national courts value the EU law supremacy doctrine against distrusted national high courts. This result recalls the idea of competition between national courts, and how judges' may empower themselves using CJEU jurisprudence as a legitimization strategy to challenge national judicial institutions who performance is not well-evaluate or trustworthy as regards the application of EU law and to overcome any reservations or counter-limits doctrines as regards the applicability of EU law.

Therefore, trust is suggested as a relevant mechanism for the functioning of the EU legal system and also for the construction and governance of the European judiciary. It is claimed then that judges are more prone to accept the relevant legal doctrines and follow the

jurisprudence that composes the constitutional structure of the EU legal system when they have (higher) trust in the CJEU, which is considered the main architect of the EU federal judicial system. Similarly, the concept of judicial trust might contribute to the idea of mutual recognition⁵⁸ where mutual trust has already been identified as a relevant principle governing the relationship between national judges when enforcing cross-border decisions like the European Arrest Warrant. All in all, we can conclude the relevance of judicial trust as an additional legal governance principle of the Union, which might reinforce the acceptance and application of other supranational constitutional principles. In comparative terms, trust might also play an important role in creating, sustaining and developing the effectiveness of other international and regional legal systems, by strengthening the main pillars of acceptance of international systems at the domestic level. In this regard, trust might help to improve the acceptance and use of supremacy rules, reducing the conflicts that the co-habitation between legal systems can produce. Trust then appears as a very useful mechanism to help national judges to internalize their legal mandates, by developing multi-level judicial structures linked or bounded by trust between judges.

⁵⁸ Nicolaidis, *supra* note 10.

APPENDIX

Normally, the task of carrying out a random probability sampling among judges is extremely difficult to execute due to the constraints in access to national judges and the conditions imposed by the judiciaries to cooperate. However, the authors of this data used different strategies during its collection that allowed for reducing representativeness bias, non-response and self-selection errors. The tables below show how difficult was to obtain representative samples under these constraints. The tables compare the sample with country-level information on judges' characteristics to assess whether despite the difficulties it was still possible to secure a representative sample.

2012 Population	<i>Judges</i>	<i>Male</i>	<i>Female</i>	<i>Lower</i>	<i>Intermediate/ Higher</i>
<i>Germany</i>	19832	59,8%	40,2%	74,9%	25,1%
<i>Netherlands</i>	2410	45,7%	54,3%	77%	23%
<i>Spain</i>	5155	49,2%	50,8%	70,7%	29,3%
<i>Poland</i>	10114	36,1%	63,9%	93,3%	6,6%

Source: CEPEJ European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice. Council of Europe. UNECE statistics: <http://w3.unece.org/PXWeb/en>

2012 Sample	<i>Judges</i>	<i>Male</i>	<i>Female</i>	<i>Lower</i>	<i>Intermediate/Hi gber</i>
<i>Germany</i>	131	40%	60%	87,8%	12,2%
<i>Netherlands</i>	127	46,7%	53,3%	68,5%	31,5%
<i>Spain</i>	112	48,1%	51,9%	27,6%	72,3%
<i>Poland</i>	111	56,6%	43,4%	71,2%	28,8%

With few exceptions, the data is not representative of the whole population of judges. However, the sample still serves the purpose of randomizing and increase the variation of some characteristics in EU law knowledge, gender and career levels (see above), avoiding the overrepresentation of certain profiles, like judges only knowledgeable about EU law and/or working exclusively in lower courts.

<i>EU law knowledge</i>	<i>%</i>
<i>Bad</i>	14.97
<i>Moderate</i>	37.42
<i>Reasonable</i>	37.21
<i>Good/Very Good</i>	10.4
<i>Total</i>	481

The questionnaires in Dutch, German, Polish and Spanish prepared by the researchers were originally distributed online among judges by the national judiciaries involved. Reminders were sent to encourage the participation in the surveys. All these projects rely on the cooperation of the judiciary to distribute via email and encourage the participation of the judges. The selection of online survey was selected due to the high number of judges available in the country. This method made it possible to reach the vast majority of them at a very low cost. The method has its risks as some judges did not trust the online methods survey or were not familiar with them. However, this collection technique was complemented with the distribution by the researchers of paper questionnaires among judges (from all jurisdictions and legal specializations) by attending judicial training courses, mailing the questionnaires or visiting the courts to handle the questionnaires with the permission of the presidents. This complementarity helped to reduce or avoid the overrepresentation of judges more knowledgeable with EU law and the underrepresentation of judges not interested in EU law, reaching judges from several jurisdictions (civil, labour, administrative, and criminal), profiles and position within the judicial hierarchy (see above). Moreover, to encourage the participation of national judges, those were informed about the main objectives of the project and several channels of response were provided to ensure confidentiality.

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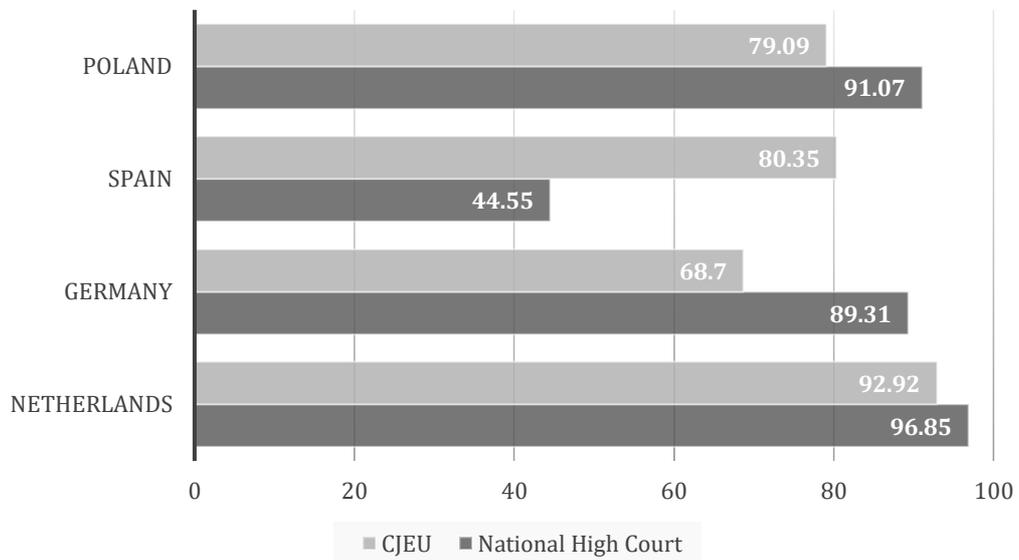
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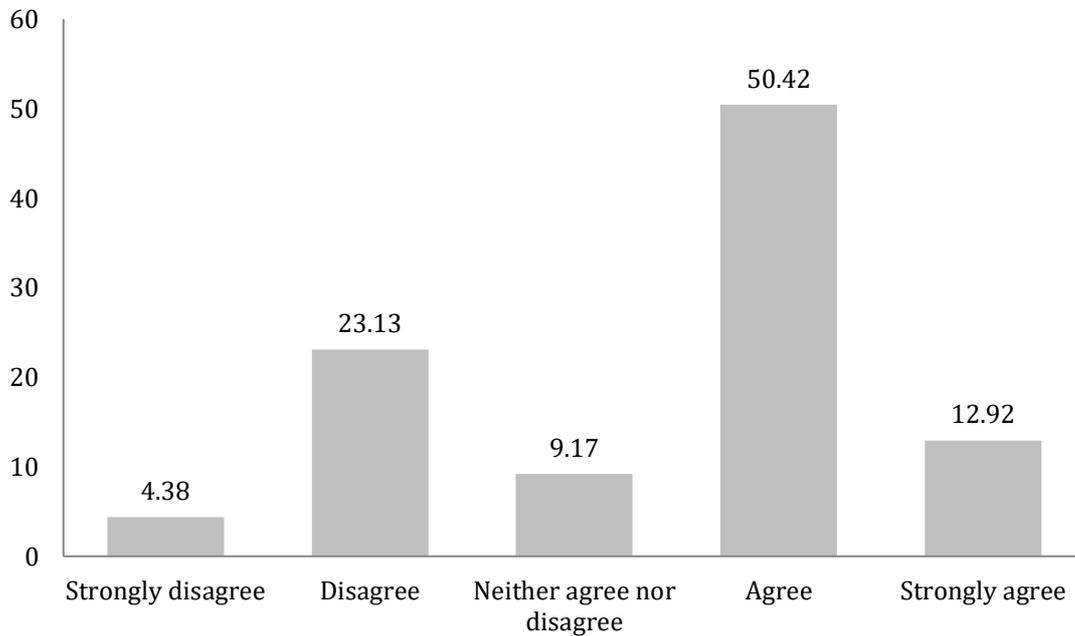
Figures:

Figure 1: Judicial trust in the CJEU and National highest courts by country (%)



Notes: The variable measures the intensity of trust in the both courts, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much. Trust is represented by taken values from 3 and 4.

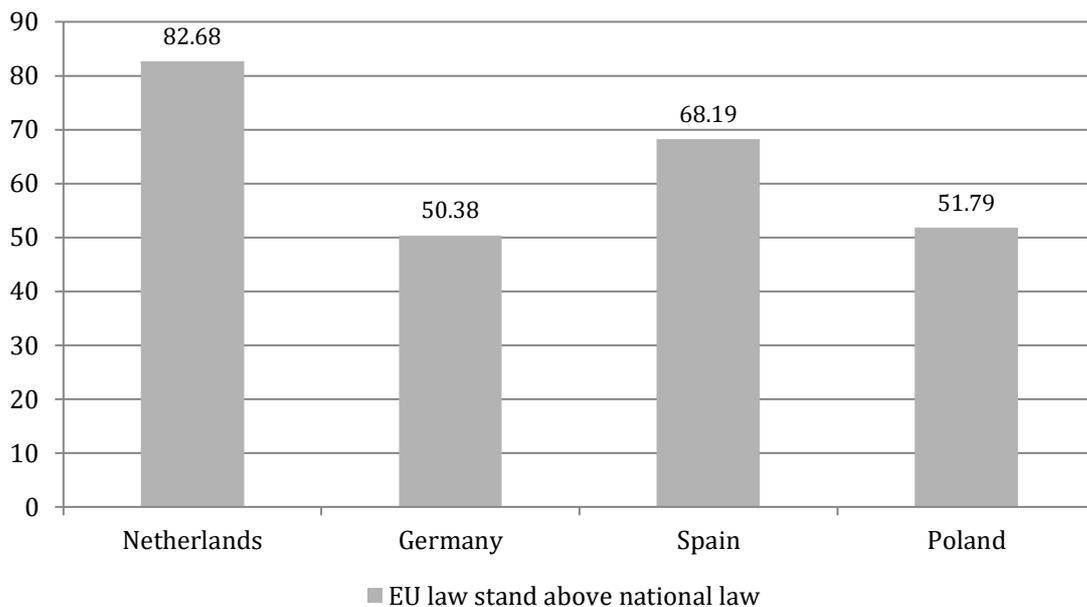
Figure 2: 'EU law stand above National law' (%)



Note: n= 480.

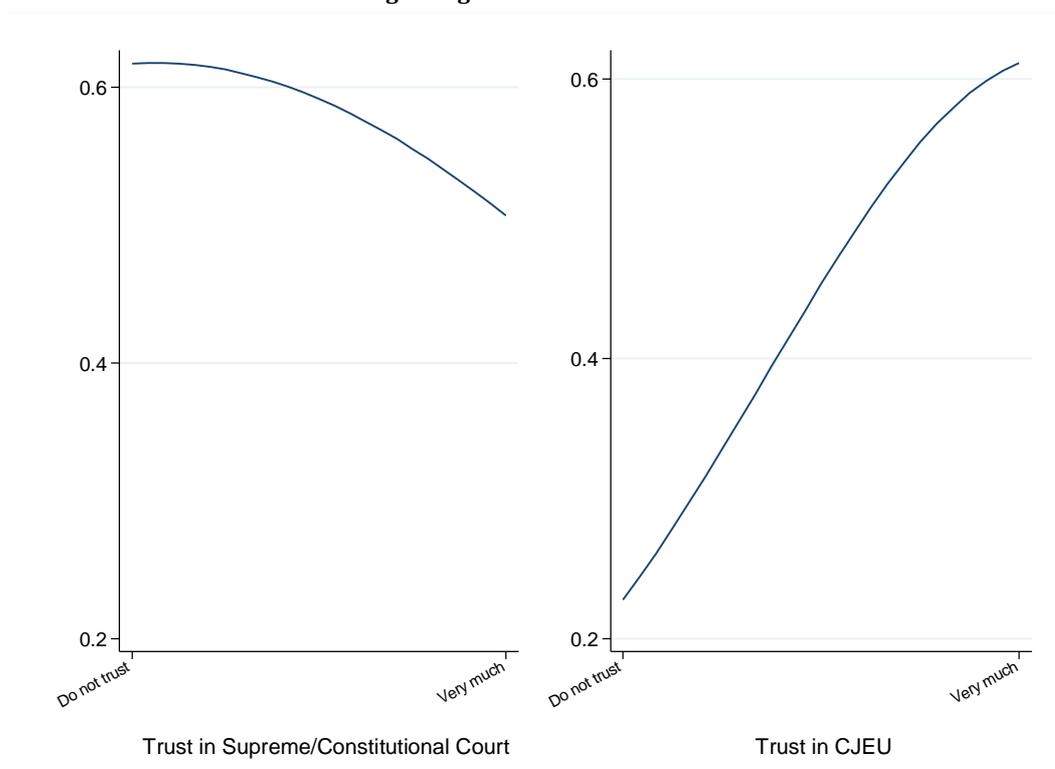
Note: n=480.

Figure 3: 'EU law stand above national law' by country (%)



Note: n= Germany (131 judges), the Netherlands (127), Spain (112) and Poland (110). Supremacy doctrine is essential: The variable measures its intensity, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

Figure 4: Predicted probabilities of the main explanatory variables for agreeing with 'EU law stands above national law'



Tables

Table 1: Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
European law is legal order standing above national law	480	2.443	1.111	0	4
Trust in national Supreme/Constitutional Court	480	3.05	1.016	0	4
Trust in the Court of Justice of the European Union	480	2.985	0.880	0	4
Knowledge of EU law	480	1.434	0.87	0	3
the Netherlands	480	0.264	0.442	0	1
Germany	480	0.272	0.446	0	1
Poland	480	0.233	0.423	0	1
Spain	480	0.229	0.421	0	1
Type of Court	480	0.365	0.842	0	1
Jurisdiction: Commercial and Civil	480	0.743	0.437	0	1
Jurisdiction: Criminal	480	0.168	0.374	0	1
Jurisdiction: Social	480	0.033	0.18	0	1
Jurisdiction: Administrative	480	0.045	0.209	0	1
Age	420	44.288	9.198	24	66
Gender	420	0.483	0.501	0	1

Table 2: Ordered logit analysis of the determinants of the assessment that European law stands above national law

	Model 1	Model 2
Trust in national Supreme/Constitutional Court	-0.299*** [0.112]	-0.245** [0.121]
Trust in the Court of Justice of the European Union	0.577*** [0.119]	0.581*** [0.129]
Knowledge of EU law	0.506*** [0.109]	0.523*** [0.121]
Type of court	-0.021 [0.209]	-0.089 [0.218]
Jurisdiction: Commercial and Civil (category of reference)		
Jurisdiction: Criminal	-0.322 [0.287]	-0.535* [0.318]
Jurisdiction: Social	-0.662 [0.505]	-0.639 [0.543]
Jurisdiction: Administrative	0.383 [0.491]	0.339 [0.518]
Country: The Netherlands (category of reference)		
Country: Germany	-1.315*** [0.261]	-1.446*** [0.290]
Country: Poland	-1.026*** [0.315]	-0.829** [0.359]
Country: Spain	-0.189 [0.319]	-0.017 [0.359]
Age		0.011 [0.011]
Gender		0.445 [0.194]
τ_1	-2.684***	-2.071***
τ_2	-0.285	0.544
τ_3	0.227	1.082
τ_4	3.112***	4.112***
Observations	481	420
Pseudo-R²	0.09	0.11

Standard errors in brackets * significant at 10 %; ** significant at 5 %; *** significant at 1 %

Table 3: Predicted probabilities of the main explanatory variables for agreeing with 'EU law stands above national law'

EU law above National law (Agree=3)	Trust in NHC	Trust in CJEU
Do not trust	0.61	0.22
Hardly trust	0.61	0.33
Neither trust nor distrust	0.59	0.45
Trust	0.55	0.55
Trust very much	0.50	0.61