The Challenges to Trust-Based Governance in the European Union

Assessing the Use of Mutual Trust as a Driver of EU Integration

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The principle of mutual trust, which is "of fundamental importance in EU law" constitutes a vital parameter for integration between Member States within the European Union. Indeed, in allowing Member States to open up to each other despite their legal diversities, the principle of mutual trust is an attractive tool in governance for achieving a borderless European area without going through the unification of the various national laws. The analysis of the consequences of the principle of mutual trust in the internal market and in the area of freedom, security and justice shows that it enables Member States to exercise, to a certain degree, their prescriptive and enforcement powers extraterritorially throughout the whole European area and, thus, in the territory of other Member States. While the objective of enabling EU integration without jeopardizing national autonomy is beyond doubt legitimate, this trust-based governance nonetheless raises several challenges. Indeed, integration by means of mutual trust may be problematic with regard to concerns such as national sovereignty, democratic legitimacy, the protection of individual prerogatives, state liability and the duty of public authorities to protect the public interest.

Introduction

The main goal of the European Union is to reduce, if not do away with altogether, physical and legal barriers between Member States within the European area. First sought in the economic field, this goal of interlocking national spheres was, in a second stage, also pursued in the area of freedom, security and justice (hereafter AFSJ) in order to avoid the inefficiencies resulting from classic interstate cooperation in this domain. The abolition of legal barriers between EU Member States is notably achieved by mechanisms based on mutual trust supplementing freedom of movement rights by requiring Member States to open-up each other's domestic legal orders.

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This principle of mutual trust, undoubtedly present in the background from the very inception of the European common market in the 1950's,[2] has indeed acquired a major functional role as a principle of governance[3] in EU integration. Based on the "fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 [of the Treaty on the European Union]",[4] this principle indeed aims to enable the effective opening up of national spheres[5] for the purposes of achieving a European area without borders, while still preserving national specificities. By presuming that Member States respect these values and, more globally, EU law,[6] mutual trust eventually permits the erosion of internal borders by requiring swift and efficient cooperation between national authorities through imposing, *inter alia*, the recognition of foreign laws and decisions and the prohibition of mutual verification of compliance with EU law by Member States, save in exceptional circumstances. A duty of mutual trust has therefore been imposed in many different areas of EU Law as a tool of integration, even though trust intuitively refers to an "intersubjective phenomenon"[7] which cannot be a dictated. N. Luhmann, prominent thinker in systems theory, describes in that sense trust as a phenomenon where an actor *willingly* surmounts a deficit of information leading to uncertainty regarding the success of an operation[8].

The approach to integration founded on compulsory trust was developed in the area of the internal market, through the case law of the Court of Justice in cases such as *Cassis de Dijon*[9] or *Wurmser.*[10] In order to ensure the abolition of internal frontiers within the EU, a "qualified duty of mutual recognition based on qualified mutual trust"[11] was inferred by the Court on the basis of a rebuttable presumption "of legal equality between the different systems of the

[2] J. SNELL, 'The Single Market: Does Mutual Trust Suffice?', in D. GERARD and E. BROUWER (eds.), *Mapping Mutual Trust: Understanding and Informing the Role of Mutual Trust in EU Law*, (European University Institute, 2016) 14.
[3] K. LENAERTS, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017) *Common Market Law review*, 805, 808.
[4] Opinion 2/13, ECLI:EU:C : 2014: 2454, paragraph 168.
[5] E. DUBOUT, 'Une question de confiance: nature juridique de l'Union européenne et adhésion à la Convention européenne des droits de l'Homme', (2015) *Cahiers de droit européen,* 73, 94.
[6] Opinion 2/13, above n. 3, paragraph 168.
[7] For an in-depth study on the notion of trust in social sciences see S. SCHWARZ, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' (2017), *European Law Journal*, 8.
[8] N. LUHMANN, 'Trust and Power' (John Wiley & Sons, 1979) 32.
[9] Case C-120/78 *Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.
[10] Case C-25/88, *Wurmser*, ECLI:EU:C:1989:187.
[11] J. SNELL, *op. cit.*, 15.

EU"[12] justifying the principle of mutual trust. The duty of mutual recognition, initiated by the Court of Justice, was rapidly relied upon by the Commission to develop a new approach for completing the internal market[13].

The principle of mutual trust was also used in the AFSJ both by the Court of Justice and the EU's political institutions. European Union private international law relies on mutual trust between Member States by aiming to constitute "appropriate legislative tool[s] that may be used to preserve the inherent characteristics of the diverse legal systems within the EU",[14] while at the same time allowing the development of an integrated European judicial area conducive to the business and private cross-border activities that underpin the construction of Europe. To assure rapidity and effectiveness in the administration of criminal justice within Europe[15] despite the lack of substantial harmonization of criminal law and of a pan-European criminal judiciary, the principle of mutual trust is also relied upon in the field of criminal cooperation.

The principle of mutual trust thereby constitutes an important tool of governance for removing borders between domestic legal systems in several fields. Its object however varies depending on the matter involved. While mutual trust in the internal market mostly concerns technical standards, more polarizing issues such as safety and human rights are often at stake in the AFSJ[16]. The duty of trust also varies depending on the actors involved: trust may indeed be imposed in a relationship binding either, legislative, administrative or judicial authorities.

Generally speaking, this principle has important consequences for Member States' exercise of their prerogatives and for inter-state relationships across these different domains. Indeed, Member States are, in certain circumstances, prevented from exercising their jurisdiction on their own territory in favour of the exercise of other jurisdictions and are sometimes entitled, conversely, to exercise their authority beyond their national borders. The use of mutual trust thus partially alters Member States' territorial authority and entails a model of integration

[12] C. JANSSENS, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013), 29.
[13] K.J. ALTER and S. MEUNIER-AITSAHALIA, 'Judicial Politics in the European Community : European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) *Comparative Political Studies,* 535, 541.
[14] P. BEAUMONT and M. DANOV, 'The EU Civil Justice Framework and Private Law: Integration through Private International Law' (2015) *Maastricht Journal of European and Comparative Law,* 706, 707.
[15] V. MITSILEGAS, 'Conceptualising Mutual Trust in European Criminal Law: The Evolving Relationship between Legal Pluralism and Rights-Based Justice in the European Union', in D. GERARD and E. BROUWER (eds), above n.1, 43.
[16] A. HÉRITIER, 'Mutual Recognition: comparing policy areas' (2007), *Journal of European Public Policy*, 800, 807.

where national boundaries no longer systematically demarcate Member States' jurisdiction. Hence, mutual trust as a tool of EU governance results, to a certain extent, in a horizontal "unbundling" of the exercise of national authority and territoriality.[17]

Writers on European public law have often preferred to address the vertical relationship between the EU and Member States, at times minimizing the fact that European law not only constrains States by vertical authority but also by dictating their "horizontal" behaviour towards one another.[18] This paper therefore aims to highlight the dynamics of trust-based governance in the EU and, furthermore, to question this model of integration. Indeed, while guaranteeing transnational mobility,[19] mutual trust as a principle of governance also raises several issues notably regarding Member States' sovereignty, democratic legitimacy, the principle of State liability, the protection of individual freedoms and the duty of public authorities to protect the public interest.

After analysing the consequences of trust-based governance on Member States' jurisdiction, the paper will attempt to highlight several issues raised by this model of integration.

I. Trust-Based integration: the Horizontal Unbundling of National Normative and Enforcement Jurisdiction with Territoriality

Trust-based horizontal integration is now commonly used in various fields of EU integration. If this method of integration may spare Member States from top-down unification of their national legal orders, it nevertheless entails important consequences for the exercise of Member States' jurisdiction. By seeking to remove legal boundaries between Member States without entrusting a supranational body with all national prerogatives, EU integration based on the principle of mutual trust indeed challenges the classical principle under international law of "territorial sovereignty". According to this principle, sovereign States hold complete and exclusive jurisdiction within their national borders.[20] Yet, this principle, which is of course no longer nowadays subject to absolute application, is furthermore called into question by trust-based EU integration. Indeed, the use of mechanisms relying on mutual trust results

[17] G. RUGGIE, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993), *International Organization,* 165.
[18] R. HOWSE and K. NICOLAIDIS, 'Democracy without Sovereignty: The Global Vocation of Political Ethics', in T. BROUDE and Y. SHANY (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, (Hart Publishing, 2008), 166.
[19] J. SIEVERS and S. K. SCHMIDT, 'Squaring the Circle with Mutual Recognition? Democratic governance in practice' (2014), *Journal of European Public Policy*, 112, 114.
[20] P. DAILLER and A. PELLET, *Droit international public*, (L.G.D.J., 1994), 450.

in, on the one hand, extra-territorial effects upon the exercise of national prerogatives[21] and, on the other, limitations to national territorial jurisdiction.

Extraterritoriality can be defined as entailing the application of a norm outside of the territory of the state that has enacted it.[22] Two main types of extraterritoriality should be distinguished: either a domestic norm is applied by foreign authorities ("indirect extraterritoriality"), or a domestic norm is directly applied by domestic authorities beyond national borders ("direct extraterritoriality")[23].

This phenomenon can furthermore be observed regarding the two facets of states' internal jurisdiction classically distinguished in international law, i.e. prescriptive jurisdiction being the power to "lay down general or individual rules through its legislative, executive or judicial bodies" and enforcement jurisdiction referring to the "power of a State to give effect to a general rule or an individual decision by means of substantive implementing measures which may include even coercion by the authorities"[24].

I.I. Member States' Territorial Prescriptive Jurisdiction and Trust-based Integration

Traditional theories of the State, coupled with the traditional principle of territoriality, presume that each sovereign State is the source of the law that will be applied on its territory. [25] European instruments enshrining mutual trust, however, may involve a dissociation of this principle by distinguishing the scope of application of national law from the territory of the State enacting it, entailing the extraterritoriality of national prescriptive jurisdiction and the limitation of Member States' exclusive territorial jurisdiction.

1. Legislative Prescriptive Jurisdiction

Unbundling the effects of legislative prescriptive jurisdiction, referring to the competence of "constitutionally recognized organs of the state to make binding laws within its territory",[26] and the domestic territory can be observed in various fields of EU law where mutual trust is used as a tool for integration.

[21] V. MITSILEGAS, 'The Limits of Mutual Trust in Europe's AFSJ: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) *Yearbook of European Law*, 319, 322.
[22] B. STERN, 'Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit' (1986) *Annuaire français de droit international*, 7, 51.
[23] *ibid.*, 9.
[24] *ibid.*, 11, quoted by AG DARMON in its opinion in joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 25 May 1988, ECLI:EU:C:1988:258, paragraph 28; see also M. N. SHAW, *International Law*, (CUP, 2008), 469.
[25] T. FLEINER-GERSTER, Théorie Générale de l'État, (Presses Universitaires de France, 1986), 205.
[26] M. N. SHAW, *op. cit.*, 472.

In internal market law, this phenomenon arises from the principle of mutual trust as expressed by the application of the principle of mutual recognition.[27] Enshrined in the case *Cassis de Dijon,*[28] this principle requires Member States to recognize and accept "regulations adopted in other polities, in which they have no say".[29] Member States are compelled to give free and unrestricted access to their markets to goods lawfully produced in other Member States.[30] Mutual trust therefore results, on the one hand, in the extraterritoriality of the home state's normative power and, on the other, in an auto-limitation of the scope of the host state's legislation.[31] This observation does not, however, mean that the host state gives the foreign legislation the status of "legal rule" as such. Indeed, "while the home state legislation constitutes in its legal order a rule directly generating rights and obligations, it becomes, once acknowledged and received in the host state's legal order, a legal fact, a mere message to which the domestic law attaches legal consequences".[32] In other words, the host state authorities must trustfully accept the way in which foreign norms are applied by foreign authorities. The extraterritoriality resulting from mutual trust can thus be said to be "direct", since the foreign norm is directly applied by the authorities of the first Member State. In that regard, one must moreover note that EU law has, from the outset, included exceptions to this duty to accept the exercise of foreign jurisdiction within domestic borders in the event of "legitimate" distrust between national authorities. Consequently, mutual trust in the internal market is to be qualified as "conditional" rather than "pure". Member States have the possibility, under certain conditions defined by EU law, to continue exercising their territorial legislative jurisdiction when they do not trust the ability of foreign authorities to preserve specific interests in an equivalent manner to their national system. The Court of Justice in that way recognizes Member States' right to limit the access of foreign goods to their market and, thus, to limit the extraterritorial exercise of normative power by another Member State resulting from the duty of mutual recognition, in order to preserve, in a proportionate manner,

[27] J. SNELL, above n. 1, p. 15.
[28] Case *Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein*, above n. 8, paragraph 23.
[29] K. NICOLAÏDIS, 'Kir Forever? The Journey of a Political Scientist in the Landscape of Mutual Recognition', in M. MADURO and L. AZOULAI (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty,* (Hart Publishing, 2010), 447, 450.
[30] C. BARNARD, *The Substantive Law of the EU*, (Oxford University Press, 2013), 20.
[31] L. RADICATI DI BROZOLO, 'L'influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation' (1993), *Revue critique de droit international privé*, 401.
[32] A. BAILLEUX, 'Traduction et droits européens – premiers jalons', in A. BAILLEUX, Y. CARTUYVELS, H. DUMONT, F. OST (dir.), *Traduction et droits européens. Enjeux d'une rencontre,* (Publications des F.U.S.L., 2009) 17, 25.

the public interest that could otherwise be jeopardised.[33] A Member State remains in this way able to refuse the extraterritorial effects of foreign standards in order to protect, *inter alia*, its consumers,[34] public health[35] or the environment.[36] These exceptions can, however, no longer be relied upon when complete harmonization has been enacted at EU level in a particular field.[37] According to the Court of Justice's case-law, Member States can indeed no longer cite a particular interest to maintain their territorial prescriptive jurisdiction when EU law already protects this aim.

In the field of private international law, EU law involves in certain circumstances the straight application of the law of another State by domestic courts on the basis of neutral connecting factors. EU private international legislation regulating conflict of laws can thereby result in the transnational application of national laws. For instance, the Rome I Regulation on the law applicable to some cross-border contractual relations[38] enables contractual parties to choose the law that applies to their relations[39] and establishes, in the absence of such a choice, neutral criteria determining the applicable legislation irrespective of the Member State where a judicial claim is or might be brought.[40] In the context of EU private international law, the foreign rule conserves its status of legal norm and is applied domestically, despite its journey from one legal order to another,[41] in contrast to the direct extraterritoriality of the prescriptive jurisdiction in the internal market where the authorities of the host state play a passive role. The ideal of trust between Member States underpinning the Rome I Regulation, based on the presumption that their laws are equivalent in producing justice[42] is however highly relative. Indeed, the application of foreign legislation remains "typically subject to public policy control in each individual case",[43] allowing domestic authorities to set aside the legal rules of other Member States if their application would violate the core values of their own domestic legal order.[44] Trust is thus conditional since the extraterritorial potential of the foreign

[33] C. BARNARD, above n. 29, 94.
[34] Case C-120/78 *Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.
[35] Art. 36 TFEU.
[36] Case C-302/86, *Commission* v *Denmark*, ECLI:EU:C:1988:421.
[37] C. BARNARD, above n. 29, 177.
[38] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations, [2008], O.J., L 177 of 4 july 2008.
[39] Art. 3.
[40] Art. 4 – 8.
[41] A. BAILLEUX, above n. 31, 25.
[42] M. WELLER, 'Mutual trust: in search of the future of European Union private international law' (2015), *Journal of Private International Law*, 64, 72.
[43] *ibid.*, 81.
[44] *ibid.*, 73.

prescriptive jurisdiction remains under the systematic control of domestic authorities to safeguard the fundamental principles of their respective legal order. Incidentally, the relative character of trust underpinning the Rome I Regulation may be explained by the fact that its use could result in the application of a third-country's legislation. As stated in Article 2 of the regulation, "[a]ny law specified by this Regulation shall be applied whether or not it is the law of a Member State".

The relativity of the trust-based unbundling of prescriptive jurisdiction and territoriality is also present in the criminal field. Closely linked to the States' sovereignty, criminal matters are steeped in the dogma of territoriality.[45] Therefore, EU law never requires, as such, national criminal judges to directly apply foreign criminal law, unlike in the field of judicial civil cooperation.[46] However, an illustration of trust-based governance resulting in extraterritorial consequences of a Member State's normative power can be found in several EU criminal cooperation instruments removing the condition of double criminality.[47] This condition, often seen as "a prerequisite for interstate cooperation in criminal matters",[48] requires, for cooperation to exist, that "the underlying act or omission is criminal in both the requesting and the requested State"[49] since a sovereign State should not be required to indict a person "for an offence that would not amount to a crime under its own law".[50] The removal of this condition for several offences by EU instruments thus requires Member States to accept foreign charges within their legal order and to enable the sanctioning, for example through the execution of a European arrest warrant, of behaviours according to the law of other States.

This consequence can therefore be equated with the granting of indirect extraterritoriality to the normative power of the State that will have its national criminal law applied beyond its borders by foreign authorities via the application of an EU instrument. The removal of this condition nevertheless concerns very few offences that are considered to be very serious by

[45] L. LEBON, *La territorialité et l'Union européenne*, (Bruylant, 2015), 489.
[46] *ibid.,* p. 493.
[47] See, *inter alia* Art. 2(§2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] O.J. L 190 of 18 July 2002 and Art. 3(§2) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, [2003], O.J. L196/45 of 2 August 2003; Art. 5(1) Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, [2005], O.J. L 76/16 of 22 March 2005.
[48] M.C. BASSIOUNI, *International Criminal Law, Volume 1: Sources, Subjects and Contents*, 3rd ed., (Nijhoff Publishers, 2008), 783.
[49] S. JOSEPH and A. MCBETH (ed.), *Research Handbook on International Human Rights Law*, (Edward Elgar, 2010), 245.
[50] *ibid.*, 245.

all Member States.[51] The extra-territorial consequences involved are hence of little significance in practice, since generally all Member States normally have, by virtue of their own prescriptive jurisdiction, criminalised the behaviours in question. The scenario whereby a Member State would nevertheless have to prosecute, either way, on its territory a person who has committed an act that is not subject to prosecution under its domestic legislation, by virtue of another Member State's criminal law, therefore seems theoretical.

2. Judicial Prescriptive Jurisdiction

Judicial prescriptive power "denotes a State's authority to subject persons or things to the process of its courts".[52] This power is traditionally recognized as being linked to the principle of territoriality,[53] sovereign states being competent to adjudicate upon issues having unfolded or unfolding within their national borders. The application of EU law instruments based on mutual trust may nevertheless result under certain circumstances in a space where Member States are prevented from exercising their territorial judicial jurisdiction.

In the field of EU private international law, EU instruments play a crucial role in determining, on the basis of neutral criteria, the horizontal distribution of civil adjudicative power between Member States within the common AFSJ. As specified by the Court of Justice, this horizontal distribution of powers is "necessarily based on the trust which [Member States] accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established".[54] The general instrument of EU private international law determining rules on adjudicative jurisdiction in cross-border commercial and contractual disputes, *viz*. the Brussels I*bis* Regulation[55], establishes, for instance, a complex system of distribution of competences on the basis of neutral criteria, thereby determining which Member State holds jurisdiction to adjudicate upon a particular claim connected to several national legal orders.[56] A Member State can hence be prevented by this Regulation from adjudicating upon a case that is nonetheless linked to its legal order in favour of the extraterritorial jurisdiction of another Member State. It is furthermore interesting to

[51] *ibid.*, 245.
[52] A. BOCZEK, *International Law: A Dictionary*, (Scarecrow Press, 2005), 77.
[53] L. RADICATI DI BROZOLO, *op. cit*, 416.
[54] Case C-116/02, *Gasser*, ECLI:EU:C:2003:657, paragraph 72.
[55] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012], O.J., L 351/1 of 20 December 2012.
[56] A. NUYTS, *L'exception de Forum Non Conveniens*: *Etude de droit international privé comparé,* (Bruyant, 2003), 214.

observe that the distribution of adjudicative jurisdiction as laid down in the Brussels I*bis*[57] Regulation does not suffer any exceptions, even with regard to a Member State's public order. Indeed, this Regulation determines, for its scope of application, Member States' jurisdiction without leaving room for exceptions based on national legal orders.[58] The Court of Justice has, among others, derived from the mutual trust principle the prohibition on national courts practising anti-suit injunctions, obliging individuals, on pain of penalty charges, to discontinue proceedings brought before the jurisdiction of another Member State.[59] By virtue of the principle of mutual trust, all Member States apply, according to the Court of Justice, rules allocating adjudicative jurisdiction with the same authority. National courts may therefore not hamper other Member States' jurisdiction.[60] The Court of Justice, in other words, not only recognizes the imperative character of the horizontal distribution of adjudicative power, but also goes a step further by rejecting the ability of Member States' judiciaries to review the correct application of these imperative rules by other Member States' courts.[61] Except in cases where a Member State can claim *exclusive* jurisdiction[62] over a specific case or when it has competence on the basis of special rules of jurisdiction protecting consumers, workers or insured persons,[63] it is not able, according to the Brussels I*bis* Regulation[64], to question a judgment on jurisdiction issued by the judiciary of another Member State, whose decision it must trust. A similar system has also been introduced in family matters by the Brussels II*bis* Regulation which concerns the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[65]. Mutual trust hence results to some extent in an area of transnational civil justice where competences are exercised by Member States not only according to territorial criteria.

Member States' adjudicative jurisdiction to deal with criminal disputes is also affected by the

[57] Above n. 54.
[58] Case C-116/02, *Gasser*, ECLI:EU:C:2003:657, paragraph 72; case C-159/02, *Turner*, ECLI:EU:2004:228, paragraph 24.
[59] M. ROCATTI, *Le rôle du juge national dans l'espace judiciaire européen*, (Bruylant, 2013), 142.
[60] Case C-159/02, *Turner*, ECLI:EU:2004:228, paragraph 225.
[61] P. STONE, *EU Private International Law*, (Edward Elgar Publisher, 2014), 44.
[62] Art. 24 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012], O.J., L 351/1.
[63] Art. 45 of Brussels I*bis* Regulation, above n. 54.
[64] Above n. 54.
[65] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, [2003], O.J., L 338/1 of 23 December 2003.

principle of mutual trust.[66] The EU *ne bis in idem* principle,[67] rooted in mutual trust and enshrined in Article 54 of the Convention implementing the Schengen Agreement (hereafter CISA) and in Article 50 of the Charter of Fundamental Rights of the European Union (hereafter Charter), prevents dual punishment of the same offence [68] and received a transnational scope with EU integration.[69] A Member State can therefore be precluded from exercising its sovereign right [70] to prosecute a behaviour, [71] for which it potentially has jurisdiction, when the behaviour has already been subject to a final judgment in another Member State. Domestic criminal decisions may thus have a direct extraterritorial "negative effect" in other Member States by preventing them from exercising their criminal adjudicative power for the same facts.[72] This principle is, however, not absolute and can be subject to exceptions. The CISA allows Member States to limit the application of this principle on particular grounds relating, *inter alia*, to territoriality and State security.[73] Indeed, Article 55 of the CISA allows Member States not to be bound by this principle where the acts to which the foreign judgment relates took place in whole or in part on their own territory. Distrust in the ability of another Member State's judicial system to correctly adjudicate a crime may thus justify a reassertion of territorial adjudicative jurisdiction. With regard to Article 50 of the Charter, the *ne bis in idem* principle may be restricted under the conditions laid down in Article 52(1) of the Charter according to which limitations on the exercise of the rights and freedoms recognised by the Charter may be made provided that they are provided for by law, that they respect the essence of those rights and freedoms, and that "they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".[74] The explanations relating to the Charter[75] furthermore

[66] This principle is now enshrined in Art. 50 of the Charter of Fundamental Rights of the European Union and in Art. 54 of the Convention implementing the Schengen Agreement of 1985.
[67] For a complete analysis of this principle in EU law, see D. FLORE, *Droit penal européen*, (Larcier, 2014), 662.
[68] J.A.E. VERVAELE, *European Criminal Justice in the Post-Lisbon Area of Freedom Security and Justice*, (Editoriale Scientifica, 2014), 168.
[69] It must however be stressed that this transnational scope was first devoted in the framework of the Schengen Agreement but coupled with several reservations, J.A.E. VERVAELE, *op. cit*, 182, 184.
[70] Opinion of AG BOT in case C-123/08 *Dominic Wolzenburg*, ECLI:EU:C:2009:183, paragraph 132.
[71] The Court of Justice indeed retains a factual definition of the *idem* independent of the national legal qualification of the facts, see, inter alia, case C-436/04 *Van Esbroeck*, ECLi:EU:C:2006:165, paragraphs 36 and 42.
[72] D. FLORE, above n. 66, 661.
[73] Art. 55 of the CISA.
[74] For an application of Article 52(1) to Article 50 of the Charter see case c-129/14 PPU *Spasic*, ECLI:EU:C:2014:586 and joint cases C-596/16 and C-597/16, *Di Puma* and *Zecca,* ECLI:EU:C:2018:192. S. VAN DROOGHENBROECK and C. RIZCALLAH, "Commentaire de l'article 52", in F. PICOD and S. Van DROOGHENBROECK in collaboration with C. RIZCALLAH (dir), *Commentaire article par article de la Charte des droits fondamentaux de l'Union européenne*, (Bruylant, 2017), 1083 - 1113.

specify that Article 52(1) covers the "very limited" exceptions enshrined the CISA.[76] Member States are hence allowed to exercise their territorial adjudicative criminal jurisdiction in specific sensitive circumstances, but always subject to the control of the Court of Justice.[77]

3. Administrative Prescriptive Jurisdiction

The establishment of the single market also jeopardizes the assumption of Member States' territorial administrative prescriptive jurisdiction in certain aspects. For example, a transnational administrative competence in the field of conformity assessments of products with CE requirements has been cited within the framework of the "New Approach", aiming to stimulate a climate of mutual trust[78]. Under these assessments, "public regulatory authorities, or (increasingly) quasi-public or private entities to which authority has been delegated, assess […] conformity with underlying substantive standards. Thus, regardless of the standards applied to a product […] some entity […] is responsible for assessing and (possibly) certifying the conformity of the product with such standards"[79]. Domestic notified bodies[80], responsible for these conformity assessments of particular products with CE standards, can automatically carry on their activities anywhere in the internal market by virtue of EU law [81]. The administrative prescriptive jurisdiction in this domain has therefore been completely diluted throughout the whole borderless internal market. However, as recalled by the Court of Justice, a CE marking given by such a body only involves a rebuttable presumption of conformity with EU requirements that do not prevent Member States from acting should suspicions of unconformity arise[82]. New Approach Directives therefore systematically include the right or even make it an obligation for Member States to refuse the recognition of notified bodies' administrative decisions should they not trust that EU requirements are guaranteed[83].

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[75] Explanations relating to the Charter of Fundamental Rights, [2007], O.J. C 303/17.
[76] For a comprehensive analysis of the interaction between Art. 50 of the Charter and Art. 54 to 58 of the CISA see, *inter alia*, J.A.E. VERVAELE, *op. cit*, p. 211.
[77] See for example case c-129/14 PPU *Spasic*, ECLI:EU:C:2014:586, where the exception to Art. 50 of the Charter based on the absence of enforcement of the first penalty was considered to comply with Art. 52(1) of the Charter according to the Court of Justice.
[78] C. JANSSENS, *cit.*, p. 83.
[79] K. NICOLAIDIS and G. SHAFFER, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005), *Law and Contemporary Problems*, 273.
[80] Notified bodies are private companies accredited by national accreditation authorities that are responsible for conformity assessment of certain products with requirements laid down in EU directives. They therefore exercise the adjudicative power of determining whether or not those standards are met. See, *inter alia*, D. HANSON, *CE Marking, Product Standards and World Trade*, (Edward Elgar, 2005), 89 – 92.
[81] Commission Communication, Enhancing the implementation of the New Approach Directives, COM(2003) 240 final (7.05.2003).
[82] Case C-470/03 *AGM-COS.MET*, ECLI:EU:C:2007:213, paragraph 62.
[83] C. JANSSENS, *op. cit*., 82.

They are indeed "required to block a product's access to the market when […] a failure to apply [a harmonized standard] properly is detected"[84]. As stated by C. Janssens, "Member States should [thus] remain vigilant rather than implementing an absolute or blind regime of trust towards other Member States [' authorities or private bodies entrusted by them]"[85].

I.II. Member States' Territorial Enforcement Jurisdiction and Trust-based Integration

It is certainly the executive jurisdiction of sovereign States that is the most closely linked to exclusive territoriality. This jurisdiction "refers to the authority of a state to induce or compel compliance" with legal rules, including by the use of "physical interference, seizure of property and similar actions." [86] EU instruments relying on mutual trust nevertheless sometimes prevent Member States from using their enforcement power within their borders or, in contrast, enable them to have their national regulations or decisions enforced on the territory of other Member States, thereby overriding the principle of territoriality regarding the monopoly on the use of force.

1. Judicial Enforcement Jurisdiction

By virtue of mutual trust, the Brussels I*bis* Regulation now requires domestic judges to treat the decisions of other Member States as if they were national decisions[87] by removing the need for a separate *exequatur* procedure to obtain their enforcement in another country bound by this Regulation.[88] The *exequatur* is a "particular procedure whose purpose is to make a foreign decision enforceable in the forum"[89] and that implies a verification by the domestic judiciary that the foreign judgment is acceptable in its legal order. The abolishment of this procedure results, in other words, in a situation where the officials of a Member State can, as such, be required to automatically use the coercive power attached to the sovereignty of their State in order to enforce a judgment decided by foreign officials. Mutual trust therefore compels Member States to "lend" their officials to another Member State in order to enforce the latter's decision that will receive indirect extraterritorial consequences. This

[84] *ibid.*, 82.
[85] *ibid.*, 83.
[86] A. BOCZEK, above n. 51, 77.
[87] Recital 26 of Brussels I*bis* Regulation, above n. 54.
[88] Art. 39 of Brussels I*bis* Regulation, above n. 54.
[89] R.A. GARCIA, 'Abolition of Exequatur: Problems and Solutions. Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea', A. BONOMI and G. PAOLO ROMANO (eds.), *Yearbook of Private International Law,* Volume 12, (Swiss Institute of Comparative Law, 2010), 357.

extraterritoriality may only be prevented in case of non-recognition of the foreign judgment which can only be pronounced upon the request of a party and on restrictive grounds. Hence, a Member State cannot, in principle, refuse to concede extraterritoriality to the judgement on its own motion or on grounds other than those enshrined in EU law.

The impact of mutual trust is even more striking in criminal matters. Indeed, as underlined by D. Gerard, "sovereignty considerations translated into the territoriality principle governing criminal law enforcement prevent, in theory, the enforcement of domestic criminal law and decisions beyond national borders"[90] either by domestic or foreign authorities. Many EU criminal cooperation instruments, however, move away from this general rule[91] and the most illustrative one is beyond any doubt Framework Decision 2002/584/JHA on the European arrest warrant (hereafter EAW)[92] which is based on the principle of mutual trust between Member States.[93] Indeed, the EAW, that replaces the former extradition procedure, obliges the authorities of a requested Member State to enforce quasi-automatically the arrest warrant issued by the authorities of another Member State by surrendering a person who is on its territory to that requesting State.[94] This instrument thus enables a Member State issuing a warrant to delegate "the act of arresting a suspect to another – unwilling host state – which therefore lends out its monopoly of force"[95] and hence entails that "the will of an authority in one Member State can be enforced beyond its own territorial legal borders".[96] The European arrest warrant is thereby subject to indirect extraterritoriality since requested Member States have "surrendered their sovereign power to shield their own nationals from the investigations and penalties of other Member States' judicial authorities".[97] Contrary to most public international law instruments establishing a political and intergovernmental extradition mechanism, the EAW system allows a very limited control of the EAW's legality and desirability by the requested State. According to the Court of Justice, relying upon the principle of mutual trust, the extraterritoriality of the enforcement jurisdiction can indeed be

[90] D. GERARD, *Managing Diversity in the European Union: Cooperation, Convergence and Mutual Trust. Towards a Union Method?*, (PhD dissertation defended at the UCLouvain, unpublished), 258.
[91] See, for example, the Framework Decisions 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] O.J. L 190 of 18 July 2002; 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, [2003] O.J., L 196/45 of 2 august 2003; 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, [2006] O.J. L 328, of 24 November 2006.
[92] Framework Decision 2002/584, above n. 90.
[93] Case C-399/11 *Melloni*, ECLI:EU:C:2013:107, paragraph 63.
[94] D. FLORE, above n. 66, 548.
[95] K. NICOLAIDIS, 'Trusting the Poles?' (2007), *Journal of European Public Policy*, 682, 690.
[96] V. MITSILEGAS, above n. 14, 29.
[97] Opinion of AG BOT in case *Dominic Wolzenburg*, 24 March 2009, C-123/08, paragraph 231.

refused only under the conditions exhaustively laid down in Framework Decision 2002/584/JHA on the EAW.[98] Due to the risks entailed for fundamental rights caused by this automaticity, the Court of justice nevertheless conceded in the *Aranyosi and Căldăraru* judgement[99] that, in very exceptional circumstances, the execution of a EAW shall be postponed[100]. In this judgement, the Court considered that these circumstances were met when the individual would face a real risk of inhuman or degrading treatment in the issuing Member State in case of surrender due to the detention conditions in this country[101]. National discretion in this field however remains locked by the test developed by the Court of Justice in order to determine the existence of such a risk: first, the executing authority must be "in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State"[102] and, "whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State"[103]. The judgement in *LM*[104] moreover ascertained that the execution of a EAW must also be postponed when systemic deficiencies in the system of justice of the issuing Member State entail a risk of violation of the essential content of the right to a fair trial. Here also, the test developed by the Court of Justice is very restrictive: in plus of observing the existence of such deficiencies, the executing authority must establish that the requested person, having regard to his/her personal situation, individually faces a risk a breach of the fundamental right to an independent tribunal.

2. Administrative Enforcement Jurisdiction

Direct extraterritoriality of Member States' jurisdiction to enforce technical rules applying to products has also been enshrined by the Court of Justice to safeguard trust-based EU market integration. It held in *Hedley Lomas*[105] that a Member State could not refuse to export goods

[98] Art. 3 and 4 of Framework Decision 2002/584, above n. 90.
[99] Joint cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru,* ECLI:EU:C:2009:616.
[100] For an in-depth analysis of the notion of "exceptional circumstances" in the case law of the Court of justice see, C. RIZCALLAH, "Le principe de confiance mutuelle : une utopie malheureuse" (2019), *Revue trimestrielle des droits de l'homme*, forthcoming.
[101] This judgment was later on specified in the case C-220/18 PPU, *ML*, ECLI:EU:C:2018:589.
[102] Joint cases *Aranyosi and Căldăraru,* above n. 98, parapgraph 89.
[103] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 92.
[104] Case C-216/18 PPU *LM*, ECLI:EU:C:2018:586.
[105] Case C-5/94 *Hedley Lomas*, ECLI:EU:C:1996:205.

to another Member State due to risks of violation of EU law in this country. Due to the principle of mutual trust, extraterritorial effects must thus be conceded to the exercise, by one Member State, of its administrative enforcement jurisdiction. Other Member States are required to accept these extraterritorial effects. A Member State may therefore "not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law".[106] Mutual trust, by preventing Member States from verifying the respect of EU law by other Member States, reinforces the exclusion provided by the international legal principle *"Inadimplenti non est adimplendum*", allowing a party to withhold an international obligation in case of another party's failure to perform a related obligation.[107] Hence, the principle of mutual trust also supports the autonomy of the EU legal order by requiring conflicts under EU law between Member States to be solved by the means provided for in the Treaties.[108] This impact of mutual trust was furthermore confirmed in other cases such as *Centro-Com* in which the Court specified that "[the] Member States must place trust in each other as far as concerns the checks made by the competent authorities of the Member State from which the products in question are dispatched".[109] Even more symptomatic of the consequences of mutual trust on the coercive power of Member States is the ruling of the Court in the *Wurmser* case,[110] where it was found that a Member State could no longer verify whether imported goods from other member states respected its own national provisions when the goods had already been inspected in their home state whose national legislation had a similar content to the host state rules. The Court thus considered that the duty of mutual trust was not limited to the enforcement of EU legislation, but also prevented Member States from checking the enforcement of their own domestic rules by products imported from other Member States whose law include similar requirements.[111]

II. Challenges Faced by Trust-Based Integration

In calling for Member States to recognize their respective norms, to accept each other's jurisdiction to adjudicate disputes, and to ask one another to enforce their own regulations or

[106] Case *Hedley Lomas*, above n. 106, paragraph 20.
[107] A. KACZOROWSKA, *European Union Law*, (Routledge, 2013), 116.
[108] Art. 344 TFEU.
[109] Case C-124/95, *Centro-com,* ECLI:EU:C:1997:8, paragraph 49.
[110] Case C-25/88, *Wurmser*, ECLI:EU:C:1989:187.
[111] L. LEBOEUF*, Le droit européen de l'asile au défi de la confiance mutuelle,* (Anthémis, 2016), 19.

decisions, the principle of mutual trust can be said to result in a particular division of labour, "not between a global centre and the periphery (or an hegemonic state and peripheral states), but between regulators and lawmakers across countries through […] combinations of home and host country control".[112] This "joint governance"[113] enables citizens and domestic authorities to avoid being prisoners of national frontiers in the European area. However, "mutual trust cannot be created on demand"[114] and trust-based governance raises some important challenges encountered in the EU legal order, especially because it is detached from a single statehood. These challenges concern, among others, Member States' sovereignty and democratic legitimacy (I), the question of States' liability (II), the protection of individual freedoms (III) and the existence of competitive federalism (IV).

II. I. Member States' Sovereignty and Democratic Legitimacy

Integration based on mutual trust has regularly been used as an alternative to substantive harmonization at EU level because, while enabling integration, it is frequently considered to better safeguard national sovereignty. This approach is indeed said to "recognise common concerns while accommodating diversity and respecting the institutional integrity and political autonomy of its Member States in all matters where uniformity and centralization are not necessary or not possible."[115] The analysis of the EU trust-based governance nevertheless calls into question the assumption whereby the use of instruments underpinned by mutual trust rather than positive integration encroaches less upon Member States' authority. Admittedly, this approach enables Member States to "maintain areas of regulation they can individually determine"[116] allowing them, at least from a theoretical point of view, to freely exercise their domestic jurisdiction within their national borders. However, it is important not to lose sight of the fact that EU instruments implementing mutual trust also require Member States to either apply, recognize or even enforce foreign jurisdiction that they cannot, in contrast to EU law, influence at all.

While it is true that the "trust-based" extraterritoriality results from EU law, that finds its roots in Member State's power, this kind of integration, driven by the Court of Justice,

[112] K. NICOLAIDIS and G. SHAFFER, above n. 78, 268.
[113] *ibid.*, 268.
[114] E. STORSKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered*, (Oxford University Press, 2008), 309.
[115] F.W. SCHARPF, 'European governance: common concerns vs. The challenge of diversity', *MPIfG Working Paper 03/1,* (2001), Max Planck Institute for the Study of Societies 2001, 13.
[116] S.K. SCHMIDT, 'Mutual recognition as a new method of governance' (2007) *Journal of European Public Policy*, 667, 673.

nevertheless entails under certain circumstances (quasi) total loss of domestic authority since Member States will be required to trustfully accept choices made by their peers sometimes without any limitation. In our view, Member States' sovereignty could consequently more likely be endangered through trust-based integration rather than through vertical integration.

This observation furthermore calls into question the democratic legitimacy of this model of integration. Indeed, it jeopardises a democratic principle according to which citizens must have the right to participate, directly or indirectly, in the regulations to which they are subject. Yet, EU trust-based governance requires citizens "to live with regulations adopted in other polities, in which they have no say"[117] and, in some cases "to be subject to foreign [rules and powers] which they cannot influence themselves".[118] Since mechanisms involving mutual trust are often used as an alternative to harmonization in order to maintain diversity, no transnational deliberative process leading to a common policy is provided for, except with regard to the formulation of the grounds for refusal, which are nonetheless often restricted in order to guarantee the effectiveness of horizontal integration.

This observation becomes even more striking in the AFSJ. As stressed by S.K. Schmidt, "for goods, the definition of technical regulations is often delegated to standards bodies; rules in JHA […] concern individual freedoms […]. These are in need of a higher input legitimacy and are normally subject to parliamentary rule".[119] For instance, in the field of cooperation in criminal matters, individuals may become subject to foreign criminal systems that they have not been able to legitimate through democratic elections. If this situation not only arises by means of EU instruments since individuals may possibly also be subject to foreign criminal laws if they, for instance, commit a crime abroad, mutual trust nevertheless prevents Member States from protecting their own nationals against other Member States' national systems by precluding, in principle, the refusal of surrender on the basis of nationality.[120]

If more sensitive issues may be at stake in the AFSJ, the long-term consequences of this method of integration may appear to be stronger, from a dynamic perspective, in the internal market. Indeed, the principle of mutual recognition in the internal market, coupled with economic competition, may indeed enable market players to severely weaken public

[117] K. NICOLAÏDIS, above n. 28, 450.
[118] J. SIEVERS and S.K. SCHMIDT, above n. 18, 124.
[119] S.K. SCHMIDT, above n. 117, 676.
[120] See however Art. 4(6) and 5(6) of Framework Decision 2002/584, above n. 90, that temper this statement.

authority's regulatory power.[121]. Simply put, the idea is that Member States will tend to adopt the same standards as their peers once they accepted to recognize them, in order to avoid "unfair" economic competition for their domestic marketers. Some market players may thus take advantage of this situation by triggering the principle of mutual recognition in order to push the spreading of their preferred national technical standard throughout the whole European area[122].This phenomenon thus leads to the undermining of democratic standards since approximation may result from private actors' choices[123]. Yet, this kind of dynamics do not occur in the AFSJ since private actors may not, similarly, derive benefits from the disparities among the national legal orders by disinvesting or relocating. If a Member State could thus possibly be required to accept another Member State's jurisdiction in this domain, it will however not be pushed by the dynamics of the market to nationally adopt the same standards, such as it could possibly be in the domain of the internal market.

II. II. The Principle of State Liability

The concept of power detached from the principle of territoriality is also problematic regarding the principle of state liability which contributes to the respect of the rule of law.[124] Indeed, under this principle a state can be held liable, in certain circumstances, for the damage resulting from faults or breaches of the law committed by its bodies, internally before its national courts but also externally before international jurisdictions. Yet, major issues in this regard arise with EU trust-based governance. In case of breach of an international obligation by a Member State's rule or decision, applied by one of its peers by virtue of the EU principle of mutual trust, who should be held responsible and under which circumstances? The State that enacted the rule or decision, the State that enforced it in the name of trust, or/and the European Union that imposed the duty of mutual trust? This question currently remains unresolved despite its importance, in particular with regard to the relationship between the EU and the European Convention of Human Rights (hereafter ECHR). Several complaints have already been filed with the European Court of Human Rights (hereafter ECtHR) for "indirect" breaches of the ECHR by EU Member States due to them implementing other Member States'

[121] S. LAVENEX, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007), *Journal of European Public Policy*, 762, 776.
[122] J. SUN and J. PELKMANS, 'Regulatory Competition in the Single Market' (1995), *Journal of Common Market Studies*, 68, 75.
[123] S. LAVENEX, above n. 122, 776.
[124] The principle of state liability refers here both to the principle of international liability for breach by a State of its international obligations and to the principle according to which a state can be held liable internally for the misconduct of its organs.

acts without assessing the respect of fundamental rights because of the EU principle of mutual trust.[125] The ECtHR's case-law on that issue nevertheless remains unclear on the conditions under which a Contracting Party's liability could be engaged when it enabled a future breach of fundamental freedoms, or when it gave effectiveness to a violation committed beforehand, by another state[126]. Notwithstanding these uncertainties, the Court of Justice highlighted the tension between EU and ECHR conflicting obligations, notably in its Opinion 2/13 in observing that the Strasbourg approach of requiring "a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust […] specifically disregards the intrinsic nature of the EU".[127]

II. III. Individual Freedoms

The specific model of EU horizontal integration, as analysed above, not only impacts upon States' authority but also has important consequences for the status of individuals, who are able in certain circumstances to avail themselves of rights deriving from this transnational governance, but who, in other situations, may suffer the extension of Member States' authority.[128]

As far as the internal market is concerned, the process of "unbundling" territoriality seems to grant more rights to individuals willing to move freely within the EU. Extraterritoriality of normative power has the effect of reducing the regulatory scope of the host Member State in order to allow foreign products complying with lower standards from another Member State to lawfully enter the host state market, which is to the advantage of the private sector. As observed here above, market players may moreover, in the long run, take advantage of economic competition and push Member States with higher standards to take over less strict rules. Mutual trust thus acts in these circumstances like a shield against the public authority and thereby "facilitates the cross-border flows of economic goods and services".[129] Inversely,

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[125] See, among others, ECtHR, Application No 21055/11, *Pirozzi c. Belgium*, ECtHR, Application No 17502/07, *Avotins* v *Latvia* and ECtHR, Application No 30696/09, *M.S.S. c. Belgium and Greece*,. For a complete analysis of the ECtHR case-law related to the EU principle of mutual trust see E. BRIBOSIA and A. WEYEMBERGH, 'Confiance mutuelle et droits fondamentaux: 'Back to the future'' (2016), *Cahiers de droit européen,* 269 - 321.
[126] See, for two conflicting judgements, ECtHR 26 June 1992, *Drozd and Janousek v. France And Spain*, paragraph 110 and ECtHR 20 July 2001, *Pellegrini v. Italy*, paragraph 40; M. THUNBERG SCHUNKE, *Whose responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU* (Intersentia 2013), 49 and D. SPIELMANN, 'La reconnaissance et l'exécution des décisions judiciaires étrangères et les exigences de la Convention européenne des droits de l'homme. Un essai de synthèse', *Revue trimestrielle des droits de l'homme* (2011), 762 -786.
[127] Opinion 2/13, above n. 3, paragraph 17.
[128] S. LAVENEX, above n. 122, 764.
[129] *ibid.,* 764.

the expression of distrust by Member States undermines individuals' freedom of movement by allowing public authorities to retain their jurisdiction to prescribe lawful behaviour on their territory with higher requirements than other national systems.

The effects of horizontal integration in EU civil justice analysed in this article also serve, to a certain extent, individual freedom. Indeed, parties to a contract may choose, under certain conditions, the national court that shall have jurisdiction to settle any dispute arising in connection with their contractual relations[130] and choose the law applicable to their contract. Mutual trust therefore ends up, conditionally, in a transnational *forum* where individuals are free to choose the domestic judiciary that would be most suitable to deal with the case in which they are involved and the rules that shall be used to deal with it. Distrust in this regard leads to the State authority retaining its prescriptive and adjudicative jurisdiction and thereby, conversely, reduces the scope of individuals' freedom.

Nevertheless, one should observe that the expression of distrust by national authorities in foreign legal systems in the domain of the internal market and private international law may also sometimes result in better protection of the public interest and other individual freedoms, such as social rights in the field of the internal market or the right to a fair trial or the rights of the child in the domain of judicial civil cooperation. To illustrate this latter example, a number issues were raised in relation to Regulation Brussels II*bis* which among others concerns child custody and abduction cases[131]. The question posed in several cases concerned the possibility for a national court to refuse the enforcement of a judgement issued by another Member State when it infringed the child's fundamental rights[132]. Relying upon the principle of mutual trust, the Court of justice for the moment precluded any double control by the executing judicial authority[133]. As underlined by V. Mitsilegas, "this endorsement of automatic mutual recognition emanates from the presumption that the courts involved in the system established by the Brussels II*bis* Regulation respect, within their respective areas of jurisdiction, the obligations which that Regulation imposes on them, in accordance with the Charter"[134].

With regard to the criminal sphere, the impact of horizontal integration on the position of the

[130] Art. 25 Brussels I*bis* Regulation, above n. 54.
[131] Brussels II*bis* Regulation, above n. 64.
[132] C. RIZCALLAH, above n. 99.
[133] Case C-491/10 PPU *Zarraga*, , EU:C:2010:828.
[134] V. MITSILEGAS, above n. 20, 349.

individual also appears to be mixed. On the one hand, in the field of extraterritoriality of adjudicative jurisdiction, the transnational principle of *ne bis in idem* in criminal matters reinforces individual rights since it will, on the basis of mutual trust, prevent a Member State from convicting the same person, a second time, for the same facts because he/she has already been subject to the adjudicative power of another Member State. Authors therefore point out the "virtuous" relationship between trust and individuals' fundamental rights in the context of the *ne bis in idem* principle.[135]

On the other hand, mutual trust may also act as a sword against private citizens. Indeed, this principle is intended to enable the enforcement of Member States' authority against private persons much more quickly and with greater certainty throughout the European area.[136] In this way, an EAW issued by a Member State will be almost automatically enforced by its peers. The power of public authorities is thereby extended through the enforcement of domestic decisions by foreign authorities without allowing, by virtue of mutual trust, any systematic check that these decisions respect individual freedoms. Moreover, the scaling back, on grounds of trust, of the motives for refusing to cooperate also undermines the protection of individual rights when this protection does not appear to be equally enshrined or effectively applied within all the Member States. The Court of Justice in this way precluded, in the *Melloni* case, Member States from relying on their constitutional protection of fundamental rights, even if they are more protective than those enshrined in the Framework Decision, to refuse the execution of an EAW because it would undermine the principle of mutual trust.[137] The ability of Member States to distrustfully prevent extraterritoriality with regard to the power of coercion is thus strictly framed by the transfer of sovereignty resulting from the harmonization of the grounds of refusal in the Framework Decision.

The *Aranyosi and Căldăraru* and *LM* judgements[138] (cf. *supra*) nonetheless devoted the obligation of Member States to express their distrust by refusing to surrender a person subject to an EAW located on its territory to another Member State in exceptional circumstances where human dignity is at risk. However, as underlined by the Court of Justice in the *N.S.*

[135] E. BRIBOSIA and A. WEYEMBERGH, above n. 126, 480.
[136] S. LAVENEX, above n. 122, 764.
[137] Case C-399/11 *Melloni*, ECLI:EU:C:2013:107, paragraph 63; for an in-depth analysis of this case law see C. RIZCALLAH, "La protection des droits fondamentaux dans l'Union européenne: L'immuable poids des origines?" (2015) *Cahiers de droit européen,* 399 - 427.
[138] Joint cases *Aranyosi and Căldăraru,* above n. 98, and case *LM*, above n. 103.

case in relation to the Dublin system[139], any violation of a fundamental right does not justify, in itself, to make an exception to the principle of mutual trust. These exceptional circumstances seem only to arise when there is a danger of violation either of an *absolute* fundamental right or of the *essential content* of another fundamental right[140]. The threshold allowing a limitation to the principle of mutual trust is thus high.

With respect to the EAW, a requested authority shall postpone the surrender if there is "evidence of a real risk of inhuman or degrading treatment" of individuals detained in the Member State that issued an EAW,[141] and there are, in addition, "substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State"[142]. The requested authority must, as part of its examination, enter in contact with the issuing authority in order to request the necessary information with respect to these questions. The Court of Justice furthermore stressed that judicial authorities called upon to decide upon the surrender of an individual to the authorities of another Member State by an EAW were "bound to assess the existence of that risk".[143] As regards the fundamental right to a fair trial, the Court of Justice underlined in *LM* that if there are "systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, [the executing authority] must determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run , […] a risk if he is surrendered to that State"[144]. If, having regard to the particular circumstances of the case, the requested person will run a risk a violation of the essence of its right to a fair trial, the execution of the EAW must also be postponed[145].

National authorities are thus compelled to remain vigilant when conceding extraterritoriality by the execution of a EAW. Distrust-based reassertions of territorial authority are indeed required in certain, but very exceptional, circumstances, in order to protect the unalienable content of fundamental freedoms[146].

II. IV. Competitive Federalism

[139] Joint cases C-411/10 and C-493/10 *N.S.*, ECLI:EU:C:2011:865, paragraph 84.
[140] On the notion of "essential content" of fundamental rights see, S. VAN DROOGHENBROECK and C. RIZCALLAH, above n. 69, p. 1088.
[141] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 88.
[142] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 92.
[143] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 88.
[144] Case *LM*, above n. 103, paragraph 34.
[145] Case *LM*, above n. 103, paragraph 79.
[146] For a critical analysis of this case-law, see C. RIZCALLAH, above n. 99.

A final issue tied in with trust-based governance arises from the combination of the decentralization of national prerogatives and free movement, which could lead to regulatory arbitrage.[147] This concept refers to "a process whereby legal rules are selected through competition between decentralized rule-making entities".[148] Indeed, individuals can in certain circumstances choose to which authority they will be subject. An illustration of this phenomenon can notably be found in the well-known *Centros* case in relation to company law, where the Court of Justice held that the fact "that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States"[149] should not be reprehensible as such.

Although this arbitrage can constitute a dynamic process finding "the optimal solution to complex problems"[150] by permitting experimentation and the content of rules to be matched more effectively to the preferences of the consumers of laws,[151] it can also lead to a race to the bottom with regard to the protection of the general interest.[152]

Indeed, market players can choose to produce their goods in a country which has low requirements before entering the goods into another Member State, whose faculty to refuse these goods is strictly framed by the duty of mutual trust. National governments have in this way partly "[given] up their ability to fully control products that are sold in their country"[153] because of EU trust-based governance. This phenomenon can moreover result in "regulatory competition" between Member States, encouraging them to edict more favourable regulations in order "to attract persons from other states".[154] As underlined here above, it carries the risk of totally undermining democratic choices, by enabling some market players to rely upon the principle of mutual recognition in order to encourage further convergence around preferred standards. Aware of this phenomenon, the EU has nonetheless introduced some safeguards in sensitive areas, such as the pharmaceutical market. Three different procedures exist in order to obtain a marketing authorisation for a medicinal product within the EU: the centralised

[147] C. BARNARD, above n. 29, 28.
[148] C. BARNARD and S. DEAKING, 'Market Access and Regulatory Competition' (2001), *Jean Monnet Working Paper 9/01*, 4.
[149] Case C-212/97, *Centros,* ECLI:EU:C:1999:126, paragraph 27.
[150] C. BARNARD, above n. 29, 28.
[151] C. BARNARD and S. DEAKING, above n. 149 , 4.
[152] This "race to the top" is sometimes called the "California effect" see W. KERBER, 'Interjurisdictional Competition within the EU' (1999), *Fordham International Law Journal*. 227.
[153] J. SNELL, above n.1, 16.
[154] M. SZYDLO, 'EU Legislation on Driving Licences: Does It Accelerate or Slow Down the Free Movement of Persons?' (2013), *German Law Journal*, 345, 366.

procedure, carried on by the European Medicines Agency and the Commission[155], the decentralized procedure and the mutual recognition procedure which is based on mutual trust. In the latter case, Member States are required to recognize national authorisations previously conceded by other Member States. Due to the principle of mutual trust, the requested Member State assumes a limited role to verifying the completeness of the file submitted to it; it can thus not carry out a new examination on the merits of the application[156]. Distrust nevertheless defeated this system in practice. The centralised procedure was therefore established in parallel[157]. Moreover, a particular conflict resolution mechanism is provided for in case of conflict between national authorities regarding mutual recognition: the regulation sets up a centralised committee which can step in if a Member State has doubts about the validity of a marketing authorisation[158]. Trust can thus be limited trough this coordination procedure[159] in order to protect public health[160].

In the domain of private international law, the existence of competing judicial systems can also sometimes lead to unexpected results. For example, relying on mutual trust, the Court of Justice obliged a domestic court, elected by a forum selection clause, to stay proceedings and strictly apply the *lis pendens* principle according to which any court other than the court first seized must stay its proceedings until the latter has examined its jurisdiction to deal with the proceedings.[161] This judgement of the court enabled the parties to deploy a stalling tactic. Here as well, the principle of mutual trust and the presumption of equivalence of the Member States' different judicial systems lead to possibilities that could be used in the wrong way. Fortunately, this misuse is now prevented by the recasting of the Brussels system operated by Regulation Brussels I*bis* which now gives priority to the court that received exclusive jurisdiction by a forum selection clause rather than to the court first petitioned to rule on the matter[162].

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[155] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] O.J. L 136 of 30 April 2004.
[156] Case C-452/06 *Synthon*, ECLI:EU:C:2008 :565, paragraphs 27 – 28.
[157] G. MAJONE, 'Mutual Recognition in Federal Type Systems' (1993), *EUI Working Papers*, p. 17.
[158] Art. 29 of the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, [2004] O.J. L 311 of 28 November 2001..
[159] L. DE LUCIA, 'From Mutual Recognition To Eu Authorization: A Decline Of Transnational Administrative Acts? ' (2016), *Italian Journal of Public Law*, 90, 98.
[160] Case C-452/06 *Synthon*, above n. 157.
[161] Art. 27 of Council Regulation (EC) 604/44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001], O.J. L 12 of 16 January 2001.
[162] Art. 31. 2. Brussels I*bis* Regulation, above n. 54.

In the field of the EAW, the system based on mutual trust as construed by the Court of Justice can also be seen to encourage regulatory arbitrage by individuals using freedom of movement in order to avoid being subject to a national criminal system[163]. The Court indeed held that in the case of serious risk of inhuman or degrading treatment of individuals detained in the Member State that issued an EAW,[164] and if there is a high probability that the individual concerned will be exposed to that risk,[165] the executing judicial authority will have to postpone the execution of the warrant.[166] Yet, as noted by the Advocate General Y. Bot, "we cannot preclude that such a solution may eventually encourage persons requested for the purposes of criminal prosecution or the execution of a custodial sentence to go to other Member States in order to escape those prosecutions or to be able to serve their sentence there". This situation could result in risks of impunity if the state of "refuge" does not have the competence under its national law to prosecute the alleged offences. Here, the exception to the principle of mutual trust combined with the principle of freedom of movement could result in a space in which prosecuted or convicted persons are able in certain circumstances to seek impunity, somewhat legitimately however, to avoid serious violations of their fundamental rights.

The coexistence, enabled by the principle of mutual trust, of diverse legal systems hand in hand with integration therefore sometimes results in regulatory arbitrage. Although this phenomenon could potentially be used in order to effectively protect fundamental rights, in it may also enable individuals to benefit from unintended advantages.

Conclusion

As this paper has attempted to demonstrate, mutual trust, rooted in the paradigm of "non-domination",[167] results to a certain extent in shared-governance exercised by the different Member States through their respective territories. By leading an unbundling of the exercise of national prerogatives and territoriality, the principle of mutual trust as principle of governance partially entails the interlocking of national systems.

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[163] On the "Prison Shopping" phenomenon, see CCBE, 'EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners', 147 and E. SELLIER and A. WEYEMBERGH, 'Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation', *Study requested by the LIBE committee of the European Parliament* (2018), 69.
[164] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 88.
[165] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 92.
[166] Joint cases *Aranyosi and Căldăraru,* above n. 98, paragraph 98.
[167] K. NICOLAIDIS, 'European Democracy and its Crisis', (2013), *Journal of Common Market Studies*, 351.

Trust in one another… yes, by all means, but not blind trust. As stated in the Latin maxim "*frangenti fidem non est fides servanda*", trust should no longer be owed to someone who has betrayed it. If distrust can, in this sense, justify the reassertion of national territorial jurisdiction within the EU, this paper has nevertheless demonstrated that not every breach of trust can be relied upon to prevent the exercise by Member States of their powers beyond their national borders. EU law in fact strictly frames Member States' faculty or obligation to "distrustfully" retain their authority and hence rebut the presumption that fundamental values are shared and applied by their peers. The Court of Justice in this way stressed that mutual trust could not be overturned save in "exceptional circumstances"[168] because it upsets "the underlying balance of the EU".[169] This principle indeed ensures the removal of internal partitions within the European area[170] and constitutes a condition of the "*raison d'être*"[171] of the European Union.

However, some fundamental questions arise from this model of integration. While the aim of allowing integration without undermining national diversities is unquestionably legitimate, the consequences of this trust-based governance involve important challenges.

The first challenge arises from the impact of the horizontal integration that mutual trust entails on Member States' sovereignty. Indeed, the assumption that the use of instruments underpinned by mutual trust rather than the harmonization of the laws at EU level better safeguards Member States' sovereignty can be challenged. As demonstrated in this paper, EU instruments implementing mutual trust require Member States to either recognize or enforce foreign regulations and decisions in which they had no say. Moreover, this observation can also be seen as jeopardizing a fundamental democratic precept, according to which citizens must have the right to participate, directly or indirectly, in the regulations to which they are subject.

The decentralization of the exercise of national prerogatives throughout the European Union space also entails a dilution of liabilities. It can be extremely difficult to determine who is responsible for an action in the model described. This situation can sometimes lead to an absence of remedies for victims of damages caused by the different players in the European

[168] Opinion 2/13, above n. 3, paragraph 191.
[169] Opinion 2/13, above n. 3, paragraph 194.
[170] E. DUBOUT, above n. 4, 93.
[171] Opinion 2/13, above n. 3, paragraph 172.

area. Some cases were already filled with the ECtHR on that issue, but the conditions under which the indirect liability of a Contracting Party could be engaged remain unclear.

These observations become even more striking where they are linked to the fourth main issue highlighted by this article, which calls into question the consequences of EU horizontal integration for individual rights. A fundamental difference can exist between the nature of the flows based on mutual trust that can sometimes benefit private individuals, but in other circumstances is rather to the advantage of the public authorities.[172] As demonstrated in this paper, mutual trust may enhance States' powers without necessarily providing safeguards for essential individual prerogatives. Yet, the infringement of the "fundamental precept of democratic rule"[173] brought to light is even more problematic when a citizen has to "suffer" the authority of another State. In other circumstances, however, the extraterritoriality of States' jurisdiction promotes individual freedom by restricting Member States' regulatory scope.

Nonetheless, the *regulatory* or *forum shopping* by private parties that can result from this restriction of Member States' territorial jurisdiction can also have detrimental consequences, notably in the race to the bottom arising from the regulations implementing mutual trust. This entails a fifth challenge. Although some safeguards do exist, this integration can result in a competitive federalism whereby individuals or companies have the freedom "to move to another Member State which has a [political/legal/social] regime which suits them better",[174] sometimes in disregard of the public interest. Economic competition in the internal market may even enable market players to force the spreading of their preferred standards throughout the whole European area.

Accordingly, EU horizontal integration based on mutual trust threatens to undermine Member States' sovereignty and various principles, ranging from the legitimacy of the exercise of power, the principle of state liability, the protection of fundamental rights to the duty of national authorities to protect the public interest. This paper aimed at pointing out these challenges to start giving thought to "trust-based governance" in the EU. If there is the willingness to continue using this method of integration, further consideration needs, in our view, to be given on the possible safeguards to European trust-based governance. These safeguards could possibly range from the enshrinement of public policy exceptions, minimum

[172] S. LAVENEX, above n. 122, 764.
[173] J. SIEVERS and S. K. SCHMIDT, above n. 18, 124.
[174] C. BARNARD, above n. 29, 28.

EU substantive rules, the control and sanction of the effective respect of fundamental rights and EU values in all Member States. More research on the empirical consequences of mutual trust as a driver of integration and the possible solutions to the issues raised would therefore be more than welcome. Indeed, one calling for deeper integration while maintaining diversity should reflect on those questions in order to optimise "the management of diversity in the EU"[175] and to democratically structure the "rivers and streams flowing from one domestic legal landscape to another"[176] as a result of mutual trust.

[175] D. GERARD, 'Mutual Trust as Constitutionalism?', D GERARD and E. BROUWER (eds.), above n. 1, 81, 93.
[176] K. NICOLAIDIS and G. SHAFFER, above n. 78, 267.