Solidarity in the European Constitutional Imaginary: The Currency of an EU Social Value

PANASCI, MARIA,ANTONIA

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Maria Antonia Panascì

Abstract

This thesis explores the unfolding of the idea of solidarity in the constitutional discourses on European integration. It analyses the levels at which solidarity situates in order to understand its constitutional status and ultimately Union's self-representation as a socio-economic organisation. In particular, it looks at two areas, free movement of persons and economic and monetary union (EMU), to test whether redistribution, as a possible aspect of the EU value of solidarity, underwrites the EU's practices and living experience.

To this end, this thesis uncovers the entanglement between law, economy, and politics and shows how the law allows but also limits the realisation of the EU as a community of solidarity. It argues that, while the pre-Maastricht constitution did not exhibit market fundamentalism, the post-Maastricht constitutional setting lacked coherence as to the role of solidarity across Union's policy areas. Two different meanings of solidarity emerged. In the EMU, solidarity has not challenged the conception of the market as a central regulatory device for both individuals and Member States, thus assuming a market-restoring function; in the free movement area, instead, solidarity has shown the potential to open, although to a limited extent, a transnational space of redistribution.

This thesis concludes that the neoliberal turn of the Union's political economy is not the inevitable result of a set of prescriptions written in the EU economic constitution and suggests that a transformative role for the law, and thus for solidarity, is possible as well as desirable.

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Court of Justice of the European Union

I**nternational Court of Justice**

National Courts

Austria

Estonia

France

Germany

Ireland

Italy

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Poland

List of Abbreviations

AG	Advocate General
BVerfG	Bundesverfassungsgericht (German Constitutional Court)
CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
DA	Debt Agency
DGS	Deposit Guarantee Schemes
EC	European Commission
ECB	European Central Bank
ECJ	European Court of Justice
EDIS	European Deposit Insurance Scheme
EDP	Excessive Deficit Procedure
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFSM	European Financial Stability Mechanism
EMA	European Monetary Agreement
EMF	European Monetary Fund
EMU	Economic and Monetary Union
EPU	European Payment Union
ES	English School
ESAs	European Supervisory Authorities
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMT	Treaty on the European Stability Mechanism
ESRB	European Systemic Risk Board
EU	European Union
GDP	Gross Domestic Product
GNI	Gross National Income
ICU	International Clearing Union

IMF	International Monetary Fund
IR	International Relations
LTROs	Long-term Refinancing Operations
MEEFP	Memorandum of Economic and Financial Policies
MIP	Macroeconomic Imbalance Procedure
NCBs	National Central Banks
NGEU	Next Generation EU
NRPs	National Reform Programmes
OCA	Optimal Currency Area
OMT	Outright Monetary Transactions
PEPP	Pandemic Emergency Purchase Programme
PSPP	Public Sector Purchase Programme
SBA	Stand-by Arrangement
SCPs	Stability or Convergence Programmes
SGP	Stability and Growth Pact
SMP	Securities Markets Programme
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
SURE	Support to mitigate Unemployment Risks in an Emergency
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination, and Governance

Statement of Copyright

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exercise of conceptual translation and still continue to see its potential to ‘translate’ concepts like citizenship and solidarity into a post-national language. This PhD thesis has been a test for legal imagination: a capacity that I hope to continue to nurture.

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Introduction

General Presentation

The aim of this thesis is to understand the substance of the EU value of solidarity beyond its rhetorical aura as well as its function in the EU composite constitutional order. In short, to ascertain what solidarity amounts to in an entity with limited conferred competence and whether an EU notion of solidarity possesses qualities resembling more a *domestic* constitutional order or an *international* order. Given the complex nature of the EU legal system, captured by the *sui generis* paradigm that places the EU somewhere in between federalism and intergovernmentalism, this thesis investigates the constitutional status of solidarity. This overarching question is not only formal (i.e. whether solidarity is a constitutional principle or an international law principle) but also substantial (i.e. what obligations an EU notion of solidarity entails). The determination of solidarity's constitutional status is inextricably linked and relevant to its substantive content, namely the scope of obligations that solidarity entails. For this reason, this thesis looks at the 'institutional' dimension of solidarity to uncover the meaning of this 'empty signifier'.

From an institutional perspective, solidarity is doctrinally depicted as a value (Article 2 TEU) – thus bearing a constitutional relevance similar to the one that imbues national constitutions - and an objective (Article 3 (3) TEU) – thus representing, in functionalist terms, the goal towards which any international organisation strives. This dual nature of solidarity is also reflected by the different levels at which it is placed. On the one hand, according to Article 2 TEU, solidarity is situated at the level of citizens, as that provision refers to 'a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality...prevail'.[1] On the other hand, according to Article 3 (3) TEU, it is located on a different plane, i.e. the one regarding the relations between Member States ('solidarity among Member States'). In this latter fashion, solidarity seems to be confined to the specific context of the internal market.

Therefore, solidarity as an EU notion unfolds as a principle governing the relations between Member States (interstate solidarity) and as a principle shaping the relations between citizens (interpersonal solidarity). Interstate solidarity is a precondition of any form of integration between

[1] Emphasis added.

states,[2] *a fortiori* in the EU where cooperation is not left to the merely horizontal relations and intergovernmental instruments available to Member States, but it is also centrally constrained and mediated by EU law. At the interstate level, law is an instrument that structures and upholds solidarity, in the sense that its role is to set limits and restraints on the exercise of Member States' sovereign prerogatives vis-à-vis each other. In this dimension, structural rules that govern mutual cooperation between Member States form the constitutional architecture of an entity, the Union, whose "operating system' is no longer governed by general principles of public international law'[3].

The supranational character of the Union explains why mutual obligations between Member States could not be reduced to an *inter*-national matter and solidarity, which is the factual prerequisite behind these obligations, to a matter *inter* nations. It also explains why the conceptualisation of solidarity within an interstate mode of discourse does not necessarily amount to saying that solidarity in the EU is a general principle of international law. 'Interstate' is not a synonym of 'international'.

In this respect, it should be established whether solidarity merely expresses a principle of international law or if it bears some constitutional relevance in the horizontal relations between Member States. It is unclear whether the principle of solidarity shapes the mutual obligations between Member States as it would do in a federal State or whether obligations between Member States in the context of the Union are similar to those that they would have under international law. The content of such obligations, and thus the meaning of solidarity - is strictly intertwined with the status (more constitutional or more international) that solidarity has in the EU.

To answer this question, this thesis traces how solidarity agreements between Member States have evolved over time and whether the European economic constitution has encapsulated these developments into a coherent legal framework. The digression on the European economic constitution in Chapters 2 and 3 charts solidarity agreements in a historical framework and enables a contextual and systemic analysis of the mutual obligations that membership of the EU entails for Member States. It will be shown how in certain areas, such as regional policy and those with a strong link with the market (free movement), interstate solidarity is fully constitutionalised, in that the relations between Member States are governed through a central structure, the Union, and thus

[2] In the words of Robert Schuman 'de facto solidarity' is the prerequisite for European integration. See 'The Schuman Declaration, 9 May 1950 https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en accessed 29 October 2020.
[3] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

mediated by EU law. This relationship between the centre and its units is what is classically defined as the key 'structural dimension of constitutionalism' in a 'nonunitary polity' such as the EU.[4] Therefore, the thesis explores those spaces of solidarity which have not been yet pre-empted by EU law and that are then left to Member States horizontal relations. Economic and Monetary Union (EMU) is the example of an area, in which solidarity is consistently negotiated through private law instruments and mainly situated in the international law plane.

The investigation of the sphere of interstate relations is complemented by the exploration of the interpersonal dimension of EU solidarity, i.e. solidarity between European citizens. As has been established in the CJEU's foundational case law, the EU represents more than an agreement between Member States. The founding Treaties have indeed created a new legal order whose organising principles cannot be reduced to the legal principles of international law.[5] The 'constitutionalisation' of the Treaties implied not simply the creation of a new *legal* order – as every (international) Treaty does so – but of a new *social* order.[6] The direct link established with individuals lies at the heart of the originality of the European project: the establishment of a common market went beyond a form of cooperation between states and reached individuals in their capacity of subjects and objects of EU law.[7] The issue raised by solidarity, then, is whether and to what extent this EU foundational value informs this new social order.

The interpersonal level at which EU solidarity unfolds is relevant to its conceptualisation. In fact, if solidarity does not exclusively pertain to the relations between Member States and, on the contrary, it entails mutual commitment among Union citizens, it would acquire a thicker meaning. Precisely, it would signal a passage from 'a Union based on international relations to a Union as federal polity'.[8] It would forge the bonds of a European society, thus fulfilling the aspiration that Article 2 TEU confers to solidarity. As has been observed, the textual novelty that the Maastricht Treaty introduced with regard to Article 2 TEU – substituting the word 'relations' with 'solidarity' when referring to the relationship between Member States – can be interpreted as

[4] ibid 2408.
[5] C- 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I; C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
[6] Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Law*, Vol. 1 *The European Union Legal Order* (OUP 2018) ix.
[7] Joseph H. H. Weiler, 'Van Gen en Loos: The Individual as Subject and Object and the dilemma of European legitimacy' (2014) 12 ICON 94, 96.
[8] Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd rev edn, Hart Publishing 2009) 53.

a conceptual shift towards a more federal understanding of the Union, where solidarity becomes a 'value of a diffuse European society'.[9]

This latter, more purposive understanding of solidarity, if embraced, would challenge what is generally considered to be the *Grundnorm* of the Union: the internal market.[10] More specifically, it would rebalance the basic aim of the EU, which has been identified with the 'preservation of a capitalist economic system',[11] because it would open a transnational space of redistribution beyond the market. This conception of solidarity would not amount to dismissing the internal market, but on the contrary to correcting its negative distributional outcomes. Ultimately, it would dismiss a rooted, and yet not fully accurate, conception of EU market as a capitalistic market that cannot be overridden by any other value.[12]

Drawing on the premise that the Union is more than a compact between states and that it has created a new social order, the thesis tries to assess whether the Union lived up to its constitutional promise to be a space in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality prevail (Article 2 TEU). To this end, it does not ask – as other recent works have done - whether solidarity is an emerging general principle of EU law[13] and justiciable value for two main reasons.

First, this question does not shed light on the substantive meaning of solidarity in a nonunitary and *sui generis* polity like the Union, relying on a mostly doctrinal analysis of the legal framework and case law. As has been already proved, it can be 'unreservedly claimed that in EU law solidarity constitutes an underlying fundamental Union value, which is unlikely to be justiciable'.[14] That means that it is not a principle of general application, nor it can be used as a ground for judicial review. However, solidarity is still a principle underpinning EU primary and secondary law and it is also expressed in the case law. It would be then more interesting to examine these provisions and case law from a normative point of view in order to detect whether redistribution is an actual aspect of the EU solidarity principle.

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[9] ibid.
[10] ibid 570.
[11] ibid 570.
[12] ibid 571.
[13] This question has been addressed by a series of contributions collected in an edited volume. See Andrea Biondi, Egle Dagilyte and Esin Küçük (eds), *Solidarity in the EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018).
[14] Egle Dagilyte, 'Solidarity: a general principle of EU law? Two variations on the solidarity theme' in Andrea Biondi, Egle Dagilyte and Esin Küçük (eds), *Solidarity in the EU Law* (n 13).

Second, the judicial applicability of the values enshrined in Article 2 TEU, which also includes solidarity, has been recently advocated with regard to the rule of law backsliding.[15] Many authors argue that the values listed in Article 2 TEU are legal norms the breach of which is not without legal consequences.[16] Therefore, some of them have construed a paradigm for the operationalisation of Article 2 TEU so as to react to the recent Europe's value crisis.[17]However, given that solidarity is included in the allegedly not justiciable second half of Article 2 TEU,[18] solidarity continues to remain out from the operative paradigm recently construed for the legal enforcement of Article 2 TEU.

The aim of this thesis is to understand in normative terms to what extent solidarity is part of – to borrow a recently coined expression – the 'constitutional imaginary of Europe'.[19] This study seeks to explore what solidarity tells about the constitutional nature of the Union not in terms of repartition of competences between the centre and its Member States, but in terms of the envisaged type of social system.

It is well known that the division of competences between the centre and the peripheries is sharply polarised between a supranational market and nationally organised welfare states. Therefore, social solidarity (i.e. solidarity between citizens as a source of redistribution) ought to remain a domestic matter. Nevertheless, this constitutional asymmetry between supranational economic integration and national social protection and equality does not imply the insulation of national social spheres from EU law.[20]'National welfare states,' although in the national remit, are

[15] See Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 GLJ 1182; Dimitry Kochenov, 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the European Union' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017); Enzo Cannizzaro, 'Il ruolo della Corte di Giustizia nella tutela dei valori dell'Unione europea' in *Liber Amicorum Antonio Tizzano* (Giappichelli 2018) 158.

[16] Among the authors who argue for the classification of Article 2 TEU values as legal principles see Van Bogdandy (n 8) 22; Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2017) 15; Stelio Mangiameli, 'The Union's homogeneity and its common values' in Hermann-Josepf Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon* (Springer 2012) 22; Rudolf Streinz, 'Principles and values in the European Union' in Armin Hatie and Lubos Ticjy (eds) *Liability of Member States for the Violation of Fundamental Values* (Nomos 2018) 11.

[17] See Armin Van Bogdandy, et al., 'Guest editorial: A potential constitutional moment for the European rule of law' (2018) 55 CMLR 983; Laurent Pech and Sébastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 CMLR 1827.

[18] Van Bogdandy, (n 17) 22.

[19] Jan Komárek, 'Why Read the Transformation of Europe today? On the Limits of a Liberal Constitutional Imaginary' (2020) iCourts Working Paper Series, No. 213, 2020 IMAGINE Paper No 10 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685722 accessed 30 November 2020.

[20] Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 JCMS 645. On the decoupling of economic integration and social protection see also Fritz Scharpf, *Governing in Europe. Effective and Democratic* (OUP 1999).

'legally and economically constrained by European rules of economic integration'.[21] This pressure is what is generally referred to as 'negative integration', while the diversity of national welfare systems makes harmonization through 'positive integration' difficult.[22]

Political scientists have described this interaction between the two decoupled spheres, economic and social, in negative terms, attributing the responsibility for the erosion of national solidarity arrangements to the European market-driven and competitive economy. For them, the 'national fragmentation of European social policy and […] the absence of centralized social protection at European level' did not allow a 'supranational replication of the postwar national welfare state, with its capacity to insulate social entitlements from economic pressure and take social and labour standards out of competition.'[23] On a policy level, political scientists' analyses have then challenged the tenability of the functional separation between the economic and the social, highlighting how political choices promoting market efficiency have negatively impacted national welfare states.

On a constitutional level, instead, it is argued that 'the autonomy of the Member States regarding their social systems as prominent instruments of the creation of national unity remains largely untouched.'[24]Constitutional lawyers tend to agree on the fact that redistribution is not part of the solidarity principle at EU level, as the structural rules forming the general EU architecture have maintained intact the demarcation between the two spheres.[25] However, this view, which acknowledges extensive capacity for economic and social intervention at the domestic level, can be questioned from a competence perspective.

While it is true that the original constitutional framework, i.e. the set of fundamental rules relating to the nature and organisation of the Union, reflected the post-war compromise of 'embedded liberalism',[26] being 'consistent with the intention […] not only to preserve intact but

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[21] ibid.

[22] See Fritz Scharpf, 'Negative and positive integration in the Political Economy of European Welfare States' (1996) EUI Working Paper RSC 96/44. On the diversity of national welfare states both for their different economic capacity ('ability to pay for social transfers and services') and for their underpinning theoretical foundations ('normative aspirations and institutional structures') see Scharpf, 'The European Social Model' (n 20).

[23] Wolfgang Streeck, 'Competitive solidarity: Rethinking the European social model' (1999) MPIfG Working Paper, No 99/8, Max Planck Institute for the Study of Societies, Cologne http://hdl.handle.net/10419/41694 accessed 30 November 2020.

[24] Van Bogdandy, (n 8) 53.

[25] Van Bogdandy, (n 8) 53.

[26] John Gerard Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379. The expression 'embedded liberalism' points to the

hopefully to expand and strengthen the Member States' powers of economic intervention and social governance',[27] the evolution of this framework through subsequent constitutional reforms has blurred the boundaries between the economic and social sphere. Maastricht was the key constitutional moment in this sense since it introduced Union citizenship and created an Economic and Monetary Union (EMU).

This thesis traces constitutional developments from Rome to Maastricht as well as the legal measures adopted on the basis of the European economic constitution, especially those adopted in response to the two major crises of the present decade, to show that the original functional and conceptual separation between the two spheres became less clearly demarcated in terms of competences.

Economic policy, which is an umbrella concept comprising public choices with regard to the allocation and distribution of resources, does not totally fall within the remit of Member States and neither it falls within one of the three categories of the EU competence catalogue.[28] The *sui generis* and undefined nature of this type of competence can be inferred from the relevant Treaty provisions. Article 2 (3) TEU recites that Member States shall coordinate their economic and employment policies within the EU institutional framework designed by the Treaties, and Article 5 TEU further specifies this coordination framework by entrusting the Council with the power to adopt broad guidelines. The EU economic governance framework and the relationship between the centre and its units, its qualitative transformation over the years, will be further explored in this work. It suffices here to say that, as has been noted, the allocation of competences with regard to economic policies in the EU does not reflect the traditional, vertical division of competences in federal systems.[29] It rather resembles a pluralist vision centred on a cooperative scheme whereby all actors involved work towards a common objective.[30] Therefore, this polycentric distribution of competences for general economic policy suggests how the Europeanisation of national systems of social policy is an inevitable result of EU constitutional rules. On the contrary, what is

institutional compromise reached in the aftermath of the war between free trade and the promise of social protection through welfare provision and intervention in the economy to reduce unemployment.

[27] Stefano Giubboni, *Social Rights and Economic Freedom in the European Constitution: A Labour Law Perspective* (CUP 2006).

[28] For 'economic policy' here is intended *general* economic policy, since the EU exercises a range of *specific* economic policies such as agriculture, transport, etc.

[29] Roland Bieber, 'The Allocation of Economic Policy Competences in the European Union' in Loïc Azoulai (ed), *Question of Competence in the European Union* (OUP 2014) 88-89.

[30] ibid.

questionable is the extent to which the EU constitution also prescribes how to strike a balance between economic integration and social protection.

In other words, while this thesis agrees on the fact that the Union does not leave the social systems of Member States untouched because the market itself is a social system and thus the two spheres, market and national societies, cannot be separated, it nevertheless doubts that market imperatives are destined to always prevail on solidarity because of the EU constitutional structure. If the premise is correct, not necessarily so is the conclusion.

In this respect, this work embarks on a brief analysis of the EU microeconomic constitution to detect the normative foundations of the rules governing free movement. It aims at understanding what conception of market the Treaties uphold and, consequently, what kind of society that conception envisages and shapes. Then, the thesis moves beyond the market and mainly focuses on those areas that, post-Maastricht, have more manifestly challenged the asymmetry and separation between supranational integration and national preservation of solidarity, namely Union citizenship and EMU. It assumes that these areas 'go beyond' the market because they intrinsically require public intervention. This does not amount to implying that the market is a neutral and self-regulating institution that does not require a set of rules to function or does not produce distributive consequences. Rather, it means that the functioning of these two areas – organisation of welfare provision and monetary policy – cannot be entrusted to the market, because they either 'correct' or 'complement' market outcomes.

The corrective function of citizenship is inherently linked to its promise of equality, being an equaliser that aims at redistributing wealth from the more productive actors to the less or those who cannot even access the market. The traditional function of welfare state is to insulate social transfers and public social services from the market logic. The performance of this social protection function varies according to the normative assumptions, historical and cultural traditions of European welfare states, [31] which strike a different balance between public and private provision (either within the family or the market) of some functions. Despite the differences in scope and nature of welfare provision, social democracies find their legitimacy in the national

[31] See the classification of the three worlds of capitalism of Esping-Andersen who distinguishes between Anglo-Saxon, Continental, and Scandinavian model. See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).

organisation of solidarity, which consists of citizens' protection against economic insecurity through redistributive and market-correcting policies.

On the other hand, monetary policy is strictly linked with the organisation of solidarity at the national level because it is distributive in nature, being an aspect of the broader concept of economic policy. The single currency is meant to 'complete' the market in the sense that it facilitates economic transactions at the microeconomic level, but it can also be considered a commodity itself to be traded in the market. In the first scenario, money plays a function of payment for the exchange of goods and services, in the second it has a store of value function. It is then crucial to establish whether financial markets serve the real economy and society.

Both citizenship and the single currency added a visible political economy dimension to the EU and challenged the assumption that identifies the EU with a market. This thesis explores to what extent these two instruments of political economy, through which distributive conflicts are addressed, rely on a conception of the market as the central institution for social reproduction. In other words, to what extent the market is the structure that determines the conditions for material and social life.

Citizenship classically provides for entitlements which are not market-based. While some social security benefits are linked with the status of workers and then presuppose economic contribution, being practically based on an insurance mechanism, social assistance benefits are detached from economic contribution being generally means-tested and thus addressed to those whose self-subsistence does not rely on the market. Citizenship helps subsidisation of individuals beyond economic contribution. It will be assessed whether Union citizenship fulfils this function.

Concurrently, the single currency is a crucial instrument to deliver macro-economic policies pursuing the aim of full employment and citizens' welfare. Control of a single currency is crucial in the achievement of social goals and the fulfilment of the promise of equality inherent in any meaningful notion of citizenship. Monetary policy distributional effects, although *prima facie* not easily detectable, are of the greatest importance. For instance, inflation is a tool of income redistribution from savers and fixed income earners to debtors and variable income earners.

Therefore, the expansion of competences realised by the Maastricht Treaty marked a crucial paradigm shift for the EU, which came to assume powers in areas with a more evident distributional vocation. The Maastricht Treaty established a link with individuals qua *citizens* rather than qua market actors and granted the Union powers in matters that are the hallmark of

statehood. Maastricht offers then the chance to reflect on whether EU solidarity might have changed and acquired a constitutional meaning similar to that it has in a national context.

To this end, the thesis explores the macro-economic dimension introduced at Maastricht from this social angle, looking at the interaction and gaps between citizenship and EMU rules, which are normally examined separately in the literature. Solidarity has received doctrinal attention in Union citizenship studies and only recently it has sparked academic interest in the context of EMU. This thesis adopts a comprehensive approach and examines together these two branches of EU law by using an overarching framework based on solidarity.

It then turns its focus on EMU specifically, where solidarity has been fiercely invoked but under-researched, exploring whether the introduction of the single currency has mutated the original economic constitution and negatively impacted the abovementioned constitutional asymmetry to the detriment of solidarity. EMU legal framework and the interpretation given to its provisions both from a Union perspective and a national perspective will be examined through the lens of solidarity. It will be assessed whether and to what extent solidarity emerging from EMU can be deemed qualitatively similar to social solidarity classically stemming from citizenship. In other words, whether the political economy of the legal and judicial developments in the EMU area is consistent with a notion of redistributive solidarity. In particular, it will be assessed i) whether Member States agreements within and without the EU legal framework have had favourable distributive effects in terms of social protection, which means where they stand in the spectrum between competition and solidarity; ii) whether the action of the Union through its institution designated to conduct monetary policy, the ECB, has followed the political economy of Member States; ii) what political economy approach the CJEU and national courts uphold.

Conclusions will be drawn on the status on solidarity in the EU, which in some constitutional areas does not act (yet) as a value - thus having negative distributional consequences for some states and their citizenries. Therefore, the thesis will suggest some possible justifications to change the current status and establish what role solidarity should have in the EU constitutional order. It will expose the kind of solidarity, more federal and more constitutional, both social cooperation (arising from the transnational division of labour) and economic interdependence (reinforced by the adoption of the single currency) not only justify but also impose.

Methodology

The methodological approach adopted by this thesis can be described as one of 'law in context', as its general aim is to uncover the 'living matrix' of the EU constitutional order.[32] In an effort to answer the methodological plea for a less arid approach to the study of constitutional law -[33]which is often a study of norms without norm-making, constitutions without institutions, principles without practice -[34] this thesis explores the interactions between law and politics and the political economy assumptions underlying EU provisions.

The premise is that the role of law is not merely to set limits and restraints on the exercise of political power, but also to positively structure and orient the way in which the power is exercised. In other words, law is neither exclusively the superficial manifestation of an underlying political economy (i.e. a superstructure) nor an autonomous system unrestrained by political and economic interests (autopoietic system).

Pre-Maastricht, the EU legal system exhibited a more evident autonomous nature and autopoietic features, given its capacity to evolve through doctrines that were developed as a natural result of the Treaty constitutional design. At the same time, the Treaty provisions did not reflect a specific preference for a certain economic model, as this thesis argues when examining the European economic constitution. They were rather the outcome of a political compromise between two competing economic positions: one more liberal promoting market efficiency and one more statist promoting social protection.

It was the post-Maastricht constitutional order that emphasised the constitutive function of law, i.e. its capacity to actively shape the market and privilege certain policy choices. Constitutional rules were indeed used to enforce a certain kind of political economy, which is often presented as an inevitable technical necessity rather than as a political choice.

For this reason, this thesis goes beyond doctrinal analysis as it tries to understand to what extent EU law exercises a distributive role and has a purchase on the way the European economic and social model is organised. It is the indeterminacy of the object of this study in the first place, i.e. the concept of solidarity, that precludes a black-letter approach to the text of the Treaties.

[32] Martin Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 Southern California Law Review 537, 538.
[33] ibid.
[34] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2409.

Therefore, the methodology of this thesis departs from a positivist understanding of EU law, which, as vividly said, has often resulted in a 'theory of interpretation' rather than a 'theory of justice'.[35] The limits of hermeneutics are even more evident if one wants to engage with questions of distribution, which after Maastricht became more evident and by definition do not assume EU law as a mere regulatory mechanism.

Whereas the functionalist theory as a mainstream narrative could have worked for the earlier stages of integration, when the then Economic Community was conceived of as an economic project of highly technical nature, the evolution of the Community into a more mature political union has revealed the fallacy of the myth of neutrality that has often surrounded the EU legal architecture and the implications of EU law.

The premise on which this thesis draws is that EU law has a power to shape the socio-economic order: the four freedoms and the single currency are never neutral but actively structure both the economy and society, expressing a certain idea of 'market society'. Similarly, the EU crisis-management law has structured the EU response in a precise legal form and lent it a certain legal language. For this reason, the choice of which legal instruments give substance to constitutional values is not only a matter of legal *form* but it determines the *substance* of that value as well. Solidarity is the telling example of this dynamic, as its substantial meaning is shaped by the legal institutions in which it is expressed. It represents the paradigmatic case of law's constitutive function or, in other words, why the law is constitutive in determining the content of solidarity.

This thesis looks at the overall relationship between law and solidarity to show that solidarity is indeed a legal concept. Solidarity is framed in terms of debt, which is a relational concept, specifically a relationship between two parties. The way in which this relationship is conceptualised is paramount to uncovering the meaning of solidarity: the set of legal obligations of the debtor and creditor respectively defines the material scope of solidarity, telling what is owed to whom and under which conditions.

This research shows this deep intertwinement between debt and solidarity, which features in both citizenship and EMU areas. Citizenship is the legal fiction that justifies social solidarity, which is framed as a debt that taxpayers have to honour to subsidise their fellow nationals.

[35] Andrew Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549.

Taxation is then the way through which interpersonal solidarity is mediated. Public debt is the other alternative through which citizenship entitlements are financed. Therefore, public provision of welfare benefits and services is enabled by taxation and public debt. The form that solidarity assumes at the level of citizens is then articulated through the doctrines of public law.

On the contrary, interstate solidarity in the EMU is not mediated through mutualisation of public debt but through private debt: in the lack of mutualisation, solidarity is an instrument of cooperation situated at the level of horizontal relations between Member States, which resort to international and private law tools to regulate their relationships. What is missing is a vertical dimension that makes Member States act as members of a Union. EMU remains the telling example of this incomplete architecture, as EU law does not have the authority to govern Member States' expressions of solidarity. As a consequence, the notion of solidarity emerging from this EU law area does not exhibit redistributive features. It is instead rooted in commutative justice – which is not concerned with socially just distributional outcomes, as it only requires a just reparation, i.e. to restore a preferred resource allocation.

Hence, political economy is the privileged angle from which this thesis tries to explore its main questions. After a concise historical analysis and a brief incursion into other disciples, such as international relations theory or social theory, this thesis draws on economic theories to understand the normative assumptions underpinning the European (economic) constitution. Traditional legal analysis accompanies this more theoretical take and ample space will be given to the case law. This comprehensive approach aims at building a theoretical framework functional to the achievement of the research objectives. The table below visually explains how the substantial and methodological aspects of this thesis intersect.

Institutional Level (personal scope)	**Area of Law**	**Constitutional status**	**Substantive meaning (material scope)**
Interstate	EMU	Principle of International Law	Market-based (commutative)
Interpersonal	Citizenship	Constitutional Principle	Redistributive

Chapter breakdown

As for the structure of this thesis, Chapter I deals with the research question in theoretical terms, aiming at deconstructing the *idea* of solidarity. It looks at its origins, evolution and adaptation to contexts different from society (for instance to the 'society of states'), including the EU legal space.

After defining a conceptual framework for the notion of solidarity, this research tries to uncover the *mechanisms* through which the EU might deliver socio-economic solidarity. To this end, Chapter II analyses the European (Economic) Constitution through the exposition of its principles and underlying assumptions. Chapter III continues this analysis from a dynamic perspective, describing the evolution of the European economic constitution in terms of institutional changes. It questions whether these legal developments have changed the nature and quality of the relationships between the Union and its Member States and between Member States themselves. In practice, whether they have brought a change in the direction of a federation.

Chapter IV examines the constitutional *limits* that the hermeneutic work of the ECJ has crafted and lifted in some crucial judgments related to the euro crisis-management law. The EU response to the financial crisis has tested the outer limits of solidarity, and the ECJ has been called to assess the constitutionality of the crisis-driven legal developments. This chapter conducts a doctrinal and critical analysis of the most important decisions on the euro area, to grasp what vision of solidarity they uphold and what limits they have attached to it. Then, it recalls the constitutional limits to solidarity, which some national courts (most notably, the German Constitutional Court) have expounded to resist further 'mutualisation' at the EU level.

Finally, Chapter V tries to overcome the arguments put forward by those who claim that more solidarity at the EU level is neither constitutionally feasible nor desirable. Ultimately, it seeks to find a justification which can legitimise further steps towards genuine solidarity in the EU. It will argue that – despite the reluctance of some Member States that fail to acknowledge it - sharing a market, and most importantly a single currency, has already realised that 'mutualisation' of risks and responsibilities for citizens' welfare.

1 Chapter I: Deconstructing solidarity

1.1 Introduction

"Europe is not just an economic market. It is a project".[1] In these words of the French President Emmanuel Macron, Europe is not just a soulless place of tradable commodities, it is an aspiration and a political vision. In a letter addressed to the citizens of Europe, rather than to the 'consumers of a common market',[2] he evokes the importance of political imagination to reinvent 'the shape of our civilization in a changing world'. The rediscovery of European collective values, especially solidarity, is often invoked as a panacea for all the evils affecting Europe.[3] The euro crisis, migration, Brexit, resurgent nationalism, illiberal populism are some of the biggest upheavals which have triggered deeper reflection on the direction of European integration. Frequent calls for more solidarity between the members of the Union witness how crucial is the directionality of the EU beyond its purely economic dimension. To say it with Macron, the question is what the European 'project' stands for beyond the single 'market'.

This chapter aims to flesh out the meaning of solidarity, a nebulous and elusive concept, which has gained the spotlight in the mainstream narrative about the latest challenges faced by the European Union. Despite the rhetorical consensus on the need of 'more solidarity', there is little agreement on what it actually means (or should mean) in the EU constitutional order.[4] According to some, solidarity in the EU should not amount to an unconditional, morally imperative preparedness to help others; it should rather be 'responsible' and driven by self-interest

[1] Emmanuel Macron, 'Dear Europe, Brexit is a lesson for all of us: it's time for renewal' *The Guardian* (London, 4 March 2019) https://www.theguardian.com/commentisfree/2019/mar/04/europe-brexit-uk accessed 7 September 2020.

[2] Nick Robinson and Matthew Patten, 'Are we citizens of Europe or just consumers of a common market?' *The Guardian* (London, 5 March 2019) https://www.theguardian.com/world/2019/mar/05/are-we-citizens-of-europe-or-just-consumers-of-a-common-market accessed 7 September 2020.

[3] See Angelique Chrisafis and Helena Smith, 'Emmanuel Macron calls for solidarity as he vows to lead EU rebuild', *The Guardian* (London, 7 September 2017) https://www.theguardian.com/world/2017/sep/07/emmanuel-macron-calls-for-solidarity-as-he-vows-to-lead-eu-rebuild accessed 7 September 2020.

[4] See Yuri Borgmann-Prebil and Malcom Ross, 'Promoting European Solidarity: Between Rhetoric and Reality?' in M Ross and Y Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP 2010) 1. See also Kurt Bayertz, 'Four Uses of Solidarity' in Kurt Bayertz (ed) *Solidarity* (Springer 1993) 3, cited in Borgmann-Prebil and Ross. *op. cit*., according to whom 'it would be wrong to speak of an *embarras de richesse* with respect to theories on solidarity'.

calculation.[5] This view generally emphasises the link between solidarity and responsibility, arguing for the necessity of a balance between collective responsibility and individual responsibility.[6]According to others, instead, solidarity is grounded in normative obligations.[7]

Acknowledging that solidarity is a 'contentious and contested' political idea,[8] this chapter explores its intellectual history and retraces its theoretical roots back to the start of the modern era. The genealogy of this concept shows how, in comparison with other grand ideas of social history, solidarity is relatively recent.[9] While solidarity as a political idea is then quite young, its relationship with law dates back to Roman law. Solidarity as a legal concept is indeed interwoven with the law of obligations and debt.

In this regard, the chapter shows how law shapes the very notion of solidarity as it institutionalises the relationships that connect states and their peoples. In short, solidarity is a debt relation. Law does not simply reflect the bonds that tie individuals together, it actively structures them. Relying on the assumption that law is an endogenous factor, the chapter looks at the inner connotations of solidarity with regard to obligations assumed by individuals in the private sphere as well as obligations of mutual assistance in the public sphere, where ties of solidarity between people are mediate by positive law. When translated from the private to the public sphere, the concept of solidarity assumes a novel political meaning: it is not a direct, personal relationship between individuals (private debt) but rather a mediated, impersonal relationship between individuals and the public administrative machine, through which redistribution of wealth takes place. The substitution of personal ties of solidarity with this vertical relationship between the individual and the state – expressed in the form of citizenship - gave rise to the welfare state, in

[5] See Enrico Letta, 'Europe's Responsible Solidarity' *Euronews* (Brussels, 4 October 2013) https://www.eunews.it/en/2013/10/04/letta-europes-responsible-solidarity/9559?responsive=n accessed 7 September 2020. See also Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: How Much, What For, For How Long?' (2012) Notre Europe Policy Paper 51/2012, forefront, citing Jacques Delors according to whom 'solidarity mechanisms are not based on pure generosity, but on enlightened self-interest.

[6] See Haerman Van Rompuy, 'Greece and Europe: building a better future in difficult times' (Speech given at the Hellenic Foundation for European and Foreign Policy (ELIAMEP) Athens, 12 April 2011) https://www.consilium.europa.eu/media/26750/121496.pdf accessed 7 September 2020.

[7] See Jürgen Habermas, 'Democracy, Solidarity and the European crisis' (Lecture delivered in Leuven University, Leuven, 26 April 2013) https://www.pro-europa.eu/europe/jurgen-habermas-democracy-solidarity-and-the-european-crisis/?print=print accessed 7 September 2020.

[8] See Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis* (Springer 2017) 37, citing Antje Wiener, *A Theory of contestation* (Springer 2014) 189.

[9] ibid 38.

the context of which solidarity amounts to collective responsibility and debt to a public instrument devoted to the correction of market outcomes for egalitarian purposes.

After trying to unravel the relationship between law, solidarity and debt, the chapter looks at the process of European integration to understand how the notion of solidarity can be adapted in a supranational framework. It will be shown how, in theoretical discourses, the meaning of solidarity in the EU has changed over time. From being a corollary of the duty of cooperation, it has now become a stand-alone concept having a redistributive connotation; from being the nemesis of national interest, it has now become its allay.

Finally, given the plurality of actors and the *sui generis* constitutional elements of the EU constellation, the chapter engages with the question of the 'site' of solidarity, be it the interstate level or the interpersonal level. Drawing on the debate on justice in the EU – strictly related to solidarity as it similarly implies 'who owes what to whom' – the chapter highlights the limitations of the current theories of EU solidarity in the EU.

This chapters proceeds as follows. Section 2 offers a digression on the theoretical and historical origins of solidarity. Section 3 explores the relationship between law and solidarity. Section 4 poses the question as to the potential meaning of solidarity in the EU context, framing this deconstruction exercise within the constitutional structure of the EU, which resembles neither a mere international organisation nor a federal state. Section 5 looks for possible conceptualisations of an EU notion of solidarity. Section 6 concludes by anticipating how the question of solidarity will be further explored in the following chapters.

1.2 The roots of an underexplored idea

As anticipated, solidarity is one of the main ideas of political theory that has received less and relatively belated attention from social scientists. Despite its centrality in the organisation of a polity, there is still no 'common practice' that might be conducive to a shared understanding of its meaning.[10] This section offers an overview of the sociological and political studies that have theorised solidarity.

[10] See Andreas Grimmel, 'Solidarity in the European Union: Fundamental Value or 'Empty Signifier" in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis* (Springer 2017) 166. The author builds on Wittegenstein's work to argue that the normative meaning of solidarity should rely on what this term *practically* implies.

1.2.1 Solidarity at the dawn of modernity

The idea of solidarity places itself at the heart of the functioning of any kind of society. In classic social theory, which analyses the collective arrangements and features of modern societies, solidarity is often used as a tool to understand what holds individuals together. While traditional, pre-modern societies usually exhibit a high degree of cohesiveness, being mostly based on family ties and loyalties between their members, 19th century European societies emerging from the process of modernisation are complex and pluralistic.[11]

Reflecting the transformations brought about by the Enlightenment and the Industrial Revolution, the urban and commercial societies of the modern era show a 'steady weakening of traditional social bonds'.[12] Theoretical paradigms that often describe this process are those of atomisation, individualisation and disaggregation, which all point to the fragmentation of social life, previously organised along ties of kinship in local communities.[13] The loosening of strong connections among members of communities led to 'the concomitant creation of new unities based on more rational, more impersonal, more fragmented forms of thought and action',[14] as well as the discovery of self-identity on the individual level and the disembedding of social institutions on the institutional level.[15]

Polanyi captured this process under the name of 'Great Transformation', which marked the rise of market society in the 19th century, that is a social order where the economy is no longer embedded in social relations, but it functions as an autonomous, self-regulating system of markets.[16] Contrary to pre-capitalistic social relations based on status and hierarchy, these new social systems adopt the language of rights and citizenship, as well as the legal instruments of contract and bureaucracy; therefore, modern social relations are largely transactional.[17]

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[11] For the start of modernity see Stephen Toulmin, *Cosmopolis. The Hidden Agenda of Modernity* (The University of Chicago Press 1992).
[12] Philip Selznick, *The Moral Commonwealth. Social Theory and the Promise of Community* (University of California Press 1994) 4. The weakening of social ties is described as one of the main features of modernity, along with the separation of spheres, secularization, and rational coordination.
[13] ibid.
[14] ibid.
[15] See Anthony Giddens, *The Contours of High Modernity. Self and Society in Late Modern Age* (Polity Press 1991).
[16] Karl Polanyi, *The Great Transformation* (first published Farrar & Rinehart 1944, 2nd Beacon pbk ed., Beacon Press 2001).
[17] On the transactional nature of modern law and more broadly on the legal changes in the historical era of modernity see Marc Galanter, 'The Modernization of Law' in Lawrence Friedman & Stewart Macaulay (eds), *Law and the Behavioral Sciences*, (Bobbs-Merrill 1969). In modern transactions, rights and obligations of individuals no longer

With the dissolution of the traditional imaginary, it is clear how the concept of solidarity offered a justification for the functioning of a more segmented society, based on the division of labour and the differentiation of social activities; a society where individuals behave on the basis of rational interests. Solidarity is essentially a product of modernity. In the modern social order, it became the conceptual paradigm through which early social theorists started reflecting on how social cohesion and integration could be achieved in the lack of traditional bonds and feelings of togetherness.[18]

Although the first systematic conceptualisation of solidarity is generally ascribed to Emile Durkheim,[19] some earlier French social philosophers had already employed the similar concept of fraternity to describe the social changes prompted by the French revolution. But even before the elaboration of an *idea* of solidarity, the *phenomenon* of solidarity was a practice spread in many societies.[20] In those revolutionary years, though, it acquired a new political meaning, being referred to as a medium between individuality and community, and thus as a means of social integration. The term *fraternité,* together with *liberté* and *egualité,* became part of the tripartite motto of the 1789 revolution. The idea of brotherhood, borrowed from the Christian experience,[21] was functional to the attainment of equality and, more broadly, to the implementation of a political project of a new social order.

According to Stjernø, who retraced the history of the idea of solidarity, Charles Fourier was the first thinker who used the term 'solidarity' as a political concept.[22] In his utopian model of societal organisation, the 'phalanx', solidarity possesses at least four different meanings, all of which are still well preserved in contemporary social experiences. The first meaning has a legal connotation, which, descending from Roman Law, indicates the principle of insurance, i.e. the

depend on external factors such as class, age or sacramental honor, but are based on elements negotiated by the parts and thus 'internal' to their agreement.

[18] Among these thinkers, it is possible to distinguish some French social philosophers who were the pioneers of this kind of reflection (Fourier and Leroux) and sociologists like Durkheim, Marx and Weber.

[19] See Émile Durkheim, *The Division of Labour in Society* (first published in French in 1893, Palgrave Macmillan 1984).

[20] See Steirnar Stjernø, *Solidarity in Europe: the history of an idea* (CUP 2005) 25. According to this author, the roots of this idea can be found in Christianity, whilst the birthplace of the term of *solidarity* in its political meaning was France during the Revolution. The author identifies three traditions in which solidarity developed: Christian ethics, classic sociology, and socialist theory.

[21] ibid. It is argued how the concept of fraternity lost its religious meaning due to the process of secularisation occurred during the Enlightenment.

[22] ibid. 27. The emergence of solidarity as a political idea is to be found in *Théorie de l'Unité Universelle* (1822).

responsibility of more people for the repayment of a debt.[23] In its second nuance, solidarity amounts to the willingness to share resources with others, while in its third it has emotional weight, indicating a collective sentiment such as the feeling of community. The fourth meaning, instead, refers to the guaranteed minimum income and family support.

Another important contribution to the study of solidarity came from Pierre Leroux, whose elaboration of solidarity revolved around three critiques: the inappropriateness of the Christian concept of charity, the atomistic conception of society at the basis of any idea of social contract, and the authoritarian potentialities of an organic conception of society. He construed solidarity as a relational concept, thus bringing it close to the meaning it would later acquire in sociology.[24]

The last of these early French thinkers reflecting upon solidarity was Hippolyte Renaud, who published a well-received booklet entitled *Solidarité* in 1842. There, he employed a notion of solidarity inspired by Fourier, and thus resulting quite utopian inasmuch as centred around the idea of harmony and happiness of the phalanx.[25]

All these early attempts to theorize a political notion of solidarity were followed in other countries like Germany and England, where the socialist movement adopted the concept for class struggle. The 1840s were indeed the decade in which solidarity enjoyed steady popularity.[26] After a temporary decline, probably to be ascribed to the failed experiment of the 1852 Third Republic in France, the idea of solidarity re-emerged in the 1880s.[27] While continuing to influence European political thought,[28] it finally became part of the vocabulary of social theorists.

1.2.2 Solidarity in classic social theory

August Comte, the father of sociology, finally incorporated the idea of solidarity into the conceptual grammar of social theory. In *Système de politique positive* published in 1852, he distinguished three different 'integrative mechanisms of society': the role of women in different

[23] More on this point, *infra*.
[24] See Stjerno (n 20), Leroux's account on solidarity can be found in *De l'Humanité* (1840).
[25] The utopian and naïve nature of this account is ascribed to the fact that, despite class differences, people are believed capable to live in harmony.
[26] For the diffusion of solidarity in the 1840s See Stjerno (n 20) 30 and Sven-Eric Liedman, 'Solidarity: A conceptual history' (*Eurozine*, 16 September 2002) https://www.eurozine.com/solidarity-a-conceptual-history/ accessed 7 September 2020. The latter reports that in 1844 an American writer, named Parke Godwin, complained of the "uncouth French word, *solidarité*, now coming in such use" (quoted in Arthur E. Bestor, 'The Evolution of the Socialist Vocabulary' (1948) 9 Journal of the History of Ideas 259, 273).
[27] Stjerno (n 20) 30.
[28] In 1896, for instance, Leon Bourgeois published a book entitled *Solidarité*.

social functions, continuity, and the so-called 'religion of humanity'. Solidarity features in the first mechanism, where it finds three different modes of expressions (obedience, union and protection), as well as in the mechanism of continuity, where it takes the form of intergenerational solidarity. In Comte's theory, society is bound by time, and human bonds across generations allow the transmission of collective knowledge and material resources, enhancing interdependence over time and upon others for the production of wealth.

This conceptual structure has been further elaborated upon by Emile Durkheim,[29] who elevated solidarity (rather than force, social contract, or self-interest)[30] to the social cement that holds society together. He observed how in the pre-modern era individuals are intimately tied to a community, which is part of their collective consciousness. The individual could only exist within a community. Solidarity underpinning these traditional societies is defined as "mechanical", as it relies on the sameness of values, beliefs, and interests among the members.[31] On the contrary, solidarity in industrial societies is "organic", as it flows from the factual interdependence among individuals resulting from the division of labour: specialization and diversification of activities increase the need for collaboration within and between different groups.

Despite the consequent fragmentation of common consciousness, this social interaction is still rooted in morality, which remains the source of solidarity in Durkheim's thinking.[32] As he wrote, 'every society is a moral society',[33] *a fortiori* a co-operative society which is mostly based on the division of labour and for this reason greatly relies on complex and deep ties that extend beyond transient exchanges. For Durkheim, co-operation is not a mere economic fact, but it 'has its intrinsic morality'.[34] Criticising Spencer,[35] he believed that altruism is the fundamental basis of any society and that (moral) obligations towards others are inescapable because any society could not work on the sole basis of rational egoism. It would then be inaccurate to think that, with the

[29] Durkheim (n 19).
[30] Durkheim critically engaged with the thought of traditional philosophers like Hobbes (who identified force as the social glue of a social order) or Locke and his social contract theory, according to which individuals enter society on the basis of a rational calculation. The Durkheimian account refused both approaches.
[31] See also Stefano Bartolini, *The Political Mobilization of the European Left 1860- 1980. The Class Cleavage* (CUP 2000), who argues that in preindustrial societies the cleavages that created a common identity were established along cultural lines rather than class conflict.
[32] See Stjernø (n 20) 34.
[33] Durkheim (n 19) chapter 7 on organic solidarity and contractual solidarity.
[34] ibid.
[35] In Durkheim's reading of Spencer's writings, altruism was for the latter 'a sort of agreeable ornament. See Durkheim (n 19). This reading might be unfair to Spencer according to some sociologists, see for instance Lars Udehn, *The Limits of Public Choice: A Sociological Critique of the Economic Theory of Politics* (Routledge 1996).

advent of modernity, social relations have lost their moral foundation. On the contrary, they have not yet reached 'the development which would now seem necessary', given the existence of social inequalities. Therefore, in the Durkheimian account, a morally grounded solidarity is closely intertwined with the question of justice.[36]

Hence, the French sociological tradition looked at solidarity as an integrating force which, on a macro-level, links society together. One the contrary, another strand of thinking saw solidarity as a divisive force. Max Weber, for instance, considered solidarity (although not explicitly) as a particular form of social relationship combining both elements of *Vergemeinschftung*, which are those social actions based upon a common interest, and *Vergesellschaftung*, which are instead based upon personal advantage. Consequently, solidarity not only unites but also divides, presupposing the exclusion of those who have different interests and whose actions are oriented towards different goals.

This line of reasoning echoes the Marxist account of class-consciousness which will later inspire the labour movement, where the organisation of workers into a class presupposes class solidarity. Yet, in the Weberian elaboration, solidarity is to apply – although to a different extent - to any kind of social relationships, including those based upon legitimate authority rather than reciprocal expectation.[37] The element that brings Weber's account closer to the Marxist discourse than the French tradition is a more political approach to the conception of solidarity,[38] which is more grounded in mundane interests and norms rather than moral duties.

From this brief comparison between the two approaches, it is possible to affirm that solidarity does not have an unequivocal meaning, and that different nuances can be attached to it. On a general level, it is maybe obvious to observe that solidarity indicates some willingness to share something with others. However, the motives underpinning the action of sharing resources can be various, as well as the addressees of those actions. They can be driven by self-interest or by interests shared with a particular group, rather than with society more broadly.

[36] In his words, 'justice is the necessary accompaniment to every kind of solidarity'. See Durkheim (n 19).
[37] Stjernø (n 20).
[38] ibid.

1.3 Law and Solidarity: debt as the thread of a long-standing relationship

The last section has fleshed out the concept of solidarity in theoretical terms. This section specifically looks at solidarity as a legal concept. It shows the form-giving function of the law, which is the constitutive element of social relations such as debts. It highlights how the meaning of solidarity is actively structured by the type of law, private or public law, that codifies its related obligations.

1.3.1 Solidarity in Roman Law: the origins of private debt

The relationship between solidarity and law has always been meaningful, as the very term 'solidarity' has been borrowed from the legal imaginary. Etymologically, it comes from the Latin adjective *solidus*, which, due to its meaning 'solid', was used in Roman law to indicate a type of obligation (*obligatio in solidum*) in which either the obligors or the obligees are bound together. The former are liable for the fulfilment of the entire prestation (be it the payment of a debt or the execution of a performance), with the action of each debtor extinguishing the whole obligation; the latter, instead, are all entitled to demand the fulfilment of the same indivisible obligation. In its original juridical sense then, solidarity implied co-responsibility and it still retains this meaning in civil law.

Even before the 1804 Napoleonic code,[39] which incorporated solidarity among the principles governing the law of obligations and contributed to spreading it in other civil codes across Europe, the French legal jargon had already adopted the principle of 'solidarité'.[40] Inherited from the Roman Law, the underlying rationale of this type of obligation is credit guarantee, i.e. to protect creditors' interests to receive the payment of the debt incurred by a subject. Historically, this form of risk protection was offered by family members or members of the same *gens* through the institute of *sponsio* (later evolved in the so-called *stipulatio*), a formal oral formula through

[39] 'Des Obligations Solidaires' was the name of Title Three of Chapter four in the French Code Civil.

[40] On 'the juridical origins' of the idea of solidarity, see Jack Ernest Shalom Hayward, 'Solidarity: the social history of an idea in the nineteenth century France' (1959) 4 International Review of Social History 261, 269. According to this author the concept of solidarity, intended as an indivisible collective debt, was already present in the *Dictionnaire de l'Académie Française* of 1694, and in Diderot's *Encyclopédie ou Dictionnaire Raisonné des Sciences, des Arts et des Métiers* of 1765.

which a *sponsor* committed to the repayment of a debt.[41] This risk-sharing has always been a constitutive element of solidarity, implying the existence of a bond between the two or more subjects co-responsible for the same obligation. This bond used to be institutionalised in archaic Roman law, constituting a kind of 'solidarity *ex lege*', whereas in a later stage it acquired a contractual nature, being confined to the consent of the parts and mutating into a sort of "contractual solidarity".

A similar duty of assistance was found in the so called *sodalitates*, which together with the *collegia* used to have corporate personality in order to perform religious, social and professional functions already in the earliest legislation of Roman law (the Law of Twelve Tables dated 450 B.C.). The collective responsibility arising from these associations of voluntary solidarity expanded in the medieval era, where guilds and corporations characterised the fabric of European societies and fell within particular legal rules (*iura propria*) having a selective personal (rather than territorial) scope of application.[42]In custom and Canon law of the Middle Ages, then, the relationship between law and solidarity changed its nature: from an instrument of credit protection, solidarity also became a 'common ground for normative obligations'[43] of mutual assistance, thus acquiring a different, collectivist nuance.

However, with the codification process inaugurated by the Enlightenment and the concomitant emergence of individualism and statism, the corporativist connotation that solidarity had assumed in earlier times loosened, making room for a stronger contractual meaning.[44] The emphasis on individual rights and freedom of contract, which followed from the assertion of the Enlightenment ideal of (formal) equality of all men, reinforced the individualist scope of the law of obligations, subjecting the principle of solidarity to a negative presumption.[45]

This significant mutation should be read in its historical context: in 1791, the Le Chapelier Law banned any intermediary organisation between the individual and the state, such as corporations, the first embryonic trade unions, and the so-called *compagnonnages*. Consequently,

[41] While the *sponsio* was a prerogative of the Roman upper class, the *stipulation*, less formalistic and newer, applied extensively. The latter indeed included foreigners (and other non-citizens) in its personal scope, thus falling within the *ius gentium*.
[42] For the territorial application of law as a feature of modernity see Galanter (n 17).
[43] This is one of the four uses of solidarity identified by Bayertz. Cf. Bayertz, (n 4).
[44] This should be read in its historical context. In 1791, the Loi Le Chapelier banned any intermediary organisation between the individual and the state, i.e. corporations, the first embryonic trade unions, and the so-called *compagnonnages*.
[45] Dated back to Roman law, the general rule applying to solidary obligations is that for the principle of solidarity to apply there must be an explicit clause negotiated by the parties or a legal provision enacting it.

this erosion of any intermediate level between the individual and the state reflected on the conception of solidarity and debt. They were indeed confined to the private sphere, i.e. the realm of individual interests, which - despite being formally distinct from the public sphere - relies on the latter for the enhancement of those interests.

The codification era then reinstated the public/private distinction, which has been inherited from Roman law and is still a key feature of western legal systems. Its most famous formulation dates back to the Code of Justinian (*Corpus iuris civilis*), where - commented on by Ulpian - it recites that "there are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests".[46] In Supiot's reading of this duality, these two spheres are reciprocally dependent, as they 'rest[s] on […] different positions of the same corpus of rules'.[47] In particular, private interests on the horizontal level rely on the vertical stability of public institutions; mutually, public power's structures could not be intelligible without the existence of private interests to protect.

The reduction of the complex architecture of social relations of the Middle Ages to the sharp dichotomy public/private implied a reorganisation through law of the social bonds underpinning society. As has been argued, two distinct systems of government can be observed: 'government by laws', in which all men are subject to the same general and abstract laws, and 'government of men', in which everyone is placed in a dependence relationship with others and where social relations are governed by personal ties rather than the same impersonal law.[48]Feudal systems belong to the second type and are characterised for the legal nature of personal bonds. There, the law shapes the intimate organisation of social life, as the very 'backbone of the social order is vassalage',[49] which is a l*egal* institute.

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[46] "Hujus studii duae sunt positions, publicum et privatum. Publicum ius est quod ad statum rei romanae spectat. Privatum quod ad singulorum utilitatem", quoted in The Digest of Justinian 1, 1 §2 (Alan Watson ed. [Latin texts, T. Mommsen and P. Krüger eds.], 1985).

[47] Alain Supiot, 'The public-private relation in the context of today's refeudalization' (2013) 11 ICON 129. For a critical account of the public/private distinction in the frame of critical legal studies and its historical roots in Justinian's *Digest* see also Scott Veitch, 'Law and the public/private distinction' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Theory* (Edwar Elgar Publishing 2019) especially section 2. See also Ulrich Beck, *Risk Society – Towards a New Modernity* (Sage 1992) 133. According to this author 'the private sphere is not what it appears to be: a sphere separated from the environment. It is the outside turned inside and made private, of conditions and decisions made elsewhere'.

[48] See Supiot (n 47) 139.

[49] ibid. Vassalage combines a personal element, a status such as the homage or serfdom, and a real element, which is a commodity burdened with a set of obligations.

Contrary to feudal systems, in modern legal orders the source of obligations for the welfare of the individuals is to be found in the public sphere, embodied in the fiction of the Nation. This one is responsible for those tasks of social assistance previously performed by private associations of mutual aid. This new conception of State's tasks and responsibility paved the way for the birth of what is normally considered to be the modern welfare state. However, the process of welfare state formation was not a direct consequence of the emergence of a public sphere. It was instead a reflection of the slow development of a market economy and a response to the commodification that the new economic order entailed.

1.3.2 The emergence of welfare capitalism: solidarity and public debt

The tendency towards centralization and nationalization which accompanied the birth of modern nation-states already occurred between the 15th and 16th centuries with the action of the embryonic state fostering the mercantile need for a larger market and internal commerce.[50] Mercantilism was the causal force behind the creation of a market on a national scale, which led to the destruction of local particularisms and unification of atomized, feudal countries.[51]

This process, however, did not amount to an abrupt dismantling of the feudal conception of economic and social ties. As observed by Polanyi, no significant difference in terms of economic ethos existed between mercantilists and feudalists as they both were 'equally adverse to the idea of commercializing labour and land - the precondition of market economy'.[52] Until the Industrial Revolution, there was not a self-regulating market. The economic system was still 'embedded' in social relations; 'markets were merely an accessory feature of an institutional setting controlled and regulated more than ever by social authority'.[53]

It was only in 1791 that, as mentioned above, the French guilds were banned, and feudalism abolished. Similarly, only in the 19th century did the first attempt to repeal pre-capitalist social legislation take place in England.[54] Through said social legislation, the emerging English state had started regulating the social aid offered by parish and craft guilds. However, far from being the

[50] See Polanyi (n 16) 68-69. As he put it, the centralised state was the product of Commercial Revolution.
[51] ibid 69. Polanyi identifies the unfolding process on different levels: on the economic side, this centralisation was driven by private capital, while on the administrative side it was made possible by the territorial application of law.
[52] ibid 73.
[53] ibid 70.
[54] ibid 73. Polanyi clarifies this tendency with two examples: the repeal of 1563 Statute of Artificers in 1813 and the repeal of the Elizabethan Poor Law in 1834.

direct provider of welfare provision, the state had not replaced the role performed by these communal institutions. This type of early state intervention had limited itself to the unification of labour legislation on a national basis. Although one might think that this legislative intervention was somehow an archetypical manifestation of the modern welfare state, it must be said that it was still deeply immerged in an institutional setting, where 'in contrast to the naked commodity-logic of capitalism, the majority could count on prevailing norms and communal organisations for subsistence'.[55]

Quite illustrative in this respect is the Speenhamland law of 1795. It represented an attempt to resist the pernicious commodification of labour heralded by the nascent market economy. However, it achieved the opposite effect of what it intended, as it rested on a fundamental contradiction. Specifically, it tried to isolate the workforce from the perils of the market without realising that depriving the workforce of its purchasing power in a capitalist order would result in starvation. Despite its benevolent intent, the Speenhamland law produced more pauperism than relief from poverty, showing all the fragility of an approach firmly anchored on paternalism. Introduced as a way to mitigate the English Poor Law of the Elizabethan era,[56] this Speenhamland system aimed to create an allowance scale indexed to the price of bread, so as to ensure a minimum income to rural workers regardless of their earnings.[57] It was basically a way to subsidise farm wages below the threshold of subsistence out of taxes (specifically, through local 'poor rates'). The financial burden of such wage subsidies was then placed upon the parish, with the perverse consequence that employers had an incentive to not raise wages. In sum, instead of protecting workers from their total dependence on the market, the Speenhamland law preventively impeded the very creation of a labour market.

As the Speenhamland story teaches then, in a nascent social order in which everything has a price, labour cannot be prevented from having one. Labour was indeed the last element of the trio – capital, land, labour - to be commodified. In 1834, with the Victorian Poor Law Reform, the

[55] Gøsta Esping-Andersen, *The three worlds of welfare capitalism* (Princeton University Press 1990) 38. The author argues that, contrary to *laisse-faire* poor relief, ''pre-capitalist' social aid was generous and benign'.
[56] Under the Poor Relief Act 1601, commonly known as the Elizabethan or Old Poor Law, only those who cannot work because too ill or old (so called 'impotent poor') were entitled to poor relief in parochial workhouses. Distinguishing between 'deserving' and 'undeserving' poor, this system forced the poor to work irrespective of the wage they could get. Moreover, the Settlement Act of 1662 prevented migration of workers from one parish to another on the basis of a more generous relief. Each parish was considered to be responsible only for its own established poor.
[57] Despite the denomination, the Speenhamland was not an enacted law. Also known as Berkshire Bread Act, it was instead a system of protocols agreed upon by magistrates who met at the Pelican Inn, a location near Speenhamland in Berkshire, in 1795 to discuss grain price rises.

Speenhamland system - which at least in theory helped also those who were in employment - was abolished and the poor were left to the devastating effects of the market. That year marked an important transition: as suggested by Polanyi, it inaugurated the age of a new social order, the one of industrial capitalism. The Poor Laws had the merit to transform charity in law, as they levied taxes, the so called 'poor rates'. However, they did not signal the beginning of a new conception of solidarity, the cement that underpins the welfare state, because they were still a matter of each parish, the very administrative unit through which the poor relief was administered.

Only the emergence of a wholly-market society finally prompted the creation of those solidarity mechanisms through which the welfare of individuals is ensured. The modern welfare state, more than being a by-product of modernity, is a by-product of capitalism. The extension of markets not only geographically but also in terms of the objects involved in commercialisation led, as a reflection, to the creation of a network of protective measures to counteract the negative effects of a self-regulating market. Given the reciprocity of these concomitant but opposite developments, Polanyi called this process a 'double movement'.

Contrary to the old Poor Law, the nascent welfare state followed the development of a competitive labour market. It constituted the natural response to the insurgence of new risks arising from the total exposure of the individual to the market. And most importantly, this response was no longer coming from the parish under the auspices of a benevolent paternalism, which distinguished the "deserving" from the "undeserving" poor. It came from an equal conception of men before the law. With the development of capitalism, a new balance had to be found between the capitalist interests of the nascent bourgeoise and the needs of the working class. Inflation first, and accumulation of public debt later were the solutions adopted to accommodate those antithetical demands.[58] Especially public debt was the instrument through which the state ensured non-market allocation of resources through citizenship entitlements. It supported the creation of a sphere in which individuals are equal as they count *qua* citizens rather than *qua* market actors.

The emergence of such a space evokes Tonnies' distinction between 'Society' (*Gesellschaft*), where individuals interact through transactions and obligations are contractual in nature, and 'Community' (*Gemeinschaft*), where obligations stem from a common consciousness

[58] Wolfang Streeck,'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5.

of being part of the same 'community of fate'.[59] In the modern welfare state, solidarity commitments are undertaken outside the sphere of contractual obligations and are mediated by public law. It is the state, indeed, that assumes the mandate to operate social distribution of services and benefits: public debt is the result of social expenditure for such entitlements, which aim at the achievement of equality between individuals.

1.3.3 Solidarity and Citizenship: the promise of equality

The idea of 'citizenship' condensed this promise of equality and stood out as a very power instrument through which cementing the loyalties of individuals to the body of the nation. But citizenship is not only political membership, denoting the belonging to a political community. It is also a formal legal status on the basis of which *rights*, including *social* rights, are conferred to individuals. For this reason, in his seminal contribution *Citizenship and Social Class*, T.H. Marshall described citizenship as the vital part of the modern welfare state.[60] Contrary to the feudal fragmentation and hierarchy of social statuses, the modern concept of citizenship indicates a status that has a universal reach. Although initially embedded in a discourse of formal egalitarianism, which was essentially functional to the capitalist social order, citizenship evolved into a 'ideology that provide[s] the main source of whatever solidarity modern societies possess'.[61]

The most known classification of rights – the triad of civil, political, and social rights - perfectly illustrates said chronological evolution. As argued by Marshall, each set of rights corresponded to the progressive emergence of different types of citizenship. Civil citizenship was the first in the succession, and it accompanied the transition from a feudal order - largely based on *involuntary* personal ties and hierarchical positions - to a modern society, where individuals are *voluntary agents* who stand equal before the law. As has been said, civil citizenship has marked the transition 'from status to contract'.[62] The essential hallmark of this type of citizenship was indeed freedom, including freedom of contract, intended as free agency to voluntarily decide upon the own individual sphere.

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[59] See Ferdinand Tönnies, *Fundamental Concepts of Sociology: Gemeinschaft and Gesellschaft* (C. P. Loomis tr., American Book Company 1940).
[60] Thomas Humphrey Marshall, *Citizenship and social class: other essays* (CUP 1950).
[61] Fernando Atria and Costanza Salgado, *'Social Rights',* in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni *Research Handbook on Critical Theory* (Edwar Elgar Publishing 2019). See also Lockwood cited in Atria and Salgado *op. cit*., David Lockwood 'For T. H. Marshall' (1974) 8 Sociology 363.
[62] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (1st edn 1861, CUP 2012) 170.

However, the principle presupposed by civil citizenship was that of formal equality. The deepening of social stratification that capitalism caused led to a more substantial understanding of equality. In the twentieth century, then, equality was progressively anchored to the concrete reality of individuals' economic conditions, which are those that determine existing material differences between men. Social citizenship then became the vehicle to fight social inequalities. As has been noted, the Marshallian citizenship is 'the clearest and most cogent answer to the question which was posed but never satisfactorily answered by Durkheim: namely, what is the basis of the "organic solidarity' of modern societies?'.[63] Citizenship offered the theoretical but also affective ground to build durable social ties and forge duties of social assistance between individuals. Solidarity thus became one of the many facets of citizenship, a concept that has long been construed as multi-dimensional.

Notwithstanding the intuitive meaning it possesses in the common parlance, there is little agreement on what citizenship is, except for its self-evident relational character (membership).[64]This definitional problem has brought to the surface all the multiple dimensions of citizenship. Three main 'usages' are usually attributed to citizenship: (a) citizenship as a system of rights, (b) citizenship as a form of political participation, and (c) citizenship as expression of identity/solidarity.[65] Not infrequently, citizenship theories address this latter dimension of citizenship as a psychological matter, construing solidarity as an affective category. The emotive connotation attributed to it might be explained with the fact that this understanding of solidarity is generally interlinked with the concept of identity. But while identity has a strong emotional appeal, solidarity alone does not per se implicate a sentimental feeling. Quite the contrary, bonds of solidarity between members of a political community do not ripe spontaneously: they are backed up and sanctioned by the law. Duties of solidarity between citizens are expressed mostly in the

[63] Lockwood (n 61) 365.

[64] The relational nature of citizenship has been clearly exposed by David Held who argued how citizenship is essentially about 'reciprocity of rights against, and duties towards, the community'. See David Held 'Between State and Civil Society: Citizenship' in Geoff Andrews (ed), *Citizenship* (Lawrence and Wishart 1991) 20. As every other problem of political philosophy, citizenship – to say it with Kymlicka and Norman – 'involves relations among citizens or between citizens and the state', see Will Kymlicka and Wayne Norman, *'Return of the citizen: A Survey of Recent Work on Citizenship Theory'* (1994) 104 Ethics 352, 353.

[65] For this classification - which includes a fourth distinctive category, citizenship as a legal status - see Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Indiana Journal of Global Legal Studies 447. See also Linda Bosniak, 'Citizenship' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003).

language of law, as they manifest as the duty to pay taxes and social security contributions.[66] In other words, solidarity as a dimension of citizenship cannot but be *social* solidarity, which is that kind of solidarity that underpins the modern welfare state. It is not a voluntary act of subsidisation. It is not charity, it is duty against which a right, rather than an expectation, corresponds. Far from being a *motive* for mutual assistance between members of a society, solidarity is an *institutionalised act.*

What is instead 'affective' in this picture is the *justification* for solidarity, which has long been found in *nationality*. Nationality, rather than solidarity itself, has long been the given, unchallenged motive behind subsidisation. Advocate General Fennelly vividly explained said principle of subsidisation in *Sodemare*, where he argued that 'social solidarity envisages the inherently uncommercial act of involuntary subsidisation of one social group by another'.[67] Basically, the one described is an act of redistribution, which presupposes the correction of the outcomes produced by the sole operation of the market. Through redistributive policies, 'a proportion of the wealth generated or enjoyed by certain members of a group is placed at the disposal of public institutions in order to satisfy the social needs of other members of the group'.[68] National citizenship has thus been used to attain the goal of de-commodification of individuals: the granting of social rights weakened their dependence on the market, as their survival was not entirely conditional upon the trade of their labour. With a bit of more cynicism, it can be said instead that national citizenship employed the 'historical trick' of horizontal solidarity to normalise 'existing [class] stratification'.[69]In any case, the moral catalyst in forging said bonds of horizontal solidarity between citizens has been the collective feeling of belonging to the same *national* community.

As has been noted, this shared sense of community has a 'morally demanding' component, as 'citizenship built upon ties of national solidarity […] is geared towards security through serial

[66] Alain Supiot, 'Judicial Enforcement of Social Solidarity in View of Recent European, German and French Jurisprudence' in Jeffrey Ellsworth and Johan ven der Walt (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos, Bloomsbury 2015). This author notices how the typical instruments through which citizenships has built the modern welfare state have been taxes and social security contributions.
[67] C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-03395.
[68] Michael Dougan and Eleanor Spaventa, "Wish you weren't here…': new models of social solidarity in the European Union' in Michael Dougan and Eleanor Spaventa (eds), *Social welfare and EU law* (Hart Publishing 2005) 184.
[69] Neil Fligstein paraphrasing Karl Deutsch. See Neil Fligstein, *Euroclash: the EU, European Identity, and the Future of Europe* (OUP 2008) 130.

reciprocity and redistribution'.[70] Thus, the nation has always been the traditional site of (social) solidarity, as well as social citizenship has always been a national artefact. Despite the controversial nature of citizenship[71] and the various understandings of this concept (largely reducible to the liberal or the republican tradition),[72] an uncontested element is its evident correlation with a community territorially (and culturally) organised along the boundaries of the state. *Prima facie*, this linkage between citizenship and the nation state seems to be ontologically necessary rather than historically contingent. And yet, in ancient Greece and Rome, for instance, citizenship was not bound up with a particular form of polity, and definitely not the state, which is a more recent form of political organisation.[73]

The fact that, historically, citizenship has been equated with membership of a polity, territorially defined by the boundaries of the nation-state, does not mean it must be ineluctably so. More recently, there has been a wave of studies revisiting citizenship beyond the nation-state.[74] In the aftermath of the new 'great transformation', global in reach and nature, traditional categories co-existing with(in) the nation-state have been tentatively readapted to a post-national context. A corollary of such an operation has been, for instance, the conceptual separation of citizenship from nationality,[75] - two terms that are often used as interchangeable[76] - in the context of European integration.

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[70] Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 JCMS 37, 51.

[71] On citizenship as a contested concept see Michael Walzer, 'Citizenship' in Terence Ball, James Farr and Russell L Hanson (eds), *Political Innovation and Conceptual Change* (CUP 1989). However, in the ancient era, Aristotle had already noticed how "the nature of citizenship is a question which is often disputed; there is no general agreement on a single definition'. See Aristotle, *Politics* (E. Barker trans. and ed., OUP 1948).

[72] The liberal tradition generally emphases the legal dimension of citizenship, whilst the republican view magnifies the communitarian aspect base on political participation. In this regard, see Richard Bellamy, Dario Castiglione and Jo Shaw, *Making European citizens: civic inclusion in a transnational context* (Palgrave Macmillan 2006).

[73] For the origins and history of citizenship see Paul Magnette, *Citizenship: The History of an Idea* (London, ECPR 2005). See also Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) chapter 1.

[74] Darren J. O'Byrne, *The Dimensions of Global Citizenship. Political Identity Beyond the Nation-State* (Frank Cass 2003).

[75] For the de-coupling of citizenship from nationality see Joseph H. H. Weiler, 'To be a European Citizen – Eros and Civilization' (1998) Working Paper Series in European Studies, University of Wisconsin. See also Carlos Closa, 'Citizenship of the Union and nationality of Member States' (1995) 32 CMLR 487 and Siofra O'Leary, 'Nationality and Citizenship: A Tale of Two Unhappy Bedfellows' (1992) 12 YEL 353, both cited in J. H. H. Weiler, *op. cit.* 21.

[76] See Global Citizenship Observatory ('GLOBALCIT'), *Citizenship* http://globalcit.eu/glossary_citizenship_nationality/. Here, citizenship is defined as 'a legal status and relation between an individual and a state that entails specific legal rights and duties', which is often used as a synonym for nationality. At the EU level, this convergence of meaning was present at an early stage of integration, before the introduction of European citizenship with the 1992 Maastricht Treaty. In this regard, see for instance Advocate General Trabucchi in case C-21/74 *Airola v. Commission* [1975] ECR 221 at 231 and 232: 'The status of nationality is, like all other rights conferring status, the legal classification of a person, carrying with it a number of rights, obligations, capacities and disabilities which are normally governed by a legal system'. At the international level, a definition of nationality that

1.4 European Union: a solidarity enterprise?

The previous section has exposed the function of solidarity in the private and public spheres, respectively. It has highlighted how, on top of its original function to protect creditors, solidarity has acquired a different meaning, that of protecting the most vulnerable in society. The existence of a public sphere, traditionally occupied by the state, has made possible the performance of this function. This section explores whether a post-national entity can also enable this social protection function.

Undoubtedly, the European integration process has been one of the most evident challenges to the nation-state, making national boundaries more blurred and porous also with regard to social provision. To a certain extent, the European Union has indeed redrawn the boundaries of national welfare states, opening them up to the transnational claims of mobile citizens.[77] The indirect intrusion of EU free movement provisions into the national welfare states is controversially interpreted in the literature. Some commentators have warned against its potential negative impact on the social fabric of welfare states and the lack of legitimacy of the EU action in this field,[78] despite its 'positive contribution' to social provision.[79]

The problem of how to conceive of the impact of the EU law on national social protection systems depends on the thin conceptual vision of social justice connected with EU citizenship. Some scholars have expressed scepticism about the capacity of the EU to replicate at the supranational level the patterns of social solidarity existing in the national sphere. In this view, the EU cannot be a post-national solidarity collective because even when it promotes solidarity between EU citizens it does so by borrowing market categories. Specifically, it has been argued

similarly recalls the traits of citizenship as a legal status (but that is also rich of other non-legal nuances) can be found in the case *Nottebohm* of the International Court of Justice. See *Nottebohm Case (Liechtenstein v. Guatemala)* Second Phase, 6 April 1955 [1955] ICJ Rep 4 at 23: 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred […], is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.

[77] Maurizio Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (OUP 2005).

[78] See for instance Oxana Golynker, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005) 30 ELR 111, 120; Michael Dougan, 'The Court helps those who help themselves…The legal status of migrant work-seekers under Community law in light of the *Collins* judgment' (2005) 7 European Journal of Social Security 7, 18: 'the case law on Union citizenship […] amounts to an exercise in social engineering which touches upon the underlying moral fabric of national solidarity systems'; Kay Hailbronner, 'Union citizenship and access to social benefits' (2005) 42 CMLR 1245, 1264 -1267.

[79] See Dougan and Spaventa (n 68) 294 who analyse 'supranational models of solidarity which support and supplement (rather than threaten or undermine) the domestic welfare state'.

that the cross-border access to the national welfare systems is modelled on the economic freedoms, and that the principle of equal treatment - lending a legal basis to social integration in the host state - is individualistic in nature.[80] Access to social rights in the host country would then end up corroding the collectivist foundations of welfare systems. Consequently, the pressure indirectly exerted on national welfare choices could result in lower standards of social protection. The inclusion of EU citizens in national welfare systems, however, can be read in more positive terms, namely as an expression of a meaningful (albeit still infant) notion of EU citizenship.[81]Notwithstanding their different approach, these two readings share the assumption that, even in a post-national framework, *social* solidarity is, either way, a matter between *individuals* - although mediated by state intervention.

Thus, the concept of solidarity in the EU has generally maintained this 'people-oriented' meaning, placing itself on the horizontal plane of society. Scholarly reflection has long explored solidarity in relation to EU citizenship, which the ECJ case law has deemed to entail a 'certain degree of solidarity between citizens of different Member States'.[82] This relationship between citizenship and solidarity has been described in terms of 'overlap or causal connection', because it implies that citizenship without solidarity 'is hardly citizenship at all', or in any case 'a gutless project'.[83] After all, as Habermas puts it, citizenship is nothing but 'an abstract, legally mediated solidarity between strangers'.[84]

This interpersonal dimension of solidarity has long influenced the discourse on redistribution in the EU. Free movement provisions, constituting the core of EU citizenship, have performed a redistributive function at the European level, allowing cross-border access for EU citizens to welfare benefits. It is no coincidence then that some commentators have seen other provisions of the founding Treaties, such as those regarding the common agricultural policy or the structural

[80] See Alexander Somek, 'Solidarity decomposed. Being and time in European citizenship' (2007) 32 ELR 787. See also Agustín José Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship' (2014) 15 GLJ 907; Stefano Giubboni, 'European Citizenship and Social Rights in Times of Crisis' (2014) 15 GLJ 935.

[81] The difference between the two approaches seems to lie in the fact that the first shares the view that social provision is still a strictly national matter, while the second already assumes a European component in the social provision.

[82] See Case C-184/99 *Grzelczyk*v *v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 44.

[83] Malcom Ross, 'The Struggle for EU Citizenship: Why Solidarity Matters', in Anthony Arnull, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 285.

[84] Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 New Left Review 5,16.

funds, as forms of redistribution between States and not citizens, in that they do not directly involve citizenship entitlements.[85]In the same vein, others have advocated the replacement of such arrangements with 'redistribution policies which are no longer conceived of as state to state but as citizen to citizen and are embodied by a criterion of distributive justice'.[86] In short, it has been asked whether the European Union can be described as a community of people rather than a mere order of states.[87]

As shown above, the general debate on European solidarity, especially post-Maastricht, has traditionally focused on the emergence of a 'transnational European welfare space',[88] due to the introduction of Union citizenship.

In the Pre-Maastricht era, however, there have been attempts to conceptualise solidarity in different terms. Specifically, some authors have pointed to the interstate dimension of solidarity, i.e. solidarity between Member States, as well as its role in the functioning of a common organisation, i.e. solidarity towards the then Community.[89] Notwithstanding the aim to examine the full significance of solidarity - sometimes clearly stated as the intention to explore the 'triple nature of solidarity as it constitutes a political, economic and social objective of the Community'[90] - earlier contributions have mostly looked at solidarity as a political means to achieve unity. As a result, solidarity has been assimilated to the principle of loyalty (vis-à-vis the Community), mutual

[85] See Faist (n 70) 51 where agricultural policy and structural funds are discussed in the context of a 'solidarity deficit', in that these policies do not 'imply explicit individual entitlements'. See also and Miguel Poiares Maduro, "Europe's Social Self: 'The Sickness unto Death" in Jo Shaw (ed), *Social Law and Policy in an Evolving EU* (Hart Publishing 2000) 342, where EU economic and social cohesion policy is criticised for being the 'result of ad hoc intergovernmental bargaining' rather than 'a constitutive element of an emerging polity founded upon a social contract which includes a criterion of distributive justice'.

[86] Poiares Maduro (n 85) 348-349. This contribution does not argue for the necessity of a supranational direct taxation or a European social security system but for a social contract at the EU level, so that directly or indirectly redistributive policies could be underpinned by a deliberate criterion of social justice *'among European citizens and not states'* (emphasis added).

[87] Ross, 'The Struggle for EU Citizenship: Why Solidarity Matters' (n 83) 283.

[88] See Michael Dougan, 'The Spatial Restructuring of National Welfare States within the European Union: the Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon' in Ulla Neergaard, Ruth Nielsen and Lynn M. Roseberry (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (Djøf Publishing Copenhagen 2009).

[89] See Epaminondas Marias, 'Solidarity as an objective of the European Union and the European Community' (1994) 2 Legal Issues of European Integration 85. Pierre Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice' *in Miscellanea W. J. Ganshof Van der Meerch: Studia ab discipulis amicisque in honorem egregii professoris edita*, Vol II (Bruylant 1972) 327. Although Marias's contribution does not technically date back to a pre-Maastricht era, it does not engage with the legal scope and meaning of the then newly introduced concept of EU citizenship.

[90] Marias (n 89).

trust (vis-à-vis other Member States) or mutual assistance.[91] In this latter fashion, solidarity has then been vested with an economic nuance,[92] though without any significant repercussion on its general conceptualisation. Generally, by retracing the pre-Maastricht case law, these pioneering studies have thus interpreted solidarity, the obscure objective of the founding Treaties, as the equivalent of a duty of cooperation in spite of own conflicting conceptions of national interest.[93]

Only recently, the literature has adopted a different approach to solidarity, not least because the multiple crises of the European Union - the financial crisis, Brexit, and the migration crisis, to cite just those having a more evident distributional dimension – have questioned the place of this nebulous concept in the process of European integration. A new way of understanding solidarity in the EU - different from both the citizenship narrative and the pre-Maastricht discourse - has emerged. Some scholars have indeed started to transpose the concept of solidarity – which is basically a sociological concept – to the sphere of relations between Member States, namely to the sphere of international law.

It is trite to observe, however, how EU law departed significantly from international law. The *sui generis* nature of the EU is widely accepted; so is its break with the Westphalian political imaginary, which 'maps the world as a system of mutually recognizing sovereign territorial states'.[94]Contrary to international law, which is an arena dominated by states, EU law establishes a direct link with individuals, thus without the intermediation of Member States. As famously stated in the foundational case *Van Gend en Loos*, the European Union 'constitutes a new legal order of international law […] the subjects of which comprise not only Member States but also their nationals'.[95] The preamble to the Treaty of Rome shares this view, referring not only to

[91] ibid 87. According to Pescatore, cited in this contribution, the two expressions in which the case law initially articulated the principle of solidarity were the notion of Community preference and the notion of mutual assistance. Drawing on this finding, this contribution identifies five distinctive ways in which Community solidarity was generally understood: 1) as a principle deriving from the very nature of the Community; 2) as a principle arising from the notion of Community preference; 3) as mutual assistance; 4) as a principle based on Articles 5 EEC and 192 EAEC, according to which Member States should adopt all the measures necessary to fulfill their Treaty obligations; 5) as a principle prohibiting Member States from taking the law into their own hands.

[92] Indeed, solidarity as mutual assistance can entail the adoption of positive measures such as the grant of credits to Member States experiencing difficulties with their balance of payments.

[93] See Case C-39/72 *Commission v. Italy* [1973] ECR 101 para 24.This was the first case that used the notion of solidarity to describe the relations between Member States, and in particular to justify the duty to fulfil Community obligations even when Community provisions are perceived as being against national interests.

[94] Jo Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space* (CUP 2007) 21. In a footnote the author uses these words to agree with Nancy Fraser's notion of Westphalia, intended as more than a strictly legal arrangement. See Nancy Fraser, 'Framing Justice in a Globalising World' (2005) 36 New Left Review 69.

[95] See Case C-26/62 *Van Gend en Loos* [1963] ECR 1.

Member States but also to peoples. The European Union, then, contrary to other international organisations, is not a mere 'facilitator' between Member States, but it is a *legal order* conferring rights (and obligations) to individuals as well. The conferral of rights upon individuals, however, was not per se an original feature if one considers the existence of international treaties that recognise and enshrine human rights. And yet, the novelty of the EU system is to be found in the peculiar enforcement system it created. The confluence of two original doctrines, direct effect and supremacy, coupled with an ingenious mechanism such as the preliminary reference procedure of now Article 267 TFEU, allowed individuals to directly invoke EU law before their national courts as if it were domestic law.[96] Individuals, then, became not only the 'objects and subjects' of EU law, but also the "legal vigilant[s]' of the [EU] public rule of law'.[97]

This complex entity is not reducible to a classical organisation of international law; it is more than a platform of interstate cooperation. For this and all the above-mentioned reasons, the paradigm that reduces an EU notion of solidarity to *interstate* solidarity, i.e. solidarity between Member States, cannot capture the complexity of the EU constitutional (rather than international) order. In this regard, some post-Maastricht attempts to offer a theoretical foundation of solidarity in the EU have rightly acknowledged the multidimensional nature of the concept. As has been noted in one of these theoretical studies on the topic, 'a full account of EU solidarity must develop principles for three main contexts', which reflect 'the complex nature of European integration'.[98] Specifically, it is said that a EU notion of solidarity must be sound at the national level, expounding obligations among nationals of member states (principles of *national* solidarity); at the interstate level, establishing obligations among member states (principles of *member state* solidarity) and at the transnational level, defining duties among EU citizens *as such* (principles of *transnational* solidarity).[99]

Despite the intention to explore the multifaceted articulation of solidarity, though, such a study reduces a sound notion of solidarity in the EU to reciprocity-based internationalism. This

[96] The original element of the EU system was not just the direct effect 'discovered' by the CJEU, considering that the self-executing character of some provisions was not a phenomenon totally unknown to international law. Nor it was supremacy. It was instead the enforcement of this supranational law, which proved itself to be very similar to *domestic* enforcement mechanisms. On direct effect and supremacy as doctrines not totally new under international law see Derrick Wyatt 'New Legal Order, or Old? (1982) 7 ELR 147.

[97] Joseph H. H. Weiler, 'Van Gen en Loos: The Individual as Subject and Object and the dilemma of European legitimacy' (2014) 12 ICON 94, 96.

[98] Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 214, 217.

[99] ibid.

specific framework is deemed to be suited to all three dimensions of European integration, notwithstanding the fact that it reduces the EU to 'a way for member states to enhance their problem-solving capacities in an era of globalisation', a solution through which 'indemnifying each other against the risks and losses implicit in integration'.[100]By focusing on the intergovernmental dimension of the EU, though, this theoretical account neglects the most original feature of the European post-national polity, namely the direct link established by the EU with individuals.

The (re)discovered interest for solidarity in the recent EU studies has not challenged this interstate dimension, which remains the main paradigm within which a European concept of solidarity is explored.

In fact, a significant aspect of this emerging field of study is the application of the most influential way of understanding solidarity in the sociological domain, i.e. the Durkheimian account of *mechanica*l and *organic* solidarity, to the relationships between Member States. References to the Durkheimian paradigm of solidarity are generally made to explain the behaviour of Member States and whether the latter is driven by pure altruism or 'enlightened' self-interest.[101]For instance, it has been said that the European Union, similarly to modern societies, lacks mechanical solidarity, because it is based on the factual interdependence of its Member States rather than on those emotional ties that underpin mechanical solidarity.[102] In accordance with the Durkheim paradigm, thus, solidarity in the EU is deemed to be 'organic', but, quite surprisingly, it is also considered an ineluctable 'product of self-interest'.[103]

Two understandings of 'organic solidarity' have indeed been elaborated: 'direct solidarity', as regarding those circumstances in which Member States offer help 'in face of a risk that is equally

[100] ibid.

[101] For the uses of Durkheim's notion of solidarity see Fernandes and Rubio, 'Solidarity within the Eurozone: How Much, What for, For How Long?' (n 5) 3-8; Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 167; Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7; Gianni Lo Schiavo, 'The European Stability Mechanism and the European Banking Union: promotion of organic financial solidarity from transient self-interest solidarity in Europe?' in Andrea Biondi, Egle Dagilyt and Esin Küçük (eds), *Solidarity in the EU Law: Legal Principle in the Making* (Edward Elgar Publishing, 2018); Esin Küçük, 'Solidarity in EU law: an elusive political statement or a legal principle with substance?' in Andrea Biondi, Egle Dagilyt and Esin Küçük (eds), *Solidarity in the EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018) 44, where she says that Durkheim's understanding of organic solidarity seems to capture the role that self-interest plays in modern, differentiated societies'.

[102] Fernandes and Rubio (n 5) 4; Hinarejos (n 101) 167.

[103] ibid. Such a reference to the self-interest is not coherent with the Durkheimian framework. As said above, for Durkheim rational egoism could not form a basis for solidarity.

spread among [them]', and 'enlightened self-interest solidarity', concerning those cases in which they act for the sake of the common good, i.e. without any immediate advantage but with ultimate benefits in the long term.[104] According to this distinction, inter-state solidarity in the EU is inspired by two different rationales. The first one is direct reciprocity, typical of insurance schemes, where the aid offered is reciprocal in the sense that today's donors can be tomorrow's receivers. Examples of this logic are Article 222 TFEU, which envisages a joint action in case of terrorist attacks and natural or man-made disasters, the EU Solidarity Fund, which offers aid in case of major natural disasters, [105] as well as Article 122 (1) TFEU, which provides for assistance in case of severe problems in the supply of certain products, especially in the energy sector.[106] All these provisions imply the symmetry of the risk involved, given that any Member State can be confronted with the same fortuitous events in the future. This type of solidarity is a one-off, negotiated effort based on voluntarism. The second rationale driving solidarity in the EU is instead the rational realization that joint efforts and coordinated action are indispensable to the viability of a common project and the stability of a group. Within this logic, countries that are members of a community of states commit to help their weaker partners because they would ultimately benefit from doing so. Helping other countries, then, would ultimately amount to serving own self-interest. An illustrative example of this type of solidarity, which is instead an institutionalised act based on structural mechanisms, has been found in the cohesion policy (Article 175 TFEU). In this regard, it has been said that by offering assistance to poorer countries benefits the donor countries as well. It is assumed indeed that the economic development of the receiving countries would have a positive economic impact for the donors 'in terms of growing exports, growing investment opportunities or decreasing population inflows.'[107]

Although descriptive of some developments occurred in the EU in the aftermath of its multiple crisis, this framework suffers from various inconsistencies. First, in both the abovementioned conceptualisations, solidarity is always driven by self-interest. Even in the case of direct reciprocity, the motives underpinning a state's conduct are linked with the need to insure

[104] Fernandes and Rubio (n 5) 5.
[105] See Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund OJ L 311, as amended by Regulation (EU) No 661/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 2012/2002 OJ L 189.
[106] The first two examples can be found in Fernandes and Rubio (n 7) 4-5, whereas the latter is made by Hinarejos, (n 101) 167.
[107] Fernandes and Rubio (n 5) 5.

itself against the same risk. Second, the analysis costs-benefits behind this understanding of solidarity seems to be economic in nature. The benefits being assessed are implicitly economic, whereas an action cannot necessarily result in' positive economic returns' for the donors or these returns can be less than the costs assumed.

In any case, the association of self-interest with the concept of organic solidarity seems dissonant with Durkheim's framework. In his account, solidarity is the antagonist of self-interest, even in its form of 'enlightened self-interest'. Solidarity is indeed the element that stands in contrast with social contract or economic calculation, which are instead the bases of other different social theories. Durkheimian solidarity has a moral component which, transposed to the European level, gets totally lost.

Hence, solidarity in the European Union ends up acquiring this self-interest connotation, which, as the first studies on the theme have showed,[108] was instead absent in the earlier case law. It is worth recalling, in this respect, how in old cases solidarity did not necessarily imply a perfect balance between benefits and losses. As repeatedly said by the Court, Member States cannot rely on their own conception of national interest to break 'the equilibrium between the advantages and obligations' flowing from their membership.[109] In this original understanding, then, the duty of solidarity run against national interest; on the contrary, in the post-crisis scenario national interest has become the justification for solidarity with fellow Member States. The ascendance of this self-interest element might be linked with the new meaning that solidarity seems to have assumed in the EU after the crisis, namely that of *redistributive* solidarity. In its original jurisprudential usage, instead, solidarity did not have this redistributive connotation, being rather a corollary of EU law supremacy. Indeed, ECJ's arguments based on solidarity were motivated more by the need to ensure the homogenous and effective application of EU law than by genuine distributional concerns.

In a more nuanced view, however, the purely economic element of self-interest is interpreted as 'transient' inasmuch as it is functional to the achievement of organic (financial) solidarity.[110]

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[108] In this regard, see Marias (n 89). Cf also André Marchal, *L'Europe Solidaire,* Vol 2 (1st edn, Éditions Cujas 1964) 182, cited in Marias (n 89).

[109] C- 128/78 *Commission v. United Kingdom* [1979] ECR 419 para 12. See also C-39/72 *Commission v. Italy* [1973] ECR 101 para 24, which articulated the duty of solidarity in these terms for the first time. In this line of case-law, the duty of solidarity has 'negative' contours, in the sense that it does not imply a positive action from Member States. Rather, it implies Member States' abstention from a selective and incomplete application of EU law.

[110] Lo Schiavo (n 101) 162-163.

The transiency of self-interest is here a means to reach genuine solidarity, which is intended as solidarity for the benefit of others. This account seems to hint at the attainment of a more purposive understanding of European integration itself, without though fully unveiling what organic financial solidarity is ultimately for. Specifically, in a passage, it traces back the origins of organic solidarity to the Schuman declaration of 1950, which spelled out the concept of *de facto* solidarity as a way to overcome the hostilities of the Second War World through the pooling of economic resources. However, it also recalls how in the words of the Schuman declaration, European integration should not only concern states; it ultimately aimed at the creation of 'a Union of people, values and institutions which centres on the interdependence of individuals.'[111]

Individuals were then the focus of the picture since the very beginning. Given the fact that the direct link that the EU established with individuals placed the EU itself beyond the traditional patterns of international law, it is worth exploring how international law theories construe solidarity, so as to understand, by way of comparison, how a sound account of solidarity in the EU should look like.

1.5 Conceptualisations of solidarity beyond the nation-state

So far, it has been shown that a meaningful notion of EU solidarity should be construed as multidimensional. However, a recent doctrinal trend has applied a sociological concept such as solidarity, which classically pertains to the social realm, to the relationships between Member States thus reducing it to an interstate dimension. This section explores the conceptualisations of solidarity between states offered by international relations theories. Although it has been established that the EU is not an ordinary international organisation, these accounts could offer more in-depth insights into why solidarity in the EU context should be differently framed. Hence, this section looks at other possible conceptualisations.

[111] ibid 163-164.

1.5.1 Solidarity in international relations theories

The process of European integration challenged the classical pattern of international relations (IR) and, to a certain extent, the classic liberal theory of international law, intended as inter-sovereign law.[112]

Regional cooperation presupposes a modicum of solidarity and, as in the case of the EU, it can lead to significant transfers of sovereignty to a supranational organisation. To explain this cooperative aspect of international relations, resulting in the creation of shared norms and institutions, many IR theories have adopted categories which are generally used in political philosophy or social analysis. Solidarity has been, sometimes implicitly, one of them.

For instance, it has been proved how international law replicates the liberal theory of the State.[113] In particular, notions such as sovereignty, self-determination or independence resemble the meaning that analogous concepts of liberty and autonomy have in the domestic sphere. The transposition into the international arena of 'domestic' categories, however, has not only concerned liberal ideas, such as those above, which pertain to the sphere of relations between the individual and the State. It has also involved ideas belonging to different traditions, e.g. solidarity, which pertain to the sphere of relations between individuals.

In this regard, a strand of IR that is the so-called English School (ES) has deliberately resorted to social theory's conceptual armoury to explain international relations. The ES has indeed adopted the frame of a 'society of states' to read processes of 'socialization' among states in the world arena. It has also used the concept of solidarity to justify the establishment and reproduction of the international order. And yet, this is not the only meaning that solidarity has been given in IR. In fact, other IR accounts, such as neo-Gramscian theories, read solidarity as a proxy for political struggle and transformative collective agency. As has been put, while in the ES

[112] For a definition of what a liberal theory of international law is see Anne-Marie Slaughter, 'A Liberal Theory of International Law' in *Proceedings of the Annual Meeting (American Society of International Law)* Vol 94 (April 5-8, 2000) 240. Liberal theory of international law is defined as a top-down view which is based the 'classic paradigm of a consent-based system of sovereign states without regard to the individuals who live within them. For liberal theory of international relations is intended, despite the label 'liberal', a bottom-up conception according to which the main actors of international politics are private groups and individuals whose interests influence state preferences. In this regard, see Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 International Organization 513.

[113] Joseph H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (CUP 1999) 92, citing Matti Koskenniemi, *From Apology to Utopia* (CUP 2006).

conceptualisation solidarity is a 'condition of order', in the neo-Gramscian approaches it is a 'category of socio-political struggle', 'a condition of the transformation of the existing order'.[114]

These conceptions of solidarity, applied to the realm of international politics, lend authority to the attempts that scholars in the field of EU law have made to offer an account of what solidarity can be in the European Union. The reason why IR theories offer such a good paradigm lies in the fact that they delve into the interplay between sovereignty and solidarity in order to explain cooperative efforts in the international arena. To this end, they draw on sociological theories, especially on Durkheim's functionalist theory. However, the more 'sociological' of these IR theories, namely the ES, does not share the perspective of functionalism with regard to sovereignty. In fact, while for the ES sovereignty is the cornerstone of the international society, for functionalists, sovereignty is a contingent element to be examined historically. Rather than being an indisputable assumption of the international order, sovereignty is an institution which is relevant as long as it is functional to the stability of such an order. After all, contrary to normative theory which assesses the validity and justification of norms, functionalism analyses the role of norms and institutions in the establishment and reproduction of a given system. In this perspective, sovereignty is only one of the conditions that allow and contribute to the coexistence of different parts into a whole. Therefore, functionalist theories pose the question of sovereignty as long as it is relevant to the functioning of a social organism – whether a society of individuals or an international order of states.

And indeed, classical social theory - although typically concerned with patterns of socialisation between individuals which historically took place in the nation-state – does not neglect the international dimension. While explaining the conditions that allow societies to work, and in particular peace - which is said to be not sufficient if not paired with 'some tie of sociability' already latent among men - Durkheim hinted at the international sphere.[115]

Specifically, he implicitly referred to an incipient 'international society' of European nations. By saying that the different nations of Europe are less independent from one another, but still not sufficiently integrated, Durkheim stated that European countries are part of the same society, which is imperfect because it is still incohesive but more and more self-conscious.[116] This

[114] Martin Weber, 'The concept of solidarity in the study of world politics: towards a critical theoretic understanding' (2007) 33 Review of International Studies 693.
[115] ibid 121.
[116] ibid. He defined the political equilibrium reached in Europe as the 'beginning of the organization of this society'.

lack of cohesiveness is ascribed to the existence of mere negative solidarity between European societies, and the geopolitical instability to which such international relationships give rise is 'the best proof that negative solidarity cannot alone suffice'.[117] For Durkheim, such a negative solidarity concerns the 'real rights' that societies have over their territories. It is an adaptation of the liberal view which recognises the right of property and other 'real rights' over things. In the Durkheimian account, then, territories are assimilated to things and negative solidarity is associated with the legal institutes of the liberal theoretical framework.

However, as explicitly specified by Durkheim, negative solidarity is a misnomer: rather than being a proper category, it is 'the negative side of every species of solidarity'.[118] In this reading, then, real rights constitute a system which is not preoccupied with the creation of social bonds, ('a positive social link'),[119] conceiving of society as a constellation of atomised individuals who protect their own sphere from others' interference. In sum, negative solidarity does not promote integration, or in the sociological parlance, societalisation.

Transposed to international politics, negative solidarity explains the institutional arrangements of the traditional international order. By analogy with the conflict between individual liberty and social order, political freedom and society, which is mediated through the rule of law, international law is the medium between sovereignty and order, states' sphere of self-determination and their social life.[120] In the adaptation of social theory that the ES makes in relation to IR, sovereignty is thus the fundamental precondition of political agency. In world politics, states are the pivotal agents while individuals are taken into account in their capacity of rights-holders against state-power.[121]

As already said, though, this central role played by sovereignty and the consequent disbalanced relationship of the individual vis-à-vis international law do not fit the European Union. Therefore, theoretical accounts that have employed Durkheimian conceptual armoury to explore solidarity between Member States – the new paradigm to which EU solidarity has been reduced – cannot capture the complexity of the EU.

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[117] ibid.
[118] ibid 119.
[119] ibid.
[120] Cf Koskenniemi (n 113).
[121] Weber (n 114) 704. Here, the author argues that even when collectivities are relevant to international law, they are considered as '*recipients* of solidarist aid extended by the society of *states* committed to human rights'. The literature on the so-called 'global civil society', though, represents a significant exception.

Although the adoption of a sociological approach to the sphere of interstate relations is not something new, given the abovementioned IR literature, it is unable to take account of the various 'agents' of solidarity in the EU. Here, as has been argued, every account of solidarity should comprehend three interwoven levels: national, interstate and transnational dimension of solidarity.[122] The transnational dimension, which involves horizontal solidarity between citizens of different Member States, raises the question of what kind of solidarity applies to the European polity. In other words, it asks which standards of social justice, if any, are conceivable for the EU. To this end, it has been discussed whether obligations of distributive justice exist among Europeans, or whether a less demanding criterion of solidarity like a 'humanitarian minimum' applies.[123]

1.5.2 Interpersonal solidarity: Is there a European society?

This question of social justice was central to a 1998 private exchange, lately published, between the Belgian political philosopher Philippe van Parijs and the American liberal philosopher John Rawls.[124]

In this correspondence, van Parijs challenges Rawls on his *The Law of Peoples* in the context of the European Union. In particular, the Belgian philosopher problematises what constitutes a demos, especially in multinational states. Building on the debate over the European demos as well as the future of the Belgian welfare state, he objects to the Rawlsian 'standard case' which reduces the existence of a demos to the 'simple matching of language and territory'.[125]

In fact, Rawls's *The Law of Peoples* assumes the nation-state as the relevant locus for distributive justice, confining the obligations between two or more peoples to a mere duty of assistance. Here, the difference principle - which in *A Theory of Justice* is one of the principles of distributive justice, specifically the criterion guiding the equal distribution of economic and social goods (wealth and income) - is sound only for domestic justice within a single (democratic)

[122] Sangiovanni (n 98).
[123] Andrea Sangiovanni, 'Solidarity in the European Union. Problems and Prospects' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012).
[124] Philippe van Parijs and John Rawls, 'Three Letters on the Law of Peoples and the European Union' (2003) 8 Revue de philosophie économique 7, https://cdn.uclouvain.be/public/Exports%20reddot/etes/documents/RawlsVanParijs1.Rev.phil.Econ.pdf accessed 7 September 2020.
[125] ibid 4.

society. On the contrary, such a principle is deemed to be unsuitable for the socio-economic inequalities existing among societies.

For van Parijs, however, this position is problematic because it seems to be based on an analytical given, i.e. the democratic society,[126] rather than on a historical and sociological concept of 'the people'. In this regard, he poses a thought-provoking question asking 'whether the emerging political entity [the EU] will (and should) never be more than a conglomerate of ethnoi-demoi, between which only assistance is required on grounds of justice, or whether it can constitute a poly-ethnic demos to which a more demanding conception of justice can conceivably apply'.[127] He further elaborates on this, linking the justification for this more demanding criterion of justice with *social cooperation*. To this end, the Belgian philosopher uses an example made by Rawls with regard to the global difference principle to turn upside down his conclusions.

The Rawlsian example in question regards two countries, very similar in terms of population and wealth. However, due to different and democratically made policy choices, they end up having a different level of wealth. For Rawls, given the existence of a liberal society and a free citizenry, the well-off country could not be taxed to give resources to the poorer. No distributive justice obligations besides a mere duty of assistance should be conceived of.

As noticed by van Parijs, however, this argument presupposes two separate societies, as it is implicitly based on the tacit assumption that social interaction takes place exclusively within the nationally bounded spheres. In the case of the European Union, instead, one might think of two EU countries not as 'two peoples on the same continent' but as 'two families within the same society'. Instead of different societies, van Parijs urges Rawls to think about a single European society, using the argument of social cooperation rather than national identity. In his words, 'there is more mobility, more contact, more interdependence, more potential competition for opportunities between the members of the two families than between the members of the two peoples'.

Rawls's reply, however, does not fully engage with this argument, or at least it does not seem very clear. He argues that, should two European countries like Belgium and the Netherlands democratically decide to form 'a single society, or a single federal union', it would be up to the

[126] In *Political Liberalism*, Rawls defines a democratic society 'as a complete and closed social system'. See John Rawls, *Political Liberalism* (Columbia University Press 1996) 40. For a critique from a cosmopolitan perspective, see Seyla Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' (2004) 72 Fordham Law Review 1761.
[127] Philippe van Parijs and John Rawls (n 124) 4.

voters to choose which liberal conception of justice shall be adopted in their union. This evasive answer, thus, does not confront the specific reality of the European Union – where no electoral consultation over joining 'a single society' has ever been held.

Other solutions to address the issue of distributive justice beyond the state have been advanced in the literature. In particular, three positions have been distinguished:[128] a) the 'statist solidarity' model, which acknowledges obligations of social justice only in the domestic sphere; b) the Habermasian 'post-national solidarity' model, which advocates the creation of a federal welfare state; c) the 'national solidarity' model, which similarly to the first one does not accept solidarity obligations beyond the domestic level but it grounds egalitarian concern in a common national identity.

The first model is an adaptation to the EU of Nagel's argument according to which obligations of social justice apply in nonvoluntary organisations such as states.[129] In this account, the conditions that must be satisfied for social justice norms (more demanding than humanitarianism) to apply are two. The so-called 'authorship condition', according to which the association must speak in the name of the people it rules for; and nonvoluntary membership of the people, who are coercively subject to its norms. For Nagel, 'a sovereign state is not just a cooperative enterprise for mutual advantage […] it is not a voluntary association',[130] but it is instead a system of rules based on coercion. At first glance, Nagel's argument as well as other 'statist' approaches can lead to the conclusion that distributive justice discourses at the EU level are misplaced. The voluntariness of EU membership as well as the absence of an EU apparatus of coercion can easily support this argument. However, as the Brexit case has shown, membership is *de facto* not easily reversible and, in any case, it is not voluntary for those generations who did not choose to join the EU.[131] Moreover, although the EU relies on Member States' coercive systems, compliance with its norms is *directly* enforced anyway. Thus, there are no valid reasons to not employ those two Nagel's arguments to reach a conclusion opposite to the one supported by the

[128] Sangiovanni, 'Solidarity in the European Union. Problems and Prospects' (n 123).
[129] Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs 113.
[130] ibid 128.
[131] This argument is developed in Sangiovanni (n 123) pointing to the significantly high costs that a withdrawal would cause (and that eventually proved to be so with Brexit). The author, however, rejected an extension of social justice norms to the EU based on Nagel's arguments. For Sangiovanni, although the voluntary nature of the EU does not hold, the authorship condition alone does not support the application of the full panoply of justice obligations to the EU.

statist view, i.e. to extend social justice obligations beyond the nation-state. The Nagelian position can be used *a contrario* to argue in favour of such an extension.

The second position, the Habermasian post-national solidarity model, builds on the premise that obligations of social justice must apply among those who are subject to a body of coercive laws. Like the Nagelian position, then, this view assumes that addressees of social justice norms are only the members of a certain legal order. Unlike the statist view, however, it believes that duties of civic solidarity should exist between all citizens of Europe, beyond the boundaries of the nation-state.[132] The arguments employed by Habermas, however, are premised on merely empirical considerations, which – as has been noted - are not always backed up by sufficient evidence. For instance, the strongest motivation for Habermas to sustain his post-national solidarity pledge is the negative impact of globalisation on the institutional as well as sociological arrangements of the national welfare state. On an institutional level, it is held that transnational markets are undermining the capacity of nation states to uphold their commitment to social solidarity. On a sociological level, instead, it is maintained that social integration based on collective values, cultural homogeneity, and shared feelings weakens, due to cross-border exchanges, migration, and growing socio-economic inequalities. With the definitive erosion of the post-war compromise between labour and capital, and the end of so called 'embedded liberalism'[133] of the glorious thirty, the very commitment to joint redistribution frays. For Habermas, it can only be restored at the EU level through a new 'constitutional patriotism', which is a substitute for nationalism in pluralist societies. If nationalism was the motif that replaced the corporativist spirit of the early modern society, thus fostering a sentiment of loyalty to the body of the nation, constitutional patriotism is the new foundation of political unity and social cohesion.

Both the two Habermasian arguments have been rejected as a plausible answer to the question of redistribution and social justice beyond the state.[134] And the reason lies in their conjectural nature: they are not indicative of any truth about the present of the nation-state and the future of the EU. In fact, the impression is that the arguments exposed are empirical in principle but not also in practice: there is no causal correlation between the European integration process

[132]Jürgen Habermas, *The Postnational Constellation: Political Essays* (Polity Press 2001) 99.
[133] The expression 'embedded liberalism' was first coined by Ruggie and later widely used by political economists. See John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379.
[134] See the position of Sangiovanni (n 123).

and the poor performance of the welfare state,[135] as well as there are not polls that show the desirability of a European welfare state.

And yet, it seems that giving these 'empirical' arguments a more normative ground would make them crucial to the issue of redistribution in the EU. Habermas himself gives some indications when he suggests that the consociates of a legal order, in this case the EU, have solidarity obligations towards one another. They are bound by norms of distributive justice – which in the Habermasian account are articulated in a substantive system of social rights - on the basis of the relationship in which they stand. However, he does not specify which kind of relations are relevant to social justice. The normative question is then what kind of political and social relations counts for the purposes of distributive justice. It has been argued that not every legal order can trigger the full range of solidarity obligations typical of the constitutional state.[136] Assuming that the EU is a legal order less comprehensive than the nation-state, this account leaves open the question of what standards of social justice, less inclusive than the national egalitarian forms of redistribution but more demanding than humanitarianism, apply.

Given the social cooperation realised in the EU, then, the third model outlined above, which rejects any form of solidarity beyond the nation state, can be hardily acceptable. Two arguments have been attributed to such a model, labelled as 'national liberalism', the first being that only nationality can build mutual trust among individuals, and the second linking nationality with political agency. According to the first line of reasoning, nationality is - to borrow the words of David Miller – what 'motivate[s] people to make the sacrifices that distributive justice requires'.[137] According to the second strand of the liberal nationalist position, instead, political agency can be

[135] In the sense that there is no evidence of the negative impact of EU law on the welfare state. There is indeed a variety of factors to consider, such as public spending, the typology of welfare state at issue etc. See in this regard, Peter A Hall and David W Soskice (eds), *Varieties of Capitalism: the Institutional Foundations of Comparative Advantage* (OUP 2001); Geoffrey Garrett, *Partisan Politics in the Global Economy* (CUP 1998).The Eurozone crisis, and in particular the austerity policies adopted in response to it, have questioned such a claim. Adjustment programmes signed by countries receiving financial assistance have entailed significant cuts to their welfare provision and promoted so called 'internal devaluation'. However, formally, such measures have not implemented EU law. They have been adopted by Member States and EU institutions acting outside EU legal framework. As a consequence, 'austerity' cannot be attributed by the EU. For the negative impact of euro crisis management law's on social rights and welfare entitlements see Claire Kilpatrick and Bruno De Witte (eds), 'Social rights in Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI WP 2014/5 https://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1&isAllowed=y accessed 7 September 2020.

[136] Sangiovanni (n 123). This philosopher embraces a third way between the two polarities: full-fledged post-national solidarity, on the one hand, and no EU solidarity at all, on the other.

[137] David Miller, 'The Left, the Nation-State, and European Citizenship' (1998) 45 Dissent 47, 48.

consolidated around certain conditions which are normally present at the national level. Distributive justice requires a collective subject which can be said to exist as long as it is organised along some conditions, such as shared aims and common reasons, continuous interaction, control over the government, *inter alia*.[138] For liberal nationalists, such requirements must be supported by a common set of attitudes, practices and rituals that can develop only in the context of the nation-state, where a collective consciousness and a common culture exist.

Rawls made this argument clear in the abovementioned correspondence, where he compared the United States and their 'common language of political discourse' with the polyphonic complexity of the EU. There, he finds the EU to be conflicted between 'a large free and open market' and 'the individual nation-states, each with its separate political and social institutions, historical memories, and forms and traditions of social policy'.[139] Rawls's take on the EU is that this entity represents an aimless project, or better it serves the interests of the capital ('large banks and the capitalist business class'). In his pessimistic view, no other *finalité* except for the pursuit of profit and 'meaningless consumerism' animates the European project.

Although justified, this critique, emphasising the role of the market and the kind of culture it promotes, does not capture the distributive nature of the European project.[140] First, the very fact of having a single market makes the EU already a 'distributional' project. Second, the attribution of rights to individuals creates a transnational community of individuals who participate in the production and reproduction of certain public goods. The challenge that an inquiry into the nature of solidarity needs to address is then to identify what kind of social cooperation the EU allows, what the shared values and the common goals reflected in the judicial practices and the legal culture are. Ultimately, what the scope and justification for solidarity in a post-national polity like the European Union is.

1.6 Conclusions: The crisis as the litmus test for EU solidarity

[138] See Philip Pettit, "Rawls's Peoples' in Rex Martin and David A. Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford Backwell 2006) 48.
[139] See the second letter of van Parjis and Rawls (n 124) 9.
[140] Chapter II, retracing the principle of solidarity in the European economic constitution, sheds light on whether and to what extent such a critique is accurate.

This chapter has attempted to deconstruct the idea of solidarity by retracing its genealogy. It has identified two main meanings that solidarity possesses: solidarity as a political idea and solidarity as a legal concept stemming from the law of obligations. Solidarity as a political idea has developed in the context of the welfare state and amounts to social cohesion among the members of a community. This meaning of (social) solidarity is strictly intertwined with the idea of social justice and equal citizenship and can be defined as 'redistributive'. Solidarity as a legal concept borrowed from Roman law denotes collective responsibility vis-à-vis the unity of an obligation and can be defined as 'contractual'. In both meanings, solidarity is a relational concept inasmuch as based on a structural relationship, i.e. between the units of a social order or between creditors and debtors. In both types of relationships, the law plays a constitutive function: in the first type, solidaristic commitments between members of a political community are structured by public law, in that horizontal relationships between individuals are institutionalised by public law and a vertical dimension with the state is created; in the second type, assumption of an obligation, although dependent on the existence of a public enforcement apparatus, is regulated by private law. Both these typologies of solidarity are inherently linked with the concept of debt.

The chapter has tried to explore the question of solidarity in the EU against this conceptual background. It has shown how solidarity in the EU can be explored through the paradigm of interstate solidarity and the theories elaborated in international law and international relations studies. However, it has also identified the limits of this approach, which does not reflect the complexity of the EU constitutional order. This theoretical paradigm can only explain the horizontal relationships between Member States and shed light on the *motives* of their actions, egotistic as in Articles 122 (1) and 222 TFEU (organic solidarity based on reciprocity and voluntarism) or self-enlightened as in Article 175 TFEU on cohesion policy (organic solidarity as an institutionalised act). Conversely, this approach does not shed light on the *content* of solidaristic duties between Member States, which cannot but be assessed in light of social justice, i.e. in light of the impact they have on individuals.

For this reason, the thesis aims to explore solidarity through a lens that combines both its interstate and interpersonal dimension. It aims to integrate the discussion on free movement and transnational social solidarity situated in EU citizenship studies into the ongoing debate on fiscal integration in the Economic and Monetary Union (EMU).

The rationale for studying these two areas together lies in their inherent aspiration to realise a European society beyond the market. Both citizenship and the creation of an economic and monetary union have implications on the welfare state, namely on the solidarity arrangements that aim at correcting and protecting individuals from the outcomes of the market. Both challenged the domestic practices of solidarity within Member States, and they did so at different levels: at the levels of citizens (citizenship and free movement) and at the level of Member States' relationships since the adoption of a single currency and the closer cooperation in the field of economic policy (taking the form of economic policy coordination) is an instrument of regulation of society.

These novelties, introduced by the Maastricht Treaty, were the telling examples of the process of constitutionalisation of the Union, which transcended the traditional forms of intergovernmentalism. They were an attempt to foster the Union as a constitutional actor, laying the foundations of a political community, in which not only Member States but also individuals *qua* EU citizens are the subjects of EU law and the agents of European integration.

On the one hand, the introduction of citizenship made the promise contained in the earlier reference of the CJEU to private individuals as the subjects of EU law more meaningful since it extended the scope of application of the Treaties, and most crucially, of the principle of equality to EU citizens as such.[141] EU citizenship challenged, although to a certain extent, the (personal) scope of national welfare[142] by introducing a limited right to political recognition for EU citizens vis-à-vis a Member State different from that of their nationality. Contrary to other expressions of redistributive solidarity such as the European Social Fund (ESF), the free movement of persons presupposes a vertical relationship between EU citizens and the Union since the interpersonal solidarity stemming from horizontal relationships between individuals of different nationalities is institutionalised by EU law and specifically by the principle of equality enshrined in Art 18 TFEU. Redistributive solidarity stemming from the ESF, instead, is mediated through Member States.

On the other hand, the euro project was an attempt to create a 'European society through economic means'.[143] The introduction of a single currency implied the transfer of monetary

[141] On the legal effects of Article 20 TFEU and more broadly on the constitutional scope of Union citizenship see Eleanor Spaventa, 'Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects' (2008) 45 CMLR 13-45.

[142] Anne Pieter Van der Mei 'Free movement of Persons within the European Communities (Hart Publishing 2003) 2-7.

[143] This expression is the paraphrased title of a presentation given by Richard Swedberg at Uppsala University. See Richard Swedberg, 'An Elephant in the Room? Or Can You Create a European Community through Economic Means?' (2013) cited in Patrik Apsers and Nigel Dodd (eds), *Re-Imagining Economic Sociology* (OUP 2015).

sovereignty to the Union with the consequent loss of state control over a crucial social institution: money. The sociology of money has explained how money is a symbolic token and disembedding mechanism,[144] which allows social interactions to take place in indefinite spans of space and time. It is not a mere facilitator of private transactions but is also, and more importantly, an instrument to shape society. Money can be described as a social relationship due to its capacity to transform itself into credit and thus into a relationship between debtors and creditors. For this reason, the different modes of production of money imply social and political conflicts between different classes and main interests in the economy.[145] Money does not only create horizontal relations between individuals but also a vertical relationship with a central public authority that needs to ensure the stability of the value of the currency and complement the need for interpersonal trust. This political nature of the money and its social implications explain why the introduction of the euro raises the question of what kind of social objectives this particular currency, as all newly created currencies, pursues.[146]

The link between the two areas is highlighted by the fact that in both areas the Union has a more pronounced capacity to address distributive conflicts that lie at the heart of the welfare state either indirectly (through the principle of non-discrimination on grounds of nationality) or directly (through its monetary policy). In theory, both citizenship and the single currency reflect a process of constitutionalisation vis-à-vis individuals and could be symbols of a progressive transformation of the Union from an intergovernmental society of states towards a supranational community of citizens.

In order to reconstrue the meaning of socio-economic solidarity in the EU, then, this thesis will look at what kind of public goods the EU generates and how the crises faced by the Union in the last decade have affected them (Chapter II). Following the evolution of the EU legal framework, both at an institutional and hermeneutic level, it will address the question of what standards of social justice the EU has provided or should provide, taking account of the impact that the crisis has had on social and interstate relations within the EU. Any account of an EU solidarity must embrace the multidimensional functioning of the EU, i.e. how the European polity works at the level of citizens besides that of states. The crisis, being a transformative moment when

[144] Anthony Giddens, *The consequences of modernity* (Polity Press 1990) 21.
[145] Geoffrey Ingham, *The Nature of Money* (Polity 2004) 77-81.
[146] This is one of the parameters used by Dodd to analyse the social dimensions of some currencies. See Nigel Dodd, *The Sociology of the Money*. *Economics, Reason and Contemporary Society* (Polity Press 1994).

a new incipient order is about to emerge, provides the ideal case study to examine the actual scope of solidarity and investigate its potentialities. The analysis of the responses that EU institutions have adopted in times of crisis (Chapter III), as well as the interpretation that the Court of Justice of the European Union has given to the relevant solidarity provisions (Chapter IV), will offer a picture of what solidarity amounts to in the EU order.

For many, it was the very lack of solidarity the cause of the multifaceted crisis of the EU, in particular the 'lack of social or distributive justice at the EU level' expressed either in terms of 'injustice between EU *citizens*' or 'institutional unfairness resulting from the present distribution of benefits and burdens of European cooperation between member states'.[147] The financial crisis first and the Covid-19 pandemic later have triggered scholarly reflection on solidarity and justice in the European Union.[148] As has been said, for a long time EU law has been grounded on a 'theory of interpretation' rather than a 'theory of justice'.[149] It has tried to give effect to the political will expressed in the Treaties rather than unveiling the telos underpinning them.

Yet, the political malaise following the Eurozone crisis has ignited the debate on EU values, among which solidarity. In particular, it has exposed the problem of what we owe as EU citizens to our fellow Europeans and why. This is basically a question of justice, well captured by the idea of debt, i.e. 'who will receive what from whom under which conditions'.[150] The crisis has shown how the issue of solidarity is basically interwoven with that of debt and ultimately justice. It has also exposed how *financial* solidarity - which is the form that a meaningful notion of European solidarity cannot but take in the context of the euro and Covid-19 crisis - is necessarily *interpersonal*, as it ultimately regards European taxpayers and citizens and should then incorporate a principle of redistribution.

[147] Juri Viehoff, 'Maximum convergence on a just minimum: A pluralist justification for European Social Policy' (2017) 16 European Journal of Political Theory 164.

[148] For the debate on solidarity in the aftermath of the euro crisis see Viehoff (n 141). For the debate on justice see Dimitry Kochenov, Gráinne de Búrca, Andrew Williams (eds), *Europe's Justice Deficit* (Hart Publishing 2015) and Floris De Witte, *Justice in the EU* (OUP 2015). For solidarity in the context of the pandemic see Charlotte Beaucillon, 'European Solidarity in Times of Emergency: An Introduction to the Special Focus on COVID-19 and the EU' (2020) 5 European Papers 687.

[149] Andrew Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549, 569. The same argument is also spelled out in Andrew Williams, *The Ethos of Europe. Values, Law and Justice in the EU* (CUP 2012) 18.

[150] This expression is borrowed from Viehoff, who uses it to define normative ideals and concrete forms of justice in the EU. See Viehoff (n 141).

Therefore, the Eurozone case has situated the problem of justice at the level of citizens, with the consequence that intergovernmentalist approaches to solidarity proved unsuitable for the EU. Accounts that place an EU notion of solidarity only among Member States underestimates that it ought to be between citizens too, since they share the same currency and the efforts required by a financial notion of solidarity are directly upon them. The necessarily interpersonal dimension of solidarity is here assumed because Eurozone's bailout measures - contrary to international aids between states, which have only indirect effects for citizens - are not immune to challenges under EU law.[151] It has been proved, indeed, how some of them create EU legal obligations for Member States and provide a basis for explicit individual entitlements.

Besides the 'site of justice', then, the financial crisis has also raised the question of what patterns of distribution the EU realises, i.e. how it distributes burdens and benefits among its participants, who are not only states but also citizens. It has also exposed the problem regarding the conditions under which redistribution, namely the correction of the distributive outcomes perceived as unfair, happens in the EU. The issue of 'conditionality' has indeed taken central stage in the Eurozone developments. Rescue measures adopted to avoid state default have been subject to 'strict conditionality' for their beneficiaries.

To what extent these operations manifest a certain degree of solidarity between Member States but also between their citizens is a question that has received conflicting answers. As said by the Greek Prime Minister Alex Tsipras in his speech at the European Parliament in July 2015, 'lending is certainly a form of solidarity. There is no doubt about it'; however, he also pleaded for a debt reduction so as not to 'be constantly obliged to seek new loans in order to repay previous loans'.[152] From a different point of view, instead, it has been argued that solidarity is not 'a one-way street',[153]being often interpreted as 'negative solidarity', that is the duty to conduct a sound fiscal policy.[154]

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[151] See Claire Kilpatrick, 'Are the bailout measures immune to EU Social challenge because they are not EU Law? (2014) 10 EuConst 393. The author argues that sovereign debt crisis measures are a source of EU social law and as such are subject to challenges under EU law.

[152] See Grimmel, 'Solidarity in the European Union: Fundamental Value or 'Empty Signifier' (n 10*)* 163 citing Alexis Tsipras, 'Summary comments at the European Parliament' (Strasbourg, 2015). For the full speech see Alexis Tsipras, 'Closing speech of PM Alexis Tsipras in the European Parliament on 8th July 2015' (*CADTM*, 9 July 2015) http://www.cadtm.org/spip.php?page=imprimer&id_article=11923 accessed 30 October 2020.

[153] In this sense, the German Finance Minister Wolfgang Schäuble, cited in Grimmel, (n 10) 163.

[154] See Herman Van Rompuy, 'The economic and political challenges for Europe' (Speech at the opening of the academic year 2011-2012 European University Institute, Fiesole 11 November 2011) https://ec.europa.eu/commission/presscorner/detail/en/PRES_11_425 accessed 30 October 2020, reported in Grimmel

The outbreak of the Covid-19 pandemic has magnified the need for interpersonal and thus redistributive solidarity. Being a health crisis, it has exposed how the Union is a deeply interconnected legal space where individuals cannot be either reduced to market actors or states' agents.

(n 10) 163: 'solidarity consists […] not merely in receiving but also in giving. Solidarity is a duty, not only a right. A lax national policy is therefore contrary to the spirit of solidarity'.

2 Chapter II: Retracing solidarity in the European (Economic) Constitution

2.1 Introduction

The two major crises that the EU has faced, the euro area crisis and more recently the coronavirus crisis, have raised important issues for the constitutional order of the EU, among which the actual scope of solidarity in the assumptions and functioning of the economic and monetary union (EMU). Although some EU law provisions acknowledge this principle – for instance, Article 3 (3) TEU on the promotion of intergenerational solidarity and solidarity between Member States, Article 122 (1) TFEU on economic policy, Article 80 TFEU on EU migration policy, or the Charter of Fundamental rights where it features in the title of Chapter IV devoted to social rights (Articles 27-58) – the constitutional meaning of solidarity in the EU, and especially in the Eurozone, is still rather controversial. Quite illustrative in this respect has been the debate over the future of the Eurozone, dominated by two antagonistic positions: on the one hand, the 'regulatory vision', centred on more rules and stricter fiscal discipline; on the other, the 'solidarity vision' with its call for more risk sharing and fiscal transfers between EU Member States.[1]

These competing views recall a historically-rooted dichotomy in economic thinking between, respectively, Germany and France, whose disagreement about the means to achieve the macroeconomic stabilisation of the euro area has animated the discussion until lately. During the negotiations for the newly adopted post-pandemic Recovery Plan, the two countries have reached a historical convergence of visions, putting an end to their ideological rivalry and leaving the rigorist position to the so-called 'frugal four'.[2]

Against this background, this chapter aims at retracing the trajectory of solidarity in the European (economic) constitution. In particular, it seeks to understand the way in which socio-economic solidarity- both a *national* constitutional value *within* Member States and an *inter-national* obligation *between* Member States – is understood in a positive rather than normative sense. The focus is on the interstate dimension of solidarity and EMU,

[1] Editorial Comments, 'Tinkering with Economic and Monetary Union' (2018) 55 CMLR 709.
[2] Sam Fleming, Mehreen Khan and Jim Brunsden, 'EU leaders strike deal on €750bn recovery fund after marathon summit' *Financial Times* (Brussels, 21 July 2020).

specifically on the agreements between Member States and their impact on EMU's constitutional design. The analysis devotes attention also to Union citizenship and its capacity to prompt a different understanding of the European constitution as a non-economic constitution. It will be asked whether the introduction of citizenship has transformed solidarity from an international obligation between Member States into a *transnational* obligation between European citizens. The general aim is to ascertain to what extent the principle of solidarity has informed the European integration process, and in particular its economic and monetary dimension.

To this end, Section 2 first looks at the foundations of the European project, examining how much room for solidarity, both at the national and transnational level, was left in the founding Treaties, or in other words whether the European Union was conceived of as a liberal economic project exclusively devoted to the free interaction of competition forces on an enlarged market with no space for public interventionism. This analysis of the European *microeconomic* constitution is indeed conducive to the understanding of how the EMU works at the macroeconomic level, as the microeconomic principles largely inform the functions of a currency area (for instance, price stability over other macroeconomic objectives). Section 2 then shifts its focus on the *macroeconomic* layer of the European economic constitution introduced by the Maastricht Treaty, in order to detect the effects of the single currency on national systems of (social) solidarity and to ascertain whether the introduction of the single currency has strengthened solidaristic obligations between Member States. Section 3 dwells on the coherency of EMU architecture with the concomitantly introduced concept of citizenship. Section 4 concludes.

2.2 Solidarity as an EU foundational value: from Rome to Maastricht

This section offers a historical and theoretical framework of the European economic constitution, following its chronological development. Specifically, subsection 2.2.1 looks at the general constitutional theories underpinning the EU constitution. Subsections 2.2.2 and 2.2.3 explore its micro-economic layer (the internal market) and macro-

economic layer, respectively. Subsection 2.2.4 zooms in on EMU and its theoretical foundations.

2.2.1 The European economic constitution: genesis of a contested concept

The aspiration to a united Europe has always implied – as in the words of the Schuman Declaration – a *de facto* solidarity between European nations, and in the first place the end of the Franco-German opposition. Many developments in the EU, if not the very idea of European Union, have indeed been driven by the value of solidarity,[3] which has long been intended as an underlying assumption of the European project, rather than a legal principle with a normative content.

The normative meaning of solidarity in the EU is indeed opaque: on the one hand, it serves the objective of interstate integration through the creation of a transnational market; on the other, it is the hallmark of the national welfare state, and a shield from the process of supranational market integration.

This lack of conceptual clarity is to be partially ascribed to the very nature of the European Union, which was conceived of as an experimental form of political integration by economic means on a piecemeal basis. Although the founding Member States committed to a common market, they did not share the same economic views, with the consequence that the constitutional theory underpinning the European economic constitution remained essentially contested. This open nature of the EU constitutional configuration is reflected in the fact that, unlike normative entities such as unified nation states with constitutions that are expression of the exercise of a constituent power, the current European Union, in all its historical configurations, does not have a constitution in the formal and traditional sense. Rather, it has been subject to a process of constitutionalisation, which as a fluid concept better captures the nature of European integration as a process mainly carried out by truly supranational institutions like the ECJ.[4]

[3] In the field of free movement, for instance, the ECJ invoked "a certain degree of financial solidarity" in the case C- 184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve,* ECR I-6193, while in the area of economic and monetary integration, Advocate General Kokott referred to a principle of solidarity between Member States in her opinion in case C- 370/12, *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756.

[4] See in this regard the introduction to the euro crisis' constitutional analysis in Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis, A Constitutional Analysis* (CUP 2014).

Besides the evolutionary character, another key feature of this process has been its differentiated nature, namely the fact that different dimensions of European constitution have emerged in accordance with different constitutional objectives.[5] Given the most prominent and earlier aspect of European integration in the economic field, the first strand emerging from this process has been the so-called European economic constitution, which has retained its functional primacy throughout the years when other constitutional layers of European Constitution developed as well. The landmark decisions of the ECJ defining the basic principles of supremacy and direct effect characterised the then Community as an independent legal system, highly differentiated from other regional and international organisations.[6]

Hence, despite the neutrality of the expression 'economic constitution', which merely points to the economy as the object of constitutional regulation, this concept stemmed from a particular market-liberal economic thought, so called Ordoliberalism, which found its advocates among the scholars of the Freiburg school of law and economics. The foundations of this school lie in the Weimar Republic period, when Hugo Sinzheimer used the term 'economic constitution' to describe the multi-layered corporatist system of that constitutional experience; later, Walter Eucken and Alexander Rüstow conceptualised that idea in their doctrinal manifestos of 1932, followed by Franz Böhm a year later. However, it was in the post-war Germany that the Ordoliberal thinking gained its scholarly and institutional success.[7]

In the aftermath of the second world war, indeed, building on the economic ideas of the interwar period, German economists started describing the correlation between the state and the market in terms of an economic order ('Ordo'), structured as a coherent legal framework meant to guarantee individual freedoms.[8] Presenting itself as a compromise between classic liberalism with its laissez-faire on the one hand, and statism with its focus on public intervention in the economy on the other, the ordoliberal doctrine revisited the 19th -century German tradition which had elevated the state to the role of major economic

[5] ibid. 4.
[6] See the seminal cases C-26/62 *Van Gend en Loos* [1963] ECR 1 and C- 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.
[7] For instance, Böhm was an advisor of the minister of economy Ludwig Erhard, who, among other leading politicians, publicly defined himself Ordoliberal in a speech of 1961; moreover, both Eucken and Böhm assisted the Allied administration.
[8] See Sakari Hänninen, 'Social Constitution in Historical Perspective: Hugo Sinzheimer in the Weimar Context' in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010).

actor. Contrary to contemporary French philosophies, which were largely dominated by the do-nothing policy as a reaction to Colbertism of the anti-liberal age of Louis XIV, nineteenth-century German thinkers elaborated the concept of *Rechtsstaat* as a political system guided by the rule of law.[9] However, in the transition from 19th to 20th century, attitudes of dominant economic thought switched in both countries, with German moving towards more liberal positions and France retreating from them.[10] In particular, German scholars deemed the old economic traditions acknowledging a prominent role to the state as a path to the arbitrariness of its course of action, eventually culminated in Nazi dictatorship and etatism.

Against this background, the ordoliberal school criticised the central planning of dirigiste economies, without however indulging in Hayek's view of a spontaneous creation of rules and orders. For Ordoliberals, the type of economic system that a state is committed to pursue should be informed by well-defined legal structures, so that public intervention is constrained in a precise framework and public policy a priori oriented by a related set of principles. Function of the state is then to enforce the economic constitution, which is basically an order of a private law society based on freedom of contract and supplemented by minimal public interference. Enforcement of rules by individuals then poses a limit on the political power in (re)orienting public economic policies. Although after the second world war the ordoliberal theory tried to combine the commitment to an open market and individual freedom with social justice through the elaboration of so-called 'social market economy' (of which the expression 'highly competitive social market economy' of Article 3 (3) TEU is reminiscent), Ordoliberalism remained basically a liberal doctrine committed to a market economy.

Central in this theoretical account was then a free price system, the only mechanism responsible for efficiently allocating resources, and its corollary of price stability towards which monetary and exchange rates policies had to work. The State should therefore refrain from intervening in the market to favour particular interest

[9] The idea of *Rechtsstaat* became popular with the work of Carl Theodor Welcker (1790-1869) and Robert von Mohl ('*The Science of Policy According to the Principles of the Constitutional State*'1799-1875).

[10] For a historical overview of the differences between French and German economic philosophies see Marcus Brunnermeier, Harold James and Jean-Pierre Landau, *The Euro and the Battle of Ideas* (Princeton University Press 2016), especially Chapters 4 and 7. Besides illustrating their evolution over the time, this work ascribes the shift in both economic traditions to the historic facts occurred during the mid-twentieth century: Nazi etatism and French inaction during the interwar period.

groups. The resulting emphasis put on competition was justified by 'constitutional' reasons, well beyond efficiency considerations. The economic constitution aimed at guaranteeing the equality of all individuals as economic subjects, thus protecting their private liberties.

Hence, the strict separation between the political and economic sphere was functional to the ordoliberal configuration of public power, preventing the subjection of the democratic state to rent-seeking interest groups, and then to market distortions. The consequences of this view affected the way in which ordoliberalism interacted with democracy: the executive was the most mistrusted function due to its discretionary powers of intervention, and for this reason its main function should be confined to the enforcement of competition rules without any margin of administrative discretion; the legislature, instead, should not be entrusted with discretionary powers in the economic field, being bound by the economic constitution and its self-evident market rules which would have to be implemented.

Under the ordoliberal economic constitution, then, those rules not only curtailed judicial interpretation, but also determined the substantive nature of constitutional law, in the sense that economic rights and freedoms should have enjoyed the same equal status of traditional political rights and freedoms and may be enforced against majoritarian decisions.[11]

Given its peculiar relationship with the political and democratic process, distilled in the view that collective interests should not override individual economic interest, the ordoliberal doctrine was understood as 'authoritarian liberalism'. This expression was coined by Hermann Heller in the intellectual turmoil of the Weimar Republic[12] to describe the conflict between democracy and capitalism and the prevalence accorded to the demands of capital. This doctrine manages said conflict from the above in an elite-led attempt to maintain economic stability. Distrust of authoritarian liberalism towards democracy is based on the need to contain public interference with private market freedoms, and for this reason it inevitably leads to the depoliticisation of the

[11] Wolf Sauter, 'The economic constitution of the European Union' (1998) 4 Columbia Journal of European Law 27.
[12] See Hermann Heller (trs Bonnie Litschewski Paulson, Stanley Paulson and Alexander Somek), 'Authoritarian Liberalism? (2015) 21 ELJ 295.

polity.[13]Numerous are the affinities of this account with the current crisis-management law in the EU to the point that some commentators have ascertained how said authoritarian stance has resurfaced in the Eurozone where a 'post-democratic executive federalism'[14] represented by the Troika has eroded legislative prerogatives of national parliaments in countries receiving financial assistance.

Notwithstanding the influential theoretical heritage of the Freiburg school, the German Federal Constitutional Court never acknowledged the ordoliberal foundations of the German economic constitution in its case-law. In fact, in a 1954 judgement confirmed later in 1979, the Court stressed the neutrality of the *Basic Law*, arguing that the Constitution did not incorporate any particular economic model and consequently the legislation could pursue any kind of economic policy.[15] The rejection of ordoliberal views at the national level paved the way to a new momentum at the transnational level. Ordoliberals exerted a considerable influence on the German position during the negotiations for the Treaty of Rome, as they read in those Treaty provisions an economic constitution characterised by a competition-based market economy.[16]

However, the ordoliberal influence on the European project was limited, as the Treaty did not reflect a precise economic orientation nor it imposed any economic paradigm on Member States, whose economic policies could then be informed to a spectrum of economic models. The Treaty of Rome was the product of different economic views and conceptions about the relationship between the market and the state. Whilst the ordoliberal thought was dominant on the German side, France and Italy were more dirigisme-oriented, having experienced public ownership and state-planning in the domestic sphere, and the Benelux countries were instead in a middle position.[17] The result

[13] Michael Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' (2013) 14 GLJ 527.
[14] Jürgen Habermas, *The crisis of the European Union: A Response* (Polity Press 2012).
[15] See *Investitionshilfegesetz* judgment of 1954, BVerfGE 4, 7, 17/18 and *Mitbestimmungsgesetz* ruling of 1979, BVerfGE 59, 290, 337/38.
[16] That group of ordoliberals who considered the Treaty of Rome as the original constitution of the Community, later jeopardised by the continuous interventions of subsequent reforms, included Hans von der Groeben, Alfred Müller-Armack, Carl-Friedrich Ophüls and Ernst-Joachim Mestmäcker.
[17] In this regard, Léontin-Jean Constantinesco identifies the positions among writers: the German, oriented towards a social market economy (*soziale Markwirtschaft)*, the French as pro-planification, and the open position of others such as Pierre Pescatore or Constantinesco himself, who pleaded the neutrality of the Treaty.

was a model of 'mixed economy',[18] in which elements of market liberalism coexisted with those of a centrally planned economy.

Since Rome, indeed, and then before the reforms of the Single European Act and the Maastricht Treaty, which according to the ordoliberal reading of the European integration corrupted the original pure free market system,[19] the economic rationale underpinning the Community was not monolithic. The founding Treaty did not prioritise any particular market model. The free movement and competition rules - that were at the heart of the European project since instrumental to the establishment of a common market - were compensated by many exceptions. Among those, it is possible to enumerate Art. 37 TEEC on state monopolies, Art. 90 (2) TEEC on derogations from competition law for operators in the field of services of general economic interest, Art. 222 TEEC on public ownership.[20] But more importantly, it was the introduction of policies other than competition, such as the common agricultural policy, transport, regional, industrial, and common commercial policy, that contradicted the character of 'economic constitution' which the ordoliberals had long been trying to confer to the Rome provisions. Unlike the free movement and competition law that could be implemented by negative integration, these sectoral policies entailed a discretionary policy-making and public interventionism, thus hardly matching the ordoliberal view of a Community with competition as the only policy to pursue.[21]

The influence of interventionist features was clearly discernible in the agricultural sector, where the objectives of the common agricultural policy (CAP) were redistributive in nature. As enshrined in Article 39 TEEC, the implementation of a common agricultural policy aimed at increasing productivity, ensuring a fair standard of living and income for farmers, and stabilising the agricultural markets via centralised control of prices and supplies. The Treaty intended to pursue these objectives by leaving the agricultural sector partially outside the scope of the common market and establishing a common organisation

[18] Sauter (n 11).
[19] See Christian Joerges, 'What is left of the European economic constitution? A melancholic eulogy' (2005) 30 ELR 461.
[20] Interestingly, over the phases of preparation, the provisional formulation of Article 222 EEC (now Article 345 TFEU) referred to the socialist expression 'ownership of the means of production'.
[21] Industrial policy, in particular, undermined the attainment of undistorted competition even before the Maastricht era, when industrial sectors in decline, such as the steel and textile industries and shipbuilding called for rescue packages, thus opening a space for public interventionism. Implementation of state aid provisions, indeed, started only in the late 1980s.

of agricultural markets (Article 40 TEEC).[22] The agricultural regime, derogating from competition rules, was not the only feature of the Treaty underpinned by a redistributive rationale. The other important example could be found in the European Social Fund, established with the aim of improving employment opportunities for workers and their standard of living (Articles 3 (i) and 123 TEEC). The implementation of these non-market functions was devolved to the EU budget, which was redistributive both on its revenue and expenditure side[23] and reflected a type of self-enlightened, non-reciprocal solidarity based on a structural mechanism. Member States indeed contributed to the EU budget on the basis of their GNI, while receiving a share of EU expenditure not proportionate to their net contribution. Hence, the Treaty of Rome created an incipient space of transnational solidarity, albeit significantly limited given the minuscule size of the EU budget. Transnational redistribution in the EU original framework took the form of fiscal transfers between Member States through the EU budget, with richer countries paying more than poorer countries and receiving less than what paid.[24]

The creation of the European regional development fund in 1975 further reinforced that redistributive stance, in that such a measure aimed at promoting cohesion within the Community and reducing regional disparities. The Preamble of the Rome Treaty had already recognised the need to strengthen the cohesive dimension of the Community and the unity of Member States' economies,[25] and post-1975 reforms, from the Single European Act to the Lisbon Treaty, granted the Union a general competence in the field of economic, social and territorial cohesion'.[26] These developments are not

[22] According to Article 40 TEEC, three different methods could have been applied in order to pursue the common organisation of agricultural markets: common rules on competition, compulsory coordination of national market organisations, and a European market organisation. This latter method, also referred to as COM (common market organisation), was the most used.
[23] Mikko Mattila, 'Fiscal transfers and redistribution in the European Union: do smaller member states get more than their share?' (2006) 13 Journal of European Public Policy 34.
[24] ibid 45.
[25] See TEEC Preamble para 5.
[26] In particular, the 1986 Single European Act introduced a specific title (Title V on Economic and Social Cohesion) to Part Three of the ECC Treaty, calling Member States to coordinate their economies in light of the objective of social and economic cohesion and granting the Community the competence to achieve the same objective through the structural funds, the European Investment Bank, and residual financial instruments (Article 130b TEEC). The 1992 Maastricht Treaty further expanded the content of said title, while the Lisbon Treaty added a territorial dimension to cohesion within the Union (Title XVIII of Part Three of TFEU on economic, social and *territorial* cohesion). In the current framework the structural funds are five: the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Maritime and Fisheries Fund, and the European Agricultural Fund for Rural Development (EAFRD). The latter, together with the European Agricultural Guarantee Fund (EAGF), replaced from 2007 the previous European Agricultural Guidance and Guarantee Fund (EAGGF). All these structural

dissimilar to the regional policies within national states, where solidarity stemming from the concept of citizenship is also a 'territorial expression', that is ensuring equal standards of living and welfare to all the citizens of a political community.[27]

The incorporation of redistributive components into the original institutional architecture of the EU then shows how a plurality of different philosophies coexisted within the founding Treaty and how Member States committed to certain degree of solidarity beyond the single market. Therefore, even if built on the market as the basis of the economy, the founding Treaty did not deliberately opt for a *liberal* market economic model. The underlying constitutional theory of the European economic constitution was not straightforward with regard to the degree of public intervention required by the economy. For sure, as stated by the Spaak Report, a common market did not necessarily amount to an entirely free market,[28] requiring instead a regulatory framework. However, notwithstanding a general consensus on the need for rules, disagreement persisted upon the scope of intervention and the centralised or decentralised nature of public action.[29]

2.2.2 The microeconomic layer of the European economic constitution

This debate was to a certain extent rehearsed in the case law on the internal market, in particular in the field of free movement. As summarised by AG Tesauro in the field of free movement, in particular the free movement of goods, the issue was whether the provision of Article 30 TEEC (now Article 34 TFEU) was intended to liberalise *intra-Community* trade, thus aiming at merely removing cross-border obstacles, or rather to encourage market access and pursuit of commerce in individual Member States, thus imposing a liberal market paradigm.[30] Differently, it can be said that free movement law

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and investment funds are subject to a general legal framework, i.e. so-called 'Common Provisions Regulation' (CPR); see Regulation (EU) No 1301/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/320.

[27] For the relationship between cohesion policy and European citizenship, see Francesca Strumia, 'Remedying the Inequalities of Economic Citizenship in Europe: Cohesion Policy and the Negative Right to Move' (2011) 17 ELJ 725.

[28] See in this regard, Comitè intergouvernemental créé par la conference de Messine, *Rapport des chefs de delegation aux Ministres des Affaires Etrangères* (21 April 1956) 16 http://aei.pitt.edu/996/ accessed 30 October 2020.

[29] While necessity of organisation and rules was consistent with ordoliberal thinking, public intervention was highly contested, since ordoliberals refuse market-correcting actions.

[30] C-292/92 *Ruth Hünermund* [1993] ECR I-6787, Opinion of AG Tesauro.

can be conceptualised either as an anti-discrimination and anti-protectionist instrument or as an economic due process instrument.[31] In this regard, three different economic constitutional models have been distinguished: 1) the competition model, which corresponds to the ordoliberal and other market liberal theories, which rely on the negative integration trajectory and prioritise economic due process over anti-protectionist approach; 2) the centralised theory, which builds on Union regulatory powers (to be increased as a result of the deregulation caused by negative integration); 3) the decentralised theory, which advocates the primacy of national regulatory powers to correct the market and then embraces a narrow, anti-protectionist reading of the judicial review of national measures by the ECJ and, under its guidance, national courts. An equivalent tripartite scheme similarly codified three different models: 1) the host country model, which opts for decentralised regulation; 2) the harmonised model, which relies on centralised rule-making at the European level; 3) the home country model, where the application of the rules of the state of origin entails the enforcement of the principle of mutual recognition (constitutionalised in *Cassis de Dijon*)[32] with the consequent reduction of public regulation.[33]

The ordoliberal reading was then only *one* of the possible constitutional theories underlying the European economic constitution. The reason of the ample influence exerted by that constitutional theory on the interpretation of the Rome Treaty provisions and the consequent affirmation of the negative integration approach (then more market liberal and competition oriented) is to be ascribed more to the political obstacles associated to the adoption of secondary legislation than to constitutional design. The ECJ did not follow a conscious liberal market agenda;[34] rather, given the unfeasibility of a centralised model, the Court could not but follow the two decentralised options: either the home country model, where the focus on mutual recognition is more distinctly liberal and deregulatory, or the host country model, which can be more or less liberal according to the broader or narrower scope of the judicial review of national legislations (i.e. the more

[31] Miguel Poiares Maduro, *We, the Court. The European Court of Justice & the European Economic Constitution* (Hart Publishing 1998), especially chapter 4.
[32] C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[33] This distinction has been elaborated by Jukka Snell, 'The internal market and the philosophies of market integration' in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2014).
[34] Maduro (n 31).

liberal the more extensive is the interpretation of the notion of restriction and narrower the interpretation of legitimate *justifications).*

Therefore, it is possible to argue that the Treaty of Rome in its original setting did not express a preference for the (ordo)liberal, decentralised model, being instead more oriented towards an harmonised model.[35]This orientation was closer to the French vision that during the Treaty negotiations stressed the trans-border element, and then had more propensity for an anti-discriminatory rather than a market liberal paradigm. However, the lack of harmonisation through the secondary legislation determined the shift to the home country model and its principle of mutual recognition, which was later incorporated into the single market programme of the 1980s.

As has been shown, the influence of the ordoliberal philosophy on the sub-strand of the European microeconomic constitution that is free movement law was rather limited since the beginning. On the contrary, competition provisions were mostly interpreted in accordance with the ordoliberal view of undistorted competition as an end in itself.[36] However, already in the Spaak Report, given the primary objective of the Treaty of Rome to establish a common market, the system of undistorted competition was merely a means of realising that task. Consequently, while Article 2 TEEC indicated 'the establishment of the common market and the progressive approximation of national economic policies' as the primary task of the Community, Article 3 TEEC (g) listed the institution of a system of undistorted competition among all the other activities of the Community, making it subject to the attainment of the purposes of Article 2 TEEC. Where the influence of neo-liberalism (or ordoliberalism) is more evident then, as in the case of competition rules, the reason is not an ideological choice, but rather an instrumental necessity: the elimination of national barriers and the promotion of a cross-border dimension for trade. Ultimately, those liberal elements within the European economic constitution serve the promotion of a political project from an integrationist perspective. [37]

[35] As stated in Article 3 (h) TEEC, one of the activities of the Community should be 'the approximation of the laws of Member States to the extent required for the proper functioning of the common market'.
[36] As pointed by Tuori, the process of formal and substantive constitutionalisation of competition provisions followed the ordoliberal prescriptions. This process consisted of direct applicability and supremacy of European law over national provisions, justiciable rights for undertakings, extension of competition rules to mergers, definition of competition objectives as protecting not only individual competitors and economic efficiency in general, but also the structure of the market and thus competition as such (Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-4529, para 38). See Kaarlo Tuori, *European Constitutionalism* (CUP 2015) 157.
[37] Maduro (n 31).

It is clear, hence, how the first layer of the European economic constitution did not incorporate an unambiguous option for a market liberal model, but rather manifested ambivalence with regard to the models of economy.

2.2.3 The macroeconomic layer of the European economic constitution

Despite the clear microeconomic character of the European economic constitution, which emerged especially in the first decades of the European integration, the Treaty of Rome included macroeconomic provisions as well, which were a compromise between the German ordoliberal view of Germany and the more dirigiste French vocation.

In accordance with the microeconomic principles of free movement and competition, the macroeconomic assumptions reflecting the ordoliberal thought were price stability and maintenance of confidence in the currency, as expressly stated by Article 104 (1) TEEC. In the ordoliberal account, a stable price mechanism is the basis for an economic system centred on competition, as it plays an essential allocation and information role. On the other hand, in a spirit of concession to French dirigiste views, the founding Treaty envisaged a high level of employment and the equilibrium of overall balance of payments as a macroeconomic objective, thus complementing the wording of Article 104 (1) TEEC, and expressly included conjunctural policy as a matter of common concern in Article 103 TEEC.[38]

The primacy of monetary policy advocated by ordoliberals was then functional to the very creation of the common market, and yet it was not exclusively meant to serve the goal of price stability. Though the latter was an end in itself in the ordoliberal account, the Treaty also envisaged the goal of economic growth, incorporating the findings of the Spaak Report on balance of payments and mutual assistance.[39] This report called for the concomitant attainment of monetary stability on the one hand, and high rate of employment and economic productivity on the other. Article 2 TEEC reflected this holistic approach in that it assigned to the Community the task to promote 'a harmonious development of economic activities, a continuous and balanced expansion, an increase in

[38] For a two-pillar structure of the macroeconomic framework, see also Jean Pisani-Ferry, 'Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro Area' (2006) 44 JCMS 823.
[39] Comitè intergouvernemental créé par la conference de Messine (n 28) 71.

stability, an accelerated rising of the standards of living'. The same provision identified the means to achieve such objectives with the logic of the market (referring to 'the establishment of the common market') as well as in the gradual approximation of national economic policies.

The Treaty of Rome was then not imbued by so-called 'market fundamentalism', which in the narratives about the poor performance of the euro area is often deemed responsible for the EMU flawed structure since its inception.[40] The founding Treaty was more ambitious than the Treaty of Maastricht, which envisaged the institutional and functional setting of the Eurozone. The Rome Treaty's title II on economic policy, indeed, set out provisions on macroeconomic coordination which, albeit not legally binding and enforceable, recalled, for instance, the objectives – totally neglected in 1992 – of the equilibrium of the balance of payments and financial stability.

The importance assigned to the balance of payments was discernible in Article 3 (g) TEEC, which listed among Community's activities the application of procedures by which disequilibria in Member States' balances of payments could be remedied. To this end, Article 6 TEEC instituted a framework of cooperation to allow Member States to coordinate their respective policies within the institutions of the Community 'to the extent necessary to attain the objectives of the Treaty'. Paragraph 2 of the same provision then stated the relevance of 'internal and external financial stability' to the coordinated action of Member States in macroeconomic matters. Article 105 TEEC restated those efforts towards the economic coordination in light of the attainment of the objectives set out in Article 104 which, as said above, coincided not only with reliable exchange rates and stable level of prices, but also with the equilibrium of the overall balance of payments and a high level of employment.

The provision of Article 104 TEEC on the balance of payments reflected the Keynesian idea, evolved from the Great Depression and embraced by the French negotiators, that major surplus countries should be obliged to adjust as much as deficit countries, so that adjustments to international imbalances could be undertaken symmetrically. Surplus in one Member State's balance of payments, indeed, reflects a

[40] The expression 'market fundamentalism' is often used by economists interchangeably with 'neoliberalism' to explain the flawed functioning of the Eurozone. See for instance, Joseph Stiglitz, *The Euro and its Threat to the Future of Europe* (Penguin 2016); see also, Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis. Has integration gone too far?* (CUP 2014).

parallel deficit in which another State is running: the imbalances consequently generated should then be treated as a matter of common concern. To a certain extent, it is then possible to affirm that the founding Treaty established solidaristic obligations between its contracting parts. In fact, the general way to deal with economic imbalances is to adopt inflationary policies in the country that has registered a commercial surplus: here, by lowering the interest rate and increasing money supply, the country increases aggregate demand and boosts imports, thereby allowing its currency to appreciate (increased exchange rate).

The very possibility to reach the equilibrium on the balance of payments is indeed strictly related to the use of monetary tools, which in the original institutional setting were subservient to the dual Community mandate to ensure high employment and stable prices: in other terms, monetary policy was not only oriented to price stability but also to the achievement of other macroeconomic objectives, largely related to economic growth and low unemployment.

Since in the context of the Rome Treaty Member States still retained monetary sovereignty and thus the tools necessary for the macroeconomic adjustments, it was necessary to create a frame of coordination of monetary policies not dissimilar to the one set up for economic policies. Given the relationship between the balance of payments and the exchange rates,[41] Article 107 provided that Member States should treat their policy with regard to rates of exchange as a matter of common concern, with the consequence that any alteration in the rate of exchange should have been made consistent with the objectives set out in Article 104 TEEC, besides the general goal of undistorted competition. To this end, the Commission after consulting the Monetary Committee (the intergovernmental institution entrusted with advisory functions in the monetary field) could authorise other Member States to undertake the necessary action to deal with the consequences of such an alteration.

Moreover, Article 108 TEEC added that, where a Member State was in difficulties or seriously threatened with regard to its balance of payments, for reasons either related to a disequilibrium or the type of currency at its disposal, it should be granted mutual assistance, especially where such difficulties could jeopardise the functioning of the

[41] As the economic theory teaches, the equilibrium of the balance of payments is indeed automatically achievable in a system of flexible exchange rates.

common market or the implementation of the common commercial policy and the state in question could not take measures compliant with the objectives of Article 104 TEEC. As pointed out in the Spaak Report, taken safeguard measures to avoid a devaluation only meant to extract a mere competitive advantage, said mutual assistance would have taken the form of credits, increased quotas, or increased imports by temporary reductions of custom duties.

The Treaty of Rome accepted those findings inasmuch as it allowed a Member State in difficulty to adopt protective measures strictly necessary to remedy such difficulties, and with the view to not affect the functioning of the common market disproportionally. In the transitional period, indeed, mutual assistance could take the form of special reductions in the custom duties or enlargement of quotas in order to facilitate an increase in imports (Article 108 (2) TEEC).

The creation of the economic and monetary union by the Maastricht Treaty partially repealed those provisions: while the equivalent of Article 108 TEEC can be found in Article 143 TFEU, which envisages forms of financial assistance only for Member States with a derogation (countries outside the euro area), no provisions equivalent to Article 104 TEEC were introduced. The architecture of EMU ignored any provision on the balance of payments, and also neglected the need for a complementary economic union.[42] While competences in the monetary field were transferred to the European Union, economic competence rested with Member States and their domestic sphere. The criteria of convergence listed in a separate protocol attached to the Treaty were indeed of monetary nature, being focused on the exchange and interest rate, ratio of deficit and debt to the GDP, and rate of inflation. More importantly, such criteria did not take into account employment, as they did not focus on *structural* deficits, that are deficits calculated in a condition of full employment. Nevertheless, promoting economic growth and full employment continued to be featured as an aspiration to promote through the

[42] The Treaty of Maastricht did not adopt the proposals of the Werner and Delors Reports relating to a wide EC decision-making power over macroeconomic management. For instance, paragraph 19 of the Delors Report, concluded that, although in the economic field a *wide* range of decisions would have remained the preserve of national and regional authorities, some policy choices should have been placed within an agreed macroeconomic framework with certain rules and procedures, given their impact on the conduct of a common monetary policy. For a detailed provision regarding the macroeconomic policy area, see paragraph 30, where the Report also deals with wage formation and industrial relations policies, considering wage flexibility and labour mobility as necessary instruments to gear differences in regional and national competitiveness.

establishment of the internal market and the economic and monetary union in Article 2 TEC, to which the new principle of solidarity was added. The Maastricht Treaty, indeed, represented a compromise, well summed up in the formula 'sustainable and non-inflationary growth' between the French more employment-oriented and German stability-focused positions.[43]

2.2.4 EMU's theoretical foundations

During the negotiations preceding the ratification of the Maastricht Treaty in 1992, the two abovementioned countries held different positions in relation to cross-border capital flows and free trade, with Germany calling for free capital flows, flexible exchange rates and no coordinated multilateral interventions in order to correct macroeconomic shocks. This position was strongly consistent with its national economic tradition of ordoliberal descent that considers capital controls arbitrary, in that they favour certain economic actors and rent-seeking. On the other hand, France was closer to the Keynesian model of controlled capital flows, fixed exchange rates, and fostered multilateral adjustment via inflationary policies in surplus countries.[44]

Basically, the divergence of the two countries on international macroeconomics reflected their different attitude on how to face the so called Mundell- Fleming trilemma, which states that an economic system cannot have a fixed exchange rate, an independent monetary policy, and allow capital to flow freely simultaneously.[45] Also known as the

[43] In this sense, also David Begg, Ginaluigi Vernasca, Stanley Fischer, Rudiger Dornbusch, *Economic*s (11th edn, McGraw-Hill Education 2014). According to the authors, European Policy making has always been a dialogue between the German tradition, preoccupied heavily by the need not to repeat the hyperinflation of 1922/23, and the tradition represented by France and Mediterranean countries, which prioritises economic growth and low unemployment.

[44] See Brunnermeier, James and Landau (n 10) in particular chapter 4.

[45] This policy trilemma was simultaneously formulated by two economists, Robert Mundell and Marcus Fleming, in the 1960s in order to offer a conciliatory solution to financial openness and foreign-exchange disequilibria with the aspiration of an internal stabilization policy to full-employment. The trilemma is explained in Robert Mundell, 'Capital Mobility and Stabilization Policy under Fixed and Flexible Exchange Rates' (1963) 29 Canadian Journal of Economic and Political Science 475-485 and in John Marcus Fleming, 'Domestic Financial Policies under Fixed and under Floating Exchange Rates' (1962) 9 IMF Staff Papers 369-380. This economic theory shows that in a system in which capital is free to move, a nation must surrender control over either its exchange rate or its interest rate. In other words, a country can maintain a target interest rate under conditions of unchecked capital movement only by letting exchange rates adjust or, on the contrary, can maintain a target exchange rate via a compensatory interest rate policy. Such a model considers an open economy where the function of production (IS, which expresses the demand for goods, given by the sum of consumption, investment, public spending and net exports), the demand for money or liquidity (LM, given by the relationship between income and interest rate) and the curve balance of payments (BP) interact.

'impossible or inconsistent trinity', this theorem shows how fiscal and monetary policy can work towards the objective of full employment while maintaining an external equilibrium of the balance of payments.

In a flexible system, exchange rate is to be determined by market forces alone and the adjustment to the balance of payments will result automatically. In fact, the central bank can intervene on the side of money supply, which is under its control, with the consequence that an increase of money supply will result in a reduced local interest rate and capital outflows, while the opposite (reduced money supply, increased interest rate and capital inflows) occurs where the central bank pursues a contractionary monetary policy.

Therefore, the instrument of monetary policy can be effectively used to correct imbalances in both directions, thus proving to be a more effective tool than fiscal policy[46] with the result that the goal of full employment can be more easily attainable, for instance, through the devaluation of the exchange rate. The devaluation of the currency, indeed, constitutes a stimulus for national production thanks to the increased demand of exports. This option demonstrates how under the condition of perfect capital mobility, in order to have an efficient monetary policy, exchange rates must be flexible. Where exchange rates are instead fixed, monetary policy will be indeed ineffective and fiscal policy, on the contrary, more effective.

In a system of fixed exchange rates, a system can opt for are either free mobility of capital with no autonomous monetary policy (a)[47] or monetary sovereignty with capital controls (b).[48] In the first scenario, the monetary authority cannot intervene in the market of exchange rates, with the consequence that a deficit in the balance of payments will result in a contraction of the supply of money, and thus in the increase of the rate of interest. On the one hand, this will attract foreign capital, given that money moves where possibilities of higher returns are; on the other, it will compress investment and then

[46] In this hypothesis, the ineffectiveness of an expansionary fiscal policy is proved by the fact that the intervention on the side of production generates a surplus in the balance of payments, which under flexible exchange rates will appreciate the domestic currency with the consequent decrease in net exports and then in production. The final result will then correspond the initial equilibrium between IS, LM and BP curves.
[47] The independence of monetary policy, that means independence over domestic interest rate, is not possible because when such an interest rate is set differently from the world interest rate, appreciation or depreciation pressure on the domestic currency would undermine a stable exchange rate.
[48] This policy option, upon which the Bretton-Woods system was built, ensures cheaper availability of domestic credit. If foreign capitals enter the state interest rate increases, thus slowing down the investment.

income, contracting the demand for imports. The adjustment of the balance of payments, then, occurs at the expense of the income and ultimately employment. Although the relationship between employment and balance of payments might seem one of trade-off, Mundell showed that such an apparent dilemma could be given a solution through a balanced combination of expansionary fiscal policy (boosting the aggregate demand) and contractionary monetary policy (attracting foreign capitals via increased interest rate, which has a negative effect on the balance of payments and then adjusts the BoP in the opposite direction). In a condition of perfect capital mobility, however, the mere expansive fiscal policy could strike alone the balance between BoP's equilibrium and employment.

In the second scenario, the one closer to the French position during the 1992 negotiations and the Keynesian thinking during the Bretton-Woods negotiations, states can have both generally stable exchange rates and independent monetary policies, but at the price of capital controls. That means that a country that wants to fix the value of its currency and have an interest-rate policy that is free from external influence cannot allow capital to flow freely across its borders, since capital inflows will exert pressure on its currency causing a surplus in the BoP which cannot be adjusted by fixing the exchange rate.

Although both versions of the trilemma came to an identical conclusion as regards the effectiveness of government policy choices vis-à-vis the type of exchange rates system, the Mundellian formulation focused on a case of perfect mobility of capital, thus being less institutionally grounded than Fleming's analysis. By assuming a condition of imperfect capital mobility, the latter was indeed more realistic, even though with the development of a globalised finance this model has nowadays become less cogent. Moreover, the two analyses showed a significant difference in the way of conceiving of the relationship between government policy and social welfare.[49] Preference over one of the possible policy options (currency unification, openness to financial flows or not) reflects a different understanding of the role of the government as an actor that should intervene to maximise individual agents' welfare or, on the contrary, refrain from any

[49]Gary A. Dymski, 'The Eurozone Crisis as a Trilemma Forcefield: Fleming, Mundell, and Power in Finance' (UCR Political Economy Seminar Paper, California 2013) https://ucrpoliticaleconomy.ucr.edu/wp-content/uploads/2014/05/Eurozone-Crisis-as-a-Trilemma-Forcefield-Fleming-Mundell-Power-in-Finance-Dymski-8-13.pdf accessed 30 October 2020.

interference. Mundell's thought, albeit initially presented in Keynesian terms, evolved into a more liberal position.[50] Despite his belief in the role of the government in public expenditure in order to increase demand and employment, he nevertheless believed, as other supply-side economists, that stimulating the entrepreneurial group by low taxes and minimal regulation would restore investment, and hence economy. Thus, his preference for capital mobility as an important instrument to overcome distortions in prices and reach a maximally-feasible economic efficiency has significant consequences in terms of redistribution – as there is no distributional process via taxation.

Fleming's position, instead, was more rooted in the Keynesian conceptual framework, which he nevertheless enriched with external equilibrium considerations. As he wrote in 1963, the crucial point in international macroeconomics is to reconcile domestic objectives of welfare states, such as full employment, equitable income distribution and high investment with the external objective of 'maximising the useful interchange of goods and services'.[51] Unlike Mundell, he saw increased capital mobility as a threat to the balance of payments stability due to uncontrolled flows of hot money and their negative effects on aggregate demand. However, he opened to the idea of the existing European custom union as a solution for maintaining national borders open without compromising on domestic commitment to welfare provision. In such a custom union, with exchange rates irrevocably fixed, hot money flows would disappear, but not all the countries of the group would attain full employment unless they agreed over some conditions: a) a 'thoroughgoing coordination [...] of fiscal and possibly wage policies', b) a degree of 'solidarity sufficient to induce those with favourable balances of payments to endure some degree of inflationary pressure for the sake of the others', c) high degree of labour mobility. As ultimately stated, in this case 'the maintenance of employment and activity would become, in effect, a collective, rather than a national, function'.[52]

At Maastricht, the contracting parties overcame the Franco-German disagreement on which side of the impossible triangle should have been dismissed. As already said, while Germany was more inclined to pick the sides of free capital flows and floating

[50] ibid 6.
[51] John Marcus Fleming, 'Developments in the International Payments System' (1963) 10 IMF Staff Papers 461.
[52] ibid 481.

exchange rates in order to restore the balance between countries,[53] France insisted on tighter capital flows management and stable exchange rates. The solution enshrined in the Maastricht Treaty was a compromise between the two positions: states adopting the euro chose a fixed exchange rate and monetary bondage in a frame of complete liberalisation of capital transactions.

The consequent sacrifice of national autonomy over monetary policy turned in a 'serfdom' to the monetary policy of the regional power, Germany, in that the aspiring members of the three-stage EMU had to peg their currency to the Deutschmark and thus to have the same interest rate set by the Bundesbank. The irrevocable fixity of parities, followed by the introduction of the single currency in the third stage, implied that Member States lost a fundamental tool for the correction of economic imbalances, given the impossibility of exchange rate adjustments as a reaction to the pressure coming from foreign markets. For Member States in the single currency, then, government instruments for dealing with economic shocks were reduced mainly to taxation, intervention in the labour market, or reliance on the market. The unavailability of the devaluation of national currencies in a competitive way to overcome national economic imbalances was not complemented with EU- level corrective powers. The Maastricht Treaty did not incorporate the provisions of the Delors Report aimed at dealing with the imbalances raised by the market forces and with the resource allocation in those economic sectors where the working of the market needed to be reinforced or adjusted.[54]

This notwithstanding, the cost associated to the loss of monetary independence was significantly felt by peripheral countries only after the introduction of the euro, especially with regard to their current-account imbalances. In 1990s, despite the absence of capital controls, capital movements and hence current-account imbalances were relatively limited. Following the introduction of the euro, Europe witnessed a massive capital movement from the core to the periphery, with the latter hence registering a high inflation (partially mitigated by the ECB's accommodating policy of setting the interest rate slightly above target). This shift of capital from the core to the periphery was then

[53] This position reflected the deep-seated ordoliberal belief that capital controls would favour lobbying and favouritism and is generally held by richer countries running surpluses: during the Bretton Woods negotiations, indeed, it was the view espoused by the United States.
[54] Committee for the study of economic and monetary union, *Report on economic and monetary union in the European Community* (17 April 1989) https://aei.pitt.edu/1007/1/monetary_delors.pdf accessed 30 October 2020.

one of the perceived benefits of the single currency, i.e. making it easier for capital to flow from countries with abundant capital - and thus banks of the core Europe - where returns on investments are relatively low, to countries with emerging markets where capital is poor and therefore chances of return on the capital invested higher.[55]

The major cause of the crisis of the Eurozone, contrarily to what is generally believed, was not the fiscal indiscipline of peripheral countries (or Piigs, as often referred to), but the effects that financial deregulation and liberalisation had on countries with no exit strategy as regards their interest rates and devaluation. The interest rates in the Eurozone's core and periphery rapidly converged, and by 2004 there was no gap in the interest rates across the Europe, although this element did not reflect a real convergence.[56] The big asymmetric shock came with the so called 'sudden stop' to capital flows in 2009, which was a reflection of the global financial crisis of 2008 and the lack of liquidity that led investors to withdraw investments from emerging economies, which were financing their public deficit with said hot money. Adverse asymmetric shocks that consequently hit those countries called government solvency into question.

Hence, the financial crisis turned into a European sovereign debt crisis which posed then a major adjustment problem. Having lost the sovereign power of currency devaluation, Member States hit by adverse asymmetric shocks had to recur to so called 'internal devaluation', i.e. restoring competitiveness through wage cuts.[57] The greatest weakness in the architecture of the Eurozone, indeed, was the very lack of a mechanism of adjustment: the euro's architects not only introduced a one-size-fits-all monetary policy, they also neglected any form of fiscal integration.[58]

In the belief that the Eurozone could have worked as an optimal currency area (OCA), the EMU's creators mostly relied on fiscal soundness and labour market's structural reforms to make wages more flexible. These two conditions were considered

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[55] Vesna Georgieva Svrtinov, 'Capital Flows and the Eurozone Crisis-Implications for Economic Policy' (8th Annual Academic Conference on European Integration, UACS 16 May 2013) http://eprints.ugd.edu.mk/8550/ accessed 30 October 2020; Kash Mansori, 'Why Greece, Spain, and Ireland aren't to Blame for Europe's Woes' (*The New Republic*, 11 October 2011) https://newrepublic.com/article/95989/eurozone-crisis-debt-dont-blame-greece accessed 30 October 2020.

[56] Capital inflows pushed up domestic wages without improving international competitiveness, as increases in domestic wages are an uncompetitive tradable sector.

[57] For instance, when a country faces an aggregate demand shock, the devaluation of its currency would prevent unemployment and a negative imbalance in its balance of payments.

[58] Paul Krugman, 'The revenge of the optimal currency area' *The New York Times* (New York, 24 June 2012).

sufficient to cope with the incidence of asymmetric shocks, while OCA orthodoxy teaches that at least a high degree of labour mobility[59] or an adequate transfer of fiscal resources should exist in order to overcome asymmetric shocks.[60] While labour mobility, which is a lever to restore full employment through emigration, proved to be less high than expected, fiscal integration was not envisaged since the inception of EMU. However, the crisis proved that even countries running low deficits had been hit by asymmetric shocks for the reason that those shocks are often caused by exogenous events (such as shifts in relative product demand) unrelated to sound finances.

As said, unlike the Treaty of Rome, the Treaty of Maastricht which introduced the institutional framework for the single currency did not envisage any *ad hoc* mechanism for the correction of macroeconomic imbalances, which were then left to the *general* coordination framework of national economic policies within the Council (now Article 121 TFEU). In the EMU architecture, indeed, Member States should internalise the viewpoints of other partners in the determination of their economic policies, avoiding externalities that could hamper the viability of Union's objectives (Article 120 TFEU).[61] Notwithstanding the inclusion of social objectives like 'a highly competitive social market economy aiming at full employment and social progress' or 'social justice' in the general provision enumerating the goals of the Union (Article 3 TEU), title VIII on economic and monetary union did not specifically recall the object of full employment. Articles 119 and 120 (1) TFEU, indeed, indicate only an open market economy with free competition as the guiding principle in the coordination of Member States economic policies, while generally referring to 'the purposes set out in Article 3 TEU'. As stated in Article 119 (2), general economic policies can be supported as long as they do not constitute a prejudice to price stability, which is the main objective of the Europeanised monetary policy. This provision then subordinates other macroeconomic objectives, that

[59] Mundell won a Nobel prize for his work on the Optimum Currency Area, which proves that a single currency zone is workable only if characterised by high labour mobility. See Robert Mundell, 'A Theory of Optimum Currency Areas' (1961) 51 The American Economic Review 657.

[60] Peter B. Kenen, 'The Optimum Currency Areas: An Eclectic View' in Robert Mundell and Alexander K Swoboda (eds), *Monetary Problems of the International Economy* (University of Chicago Press 1969) 405. This author sustains that cohesion funds can smooth asymmetric shocks in the lack of exchange rates devaluation.

[61] According to Article 120 TFEU, 'Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121 (2)'.

Member States might want to pursue through their fiscal and social policies, to the objective of price stability.

The primacy conferred to price stability is also evident in the mandate of the European Central Bank (ECB): as stated by Article 127 (1) TFEU, the primary objective of the European System of Central Banks (ESCB) is to maintain stable prices. Consequently, the ECB shall act in light of this principle and its corollary of an open market economy with free competition when supporting the general economic policies of Member States. Similarly to Article 119 TFEU, said provision refers to other Union objectives by generally recalling Article 3 TEU with the consequence that the objective of full employment does not counter-weigh directly price stability, at it seems more a 'value' generally recalled without any 'hard' legal effect.

The formulation of Title VIII provisions then seems to suggest the 'continuing primacy of the microeconomic constitution', given that the basic principles of 'the first layer of the European economic constitution', an open market economy and free competition, have prevailed in the EMU's macroeconomic framework.[62]

The German ordoliberal tenet, which elevated price stability to the necessary condition for competition to work, inspired the way in which the Maastricht Treaty shaped the legal framework for monetary policy to the extent that even sceptical German ordoliberals gradually adhered to the single currency project.[63]The institutional provisions on the ESCB fulfilled the residual ordoliberal expectations by ensuring the independence of both the European Central Bank and national central banks. In fact, Article 130 TFEU recites that neither of them shall seek or take instructions from any body or institution within the Union or Member States.

Due to loss of monetary sovereignty and the price stability-oriented mandate of the ECB, fiscal policy grew in importance, as it became the crucial instrument of Member States' competence to offset asymmetric shocks. However, national fiscal sovereignty was conceived as relative, in that macroeconomic policies were made subject to specific constraints. In particular, now Article 119 (3) TFEU specified that national policy-making should be compliant with the principles of stable prices, sound public finances and a sustainable balance of payments. The Maastricht Treaty then opted for a model which

[62] Tuori, *European Constitutionalism* (n 36).
[63] ibid 179.

took an opposite direction to the conclusion of the Mundell-Fleming trilemma that the adoption of an *expansionary* fiscal policy is the only effective tool to support the function of the internal demand (Y), on which the level of employment depends. Even the Rome Treaty's reference to a balance of payment *in equilibrium* gave way to a *sustainable* balance of payment, where the concept of sustainability seems to suggest due discipline against profligacy unilaterally required for countries in deficit, rather than a mutual effort of all Member States, including those with sound finances, towards convergence. None of the 1992 Treaty provisions introduced rules in relation to the account balance or trade surpluses, with the consequence that the macroeconomic coordination framework did not consider the costs that uncoordinated economic policies could have imposed on other countries.

The only concern of the Treaty was to avoid moral hazard and negative externalities through fiscal soundness: to this end, Article 121 TFEU formed the basis for a multilateral surveillance procedure while Article 126 TFEU, complemented by Protocol no 12, set out the excessive deficit procedure, aimed at monitoring the government budgetary position as well as debt levels and correcting – originally with soft-law instruments – states' deviation from fiscal prudency.[64] The Swabian spirit informing the EMU design later inspired the Stability and Growth Pact (SGP) of 1997 that - consisting of two regulations, respectively forming the preventative and dissuasive arm - reinforced both procedures.[65]

The adoption of the SGP was, once again, the result of a compromise between Germany and France over the Weigel plan of 1995, a proposal of the German finance minister Theo Weigel that embraced the conclusions of the 1992 German Council of Economic Advisers' report demanding stricter observance of the rules on excessive deficits. The French government opposed the plan due to the provision of automatic sanctions and remained vocal in its pledge for a political solution to budget deficits. The Franco-German disagreement ended at the 1996 Dublin European Council, where

[64] For a more detailed analysis of the procedures set out in Articles 121 and 126 TFEU and the measures adopted to strengthen them see Chapter III, specifically subsection 3.2.1.2 and 3.2.3.1.

[65] Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1 and Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6. Besides such regulations, the SGP included a political, legally non-binding resolution of the European Council. See Resolution of the European Council on the Stability and Growth Pact (EC) 17 June 1997 [97/C 236/01].

Member States converged on enhanced mutual surveillance and reinforced dissuasion, on the one hand, and the lack of automatic fines on countries with deficits, on the other.

The emphasis on the need for Member States to obey fiscal discipline, which had been elevated to a prerequisite of a monetary policy that prioritises price stability, emerged from other two provisions of the Treaty, Article 125 (1) TFEU containing the no-bailout clause and Article 123 TFEU on the prohibition of monetary-financing. This legal safeguards for fiscal moderation aimed at preventing the moral hazard inherent in deficit financing and debt monetisation: Article 125 aimed to avoid that the expectation of a bailout from the Union or its Member States could induce incautious borrowing from financial markets, while Article 123 TFEU complemented that limit with the prohibition of central-bank financing of government expenditures.[66] The ban on rescue packages implied exclusive responsibility of Member States for their debt, in accordance with the principle of national fiscal sovereignty, which entails consequent liability for financial obligations. In short, it can be said that the EMU institutional framework has been centred around the idea of fiscal self-responsibility rather than interstate risk sharing.

2.3 The inherent contradictions of European financial solidarity

As shown above, the Maastricht Treaty shaped the Eurozone as a non-transfer union, reaffirming the paramount importance of national boundaries of financial solidarity. This section explores whether this choice was coherent with Union citizenship in light of the implications of this concurrently introduced concept. Subsection 2.3.1. expounds the reasons behind national allocation of redistributive powers. Subsection 2.3.2. focuses on the impact of Union citizenship on national redistributive systems.

2.3.1 The choice for national redistribution

The main justification for the allocation of fiscal competences with Member States- which also determined the asymmetrical EMU architecture – lay in redistribution, which forms the core identity of modern welfare states and shapes their internal structures

[66]Both provisions, which are expression of the same rationale, should be read in conjunction with Articles 124 on the prohibition of privileged access to financial institutions and 126 TFEU on excessive deficits as well.

of social organisation. Social policies were (and still are) understood as a matter of national competence that should rest with national political process, and in particular the annual budgetary process in that they require a high degree of democratic legitimacy.

The overall legitimacy of modern capitalist democracies, indeed, lies in the redistribution of wealth through welfare state mechanisms, or in other words in their capacity to face the tension between labour, on one side, and capital on the other. As those concepts rely on structurally incompatible ideas of social justice, one resting on the entitlements of citizenship and the other on the right of property and market reliance, the post-war settlement between those competing forces in societies based on democratic capitalism was a growing welfare state, committed to the political aim of full employment – an underwritten guarantee made possible by an extensive use of Keynesian macroeconomic toolkit – and the right of workers to free collective bargaining in order to achieve rising standards of living and social security entitlements.[67] Redistribution hence embodies diverse value choices that, forming the constitutional identity of Member States, reflect profound cultural and ideological differences between them. That diversity in terms of ideological, financial and institutional arrangements explains the different configuration of national welfare regimes, which do not converge into a uniform European social model.[68] As held by the German Federal Constitutional Court in its *Lisbon* judgment,[69] fiscal and social competences constitute a core area of national sovereignty, and given their strict intertwining relationship with democracy cannot be transferred to the transnational level. Should that shift occur, democratic legitimacy of national political systems, which in their post-war configuration evolved from merely liberal to more comprehensive welfare states, would be compromised.

For this reason, despite the attempt to deepen political union between Member States – a goal also enhanced by the introduction of the single currency – the Maastricht Treaty neither introduced a basis for the harmonisation of national welfare systems, nor it created Union-level redistributive mechanisms. The thin supranational redistribution-oriented policy instruments, i.e. EU cohesion funds and EU budget, were not

[67] Wolfang Streek, 'The crisis of democratic capitalism' (2011) 71 New Left Review 5, 10-11.
[68] For a traditional classification of European welfare states into Anglo-Saxon liberal, Central and Southern European corporatist, and Nordic social democratic welfare models, see Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).
[69] BVerfG, 2 BvE 2/08, Decision of 30 June 2009 (*Lisbon Urteil*).

complemented by venues of allocation of resources and redistribution of wealth at transnational level, and no powers of taxation were allocated with the Union.

However, the other constitutional novelty introduced at Maastricht, Union citizenship, led to a partial openness of national redistributive structures to cross-border claims of nationals of other Member States, thanks to the activism of the early case law of the Court of Justice, which interpreted the relatively scant provisions of the Treaty as creating transnational – albeit limited – solidarity. Though Member States maintained exclusive competence in determining conditions and extent of welfare entitlements, they had to respect EU law, and thus the principle of non-discrimination on grounds of nationality when exercising that power. This led to a partial opening up of welfare systems, as Member States had to modify the conditions of eligibility for social benefits and extend access to their healthcare system to non-nationals (including medium-term residents and temporary visitors).

2.3.2 Union citizenship and its constitutional implications

The introduction of EU citizenship – certainly against the expectations of the Maastricht Treaty's drafters - went beyond the concept of market solidarity and reshaped, to a limited extent, boundaries of redistribution between citizens of Europe: as affirmed in *Grzelczyk*,[70] the fundamental status of EU citizenship implied some degree of financial solidarity between nationals of different Member States. While early-stage integration process concerned individuals in their only capacity as economic agents, post-Maastricht Union included individuals qua citizens in the outreach of the European project. The novelty of EU citizenship amounted to a partial shift of the focus of EU law, which was no longer meant to confer rights on individuals falling into the scope of the Treaties by virtue of their economic activity. EU citizenship constitutionalised the right of free movement of all individuals, regardless of their market credentials, while on the side of non-discrimination vis-à-vis welfare provision, Regulation 883/2004 on the coordination of social security systems of Member States included economically inactive citizens in its universalistic scope *ratione personae*.

[70] Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

The inclusion of all citizens into the scope of EU law prompted the expansion of EU citizenship beyond the justiciable economic rights forming its first layer, i.e. judicial and economic (market) citizenship[71] – which in turn corresponded to the first microeconomic layer of the European economic constitution. And yet, even free movement provisions regarding economic actors (workers or established persons) had no longer been interpreted in light of the internal market rationale alone.[72] The extension of the scope of application of the Treaty to situations with no intra-Union specificity, be it a cross-border dimension or the exercise of an economic activity, brought individuals qua citizens rather than qua movers or market agents into the scope of EU law, thus ensuring the protection of economic (*Gebhard*) and non-economic (*Carpenter*) rights pertaining to the sphere of personal freedom of individuals, rather than their access to the market. This expansion of EU law did not only entail a liberal approach, in the sense of protecting individual's rights of civil nature,[73] but the authority of EU law also reached social rights and welfare entitlements, which liberal European democracies (that in their post-war configuration evolved into more comprehensive welfare states) guarantee to all their citizens. The difference between the protection of traditional liberal rights and social rights by virtue of EU law then consisted in the weakening of the cross-border element in the first case, and in the emphasis put on that same transnational element when it came to opening national borders of welfare systems to claims of non-nationals.

Therefore, the conferral of a right to free movement not strictly subservient to the realisation of economic integration may have signalled a change in the telos of the European project, where the promotion of mobility, not only of economically active persons, but of all European citizens could have served the purpose of a broader societal integration. In effect, both Union citizenship and monetary and economic union (EMU) were concomitantly introduced with the aim of deepening political union between Member States and their citizenries. In this regard, the single currency could have been a 'technology of citizenship',[74] and then shaped accordingly the second, macroeconomic layer of the European economic constitution, established by the EMU.

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[71] Tuori, *European Constitutionalism* (n 36).
[72] See Eleanor Spaventa, 'From Gebhard to Carpenter: towards a (non-) economic constitution' (2004) 41 CMLR 743.
[73] ibid.
[74] Barbara Cruikshank, *The will to empower: Democratic citizens and other subjects* (Cornell University Press 1999).

Instead, the promise of a (limited) space of transnational solidarity stemming from the notion of Union citizenship ripened straight after Maastricht only in the context of free movement, which was no longer intended as a mere microeconomic principle, given the new constitutional dimension added to mobility and to non-discrimination on grounds of nationality. In the aftermath of its introduction, Union citizenship showed a 'relational' potential as it opened up the possibility for EU nationals to invoke equal treatment as citizens rather than as workers. Some commentators read this development in optimistic terms, stating that the 'umbilical cord' of free movement provisions with the market freedoms appeared to be cut[75] since Union citizenship expanded the material scope of EU law and severed the equality principle from the economic status of individuals.[76] The introduction of EU citizenship seemed to have strengthened the welfare rights of EU migrants and given a constitutional dimension to their equality claims under EU law. For this reason, EU citizenship, despite all the limitations attached, could offer a normatively attractive vision of the Union as a corrective institutional structure to tackle the externalities of the nation-state.[77]

Admittedly, the limitations inherent in the construction of EU citizenship have rendered its *de facto* scope - i.e. the categories of citizens who are effectively able to claim citizenship rights and the specific content of such rights - quite erratic and not inclusive enough to deliver the promise of equality underwritten in any meaningful concept of citizenship. In abstract terms, however, the concept of EU citizenship could be read – and in the earlier case law of the ECJ there were the seeds of this different construction – as a normative justification to offer an 'enforceable system of rights and obligations' to

[75] See Xavier Groussot, 'Principled citizenship and the process of European constitutionalization: from a pie I the sky to a sky with diamonds' in Ulf Bernitz, Joakin Nergelius and Cecila Gardners (eds), *General Principles of EC Law in A Process of Development* (Kluwer 2008) 328.

[76] See, for instance, Catherine Jacquesson, 'Union Citizenship and the Court of Justice: Something new under the Sun? Towards Social Citizenship' (2002) 27 ELR 260, at 267 concluding that 'the principle of equal treatment is not perceived anymore as a means to ensure the principle of free movement and the achievement of the internal market but as a goal in itself' and identifying 'the contribution of the citizenship provisions […] towards more social justice'. Similarly, Eleanor Spaventa, 'Seeing the wood despite the trees? On the Scope of Unio citizenship and its constitutional effects' (2008) 45 CMLR 13, at 27-28: 'since the situation is brought within the material scope of the Treaty by the exercise of the right to move, rather than (for instance) by the exercise of the right to engage in an economic activity, there is no "inherent" limit to the possibility to invoke the right to equal treatment'.

[77] Floris De Witte, 'Freedom of movement needs to be defended as the core of EU citizenship' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019).

'relational claims of justice and solidarity' across borders.[78] In other words, the novelty of EU citizenship was its capacity to bring EU citizens without market credentials within the protective scope of the principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU. Union citizenship not only challenged the economic paradigm underpinning the free movement provisions by conferring a right to move upon every citizen as such, but *in principle* allowed citizens who exercise such right to invoke equal treatment on equal footing with nationals of the host Member State. The exercise of the right to move under Article 21 TFEU enabled citizens to bring themselves within the scope of the Treaty and thus to invoke in principle Article 18 TFEU also in relation to social benefits. However, such equality claims did not amount, *practically*, to an unconditional and full inclusion of non-nationals within the solidarity structures of the host Member State.

Nonetheless, on an abstract level, the *existence* of a normative ground, EU citizenship, capable of extending equal treatment as regards welfare protection to non-nationals offered an institutional dimension to interpersonal relationships across borders. In the absence of own meaningful redistributive mechanisms at the supranational level, any aspiration of the Union to deliver social protection cannot but be realised through the opening-up effect that the principle of non-discrimination on grounds of nationality has on the boundaries of national welfare states. Nationality is indeed the demarcation line of territorially-bounded social solidarity systems because it expresses the idea of belonging to a (fictional) community. Membership of this community justifies the 'assumption of welfare responsibilities between [its] members'[79]. Through the principle of subsidisation, public institutions redistribute a portion of the wealth at the disposal of certain groups to satisfy the needs of other social groups.[80] Although the Union does not have its own redistributive power, i.e. the capacity to directly organise wealth transfers between social groups, it demands Member States to assimilate EU migrant citizens into their social protection systems. This process of 'assimilation' relies on the 'vicarious responsibility' of Member States which are called to accommodate 'novel expectations of social

[78] Floris de Witte, 'EU Citizenship, Free movement and Emancipation: A Rejoinder' in Baübock (n 77) 178.
[79] Michael Dougan and Eleanor Spaventa, "Wish you weren't here…': new models of social solidarity in the European Union' in Michael Dougan and Eleanor Spaventa (eds), *Social welfare and EU law* (Hart Publishing 2005) 296.
[80] ibid.

solidarity engendered at the supranational level […] through their domestic welfare budgets'.[81] It has been suggested that this concept of assimilation, stemming from the principle of equality, could redraw the boundaries of belonging to national solidaristic communities and challenge the link between a right to welfare claims and membership established along the lines of nationality.

On the contrary, in relation to the second layer of the European economic constitution little, if any, room was left for transnational solidarity, as in the frame of Member States' coordination the macroeconomic principles guiding their fiscal and social policies were basically reduced to pricy stability and strict fiscal discipline, mirroring the objectives of microeconomic echelon, free movement of factors of production and competition.

On the one hand, citizens were admitted - to a limited extent- to wealth distribution by moving to a different State and enjoying a share of the host country's national income through (limited and conditional) access to its redistributive mechanisms, regardless of their economic contribution; on the other, they could not benefit from a Pan-European wealth, i.e. the wealth created by the forces of factors of production on a large-scale market, as no mechanisms of fiscal transfer complemented the creation of the EMU, where the redistributive mechanisms rested within the domestic sphere. In other words, while the production of wealth was made Pan-European, the redistribution of it remained national.

The assumption underlying the *national* allocation of redistributive powers espoused by the Treaty of Rome was that the economic wealth brought about by the internal market and a large-scale economy should have been then redistributed through the domestic welfare systems. The microeconomic layer of the European economic constitution indeed presupposed the existence of national channels of redistribution that would have preserved social solidarity within Member States. Therefore, it has already been said how the principles informing the microeconomic constitution were partially mitigated by social objectives that Member States could invoke to safeguard their national social constitution, i.e. services of national economic interest. A tension between demands of the common market and protection of (national) citizenship entitlements

[81] ibid 304.

pervaded the microeconomic layer and, at least before *Viking* and *Laval*,[82] economic freedoms, albeit fundamental, did not trump (more) fundamental social rights at national level, which are the great expression of solidarity and the social contract between welfare (not simply liberal) states and their citizens.

This trajectory of solidarity seemed reversed, on the contrary, with regard to the second, macroeconomic layer of the European economic constitution. The establishment of a monetary union deprived Member States of 'their capacity to respond to problems of inflation and unemployment through the macroeconomic management of aggregate domestic demand',[83] and thus weakened, on a theoretical rather than factual level, national solidarity underpinning citizenship entitlements in the domestic sphere. The European macroeconomic constitution did not envisage any mechanism for compensating the loss of important instruments of solidarity and redistribution at the national level, where neither inflation nor public debt was longer available.[84] National solidarity appeared diluted because the economic policy toolkit of Member States in the monetary union changed in size and composition.[85]

At Maastricht then, while solidarity *within* Member States (*national* solidarity) was demoted with the creation of the single currency, solidarity *between* Member States and *across* their citizenries (*transnational* solidarity) was potentiated, perhaps involuntarily, by the concept of transnational citizenship, though without entailing transnational solidarity-oriented management of macroeconomic policies. Although the Delors Report envisaged some forms of transnational redistribution other than spontaneous capital flows or external borrowing,[86] the cornerstone principle at the transnational level was the exclusive responsibility of Member States for their public debt

[82] Cases C-438/05 *Viking* [2007] ECR I-10779 and C-341/05 *Laval* [2007] ECR I-11767.

[83] Fritz Scharpf, 'The Political Legitimacy in a Non-optimal Currency Area' in Olaf Cramme and Sara B. Hobolt (eds), *Democratic Policies in a European Union under Stress* (OUP 2014).

[84] Streeck, (n 67). According to Streeck, inflation was 'a monetary reflection of distributional conflict between a working class, demanding both employment security and high share in their country's income, and a capitalist class, striving to maximise the return on its capital'.

[85] It changed in size because the so-called 'Maastricht convergence criteria' reduced national capacity for expansionary fiscal policies. It also changed in composition because euro countries lost crucial monetary policy tools like the currency devaluation power, which in turn affected the fiscal instruments available at the national level.

[86] Delors Report, para 29, took into account the 'large declines in output and employment' in areas where the rate of productivity was too low to be compensated by mere wage flexibility and labour mobility. It then referred to the necessity of financial flows through official channels in order to adjust difference in competitiveness.

(enshrined in the bailout clause of Article 125 TFEU), which was seen as a reflection of the principle of fiscal sovereignty.

However, Union citizenship had significant implications on said principle of fiscal sovereignty, i.e. providing financial assistance to nationals of other Member States, albeit under limited circumstances. And while free movement law partially challenged that principle, EU macroeconomic framework restated it as the cornerstone rule at the heart of EMU.

In fact, the attraction of the monetary sovereignty at the EU level was not backed up with the parallel transfer of fiscal competences to the Union: the currency became a technical instrument with no sovereign, an apolitical commodity no longer intertwined with the classic functions of any public budget: investment in public goods, redistribution, and macroeconomic stabilisation.[87]

The Eurozone's policy-making framework was then intrinsically incoherent, in that sharing a common currency did not pave the way for a mutualisation of national debts, which remained the responsibility of Member States, forced to issue bonds to finance their debts in a currency, i.e. unity of account, on which they no longer retained control.

Consequently, the small dimension of the EU budget and the loose centralised coordination of national fiscal policies did not allow Member States to correct EMU-externalities. As highlighted in the Sapir report, a decentralised policy-making could hardly ensure coherence since national authorities are accountable to constituencies smaller in comparison to the scope of economic interaction across a large integrated area and they also focus on a small portion of aggregate trade-offs, such as for instance that of efficiency v. employment.[88] Said report construed 'local decision-making, unfettered integration of factor and product markets, and a desire to protect one's own citizens from poverty' as the three elements of an inconsistent trinity, where one out of the three must be sacrificed.[89] Indeed, centralised or coordinated policy-making is necessary to preserve redistribution in a large integrated area, otherwise either redistribution would be

[87] See European Commission, 'Reflection Paper on the Future of EU Finances' COM (2017) 358 final, specifying the functions of any public budget. The EU budget performs these functions, albeit to different degrees.
[88] A Sapir et al., *An Agenda for a Growing Europe: the Sapir Report* (OUP 2004).
[89] ibid 15-16.

abandoned in a politically inacceptable race to the bottom or a perfect economic integration is sacrificed.

Notwithstanding the creation of a macroeconomic framework of coordination, Member States were made substantially unable to achieve redistribution they deemed desirable at the national level, as the Eurozone's architecture was not created to pursue economic growth. The attempts to centralise euro-area macroeconomic management did not result in the establishment of a fiscal transfer system which would have entailed a significant degree of transnational solidarity between Member States. Hence, this institutional choice explains the common discourse on the 'incomplete' nature of the EMU's design. However, the outbreak of the financial crisis has partially changed the constitutional principles upon which the European economic constitution was created.

2.4 Conclusions

This chapter has shown that the original European constitution was not imbued with market fundamentalism as market imperatives were not meant to necessarily prevail over nationally organised system of social protection. The creation of EMU, however, changed the constitutional balance between market liberalism and solidarity to the detriment of the latter. In this respect, Maastricht was the key constitutional moment. It eroded solidarity at the national level by reducing the fiscal capacity of welfare states to resort to deficit spending to finance the delivery of social protection, but at the same time reinforced solidarity at the interpersonal level and across borders. The interpretation of Union citizenship provisions resulted in the emergence of a transnational space of social solidarity, at least before the judicial revirement which abandoned the integrationist approach of the earlier case law (see *infra* 3.2.3.3).

In conceptual terms, that purposive interpretation transformed solidarity between Member States (*inter-national* solidarity) into a thicker form of *transnational* solidarity (between European citizens), but only in the field of free movement of persons. In fact, by virtue of the proportionality principle, Member States' welfare choices, as potential obstacles to free movement, fell under the scrutiny demanded by the imperative requirements doctrine. In this context, economic justifications to transnational solidarity were not considered lawful and thus allowed. In the context of EMU, instead, citizenship

did not help the development of transnational solidarity, neither thickened obligations between Member States. Market remained the main regulatory device for Member States' relationships and transnational solidarity was a priori excluded from the scope of their reciprocal obligations.

Therefore, in the field of free movement, relationships between Member States were articulated through the instruments of public law, specifically through proportionality, as a Member State's decision to shield its welfare system against cross-border claims of citizens of another Member State had to be mediated by EU law. On the contrary, in the EMU area, there was not such a 'vertical' dimension in the relationships between Member States demanded by their membership to the Union.[90] The next chapters show how the mere 'horizontality' of these relationships, which were not shaped in light of EU law's authority, resulted in the use of international and private law instruments (Chapter III) as well as in a different, if any, conception of solidarity (Chapter IV).

[90] The term 'vertical' is generally used to describe the relationship between the centre and its units. The relationships between the units themselves have been captured by the concept of 'horizontal federalism', which has not received much attention in the federalism literature. The legal arrangements that shape Member States' relations in the EU have been identified with mutual recognition, harmonization and national autonomy. On this classification see Ton van den Brink, 'Horizontal Federalism, Mutual Recognition and the Balance Between Harmonization, Home State Control and Host State Autonomy' (2016) 1 European Papers 921. In this thesis, the term 'vertical' is also attached to the horizontal relations between Member States to convey the fact that their mutual obligations are shaped under EU law.

3 Chapter III: The evolution of the European Economic Constitution

3.1 Introduction: the dynamic life of the European economic constitution

This chapter explores the constitutional changes brought by the financial crisis and the Covid-19 pandemic to the EMU's architecture and functioning, questioning to what extent these two major crises experienced by the Union in the last decade have triggered a change in direction towards transnational solidarity. As the previous chapter has shown, transnational solidarity, intended as redistributive solidarity between not only Member States but also their citizenries, was not part of the original EMU's design. This chapter analyses to what extent the eurozone crisis-management framework and the legal developments that occurred amid the coronavirus crisis have altered the material constitution of the EU and thus changed its underlying normative assumptions as regards solidarity.

The first event that has tested the EMU's resilience and capacity to withstand economic shocks has been the debt crisis experienced by Europe after the fall of Lehman Brothers in the US. The EU's response to such a crisis – which broke up as a private debt crisis and later became a sovereign debt crisis – has been framed in terms of constitutional transformation by the relevant literature on the Eurozone crisis.[1] Some authors have pointed to the substantial mutations regarding the general principles of the European Economic Constitution, such as the shift from a stability conception based on price stability and inflation control to one centred on financial stability.[2] Other accounts have highlighted the changes in the governance of the euro area, such as the prevalence of

[1] For an overview see Giuseppe Martinico, 'EU Crisis and Constitutional Mutations: A Review Articles' (2014) STALS Research Paper 3/2014. The frame of 'constitutional mutation' recurs in several contributions on the theme. See for instance Bruno De Witte, 'Euro crisis responses and the EU legal order: Increased institutional variation or constitutional mutation?' (2015) 11 EuConst 434; Christian Joerges, 'Europe's economic constitution in crisis and the emergence of a new constitutional constellation' (2014) 15 GLJ (Special Issue EU Citizenship: Twenty Years On) 985; Mark Dawson, Henrik Enderlein, and Christian Joerges (eds), *Beyond the Crisis. The Governance of Europe's Economic, Political and Legal Transformation* (OUP 2015). Edoardo Chiti and Pedro Texeira, 'The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50 CMLR 683. Augustín Menéndez, 'Editorial: A European Union in constitutional mutation? (2014) 20 ELJ 127; Michael Ioannidis 'Europe's New Transformations: How the EU Economic Constitution changed during the Eurozone crisis' (2016) 53 CMLR 1237.

[2] Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (CUP 2014).

intergovernmentalism or the disempowering of parliaments over budgetary decision-making.[3] Whether they have focused on the substance or the method of such changes, these accounts acknowledged the constitutional relevance of EU's crisis-management, which has implied significant modifications of the material constitution of Europe even in the absence of textual amendments.[4] The aim of this chapter is to understand the nature of these changes from a solidarity perspective.

This chapter proceeds as follows. Section 2 offers an overview of the developments occurred in the aftermath of the financial crisis, exploring to what extent they have put the principles of the European economic constitution (explored in the previous chapter) into question. In particular, it looks at whether the significant transfer of resources occurred in the euro area as well as the unprecedented measures adopted by the ECB have challenged the ordoliberal, price-stability oriented configuration of the Eurozone as a non-transfer union. It basically assesses these measures through the lens of solidarity. Section 3 shifts its focus on the EU's response to the coronavirus crisis exploring the constitutional nature of the changes brought by the pandemic. It questions whether the measures adopted to face the pandemic have been in line with those taken in the context of the euro area crisis and what conception of solidarity they embrace. Section 4 concludes.

3.2 The outbreak of the sovereign debt crisis: a step towards genuine transnational solidarity?

The aim of this section is to understand whether the EU's response to the financial crisis marked a step towards genuine transnational solidarity or whether it was a move to restore the stability of the previous order. To this end, subsection 3.2.1 lists and classifies the measures adopted in response to the crisis. Subsection 3.2.2 illustrates the theory of

[3] See for instance Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014).

[4] In this sense Pernice described the phenomenon of 'constitutional mutation' as 'the substantial material modifications of the contents' of the Constitution 'even without explicit changes made to the Constitution'. See Ingolf Pernice, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and Multilevel Constitutionalism' in Eibe Riedel (ed), *German Reports on Public Law Presented to the XV International Congress on Comparative Law* (Baden-Baden, Nomos 1998) cited in Martinico (n 1).

fiscal federalism, whilst subsection 3.2.3 assesses to what extent the specific measures adopted by the EU have adhered to this federal paradigm and thus conveyed a new conception of solidarity.

3.2.1 EU's crisis-management measures

When the effects of the American subprime crisis crossed the Atlantic, due to the high exposure of European banks and financial institutions to US subprime securities, the Eurozone faced not only a financial crisis but also an existential one. Erupted as sovereign debt crisis, given the strict interrelation between sovereigns and banks, public and private debt, the crisis shed light on the pitfalls of the EMU's architecture and more broadly on all the constitutional limits of the EU, calling into question the very *finalité* of the whole integration process.

Despite the narrative based on the moral hazard of certain countries - who were said to have borrowed money from the markets much more cheaply than their actual possibilities - the cause of the Eurozone crisis lies in its ill-fated structure.[5] It is widely acknowledged that the Eurozone's crisis was a balance of payments crisis: the structural differences in competitiveness between Member States were exacerbated by the 'sudden stop' of capital flows which precipitated the already existing imbalances within the euro area.[6] Absent a lender of last resort and the possibility of devaluation, peripherical countries running current account deficits were deprived of the traditional instruments to tackle a shock of those proportions.

The EU-wide dimension of the turmoil given by the risk of contagion did not immediately win the reluctance of Member States from the core to bail-out their euro partners in the periphery. The EU as such, with its limited powers, could not guarantee an immediate institutional response fully centralised at the supranational level. The asymmetry between a supranational monetary policy and national economic policies made it difficult for the EU to intervene in a consistent manner, with the consequence that its action was perceived as either intruding into domains of national competences or as

[5] In 2015 leading economists agreed upon a crisis narrative according to which the euro area crisis was a 'sudden stop' crisis caused by the large intra-Eurozone capital flows. See in this regard, Richard Baldwin et al., 'Rebooting the Eurozone: Step 1 – Agreeing a Crisis narrative' (*Vox, CEPR Political Portal*, 20 November 2015) https://voxeu.org/article/ez-crisis-consensus-narrative accessed 13 August 2020.

[6] ibid. See also Sergio Cesaratto, 'Alternative Interpretation of a Stateless Currency Crisis' (2015) 41 Cambridge Journal of Economics 977.

ineffective. The need to preserve the allocation of competence as set out in the Treaties and the related limited EU's legislative powers in the sphere of economic policy might explain the shift of the instruments of economic governance from the EU institutional framework to international fora. In fact, it was the European Council of 25 March 2010 that reached political agreement to adopt a coordinated action to preserve the stability of the euro area.[7] In particular, it agreed on the activation of a rescue mechanism as *ultima ratio* - had market financing proved to be ineffective - providing bilateral loans based on strong conditionality and financed by euro-members on the basis of their respective ECB's capital key. The euro area leaders also committed to an enhanced and stronger surveillance of economic and fiscal policies, by complementing the then existing legal framework with more stringent rules.

The adoption of bail-out measures and the empowered budgetary surveillance and macroeconomic coordination were not the only responses adopted. Given the multi-faced nature of the crises – combining the risk of sovereign insolvency, sovereign illiquidity and bank undercapitalization -– significant reforms aimed at reinforcing the financial framework through the creation of the so-called banking union were introduced. Lastly, the ECB's response to the crisis involved the adoption of unprecedented measures, which redrew the boundaries of its monetary policy mandate.

3.2.1.1 The bail-out measures

As mentioned above, Eurozone countries declared their willingness to take a common action in the early 2010. The first mechanism of financial assistance was created for Greece in May 2010, following a formal request from Greek authorities received on 23 April 2010. After negotiations between Greece and a joint EC/ECB/IMF mission on a multi-year programme to restore macroeconomic stability, on 2 May 2010 the delegations reached an agreement for a joint euro area/IMF financing package of € 110 billion, subject to a policy package to be implemented for the period 2010-2013.[8]On the same day, the Eurogroup unanimously agreed to activate a stability support to Greece via bilateral loans

[7] See Statement by the Heads of State and Government of the Euro Area, 25 March 2010.

[8] Yet, three Eurozone countries withdrew their contribution: Ireland and Portugal since they received bailouts as well, and Slovakia. As a consequence, the pot was reduced by € 2.7 billion. In addition, before it had run its course a second bailout for Greece was agreed and part of the resulting non-used portion of the first package cancelled.

centrally pooled by the Commission for a total amount of € 80 billion according to the modalities clarified in its previous statement of 11 April.[9] On 9 May, the executive board of the International Monetary Fund (IMF) approved the Stand-By Arrangement (SBA) disbursing the residual € 30 billion. Eurozone States released their first instalment of € 14.5 billion on 18 May 2010, following the IMF disbursement of € 5.5 billion and after domestic parliamentary approval – if required.[10]

A distinguishing feature of this first bailout, known as Greek Loan Facility, is its 'strict conditionality', an element recurring in all the other disbursements later agreed.[11] Greek authorities were expected to carry out the structural reforms and the fiscal adjustments specified in a three-year programme negotiated with the joint EC/ECB/IMF mission.[12] The two Annexes attached to this macroeconomic adjustment programme envisaged detailed policy measures. The first Annex, a Memorandum of Economic and Financial Policies (MEFP), outlined the measures to be implemented by the Greek Government and the Bank of Greece by the end of 2013. The second Annex, containing a Memorandum of Understanding (MoU), set out specific benchmarks for the assessment of policy performances, which should have been carried out in the frame of quarterly reviews to monitor the efforts towards conditionality.[13]

These measures were incorporated within the EU legal framework by Council Decision 2010/320/EU,[14] adopted in the context of the excessive deficit procedure to give

[9] Statement by the Eurogroup of 2 May 2010 https://www.consilium.europa.eu/media/25673/20100502-eurogroup_statement_greece.pdf accessed 13 August 2020.

[10] As a consequence of the need for a swift approval, highlighted in the Statement by the Eurogroup (n 9), States made recourse to legislative instruments to be adopted in situations of necessity and urgency. See, for instance, the Italian Decree Law no 67 of 10 May 2010, as converted by Law no 99 of 22 June 2010, ratifying the "Intercreditor Agreement" and the "Loan Facility Agreement", both concluded on 8 May 2010.

[11] See in this regard the Eurogroup statement (n 9), where a reference to a "strong conditionality" is expressly made.

[12] European Commission, 'The Economic Adjustment Programme of Greece' (2010) Occasional Papers No 61 https://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf accessed 13 August 2020.

[13] See the attachments to 'The Economic Adjustment Programme of Greece' (n 12). The first Memorandum (MEFP) set out quantitative performance criteria concerning economic as well as fiscal policies (Table 2) and includes the measures to be adopted (Tables 1 and 3). The second Memorandum (MoU) further specifies the adjustments required, setting a precise time frame for their implementation. It indicates detailed structural reforms in the field of pensions, health and taxation, imposes cuts on public expenditure and boosts revenue, demands pensions and wage bill reductions.

[14] Council Decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L 145, 11.6.2010, p. 6–11. Already in April 2009, upon a recommendation made by the Commission, the Council decided, in accordance with Article 104 (6) TEC, that an excessive deficit existed in Greece (Council Decision 2009/415/EC [2009] OJ L 135, 30.5.2009,

Greece a revised notice to correct its persistent excessive deficit. Paragraph (8) thereof recalled the pooling of bilateral loans in favour of Greece and made them conditional upon the implementation of the measures set out in the Decision (similar to those of the Economic Adjustment Programme negotiated with the EC/ECB/IMF).

As the crisis worsened and its effects propagated to other States, it became necessary to create other mechanisms of financial assistance. The day after the first Greek loan, Eurozone States set up the European Financial Stabilisation Mechanism (EFSM), a loan facility under EU law,[15] as well as the European Financial Stability Facility (EFSF), a more ample, albeit equally temporary, loan vehicle arranged as a Luxembourgish *société anonyme* on the basis of an international agreement.[16]

Both the stabilisation instruments immediately raised doubts about their compatibility with the 'no-bailout clause' of Article 125 TFEU, which prohibits the Union and its Member States from assuming other sovereign debts, implying states' exclusive responsibility for their own public finance.[17] This provision has long been interpreted as a ban on rescue packages and read in conjunction with a body of provisions meant to complement such a ban with a budgetary code, such as Article 123 TFEU on the prohibition of monetary financing, Article 124 TFEU on the prohibition of privileged

p.21). At the same time, under Article 104 (7) TEC, the Council addressed recommendations to Greece to put an end to the excessive deficit situation by 2010, by bringing the general government deficit below 3% of GDP. Given the severe deterioration of the Greek financial situation and the inadequacy of the measures taken to correct the excessive deficit by 2010 (as assessed by the Commission after the Council recommendation of 27 April 2009), the Council established an extension of the original deadline by two years to 2014.

[15] See Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism. This programme, under which the Commission has borrowed up to € 60 billion from the financial markets to ensure loans to bailout States, served Ireland (€ 22.5 billion) and Portugal (€ 26 billion).

[16] See Ecofin Council Decision of 9 May 2010, under which this facility was conceived of as a issuer of bonds backed by guarantor Member States (Cyprus, however, withdrew from 29 April 2013, after requesting assistance itself). It has been activated for Ireland (€ 17.7 billion) in February 2011, Portugal (€ 26 billion) in June 2011, Greece (€ 130 billion) in March 2012, and runs only for existing programmes as it can no longer make new loans.

The total loan amount received by Portugal under the EFSM and EFSF is € 78 billion (May 2011-May 2014), while the assistance pot received by Ireland is € 85 billion, of which € 40.2 coming from the EFSM/EFSF arrangement, € 22.5 from the IMF and € 4.8 from bilateral loans involving non-Eurozone countries as for instance the United Kingdom). As far as the Greece's financial assistance is concerned, it should be noted that the second bailout was entirely EFSF-funded: a € 130 billion loan to run until December 2014.

[17] Albeit the direct applicability of the provision, its paragraph (2) enables the Council to specify definitions contained therein. See, in this regard, the adopted Council Regulation (EC) 3603/1993 of 13 December 1993 specifying the definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty [1993] OJ 1993 L 332/1.

access to financial institutions and Article 126 TFEU on excessive deficits.[18] The underlying rationale of this body of provisions is to ensure that Member States finance themselves through access to the market,[19] without recurring to EU financial aids, whose adoption could affect the principle of price stability, mentioned in many Treaties provisions.[20]

Besides the alleged incompatibility with the no-bailout clause, legal doubts arose with regard to the legal basis of such financial assistance instruments. For instance, the EFSM was deemed to be in contrast with Article 122 TFEU which enables the Union to assist a state in severe difficulties caused by exceptional events. The exceptionality of the occurrences that led the state into difficulties – which are by definition beyond its control - suggested the exclusion of situations caused by a country's own fiscal behaviour from the scope of application of Article 122 TFEU.

Given such perplexities on the first rescue packages, the European Council added a new third paragraph to Article 136 TFEU, making using of the simplified amendment procedure of Article 48 (6) TEU which applies to Treaty revisions that do not expand EU competences.[21] According to the introduced amendment, Member States are now allowed to create permanent crisis mechanism if indispensable to safeguard the stability of the Eurozone and provided that a strict conditionality is observed (Article 136 (3) TFEU). Although the parliamentary ratification procedures related to such Treaty amendment were not completed yet,[22] Eurozone States signed an international agreement creating a permanent intergovernmental mechanism, the European Stability Mechanism (ESM).[23]

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[18] See Jean-Victor Louis, 'Guest Editorial: The No-Bailout Clause and Rescue Package' (2010) 47 CMLR 971.

[19] Whose forces should constitute the consequent sanction for their profligacy.

[20] See Articles 3 (3) TEU, 119 (2) and (3) TFEU and also in Article 2 (1) of the Statute of the ESCB and ECB.

[21] European Council Decision 2011/199/EU amending Article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] L 91/1.

[22] For an overview of the national constitutional requirements and ratification procedures see European Parliament Directorate- General for Internal Policies, Policy Department C 'Citizens' rights and constitutional affairs', *Article 136 TFEU, ESM, Fiscal Stability Treaty – Ratification requirements and present situation in the Member States* 2013, available at www.europarl.europa.eu/studies.

[23]The ratification of the ESM Treaty before the date of entry into force of the Treaty amendment was one of the legality issues discussed before the Court of Justice in the *Pringle* case, which will be examined in the next chapter.

The date of entry into force of the Treaty amendment was 1st January 2013, whereas the date initially set for the ratification of the ESM Treaty was 1st July 201. However, a number of challenges before national courts postponed the entry into force of the ESM to 27 September 2012 – when Germany deposited its

The ESM replaced the previous EFSF and EFSM, fulfilling their tasks and funding new programmes of financial assistance: in December 2012 it served the recapitalisation of the Spanish banking system, whilst in May 2013 it disbursed its first fully-fledged programme to Cyprus.[24] Later in August 2015, another assistance programme was activated for Greece which received its third bailout of up to € 86 billion. The conditions to access the fund are set out in Article 13 of the ESM Treaty, according to which, once a request from a struggling State is received, the European Commission, in liaison with the European Central Bank and – wherever possible - with the IMF, shall assess the financial situation and needs of the State in question. Should the Board of Governors adopt a decision on the basis of the said appraisal, it gives mandate to those three institutions, the so-called Troika, to negotiate – and subsequently monitor - the economic policy conditionality attached to the financial support instrument requested, in accordance with Article 13 (3). In particular, a Memorandum of Understanding (MoU) is to be agreed in compliance with the measures of economic policy coordination, such as recommendations or decisions pursuant to Articles 121, 126 and 136 TFEU.

A strong linkage with the EU framework is then discernible and yet problematic, inasmuch as it makes it difficult to identify the nature of the bailouts with evident repercussions for their judicial review and parliamentary scrutiny. Despite the proposals to incorporate this intergovernmental instrument within the EU legal framework, which have come from the European Parliament[25] and the European Commission,[26] the ESM continues to maintain its intergovernmental features, such as the decision-making firmly anchored with Member States. The only step forward which has been agreed upon by Eurozone countries after the Franco-German agreement (Meseberg Declaration) has been the use of the ESM as a backstop to the Single Resolution Mechanism (on which see *infra 3.2.1.3*).

ratification instrument. According to Article 48 of the ESM Treaty, the entry into force of the provisions thereof is conditional upon the ratification (approval or acceptance, where required) of signatories representing at least 90% of the capital subscription (as indicated in the attached Annex I and based on ECB contribution key). The ESM came into force for all the Eurozone countries on 3rd October 2012 – with the last State, Estonia, ratifying it.

[24] Spain received € 41.3 billion (indirectly lent to the government in lieu of the banks); Cyprus borrowed € 9 billion from the ESM and € 1 billion from the IMF.

[25] European Parliament resolution of 12 June 2013 on strengthening European democracy in the future EMU (2013/2672 (RSP)).

[26] European Commission, Communication on further steps towards completing the Economic and Monetary Union COM (2017).

3.2.1.2 The budgetary surveillance and macroeconomic coordination

The stabilisation of the euro area through the grant of loan assistance was only a subset of the actions taken to address the crisis: it became necessary, in the longer term, to reinforce the economic coordination machinery. To this end, Member States have adopted several packages of measures, some of which are EU instruments - more specifically EU legislation as the so called Six-Pack[27] and Two-Pack,[28] or EU soft law as the Euro Plus Pact – while others fall outside the EU legal framework, as the Treaty on Stability, Coordination, and Governance (TSCG). These instruments aimed at overcoming the pitfalls of the economic policy coordination framework, which remained too legally weak and politically oriented over the years. In fact, although the Stability and Growth Pact (SGP) adopted in 1997[29] tried to potentiate the two procedures through which the coordination of economic policies is pursued, i.e. the multilateral surveillance and the excessive deficit procedure, the overall coordination framework lacked effective enforcement measures.[30]

The first EU measures package, known as Six-Pack, was adopted with the aim of enhancing budgetary and economic surveillance of all Member States, despite a bunch of more stringent rules that were to apply only to Eurozone countries. In particular, Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro

[27] This package consists of five regulations and one directive. See, respectively, Regulation (EU) 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Regulation (EU) 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8; Regulation (EU) 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Council Regulation (EU) 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

[28] The Two-Pack consists of Regulation (EU) 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11 and Regulation (EU) 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJL140/1.

[29] See Resolution of European Council on the Stability and Growth Pact (EC) 17 June 1997 [97/C236/01}. As said in chapter 2, the SGP consists of two arms. The first arm is Council Regulation (EC) 1466/97, i. e. the preventative arm, which sets out the budgetary limits with which Member States ensure compliance through the submission of convergence or stability programmes. The second arm is Council Regulation (EC) 1467/97, i.e. the dissuasive arm, which aims at the correction of gross errors.

[30] On the SGP and the procedures of Articles 121 and 126 TFEU in a historical and theoretical framework see *supra* 2.2.4. On the ineffectiveness of such procedures and the effects of their strengthening after the euro crisis see *infra* 3.2.3.1.

area and Regulation 1174/2011 on enforcement measures to correct macroeconomic imbalances in the euro area were adopted on the basis of Articles 136 TFEU and 121 (6) TFEU, which envisage, respectively, the adoption of measures specific to the Eurozone and detailed provisions for the multilateral surveillance procedure. Both the instruments introduced a system of sanctions designed to strengthen the SGP's preventative and corrective arms and to ensure the effective correction of excessive macroeconomic imbalances.[31] Specifically, the sanction introduced in the SGP's preventive arm consists of an interest-bearing deposit amounting to 0,2% of the GDP recorded by the country concerned in the precedent year. The power to adopt such a sanction is left to the Council, following a Commission's recommendation and within 10 days of the adoption thereof. In fact, when a Member State has not taken action in compliance with a Council's recommendation issued under Article 6 (2) of Regulation 1466/97 (SGP's preventative arm), the Commission is supposed to address a recommendation to the Council, no later than 20 days after the Council decision establishing that a State has failed to take the necessary adjustment measures.[32] Should the Council not follow the Commission's recommendation, it has to vote a rejection or an amendment by a qualified majority.[33] Similarly, the sanctions introduced in the SGP's corrective arm follow the same procedure and consist of a *non-interest-bearing* deposit- had the Council decided that an excessive deficit exists under Article 126 (6) TFEU or had the Commission assessed a dramatic non-compliance with budgetary obligations[34] - and fines - when, as provided in Article 126 (8) TFEU, no effective action has been taken in response to Council recommendations.

The other instruments composing the Six-Pack, i.e. other three Regulations and a Directive, contributed to the strengthening of the described enforcement mechanism, and more broadly of the whole Union's economic governance framework. Specifically, Regulation 1175/2011 amending the SGP's preventative arm and Regulation 1177/2011 on speeding up and clarifying the implementation of the SGP's corrective arm (the

[31] Besides these administrative sanctions, Regulation 1173/2011 introduced other fines of the same nature (Article 8) in case of manipulation or negligent misrepresentation of statistic data.
[32] Unless the Commission, due to a reasoned request made by the State concerned by the Council decision stating persistent divergence from the medium-term budgetary objective, asks the Council to reduce or cancel the deposit, the recommendation should point to the imposition of a sanction.
[33] Article 4 of Regulation (EU) 1173/2011.
[34] Article 5 of Regulation (EU) 1173/2011.

excessive deficit procedure) introduced a more rigorous discipline for cases of significant deviation from medium-term budgetary objectives. Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances, instead, established a new procedure through which the Commission detects competitiveness or other kinds of economic imbalances by using a scoreboard based on certain indicators[35] and possibly conducts special surveillance by demanding a corrective action plan. This macroeconomic imbalance procedure - which supplements and runs aligned with, the multilateral surveillance under Article 121 TFEU (3) and (4) – constitutes an important novelty introduced by the Six-Pack. According to such procedure, an alert mechanism for the early detection of emerging macroeconomic imbalances is established, so as to prevent at an early stage the entrenchment of detected divergences. Based on the alert mechanism, should the Commission identify a need for an urgent analysis, it puts the country interested under an in-depth review,[36] even without the presumption that an imbalance exists. When a macroeconomic imbalance occurs, instead, the Commission may open up an excessive macroeconomic imbalance procedure, asking the State concerned to submit a corrective plan: in the case of Euro countries, the Council might not impose sanctions, such as fines and interest-bearing deposit, by reverse qualified majority voting. The described enforcement regimes, in fact, work in a more forceful manner only for Eurozone States, since they only are subject to sanctions which can be avoided, rather than imposed, by a qualified majority. Lastly, the Directive on requirements for budgetary frameworks provided a number of numerical fiscal rules that Member States are called upon to adopt when preparing macroeconomic and budgetary forecasts so that their fiscal planning and their consequent commitment to budgetary discipline at the Union level can result in increased transparency and effectiveness.

On an institutional level, the other significant novelty of the Six-Pack has been the formalisation of the European Semester, an annual cycle of policy coordination in which

[35] Among the 14 indicators there are, for instance, labour costs and private and public sector debt, trends in export market shares, net international investment. Following the Communication from the Commission to the European Parliament and the Council 'Strengthening the Social Dimension of the Economic and Monetary Union' COM (2015) 690 and the declared need to take account of the coordination of employment and social policies within the European Semester, appropriate social indicators – such as rates of poverty and exclusion or youth unemployment - have been included in the Commission's scoreboard.

[36] Given the prioritised objective of strengthening the social dimension of the EMU (see *supra* no 63), according to the overall dimension of the Europe 2020 strategy, a section on social and employment developments should be then incorporated in the Commission's in-depth reviews.

all the EU surveillance and correction measures are adopted.[37] This cycle begins in late autumn with the publication of the Commission's Annual Growth Survey to be later discussed by the Council in its different formations and possibly debated by the European Parliament, if it decides to make use of the 'economic dialogue' expressly provided in the Six-Pack. According to such an instrument, the competent committee of the European Parliament may invite other institutions[38] to share information on the guidance issued to Member States in the frame of multilateral surveillance.[39] The annual growth survey is to be endorsed by the European Council at its spring meeting, where it publishes the Broad Economic Policy Guidelines of Article 121 (2) TFEU and the Broad Employment Policy Guidelines of Article 148 (2) TFEU. In the meanwhile, drawing on the priorities set out in the survey, the Commission publishes country reports on the overall socio-economic situation specific to each Member State in February. In April, EU countries present their national plans, namely the Stability or Convergence Programmes and the national reform programmes, which constitute the preventative arm of the SGP and of the macroeconomic imbalance procedure, respectively. These programmes should be in line with the broad economic guidelines, the employment guidelines, and the general guidance issued by the Commission through the publication of the annual growth survey and by the European Council at the beginning of the annual cycle of surveillance. In May the Commission proposes country-specific recommendations for each Member State – with the only exception of those concerned by a macroeconomic adjustment programme due to the comprehensive nature of the latter - to be discussed by the Council in June and endorsed by the European Council in July. Member States are expected to implement the recommendations in their budgetary and policy plans for the subsequent year. Furthermore, during the semester, excessive deficit procedures and excessive imbalances procedures may be activated.

In order to further strengthen surveillance of euro area countries, another package of measures adopted in May 2013, the so-called Two-Pack, envisaged the submission of Eurozone countries' budgetary plans before the end of the European semester so as to allow the Commission to review them by issuing an opinion. If necessary, for instance in

[37] For a detailed account on how this cycle works see Section 1-A European Semester for economic policy coordination of Regulation 1175/2011.
[38] See Article 2-ab Regulation 1175/2011.
[39] On the economic dialogue see Cristina Fasone 'The Struggle of the European parliament to Participate in the New Economic Governance' (2012) EUI Working Paper, RSCAS 2012/45.

the event of a serious non-compliance with the obligations under the SGP, the Commission may request an amended plan. Member States failing to follow Commission's opinions may be charged with sanctions. The second Regulation in the Two-Pack, indeed, set up a common budgetary timeline for euro area countries so as to synchronize the preparation of national budgets with the European Semester for economic policy coordination.[40] Should Member States experience or be threatened with serious difficulties, they would be subject to enhanced surveillance by the Commission after an assessment based on the alert mechanism established under Article 3 (1) of Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances or, where available, the latest in-depth review.[41] Enhanced surveillance entails full compliance with any recommendation addressed under both Regulations forming the SGP's preventative and the corrective arms and the same Regulation 1176/2011. Member States in receipt of financial assistance have also to submit their macroeconomic adjustment programme, which needs to be approved by the Council, on the basis of a proposal of the Commission.

Thanks to the first Regulation in Two-pack, then, the special monitoring control under which States in financial difficulties are placed is integrated within the European Semester in order to avoid a diffuse and superfluous surveillance or reporting obligations under both the SGP and macroeconomic imbalance procedure. Even the strict conditionality, under which fiscal policies of Eurozone countries receiving loans are subject, has been coordinated with all the other existing mechanisms of economic and budgetary surveillance.[42] Notwithstanding the efforts to clarify the link between EU law and financial assistance provided without the EU legal framework, the CJEU has until

[40] See Regulation 473/2013 *supra* which, drawing on the preventive arm of the Stability and Growth Pact and the numerical fiscal requirements for national budgetary frameworks already provided by the Six-Pack, seeks to ensure that the general guidance issued by the European Council and the Commission at the beginning of the annual cycle of surveillance as well as Council and Commission recommendations adopted in the context of the SGP and MIP are properly integrated in the budgetary procedure of Member States. In particular, Member States should publish their national medium-term plan as well as their stability programmes in the same document, preferably by 15 April and no later than 30 April. Later on, they should make public their draft central government budget by 15 October.

[41] The Commission's decision to subject a State to enhanced surveillance is to be taken in close cooperation with the Economic and Financial Committee (EFC), the European Supervisory Authorities (ESAs) and the European Systemic Risk Board (ESRB). The three European authorities, collectively referred to as ESAs, are the European Banking Authority (EBA) established by Regulation (EU) 1093/2010, the European Insurance and Pensions Authority (EIOPA) established by Regulation (EU) No 1094/2010 and European Securities and Markets Authority (ESMA) established by Regulation (EU) 1095/2010. They form, together with the European Systemic Risk Board (ESRB) the European System of Financial Supervision (ESFS).

[42] See Articles 10-13 of Regulation 472/2013 and paragraph (7) of the preamble thereof.

recently neglected such a connection.[43] The consequence of these interventions has therefore been a stratification and fragmentation of the EU's general framework for economic governance.

In fact, in addition to the EU legislation examined, other measures were adopted within the EU framework, for instance a soft law instrument as the 'Euro Plus Pact'. Grown out of a Franco-German initiative called 'Competitiveness Pact', this instrument was adopted during the European Council Meeting of 24-25 March 2011. Its core scope of application regards 'priorities areas', such as competitiveness and employment, public finances and financial stability. Given its nature of soft law, it does not create an enforceable system of legal obligations for the signatory States. Under the 'Open Method of Coordination', the signatories undertake to implement, in areas falling into their national competence, a set of reforms consistent with the indicators published by the Commission and to include them in their National Reform Programmes (NRPs) and Stability or Convergence Programmes (SCPs). The underlying rationale is indeed to achieve a new quality policy coordination beyond the framework of the existing arrangements and thus to promote a closer cooperation across policy areas. In fact, the Euro Plus Pact, meant to be fully integrated in the European Semester, covers areas which are complementary to those specified in National Reform Programmes (such as economic policies) and Stability and Convergence Programmes (mostly budgetary policies).[44] These areas for additional commitments of Member States are to be identified by the Commission in the Annual Growth Survey.

The efforts to reinforce the coordination of economic policies have not been limited to improving the euro governance structures within the EU framework. The alleged need for enhanced commitments to budgetary discipline paved the way for a new "fiscal compact", whose main elements should have been automatic correction mechanisms for central government budgets in case of deviation, a commitment to support all steps or sanctions proposed or recommended by the Commission in the context

[43] However, a change in direction might come from the *Ledra* judgment. See C-8/15 *Ledra Advertising Ltd and Others v European Commission and European Central Bank* [2016] ECLI:EU:C: 2016:701.

[44] For a detailed overview of the Euro Plus Pact, see European Commission, EPSC Strategic Notes 'The Euro Plus Pact. How Integration into the EU Framework can Give New Momentum for Structural Reforms in the Euro Area' (2015) no 3/2015. For an account on how the commitments of Member States under the Euro Plus Pact are integrated within the European Semester, see Graph no 3 contained therein.

of the excessive deficit procedure under Article 126 TFEU, and a more frequent use of the enhanced cooperation on crucial matters regarding the single currency.[45]

The options to reach the desired "genuine fiscal stability union", pleaded by the European Council and attainable only with changes at the level of primary law, envisaged a replacement of Protocol No 12 on the excessive budget procedure, amendments to the Treaties by virtue of the ordinary or simplified revision procedure under Article 48 TEU, or a new intergovernmental treaty standing outside the EU legal framework. Given the reluctance of some Member States towards the first two options - which would have bypassed or rather burdened national democratic processes (depending on whether the need for a parliamentary ratification was necessary or not, respectively)[46] – the European Council of 30 January 2012 agreed upon an intergovernmental treaty. The resulting "Treaty on Stability, Coordination and Governance in the EMU" (TSCG) was adopted on 2 March 2012 by all Member States except the UK, the Czech Republic, and Croatia (acceding the Union only subsequently in July 2013). It is better known with the name of 'Fiscal Compact' even if only its first – and most meaningful - part deals with budgetary discipline,[47] although largely reiterating contents already covered by previous instruments such as the SGP and the Six-Pack. The novelty of the TSCG, then, can be found in the enforceable obligation to implement the balance rules set out in Article 3 (1) into national law, preferably at the constitutional level,[48] and in the related conferral of jurisdiction to the ECJ. Another significant, although not enforceable, provision is set out in Article 7 TSCG, whereby Member States undertake to support the action of the Commission in the context of an excessive deficit procedure.

As regards other substantial parts of the Treaty, they were limited to the use of EU competences 'whenever appropriate and necessary' (for instance, through the adoption of Eurozone specific measures of Article 136 TFEU or the enhanced cooperation under 326-

[45] See the Statement by the euro area Heads of State or Government of 9 December 2011.
[46] For an analysis of the three proposals see Editorial Comments, 'Some thoughts concerning the Draft Treaty on a Reinforced Economic Union? (2012) 49 CMLR 1.
[47] The other two distinguishable parts concern economic convergence and cooperation as well as governance of the euro area.
[48] It should be noted that, contrary to the Statement made by Heads of State and Government in December 2011, the final version of the Treaty expresses a mere preference for the transposition of limits on the size of public debt and deficit into national constitutions, provided that any other form of embedding the fiscal rules into domestic law guarantees full adherence to them throughout the national budgetary processes (Art 3(2) TSCG).

334 TFEU, according Article 10 TSCG) or the institutionalisation of Euro Summit meetings at least twice.

From a legal point of view, then, the importance of the TSCG seems quite modest and limited to the preference for intergovernmentalism as the elected method to face the Eurozone crisis, given that the contents of the Treaty are rather redundant with previous provisions. From a political point of view, instead, the TSCG can be interpreted as a vehicle for the 'constitutionalisation of austerity'[49] at the domestic level, whose implications on welfare provision were more strongly felt as institutionalised.[50]

3.2.1.3 Financial regulation and Banking Union

Given the strong connections between the financial crisis and the sovereign debt crisis, a crucial part of the EU response to the crisis aimed at improving the financial sector in general, through the introduction of a better financial regulation and the creation of a banking union.

The first step was taken in 2010 with the Commission's proposals for multiple sets of rules to ensure better regulation and effective supervision of all financial actors, products and markets. This legal framework, mostly built on the basis of the Treaty provisions governing the single market, was to apply to the whole Union and not only to Eurozone countries, with the aim of reducing the fragmentation of the financial sector.[51] The EU-wide reforms adopted in this field included a) the adoption of a corpus of legislative texts, the so-called 'single rulebook', aimed at harmonising the discipline of financial institutions' practices,[52] and b) the establishment of a European System of Financial Supervision (ESFS), consisting of the European Supervisory Authorities (ESAs) and the European Systemic Risk Board (ESRB).

[49] Floris De Witte, 'EU Law, Politics and the Social Question' (2013) 14 GLJ 5.
[50] For an insight into the impact of the Fiscal Compact on the national constitutional orders see Editorial, 'The Fiscal Compact and the European Constitutions: "Europe Speaking German"' (2012) 8 EuConst 1.
[51] For a concise but complete analysis, see European Commission, 'A comprehensive EU response to the financial crisis: a strong financial framework for Europe and a banking union for the Eurozone', 10 July 2013, MEMO/13/679.
[52] It comprises several Directives and Regulations on various matters as capital requirements for financial institutions (for instance, Directives 2009/111/EC, 2010/76/EU, 2013/36/EU), Regulation 575/2013), recovery and resolution of credit institutions and investment firms (Directive 2014/59/EU), or national deposit guarantee schemes (Directive 2014/49/EU).

The "agentification' of financial supervision and of EU administration'[53] was a trend even more perceivable in the banking sector, where efforts to avoid the spillover effects of bank defaults led to the creation of the so-called Banking Union. As highlighted by the Commission, a more robust financial sector is not enough for those countries sharing a single currency, for which a more integrated system – open to non-euro countries willing to participate – is required.[54] This conclusion was shared by the European Council, which in several occasions affirmed the necessity to complete the EMU through the creation of a 'Banking Union'.[55] The reasons for such a banking union lay in the necessity to overcome impaired monetary policy's transmission and the ring-fencing of national markets, restore lending to the real economy, and break the doom loop between banks' deteriorating finances and the fiscal outlook of their sovereigns and, inversely, between sovereigns with weak public finances and banks holding their bonds. The foundations for the banking union lie in the 2012 Commission's Roadmap towards a Banking Union.[56]

The latter consists of two fundamental pillars: the Single Supervisory Mechanism (SSM), which has given the ECB special tasks with regard to prudential supervision of credit institutions;[57] and the Single Resolution Mechanism (SRM), which has entrusted a central authority, the Single Resolution Board (SRB), with the power to manage bank failures in a centralised way through a fund financed by bank contributions, the Single Resolution Fund (SRF).[58] These two pillars, finalised by 2014 and fully operational, are supposed to be complemented by a third pillar, the European Deposit Insurance Scheme

[53] Alicia Hinarejos, *The Euro Area Crisis in constitutional perspective* (OUP 2014) 44.
[54] See European Commission (n 51).
[55] The first declaration dated back to 29 June 2012, see European Council 'Euro Area Summit Statement' of 29 June 2012, available at https://www.consilium.europa.eu/media/21400/20120629-euro-area-summit-statement-en.pdf (last access 13 August 2020). The completion of the Banking Union was later reaffirmed and identified as a priority on 28 June 2013, see European Council Conclusions 27/28 June 2013 EUCO 104/13 REV2.
[56] European Commission, Communication from the Commission to the European Parliament and the Council, 'A Roadmap towards a Banking Union' COM/2012/0510 – 2012.
[57] See Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; Regulation (EU) 1022/2013 of the European Parliament and of the Council amending Regulation (EU) 1093/2010 establishing a European Supervisory Authority (EBA) as regards the conferral of specific tasks on the ECB pursuant to Council Regulation (EU) 1024/2013. This second Regulation basically aligned the existing rules on EBA to the framework for banking supervision.
[58] See Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010.

(EDIS), which has not yet been achieved. The establishment of such a scheme was proposed by the Commission in November 2015 [59]and builds on the existing system of national guarantee schemes (DGS) of Directive 2014/49/EU, which protects deposits up to 100,000 euro. The EDIS proposal aims at strengthening the insurance and depositors' confidence, regardless of the bank's location. This would weaken the link between national DGSs, which remain purely national and exposed to large local shocks, and the financial position of their sovereigns, thus ensuring a uniform protection of depositors.

The EDIS proposal has not received political support from all Eurozone countries, with the consequence that the architecture of the European Banking Union is to date incomplete. The reluctance of some Member States to accept the possibility that taxpayers in one country could pay, even on a temporary basis, for a bank crisis in another country shows how banks are still perceived as a national matter.[60]

Member States have opposed a similar resistance with regard to the proposed common fiscal backstop to the Single Resolution Fund. The idea of reinforcing the SRF was advanced by the 2015 Five Presidents Report,[61] which envisaged the implementation of a bridge financing mechanism for the SRF in the event that money in the fund is not enough for a bank that needs to be unwound. A public fiscal backstop in also necessary for cases in which 'the application of the bail-in [rule] might exacerbate, rather than alleviate, the risk of systemic instability'.[62]

In its roadmap for deepening the EMU published in December 2017, the Commission has urged Member States to set up such a fiscal backstop and, to this end, it has proposed a Council Regulation for the creation of a European Monetary Fund (EMF)

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[59] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (Eu) 806/2014 in order to establish a European Deposit Insurance Scheme' CO/2015/0586 final -2015/0270 (COD).

[60] For this critique see Salvatore Rossi, 'The Banking Union in the European integration process' (Speech by the Senior Deputy Governor of the Bank of Italy at the Conference on *European Banking Union and bank/firm relationship*, 7 April 2016) https://www.bancaditalia.it/pubblicazioni/interventi-direttorio/int-dir-2016/en-rossi-070416.pdf?language_id=1 accessed 15 August 2020.

[61] See European Commission, 'Completing Europe's Economic and Monetary Union' [Five Presidents' Report] 22 June 2015 https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en accessed 15 August 2020. Report prepared by the President of the European Commission Jean Claude Juncker in close cooperation with the President of the Euro Summit, the President of the Eurogroup, the President of the ECB, and the President of the European Parliament. This document built on a previous report, 'Towards a Genuine Economic and Monetary Union (the so-called 'Four Presidents' Report') and on the Commission's 'Blueprint for a Deep and Genuine economic and monetary union. Launching a European Debate' COM (2012) 777 final.

[62] Rossi (n 60).

within the EU legal framework. The aim is to integrate the existing European Stability Mechanism (ESM) into EU law by creating an EMF, which will take over the financial capacity and the tasks of the ESM and will also serve as a backstop to the SFR. Although the Euro Summit of 29 June 2018 agreed on the use of the ESM as a backstop to the SFR, the negotiations on the general reform of the ESM – on which an agreement has not yet been reached - are still open.

In conclusion, a common fiscal backstop for both the SRF and the EDIS is still missing.

3.2.1.4 The ECB's response to the financial crisis

Besides the loan facilities examined, another source of financial assistance has been the European System of Central Banks (ESCB or 'Eurosystem'), whose role has changed with the outbreak of the crisis. Despite the widespread assumption that monetary policy is unitedly run by the ECB, the latter is only 'the tip of a quasi-federal central banking system',[63] which is in fact composed by national central banks (NCBs) forming with the ECB the so-called 'Eurosystem'. This composite structure is reflected in the ECB's Board of Governors and in the strict separation between NCB's respective assets and liabilities. NCBs in the Eurosystem have indeed their own balance sheets as a result of the separation of national public debts and exchequers enshrined in Article 125 TFEU. From an economic perspective, then, the ESCB is not a federal system because it does not correspond to a single, supranational exchequer. From a legal perspective, though, it resembles the functioning of a centralised federal system, where NCBs are the operational arms of a central unit, the ECB. NCBs do not enjoy autonomous powers, since it is the ECB that delegates these powers to them. As a result, NCBs act in accordance with the instructions of the ECB, being in a certain sense its agents. For these reasons, this paragraph will use the terms "Eurosystem" and "ECB" interchangeably, i.e. without distinguishing between the centre, ECB, and its units, NCBs.

According to Articles 3 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank and 127 (2) TFEU, the primary tasks of the Eurosystem are the definition and implementation of monetary policy, the conduction of foreign-exchange operations, the management of the official foreign

[63] Klaus Tuori, 'Has the Euro Area Monetary Policy Become Redistribution by Monetary Means? 'Unconventional' Monetary Policy as a Hidden Transfer Mechanism' (2016) 22 ELJ 838, 839.

reserves of Member States, and the smooth operation of payment systems. Its primary objective, instead, is to maintain price stability pursuant to Articles 2 of Protocol No 4, 127 (1) and 282 (2) TFEU. The instruments through which the Eurosystem fulfils its mandate are the setting of interest rates and the supply of liquidity to the banking system against appropriate collateral. In this way the ECB ensures the transmission of monetary policy and acts as a "lender of last resort" to private banks, when the latter have difficulties in accessing the interbank money market. The possibility to supply liquidity directly to the EU or Member States, instead, is precluded. Article 123 TFEU prohibits monetary financing in the form of credit facilities or direct purchases of debt instruments in favour of national governments and EU institutions. This prohibition is consistent with the no-bailout clause of Article 125 TFEU, which allocates fiscal responsibilities for public debt along national lines. In a currency union such as the euro area, which is not a transfer union, Member States are responsible to their creditors for their own debts. The ban on monetary financing, then, contributes to preserving the fundamental separation on which the EMU is based: the decoupling of monetary policy from economic and fiscal policy.

In this context, the ECB's independence is functional to the immunity of monetary policy from short-term political considerations, on the one hand, and to the expertise generally required to central banks, on the other. Central banks are indeed generally understood as being expert bodies entrusted with technical rather than political tasks. This scientific, rule-based role has long justified the lack of democratic control on the ECB's tasks. However, if in the national dimension central banks' independence is an accepted feature of this type of bodies, in the EU context it has raised criticism due to its extra "disembeddedness".[64] In fact, while national central banks act alongside a democratically elected government in accordance with social and labour policies developed within the national political process, the ECB has been deemed to operate in a political vacuum.[65] Following the euro area crisis, the expansion of the ECB's role has deepened these concerns.

In particular, the crisis has changed the practices of the ECB from both the perspectives of the separation of monetary policy from economic and financial policy, on

[64] See Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis* (CUP 2014) 134, 165, 173.
[65] ibid.

one hand, and the prohibition of monetary financing, on the other. The ECB's response to the financial crisis has consisted in the unconventional use of standard instruments, such as the 'enhanced liquidity support' measures, and in the adoption of unconventional measures, such as the bond-buying schemes.[66]

The aim of the first range of measures was to supply liquidity to private banks and credit institutions on an easier basis, so as to ensure a lender of last resort to the banking system. To this purpose, injections of liquidity have been potentiated through tenders at full allotment and at fixed rate,[67]Long Term Refinancing Operations with a maturity of 1 year (so-called LTROs, whose maturity has been prolonged for 3 years in 2010 when the financial crisis turned into a sovereign bond crisis),[68] and the easing of rules on collaterals. While liquidity support operations (so called refinancing operations) are conventional tools of the ECB's monetary policy, enhanced liquidity operations raised significant doubts as they departed from the ordinary framework for refinancing operations. In fact, the Eurosystem normally intervenes on the interbank market to refinance financial institutions while respecting the interest rate defined by competitive bids made by banks during actions.

In the aftermath of the crisis, rules centred on the market principle of free competition were relaxed. This fuelled the critique that the Eurosystem was favouring certain financial institutions and Member States or, on the contrary, forcing some countries to enter programmes of economic reforms: in sum, that it was overstepping its mandate in any case. For instance, it has been argued that by threatening to deny liquidity to some national banks, the ECB can indirectly push their respective countries into

[66] This division is used by Hinarejos (n 53) 20 and Thomas Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) 50 CMLR 1591.

[67] Thanks to the ECB's fixed-rate full allotment policy, credit institutions can place bids for the all the amount of credit they need. For the tender allotment procedure, see ECB, General documentation on ESCB monetary policy instruments and procedures, 'The Single Monetary Policy in stage three' (September 1998), in particular chapter 1; for a more updated version see ECB, General Documentation on Eurosystem monetary policy instruments and procedures, 'The implementation of monetary policy in the euro area' (September 2006). In general, in relation to fixed tenders, designed to increase liquidity, a central bank announces the rate of interest at which it will provide the counterparties with liquidity. After the announcement, each bank may submit a bid to the central bank specifying the amount of liquidity it would like to borrow. The central bank, subsequently, can either accept all the bids received in full (full allotment) or scale them down proportionally (proportional allotment). In the case of tenders completed with full allotment, every bid is satisfied regardless of the amount of liquidity demanded. Conversely, in proportional allotment the received bids will be satisfied only pro rata, if the aggregate amount bid exceeds liquidity to be allotted.

[68] They provide cheap loans to credit institutions.

financial assistance programmes.[69]Similarly, when some credit institutions apply for emergency lending assistance (ELA) from national central banks, the ECB can preclude the provision of assistance through this channel. It has been argued that the ECB has done exactly so with its refusal of ELA provision for Cyprus. On the other hand, these refinancing operations can be a means to subsidy certain credit institutions and indirectly to finance some governments, since cheap liquidity makes it easier for banks to buy government bonds - which become more attractive - and at the same time it helps states finance their debts. However, despite the easy temptation to see political manoeuvres in this unconventional refinancing, there is no evidence that the ECB's action has effectively been driven by political intentions.

The second type of instruments through which the Eurosystem has intervened to tackle the effects of the financial crisis has been a series of bond buying programmes. The aim of these programmes was to restore the single and proper transmission of monetary policy. Standing the prohibition of monetary financing, which prohibits the ECB from directly acquiring government bonds, the ECB has designed and implemented schemes whereby it has been able to buy government bonds on the secondary market, i.e. from an institution that has directly bought these bonds from a Member State.

The first programme dates back to 2010, when the ECB launched the Securities Markets Programme (SMP) through which it bought government bonds from Italy, Spain, Greece, Ireland, and Portugal vis-à-vis a *de facto* conditionality.[70]A second scheme, the Outright Monetary Transactions Programme (OMT), was launched in 2012 but never implemented. It held a formal element of conditionality, since Member States whose bonds were supposed to be purchased by the ECB needed to obtain a loan from the ESM and thus to abide by its conditions. A third programme, the Public Sector Purchase Programme (PSPP) was instead launched in 2015 and included public sector assets, the majority of which bonds, of all euro countries. Both the OMT and the PSPP were the object of litigation before the German Constitutional Court and the Court of Justice for their alleged violation of the monetary financing prohibition of Article 123 TFEU and transgression of the limits of ECB's mandate (on which see Chapter IV).

[69] Hinarejos (n 53) and Beukers (n 66). This was arguably the case of Portugal, Ireland and Spain.

[70] At least as far as regards Spain and Italy. In 2011, both countries received a letter from the ECB recommending economic reforms. The other states, instead, were the recipients of financial assistance provided through the examined loans facilities, which were established only 2 days after the launch of the SMP.

Doubts about the legality of these programmes have arisen since, although secondary-market operations are permitted under Article 123 (1) TFEU, these purchases of government bonds can be used in practice for bailout purposes, and consequently need to be examined in accordance with the no-bailout clause of Article 125 (1) TFEU. The prohibition of monetary financing pursues the aim of facilitating 'normal liquidity operations' which should not amount to emergency measures meant to bail-out a State at risk of insolvency.[71] Secondary market purchases are then allowed insofar as they do not circumvent the ultimate objective of Article 123 (1) TFEU, which is to prevent Member States' profligacy and moral hazard through market discipline. This view is confirmed by the Preamble to Regulation (EC) No. 3603/93 on the application of the prohibitions referred to in Articles 123 and 125 TFEU, which states that purchases on the secondary market should not circumvent the aim of Article 123.[72] A second argument made against the constitutionality of these bond purchases concerns the risk that, as in the case of enhanced credit support, the ECB can indirectly exert pressure on Member States by making such purchases conditional upon their structural reforms in the area of fiscal policy. The legality of said bond buying programmes will be extensively discussed in Chapter IV.

3.2.2 EMU in federal perspective

As said above, the euro area crisis has called into question the viability of the original design of the EMU, shaking its underlying macroeconomic assumptions. Adopted in response to the global financial turmoil, EU crisis-management measures have indeed reshaped the constitutional configuration of the Eurozone, as existing provisions that establish negative obligations, such as the no-bailout clause and the other prohibitions under Articles 123-126 TFEU, did not apply with their full rigour. In particular, the principle of fiscal sovereignty that in the Maastricht Treaty framework was at the heart of the EMU's architecture resulted greatly weakened by the significant financial transfers between Member States. The bailouts occurred within the euro area then proved that the original structure of the Eurozone as a decentralised system of fiscal

[71] In this sense, Tuori and Tuori (n 2).
[72] Council Regulation (EC) No. 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 [renumbered Article 123 TFEU after the Lisbon Treaty] and 104b (1) [renumbered Article 125 TFEU after the Lisbon Treaty] [1993] OJ L 332/1.

governance, with fully sovereign units (its member countries), could not face the challenges that all multilevel systems need to address in their institutional organisation and distribution of competences to different levels of government.

The euro area crisis exposed the way in which economic and fiscal integration is pursued within the EMU to a significant evolution culminated in the possibility of a bailout from the centre, originally excluded by the explicit clause of Article 125 TFEU in consideration of the peculiar nature of the EU and the EMU as well, where the preservation of the national sovereignty of its units was the *raison d'être* of the decentralised nature of the system. Similarly, monetary policy measures of doubtful compatibility with Article 123 TFEU were adopted.

These developments beg the question of whether a transformation of EMU in the direction of a federation has occurred. In other words, they pose the problem of whether a modicum of solidarity between members of a Union, similar to that between units of a federation, emerged.

It has been said that, under the system of fiscal governance envisaged in Maastricht, Member States were sovereign debtors, albeit under centrally imposed fiscal constraints (especially those set out in the Stability and Growth Pact), that is to say that they were sovereign debtors but not also sovereign borrowers. Although the provision of limitations on Member States' budgets may seem to contradict their fiscal sovereignty, in multi-tiered fiscal systems fiscal discipline is generally imposed by the centre on lower-tier governments in order to avoid profligacy and moral hazard. Indeed, if the units of a fiscal federation were bailed out easily by the centre, they would not have an incentive to be judicious when borrowing from the market. The same market would not lend at an interest rate reflecting the fiscal 'healthiness' of the sovereign debtor, since the assumption of a central bailout for states at risk of default will certainly arise.

Therefore, given that budgetary discipline is an element of fiscal federations, the Maastricht Treaty already turned the EU, to a certain extent, into a federation. As has been said, 'the monetary Union was an attempt to usher in Federation through the back door'.[73]

[73] Margaret Thatcher was referred to had pronounced those words in 1990. See Yanis Varoufakis, "Why is Europe not 'coming together' in response to the euro crisis?" (*Yanis Varoufakis Blog*, 29 August 2014) https://www.yanisvaroufakis.eu/2014/08/29/why-is-europe-not-coming-together-in-response-to-the-euro-crisis/ accessed 30 October 2020.

The reasons behind EMU's multi-layered fiscal structure are explained by the literature on fiscal federalism, which generally identifies the advantages of fiscal decentralisation, *inter alia*, with subsidiarity (according to which fiscal decisions are better made at a level closer to citizens), greater democratic legitimacy, and competition between lower-tier governments, since their reliance on the market and the consequent fear of higher interest rates or outflows of capital will result in their more virtuous fiscal behaviour.[74] However, even when the centre is fully committed to a no-bailout policy, such a promise to let the units default might not be sufficiently credible or might undermine the very reason why the centre was created in the first place. This conundrum, also known as Hamilton's Paradox,[75] shows that a strong centre committed to the macro-stabilisation of the union might induce free riding of its units, with the consequence that a central fiscal capacity needs to be weak in order to be credible. On the other hand, when the centre is under institutional constraints and its authority effectively limited, it might be unable to deliver public goods typically federal, such as a common market or a common currency.[76]

As shown, the enforcement of fiscal discipline and the non-bailout promise constitute the way through which fiscal federations typically prevent moral hazard of their units: both elements were inherent in the EMU's functioning and, notwithstanding their inclusion in the EMU's architecture, they did not prevent fiscal shocks within the Eurozone. That paradigm of weak central backstops enforcing market discipline, indeed, does not explain the crisis of the euro area, where the centre was credibly weak and the prohibition of a bailout explicitly enshrined in Article 125 TFEU.[77] In fact, even if the reality of many fiscal federations shows that fiscal transfers are limited in order to prevent

[74] Wallace Oates, 'An essay on Fiscal Federalism' (1999) 27 Journal of Economic Literature 1120.
[75] For this definition see Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (CUP 2006). This contribution unveils the inherent tension within the federalist vision of the first US finance minister, Alexander Hamilton, and federalist theories inspired by his writings. His legacy shows two apparently irreconcilable views of federalism: on the one hand, the need for centralisation, given by the inconsistency of the principle of divided sovereignty; on the other, the peril inherent in a strong fiscal capacity at the federal level, which could induce free-riding at the national level. For an extension of the Hamilton's Paradox to the euro area see Waltraud Schelkle, 'Hamilton's Paradox Revisited. Alternative lessons from US history' (2010) CEPS Working Document no. 2017/10. The author proves how that paradigm according to which fiscal capacities at the federal level are effective only if they are weak does not explain the Eurozone crisis, given the extremely weak fiscal capacity of the EU. In that analysis, the roots of the euro area turmoil lie instead in the role of the financial markets and in their lack of discipline, and for this reason a fiscal union for the EMU should not be the answer to the Eurozone's dysfunctions.
[76] See Rodden (n 75).
[77] See Schelkle (n 75).

reckless fiscal policies of the units, these transfers are nevertheless necessary to tackle fiscal shocks.

Therefore, the question of whether the euro area crisis led to a constitutional change of the nature of the EMU in the sense of a federation[78] needs to be answered in light of all the elements of fiscal federations. The answer to this question should be in the affirmative if one looks at the fiscal discipline required by EMU's membership, which has been reinforced after the financial crisis. Fiscal discipline is an element shared by the majority of fiscal federations, in which it is imposed from the centre and does not deprive members of the federation of their sovereign fiscal prerogatives, in light of the principle of dual sovereignty. However, with regard to the other elements that every multi-tier system of fiscal governance has to possess, the answer is not straightforward. In fact, the fiscal federalism literature[79] explains how, besides the problem of the fiscal behaviour of the members of the union, multi-layered and greatly decentralised fiscal systems need to address other two typical problems: structural imbalances or inequalities and asymmetric shocks.

In the context of EMU, the issue of structural imbalances and inequalities derives from the divergence of the Eurozone from the model of an optimum currency area. Many differences in terms of economic structures persist in the Eurozone, preventing its Member States from being equally competitive. The loss of the currency devaluation power compounded those inequalities, as the state affected by a shock could no longer adjust the exchange rate of its currency to restore competitiveness. But even before the creation of the economic and monetary union, the European Economic Community worked under the Treaty of Rome as an 'asymmetrical free trade zone', with a consequent asymmetrical political economy.[80]While the establishment of a single market advantaged economies of scale in states with a developed manufacturing sector like Germany, it penalised countries with less productive capacity and capital goods like Greece. Countries with a capital-intensive industry, indeed, cannot generate enough domestic demand to absorb the national production, with the consequence that they need to export their products to capital-poor countries that cannot produce them competitively due to low

[78] As Hamilton allegedly wrote in 1781, a mutualised debt at the federal level could be a blessing for, and a tangible symbol of the strength of, the federation. For this reason, he proposed the creation of a central bank and a joint debt mechanism during the war of independence. See Rodden (n 75).
[79] On these three challenges see Hinarejos (n 53) chapter 4.
[80] Varoufakis (n 73).

price-cost margins. The resulting trade surplus, in the lack of adjustable exchange rates, causes capital accumulation and thus capital flows to countries where the interest rates are higher.[81] This migration of capital from (banks of the) surplus to deficit countries - which, as already said, has been at the roots of the euro crisis - constitutes a mechanism to recycle those surpluses through financial markets. According to Varoufakis, this system represents only one of the two ways of recycling surpluses, specifically a market-based one that relies 'on the financial system to channel surpluses in the form of loans and credit to the deficit countries and regions'[82] and that normally creates bubbles since, in a sort of vicious circle, it raises the domestic demand for exports in the deficit country, deepening the asymmetry within the trade area.[83]

What allows an asymmetrical currency union, for instance the United States, to work is an 'Extra-market Surplus Recycling Mechanism',[84] which on the contrary relies on political solutions, like fiscal transfers. Inequalities within the Eurozone then postulate an automatic equalisation system, that means a coordinated use of fiscal tools as taxation or central spending powers at the central level. In the absence of flexible exchange rates, which by definition are automatic stabilisers,[85] the burden of macro-adjustment cannot but be allocated with fiscal instruments, such as progressive taxation, unemployment schemes and other forms of social insurance.[86]

The use of these fiscal tools then becomes paramount in addressing the third challenge that a currency union with decentralised fiscal governance normally faces, namely how to correct asymmetric shocks. Indeed, when a worker loses their job as a consequence of a negative shock, for instance the contraction of the demand for exports,

[81] Capital accumulation pushes down real interest rates in the surplus country.
[82] Varoufakis (n 73).
[83] Besides Varoufakis, also Stiglitz has pointed out how money going to deficit countries does not make their economies more productive, but rather it finances real estate bubble and consumption. See Joseph Stiglitz, *The Euro and its Threat to the Future of Europe* (Penguin 2016), chapters 3 and 4. According to the American economist, the financial system did not serve growth, as it did not perform its typical function of intermediation between savings and investment (pp 257-8).
[84] Varoufakis (n 73).
[85] In a regime of adjustable fixed rates, indeed, the exchange rate works as an automatic stabiliser as it decreases when a country is affected by a downturn, thus boosting exports and consequently national income. The function of these economic features (also referred to as built-in stabilisers) is to limit economic fluctuations without the need for ad hoc government's intervention (policy measures that would not operate automatically and immediately). A classic example is provided by the government's budget that in the event of a rise of unemployment provides the benefits ensuring maintenance of the income. See John Black, Dictionary of Economics (2nd edn, OUP 2002).
[86] See Stiglitz (n 83) 247-8.

the multiplied effects of such a decrease will be neutralised by the unemployment insurance that the worker will get. Therefore, the need for an automatic equalisation presupposes a federal budget and thus the existence of a central spending power, which can trigger, through central taxation or transfer mechanisms, a countercyclical performance in response to an economic downturn. The original EMU framework created at Maastricht, instead, did not equip the Union with instruments capable to face the challenges posed by asymmetric imbalances and shocks.

The next subsection considers specifically each of the objectives of fiscal federations - i.e. compliance with fiscal discipline, correction of structural imbalances, and adjustment to asymmetric shocks - to assess to what extent Eurozone reforms have worked towards them.

3.2.3 The significance of crisis-driven developments in light of transnational solidarity

If a constitutional change of the EMU in the sense of a federation is to be detected, it can only be confined to the enhancement of fiscal discipline. With regard to the other two elements explained above, i.e. capacity to counter structural inequalities and asymmetric shocks, the Eurozone promoted divergence instead of convergence of its Member States towards a fully-fledged union. Therefore, it can be hardly said that the euro area crisis fostered the development of genuine solidarity between Member States.

3.2.3.1 Fiscal discipline

In theory, given the strong commitment of the centre to the no-bailout of its units (Article 125 TFEU), fiscal discipline should not have been an issue for the functioning of EMU. Nevertheless, Treaty provisions (Articles 121 and 126 TFEU) and the Stability and Growth Pact, as mentioned in Chapter 2, fostered fiscal prudence by setting out certain limits on national fiscal policies.[87] In particular, Article 121 TFEU envisaged a framework of macroeconomic coordination and multilateral surveillance through which attaining said objective. Based on the Broad Economic Policy Guidelines (BEPG), issued by the Council (Ecofin) on a three-year basis, Member States shall report on their

[87] For a systematic interpretation of Articles 121 and 126 TFEU in conjunction with other provisions of the European economic constitution see 2.2.4.

compliance with the budgetary constraints set out in Article 126 TFEU. To this end, they submit a stability programme on which the Commission monitors and then reports to the Council. Furthermore, Article 126 TFEU prohibits excessive government deficit, according to the ratio set out in Protocol no 12. When an excessive deficit occurs, the Commission initiates the procedure, so called Excessive Deficit Procedure (EDP) and formulates a recommendation to the Council, which ultimately has the power to adopt a decision and even penalise the non-compliant state by imposing sanctions.

Both the multilateral surveillance and the excessive deficit procedure were potentiated by the Stability and Growth Pact (SGP) adopted in 1997, which consists of a preventative arm, under which Member States commit to keep their annual deficit and debt below a certain percentage of their GDP, and a dissuasive arm, aiming at the correction of excessive deficits through the imposition of fines.[88] Integration in the fiscal area was then mainly pursued through the adoption of budgetary rules setting out numerical values and thus leaving Member States free to pursue the economic policies they deemed as the most appropriate to achieve those budgetary objectives. Despite the legally binding nature of said numerical fiscal rules, their enforcement was ultimately left to a political decision of the Council. This hybrid system, combing hard law elements (legally binding measures prescribing budgetary limits) and soft law instruments (political mechanism to adopt sanctions) proved ineffective. Indeed, the excessive deficit procedure initiated by the Commission against Germany and France, respectively in 2002 and 2003, did not lead to any sanction due to the lack of political consensus within the Council and could not even be enforced before the Court of Justice.[89] On the other hand, macroeconomic coordination through the Broad Economic Policy Guidelines was even looser, given the non-binding character of those guidelines and the absence of an enforcement mechanism other than self-reporting of the Member States. Fiscal and

[88] For the historical context and theoretical assumptions of the SGP see 2.2.4. The Stability and Growth Pact, following the Resolution of the European Council of 17 June 1997, envisages two regulations: Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1 (the preventative arm) and Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6 (the corrective arm).

[89] The Council did not follow the Commission's recommendations to urge Germany and France to take more effective actions to reduce their deficits. The Commission challenged the failure of the Council to adopt the formal instruments contained in its recommendations before the Court of Justice, which rejected the claim on the basis that, formally, no decision to be annulled was at stake. See case C-27/04 *Commission v. Council* [2004] ECR I-6649.

economic integration involving 'policy choices', as opposed to mere budgetary or numerical fiscal rules, was therefore pursued with purely soft law methods.[90]

The reason for this more relaxed form of integration lay in the effect that those measures have on the allocation of resources and their redistribution at the national level. Contrary to quantitative constraints that merely put a limit on the size of national deficits by creating a numerical framework within which redistributive decisions should be made, policy choices express the concrete form of state intervention in the economy, or in other words the preference for one model of redistribution over another. Consequently, such policy choices postulate a high degree of political confrontation and democratic deliberation which cannot but rest within domestic democratic structures. In terms of competences, in theory, the EU has only a coordinating competence, that means that it is not able to conduct its own broad fiscal and economic policy.

Nonetheless, the outbreak of the crisis changed the path of coordination of fiscal and economic policy within the Union. One of the responses to the euro area's instability has been the strengthening of budgetary surveillance and macroeconomic coordination through a variety of instruments, already extensively examined (see *supra* 3.2.1.2). Through the adoption of EU binding legislation such as the Six-Pack and the Two-Pack, surveillance mechanisms now cover broader areas: not just budgetary rules expressed in the form of numerical limits, but also economic policies broadly conceived. For instance, through the Macroeconomic Imbalance Procedure (MIP) introduced by the Six Pack the Commission detects economic imbalances on the basis of a scoreboard that builds on various indicators, including *inter alia* competitiveness, labour costs, private and public sector debt. Following the Communication 'Strengthening the Social Dimension of the Economic and Monetary Union',[91] the Commission explicitly referred to social indicators such as poverty, social exclusion or youth unemployment as parameters to take into account when coordinating employment and social policies within the European Semester.

The surveillance of the Commission is no longer limited then to budgetary constraints, but it also involves certain specific reforms that member States are called to

[90] For the distinction between numerical fiscal rules and policy choices, see Hinarejos (n 53) 58; see also Nina Budina et al., 'Fiscal Rules at a Glance: Country Details from a New Dataset' (2012) IMF Working Paper 12/273, 6.

[91] Communication from the Commission to the European Parliament and the Council 'Strengthening the Social Dimension of the Economic and Monetary Union'[91] COM (2015) 690.

adopt. During the European Semester described above (see 3.2.1.2), Member States have to present not only programmes detailing budgetary rules but also national reforms programmes in line with the broad economic guidelines, the employment guidelines, the general guidance set in the Commission's Annual Growth Survey.[92]

Hence, both the coordination of national policy choices and the imposition of budgetary rules have been strengthened: the former through the extension of the surveillance framework originally designed for the enforcement of numerical fiscal rules, the latter through the adoption of further rules with more specific and stricter numeric limitations. [93].

The shift of macroeconomic coordination from mere budgetary rules setting out objectives to more intrusive policy rules is even more evident in the case of macroeconomic adjustment programmes that State receiving financial assistance under the European Stability Mechanism (ESM) or the European Financial Stability Facility (EFSF) have to implement. The Memoranda of Understanding (MoUs) have become a very detailed source of fiscal and social policies of Eurozone countries receiving loans, since they articulate the strict conditionality to which the loan disbursement is subject.

In sum, these developments suggest a departure of EU law from a general coordination of national economic policies as matter of common concern and, conversely, show the emergence of a central conduct of prescriptive policies in fiscal and social areas. The EU action in this field has gone beyond the aim to avoid the risk of fiscal profligacy inherent in a currency union and has intruded into the domestic domain of redistribution.[94] It can be said that the EU started conducting its own policy in the fiscal and social areas, as the imposition of 'strict conditionality' which took the form of 'austerity' proves. The EU, or better its two 'borrowed' institutions (the European Central Bank and the European Commission) did make, together with the International Monetary Fund, true policy choices over how to reduce public debt. Specifically, they imposed harsh cuts on public expenditure with dramatic repercussions on welfare provision and social services.

[92] For a detailed account on how the European Semester works see Section 1-A 'European Semester for economic policy coordination' of Regulation 1175/2011.
[93] Hinarejos (53) 67-72.
[94] See in this regard Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 ELJ 667; Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro Crisis' (2013) 76 The Modern Law Review 817.

These centrally made fiscal decisions were fully-fledged policy choices, in that they express a preference for austerity as one of the many means through which public debt can be reduced. Indeed, besides austerity, other instruments generally at states' disposal are tax on capital and inflation.[95] With inflation out of the spectrum of available tools, tax on capital or austerity are the remaining methods that allow country to reduce their public debt. The choice over either of them heralds significant differences in terms of redistribution. Consequently, the Troika's commitment to austerity directly affected redistribution internal to Member States accepting conditionality attached to the bailout measures, thereby showing how the EU, or better its intergovernmental torsion, was conducting its own macroeconomic policy.

3.2.3.2 Structural imbalances and inequalities

Even prior to the creation of the EMU with the Maastricht Treaty, Member States tried to bring their national economic policies closer together, mostly with the aim to prepare the three stages of the EMU.[96] The Treaty of Rome foresaw some macroeconomic principles subservient to the functioning of the internal market rather than to the single currency. In particular, the Council decision of 17 July 1969 on the coordination of short-term economic policies of the Member States,[97] adopted on the basis of Article 103 (2) and 105 (1) TEEC, encompassed a chapter concerning the balance of payments which took into account, to some extent, structural imbalances within a free trade area. By recalling the objective to achieve continuous and adequate economic growth and a high level of employment besides the more ordoliberal objective of a stable price level, the

[95] For this tripartition see Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2013), chapter 16.

[96] Even prior to the Maastricht Treaty, and thus the creation of the EMU, the Council used to undertake multilateral surveillance of national economic policies with the aim to prepare the first stage of EMU (see in this regard, Council Decision 90/141/EEC on the attainment of progressive convergence of economic policies and performance during stage one of economic and monetary union [1990] OJL78/23 which replaced Council Decision 74/120 [1974] OJ L63/16) as well as during the second stage where Member States were required to adopt convergence programmes (See Article 109e (2) (a) EC. During the third stage, instead, such programmes were required for Member States which had not (yet) joined the Eurozone (the "Outs"), while the Eurozone States were demanded to provide "stability programmes". All programmes and assessments - which are national documents formulated within EU guidelines and thus not EU instruments - from 1998 until 2010 are available at ‹http://ec.europa.eu/economy_finance/economic_governance/sgp/convergence/programmes/index_en.htm›).

[97] Council Decision of 17 July 1969 on the co-ordination of short-term economic policies of the Member States of February (69/227/EEC) --- [1969] OJ L 183/41 – Council Decision (EEC).

decision called for 'prior consultations on important short-term economic policy measures taken by a Member State which substantially affect the internal and external equilibrium of the Member States [...] or their internal or external equilibrium or which might cause a substantial divergence between the trend of one country's economy and the medium-term objectives determined jointly'. The consultations, according to the wording of Article 1 of that Council decision, should have involved not only overall budgetary policy but also 'measures designed to have a direct effect on foreign trade'.

With the introduction of the common currency, the institutional framework for economic policies' coordination was enhanced, in that macroeconomic coordination between Member States was to be pursued by the (albeit non-binding) Broad Economic Policy Guidelines to be issued by the Council on a regular basis. In the frame of the Rome Treaty, instead, such a coordination was designed as a piece-meal action to be taken within various committees (budgetary committee, monetary committee, and conjuctural policy committee, according to Article 2 of Council Decision 69/227/EEC). Despite the Maastricht attempt to strengthen the framework within which coordination of national economies is to take place, structural imbalances have not been prevented. Moreover, the 1992 Treaty did not even refer to costs that uncoordinated economic policies could have imposed on other countries: *de facto*, macroeconomic coordination focused only on fiscal discipline.

None provision explicitly referred to the inequalities brought about by the asymmetry inherent to the free trade area, or better to a single market with a single currency. Within such an area with intense economic interdependencies between Member States, the way one country conducts its own economic policy generates externalities for the other countries of the region. Countries running surpluses create parallel deficits elsewhere that, without the monetary tool of devaluation at their disposal, cannot but be addressed by centralised fiscal tools, such as transfer mechanisms. On the side of money, a current account surplus means that there should be a deficit in another country, which then needs to borrow thereby facing the risk of a sudden stop in the flow of capital.

This profound, structural asymmetry shaped the Eurozone as an area founded on an unbalanced credit/debt relationship between its Members States rather than on the value of solidarity. The outbreak of the financial crisis, however, partially changed this scenario, in that the Six-Pack aimed not only at reinforcing fiscal discipline but also at

ameliorating the economic governance framework through the introduction of the Macroeconomic Imbalance Procedure (MIP).[98] Thanks to this new monitoring mechanism, the Commission detects macroeconomic developments within euro countries that may harm the proper functioning of the EMU. To this end, the Alert Mechanism Report (AMR) draws on indicators of a scoreboard that is not limited to budgetary criteria, but that also includes export shares, external account or net investment balances. According to the results of this preliminary analysis, then, the Commission publishes an in-depth review for each country with potential imbalances, exposing the nature of the latter and the course of action to follow in order to face them.

For the first time, hence, following the financial unrest of the Eurozone, the EU economic governance does not merely address Member States' *deficits*, since the EU crisis-management framework now encompasses also rules designed to limit trade and current account *surpluses*. As the in-depth reviews addressed to Germany from 2014 to date show,[99] significant progress has been made in detecting German trade and current account surpluses as a source of spillover effects for the Eurozone. In 2018, for instance, the Commission has signalled how adjustments requested in country-specific recommendations addressed to Germany have not been satisfactorily implemented, as internal growth has remained limited, with public investment not effective in raising domestic demand and wage growth moderately low.[100] In its most recent report, however, the Commission has acknowledged that, albeit considerable, the account surplus is diminishing.[101] Therefore, the efforts to promote a solidarity-oriented macroeconomic policy, that is a national policy-making sensitive to the externalities that own choices may

[98] Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area and Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances.

[99] See European Commission country reports including in-depth review: European Commission, Directorate General for Economic and Financial Affairs 'Macroeconomic Imbalances Germany 2014, Occasional Papers 174, March 2014; - 'Macroeconomic Imbalances Country report Germany 2015, Occasional Paper 214, June 2015; - 'Country Report Germany 2016 including an In-Depth Review on the prevention and correction of macroeconomic imbalances' Commission Staff Working Document, SWD (2016) 75; - 'Country Report for Germany 2017 including an In-Depth Review on the prevention and correction of macroeconomic imbalances' Commission Staff Working Document, SWD (2017) 71; 'Country Report for Germany 2018 including an In-Depth Review on the prevention and correction of macroeconomic imbalances' Commission Staff Working Document, SWD (2018) 204; 'Country Report Germany 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances', Commission Staff Working Document, SWD (2019) 1004.

[100] See Country Report Germany 2018 executive summary (n 99) 1-3.

[101] See Country Report Germany 2020, Commission Staff Working Document, SWD (2020) 504, executive summary.

have for other states of a union, have proved ineffective insofar as no action has been taken to sanction surplus countries.

3.2.3.3 Asymmetric shocks

The lack of centrally placed adjustment mechanisms within the euro area impeded the correction of said structural imbalances and thus the prevention of asymmetric shocks. As said, a currency area with a decentralised fiscal system is more prone to experience dysfunctions, as an economic downturn may affect only a part of the whole area, which in the absence of central transfer mechanisms cannot resort to monetary tools to restore its prosperity. In the Eurozone, not only cannot euro countries dispose of monetary tools, but they cannot also resort to financial tools to prevent and counter economic downturns, given the fact that the policies imposed by the Troika on countries receiving financial assistance have curbed the use of such tools.

In a comparison with the US, the other immediate example of a single currency system, the Eurozone exhibits less compliance with the main criteria of an optimum currency area (OCA), in particular with high mobility of labour and fiscal transfer mechanisms. In this regard, Stiglitz has highlighted three main differences between the US and the Eurozone.[102] The first - and most important for the discourse on EU citizenship - is the intra-mobility of citizens and their reliance on federal social security schemes; the second consists in the discretional financial support that states in difficulty receive from the federal government, and the third is a banking union.

The degree to which the European Union has worked towards the implementation of each of those adjustment mechanisms varies significantly. While a contraction of transnational solidarity has been shown towards vulnerable migrants claiming social benefits in the host State, significant financial transfers have occurred between Member States (despite them being subjected to 'strict conditionality'), and the creation of the so-called banking union has followed as well. The significance of these post-crisis developments in light of transnational solidarity is rather opaque and not always consistent, as they do not adhere to a coherent constitutional order between the Union and its Member States, and thus between the Union and its citizens. In other words, said direct

[102] Stiglitz (n 83).

and indirect responses to the financial crisis do not presuppose the same constitutional nature and telos of the Union.

On the side of citizenship, the cross-border access of wholly economically inactive citizens or first-job seekers to social benefits in the host State has been significantly restricted, if not denied tout court.[103] This judicial trend has restated the importance of nationality as the paramount criterion upon which allocating responsibility for citizens' welfare.[104] The ultimate aim of free movement provisions now seems to be that of preserving national boundaries from cross-border claims of distributive justice rather than that of promoting mobility among European peoples. This teleological reduction of EU citizenship - which has been made ever more dependent on national citizenship when it comes to free movement, and instead magnified when it comes to shoulder the financial burden of countries in financial trouble - is problematic not only for the European Union as a political project, but also for the viability of EMU as a currency area. As the theory of an optimum currency area suggests, high mobility of the labour force and of citizens works as an equalising mechanism without which a single currency area is not destined to function. The recent restrictions on cross-border access to welfare provision (re)affirm a conception of welfare states as bounded systems in the exclusive purview of Member States, upon which the authority of EU law is now significantly limited.

Instead, with regard to the second mechanism of adjustment, that is financial support through fiscal transfers, it should be noted how the principle of national sovereignty on fiscal and social domains – reaffirmed in the field of free movement, as mentioned above - should have implied a strict commitment to the non-bailout clause

[103]See cases C- 333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358; C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597; C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* [2016] ECLI:EU:C:2016:114; C- 308/14 *Commission v UK* [2016] ECLI:EU:C:2016:436. On this restrictive trend of citizenship case law, see inter alia Daniel Thym, 'The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 CMLR 17; Daniel Thym, 'When Union Citizens Turn into Illegal Migrants: The Dano Case' (2015) 40 ELR 249; Herwig Verschueren, "Preventing 'benefit tourism' in the EU: A narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?" (2015) 52 CMLR 363; Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 CMLR 889; Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017) 54 CMLR 209.

[104]Eleanor Spaventa, 'Economic Justifications and Union Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in Panos Koutrakos, Phil Syrpis, Niamh Nic Shuibhne (eds), *Exceptions from EU free movement law: derogation, justification and proportionality* (Hart Publishing 2016);

under Article 125 TFEU. Nonetheless, such prohibition of debt mutualisation did not impede the financial assistance, that following the start of the crisis, has been granted to countries in trouble. Similarly, the ban on monetary financing under Article 123 TFEU did not preclude the ECB from buying sovereign bonds on the secondary market, thus intervening with quasi-fiscal tools in order to correct asymmetric shocks effectively.

Although such bailouts for countries at risk of default did not directly involve the Union – as the financial assistance has been provided via bi-lateral agreements or facilities outside the EU legal framework – they presuppose euro area membership and then have important repercussions on the constitutional nature of the EU. Undoubtedly the bailout operations concern the mutual relationship between Member States, and in particular the extent to which Member States are willing to offer financial assistance to their euro area partners. Provided that said bailout operations find their *raison d'être* in a shared, supranational political project (the euro), it is open to contestation whether such measures show the degree and type of solidarity typical of a fully-fledged fiscal federation.

In a true union, solidarity is the lowest common denominator between its units, which are committed to assist each other for the sake of a common fate. In this context, solidarity is not left to their voluntarism or philanthropy, but it is a constitutional obligation deriving from the existence of a vertical dimension, a public sphere, which regulates the horizontal relationship between the units of a union. On the basis of these considerations, any form of cooperation between Member States presupposes a certain way to conceive of the Union as a polity. In the case of bailouts, the fact that they came from Member States rather than the Union does not rule out a conception of the Union as a fiscal federation. An economic and fiscal union does not necessarily entail a large-size own budget and central spending powers. It can also be designed as imposing its authority on national budgets and the way single units should be raising revenues and directing their spending powers.

The response to the euro area crisis, and in particular to the new 'impossibility trinity'- according to which prohibition of co-responsibility over Member States' public debt (Article 125 TFEU), ban on monetary financing (Article 123 TFEU), and national

banking systems cannot coexist -[105] can be examined against the paradigm of transnational solidarity in two different ways.

On a factual level, the close cooperation of Member States in the macroeconomic field does not amount to the type of solidarity existing in a fully-fledged union as far as financial assistance takes the form of loans to which conditionality is attached. In a true fiscal union, financial assistance would amount to fiscal transfers, directed to compensate for the asymmetries existing between the members. The resulting conception of solidarity is then merely international, as the financial assistance provided by Member States is voluntary and negotiated through international law instruments. The fact that financial assistance came from Member States rather than the Union is not per se an element against genuine solidarity. It is rather the voluntary and conditional nature of such assistance to exclude transnational solidarity, as it does not pursue redistribution and relies on the market. Member States in need of financial assistance continue to be subject to the logic of the market, which remains the central structure for the regulation of their reciprocal obligations.

The centrality of the market is further proved by the resurgence of 'market citizenship', an idea that part of the literature left behind as it read in EU citizenship the promise of emancipation from an economic paradigm.[106]

Admittedly, although EU citizenship introduced a status-based relationship between the individual and the Union and the earlier case law seemed to suggest that only the *exercise* of citizenship rights, rather than their *existence*, was subject to limitations, nationals and non-nationals have never been in a comparable situation vis-à-vis access to social benefits. EU citizenship, despite its promise of equality, did not totally erode Member States' powers to exclude non-nationals from domestic solidarity systems. While assimilation into domestic solidarity networks and equal treatment with home-nationals of the host Member State was automatically 'earned' for workers through economic contribution, additional criteria for the economically inactive, such as a 'real link with the employment market' or 'a certain degree of integration into the host society', could be

[105] Jean Pisani-Ferry, 'The Euro Crisis and the New Impossible Trinity' (2012) Brueghel Policy Contribution 2012/01.

[106] Of course, there were more nuanced accounts on EU citizenship, which had highlighted the prolonged relevance, or better 'resilience', of the market in the conceptualisation of citizenship. See Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLR 1597.

required by Member States for certain welfare entitlements, provided that the claimants did not become an unreasonable burden on the public finances of the host state'.[107]

These exclusionary powers of Member States, which took the form of indirectly discriminatory measures such as residence tests, were balanced against the EU citizens' right to welfare claims through the principle of proportionality. The ECJ's earlier case law positively sanctioned these exclusionary mechanisms holding that Member States could legitimately reserve access to welfare entitlements to citizens who are *lawfully* resident either pursuant to national law or EU law.[108]

This line of case law has been codified into Directive 2004/38 which specifies the conditions and limitations to which the right to reside in the host Member State is subject. The regime of the Directive entrenched a hierarchy of migrants, distinguishing between workers who enjoy an unconditional right to residence and equal treatment (in that they are presumably integrated into the host society by virtue of their economic contribution),[109] and non-economic actors who enjoy incremental citizenship rights according to the length of their residence and whose right to residence is subject to the possession of sufficient economic resources and comprehensive health insurance.[110]

According to an earlier expansive reading of these provisions, Member States could either terminate the right of residence of those medium-term residents who do not satisfy these economic requirements so as not to be obliged to confer welfare entitlements to them or justify indirect discrimination on grounds that were not purely economic.[111] Moreover, the economic requirements of sufficient resources and comprehensive health

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[107] See respectively C-138/02 *Collins* [2004] ECR I-2703 and C-209/03 *Bidar* [2005] ECR I-2119.

[108] This line of case law can be traced back to C-85/96 *Martinez Sala* [1998] ECR I-2691.

[109] See, for instance, Case C-20/12 *Giersch and others v Luxembourg* [2013] EU:C:2013:411 para 63: 'It should be noted that migrant and former workers, since they have participated in the labour market of a Member State, have in principle created a sufficient link of integration with the society of that State […] The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant and frontier workers also contribute to the financing of the social policies of that State'.

[110] According to Directive 2004/38, new arrivals (i.e. residents for less than three months according to Article 6 Directive 2004/38) are excluded from social assistance *tout court* (Art 24 (2) Directive 2004/38), while medium-term residents (i.e. those resident for more than three months but less than five years) should possess sufficient economic resources and comprehensive health insurance to *legally* reside in the host Member States (Article 7 (1) (b) and (c) Directive 2004/38) and thus to claim equal treatment in matters of social assistance according to the initially expansive case law.

[111] See Spaventa (n 104). The consolidated position on justifications was that 'aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-04071).

insurance detailed in secondary law had to be interpreted in light of proportionality since they constituted a limitation upon a right conferred by the Treaty.

However, as anticipated above, there has been a step back from this purposive interpretation, which tried to accommodate EU citizens' needs within national social solidarity structures, and proportionality has been abandoned.[112] Member States have increasingly taken advantage of the conditions built in the EU secondary legislation to exclude non-nationals from welfare entitlements through the introduction of right to residence tests, and the ECJ's case law has started condoning this rights-curbing stance.

The seeds of this approach were evident in *Brey*, where the ECJ accepted that national legislation, *in principle*, can make the granting of social benefits conditional upon a legal right of residence in the host Member State on the basis of Directive 2004/38.[113]However, the requirements to establish a right to residence were there still interpreted in light of proportionality, which translated into the right to have personal circumstances assessed but also into a systematic assessment of the specific burden that granting a certain benefit would place on the social assistance system as a whole.[114] The proportionality-based assessment of the claimant's situation, however, was deemed to be unnecessary when the citizen had moved 'solely' for the purpose of obtaining social benefits (*Dano*)[115] and for jobseekers claiming social assistance-type benefits (*Alimanovic*).[116]

These findings were later extended to any type of social benefits, including those classified as social security for the purposes of Regulation 883/2004 which are payable by the state of habitual residence (when it is the competent state according to Article 11 (3) (e) Regulation 883/2004) to *all* its residents. Indeed, the *Brey* principle that residence tests might be legitimate in the context of social assistance (that is the provision of benefits that are paid out of general taxation and generally means-tested) was distilled as a blanket rule in *Commission v UK*, where the Court accepted the automatic exclusion of

[112] See cases *Dano* ff (n 103).
[113] C-140/12 *Pensionsversicherungsanstalt v. Brey* [2013] ECLI: EU:C:2013:565 para 44 citing the line of case law from *Martinez Sala* onwards.
[114] ibid. para 64.
[115] *Dano* para 78.
[116] See *Alimanovic* and *Garcia Nierto* (n 103). Specifically, in *Alimanovic* the ECJ departed from its previous case law on jobseekers who had long been granted benefits facilitating their access to the labour market. For this previous and more generous line of case law see C-22/08 and C-23/08 *Vatsouras* and *Koupatantze* [2009] I-04585.

non-nationals as a result of a right-to-reside-test-under-Directive 2004/38 in relation to 'pure' social security benefits under Regulation 883/2004.[117] As a result, the transposition of the conditions of Article 7 Directive 2004/38 into Regulation 883/2004 rewrote the (broader) personal scope of this latter instrument of secondary law, leading to an overt circumvention of Article 4 Regulation 8832004 on equal treatment.

This restrictive line of case law seems to have elevated the Directive - whose teleological orientation has been transformed from enhancing free movement to preventing welfare tourism - to an exhaustive source of citizenship rights. As a result, it appears that anyone who is deemed to be economically inactive and falls foul of a residence test cannot make claims based on equal treatment, regardless of their degree of connection with the host country. This outcome is problematic because it ignores the reality of discontinued or undocumented work, previous employment history, unpaid care work, and a range of other facets of 'economic inactivity'.[118]

More worryingly, it leaves the status of EU citizen children - who by definition do not (and should not) fall in the categories of economically active and inactive of the Directive - dubious and in *Commission v UK* overtly unprotected. This line of case law seemed to suggest the resurgence – or possibly the never-ceased endurance - of market citizenship, which relies on the importance of the market as the main device of distribution of rights and opportunities for citizens.

A partial clarification in relation to the status of the Directive has recently come from *Jobcenter Krefeld*,[119] in which the right to education of EU citizen children has not been made conditional upon their primary carers' fulfilment of the self-sufficiency requirements of the Directive. This judgment granted access to welfare benefits to former workers deriving a residence right from Article 10 Regulation 492/2011 as primary carers of children in education (*Texeira* carers). It rules out that Article 24 (2) Directive 2004/38 on derogations to equal treatment constitutes a transversal principle applicable to the whole area of free movement, reinstates the application of Regulation 883/2004 for those who reside by virtue of an instrument other than Directive 2004/38, and seems to confine

[117] On this judgment see O'Brien (n 103). For a broader critical analysis of the UK 'declaratory discrimination programme', which systemically excludes EU nationals from equal treatment through the application of right to reside tests to non-nationals see Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the* UK (Hart Publishing 2017).
[118] O' Brien (n 117).
[119] C-181/19 *Jobcenter Krefeld Widerspruchsstelle v. JD* [2020] EU:C:2020:794.

the rights-curbing stance of *Dano* and onward cases to first-time jobseekers, short-term residents, and wholly economically inactive citizens. To be unclear are instead the rights of 'second-time' jobseekers in an *Alimanovic*-type situation, who after the loss of their retained status of workers had been compared to first-time jobseekers. In particular, the judgment did not clarify whether they can claim equal treatment under Article 7 (2) Regulation 492/2011 by virtue of their past participation in the market even if they do not have children and thus do not have a derived right of residence under Article 10 Regulation 492/2011. On the other hand, the rights of the children of primary carers who have never engaged in economic activity remain perhaps subject to the (now) automatic exclusion from equal treatment according to the reading of Article 24 (2) Directive 2004/38 that the ECJ has given in its recent strand of case law.

These judicial developments show how the legal framework of free movement is rather fragmented and perhaps conceptually underpinned not just by the market, but by an 'inhuman' conception of the market. Not only did EU citizenship not evolve into social citizenship, retaining the traction of market citizenship, but it also showed a particular vision of the market as a place of labour commodification and destitution of individuals who do not satisfy the economic conditions of EU secondary law.

While the generous interpretation of economic freedoms pre-dating Maastricht could be seen as a 'form of citizenship *in pectore*'[120] since it was concerned not only with the participation of the worker to the market and their contribution to the production of wealth but also with their social integration in the host community, the restrictive stance on former (precarious) workers expressed by *Alimanovic* is quite problematic even from a 'functionalist' perspective in that it suggested that only those (workers) who can 'pay their way' can be treated equally. The recent case *Jobcenter Krefeld* seems to partially correct the odd outcome of *Alimanovic,* which had erased the relevance of previous economic activity. It did not expressly reinstate, though, a general proportionality assessment of the personal circumstances of the claimant and equal treatment as a default rule. It is still unclear when Member States can automatically exclude EU nationals from social protection, without carrying out proportionality-based scrutiny of their personal needs.

[120] Eleanor Spaventa, 'Earned Citizenship. Understanding Union Citizenship through Its Scope' in Dimitri Kochenov (ed), *EU Citizenship and Federalism*: *The Role of Rights* (CUP 2017) 207.

In other words, it is still unclear whether Union citizenship is reinstated as a concept 'destined to be the fundamental status of EU nationals', a 'convergence status'[121] which can bridge 'the gaps between the different categories of EU movers'[122] and offer protection to those who 'fall outside the rigidly defined categories in Directive 2004/38'.[123] For this reason, a call for a reinvigorated principle of proportionality has been made with the aim of introducing principles of social justice in the balancing exercise between social-protection claims of EU nationals and (allegedly legitimate) interests of Member States to restrict access to their social protection systems.[124]

A substantive version of proportionality, construed not as a shallow principle but as an instrument capable of accommodating the needs of individuals, could restore the EU citizenship's promise of transnational solidarity and bring back the 'Arcadian objective'[125] of full egalitarianism and unconditional free movement for all EU nationals in the discourse on the status that EU citizenship is 'destined' to be.

At present, the general pattern emerging from the citizenship case law focuses on the importance of economic self-sufficiency for individuals' protection under EU law. Individuals who do not meet the conditions of economic sufficiency set out by Directive 2004/38 are automatically excluded from the scope of protection of the Treaty unless they can claim an independent right to residence under an instrument different from the Directive. This restrictive approach has been applied, with limited exceptions seen above, to non-economically active citizens - including jobseekers who, though, have a link, albeit potential, with the market. However, there are serious concerns that this narrow approach could be extended to those economically active, who on the contrary have always been legally protected under EU law. The risk is that economic activity would no longer be material to equal treatment in matters of social protection. This judicial stance, more deferential towards Member States' justifications of restrictions to Treaty rights,[126]threatens the internal market as it might reach the interpretation of free

[121] Thym (n 103) 18.
[122] Anastasia Iliopoulou-Penot, 'Deconstructing the former edifice of Union citizenship? The *Alimanovic* judgment (2016) 53 CMLR 1007, 1021.
[123] O' Brien (n 117) chapter 9.
[124] ibid.
[125] Jessurun d'Oliveira, 'Union citizenship: Pie in the sky?' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe*: *In Search for a New Order* (Sage 1995) 69-70.
[126] In the latest 'reactionary' phase of citizenship case law, economic justifications seem now accepted. On this point, see Spaventa (n 104) and (n 120).

movement of workers' provisions with regard to their unconditional access to social advantages.[127] The practice of setting up national residence-tests for low-income workers, as has been pointedly observed, is 'creating an elitist model of free movement – alienating the working poor, and effectively awarding rights on the basis of socio-economic class'.[128] Therefore, the ascendance of Directive 2004/38 in determining the material rights of EU citizens casts doubts even on the validity of the mainstream understanding of 'market citizenship' as a conceptual framework capable of explaining the free movement of persons case law. The impression is that the nuanced and constitutional construction of the market as the place which puts the person at its centre, for which the theory of market citizenship advocated, does no longer hold true.[129] The market has become an instrument of domination for individuals, and so has become for Member States.

Financial assistance offered to Eurozone countries amid the crisis is then not in contradiction with the contraction of transnational solidarity towards European mobile citizens. Bailouts and other measures adopted in response to the crisis have exhibited a minuscule scope of solidarity: the latter has amounted to lending. Hence, on a factual level, the market continues to be the main source of discipline and financing for both Member States and citizens. It rewards those who can credibly sell their debt and those who can trade their labour, respectively.

On a normative level, instead, the crisis has proved that 'stronger' Member States *ought* to support the 'weaker', given the entangled interdependencies that sharing a single currency in a single market entails. In this sense, the Eurozone crisis could have precipitated an enhanced sense of belonging to the same 'community of destiny', where the advantages of having an enlarged market with zero transaction costs need to be

[127] As has been pointed out, even though there has always been a presumption that access to social benefits is unconditional for workers, the wording of Article 24 Directive 2004/38 on derogations from equal treatment does not expressly exclude economically active citizens from its scope of application. In this regard, see Niamh Nic Shuibhne, 'What I Tell You Three Times Is True, Lawful Residence and Equal Treatment after Dano' (2016) 23 MJECL 908.

[128] Charlotte O'Brien, '*Civis Capitalist Sum*: Class as the New Guiding Principle of Free Movement Rights', (2016) 53 CMLR 937. The extension of the right to reside test to the eligibility for 'pure' social security benefits, which was the legal issue in case C-308/14, Commission v. UK, has been similarly criticised in Charlotte O' Brien (n 103).

[129] Nic Shuibhne, in her defence of 'market citizenship', pointed how a 'constitutional market does not presume crude victory for the economic values or vices of the market-place. Rather constitutionalism requires a more nuanced market to take place'. See Nic Shuibhne, 'The Resilience of Market Citizenship' (n 106).

mirrored by the related risks. The crisis could then have developed an authentic sense of solidarity between Member States, or better of 'organic solidarity', which is the collective consciousness to be better off in a cohesive whole.[130] After all, as the under-narrated account of the Eurozone crisis points out, the underlying motive behind bailouts was not a kind-hearted desire to help the citizens of crisis-hit countries, but rather to protect financial assets in the banks of the richest countries.[131] The rescue packages then proved how assisting euro area partners was not just a gesture driven by the fear of a risk of contagion, but also a vital course of action for the same countries with sound public finances, which had built their large surpluses thanks to peripheral countries.

However, this 'organic' connection, which linked the Eurozone countries as they were parts of an organism, did not correspond to a Durkheimian conception of 'organic' solidarity. The response to the financial crisis has not led to the development of a self-enlightened interest, as the missed completion of the banking union - which according to Stiglitz is the third element necessary for the smooth functioning of the Eurozone[132] - has further proved.

The reluctance to create a common fiscal backstop – which, as argued above, would have implied a significant degree of solidarity between European citizens – has contributed to slowing down the emergence of redistributive solidarity in the EU. Even the ECB's response to the euro crisis did not pursue redistribution by monetary means:[133]Despite the inevitable distributional consequences of monetary policy, the transfers occurred in the aftermath of the crisis were not intentional and, more importantly, did generally respect the principle of national fiscal liability, in some cases even worsening the imbalances already existing within the euro area.

3.3 The Covid-19 crisis: a further step in the same direction or a paradigm shift?

[130] Émile Durkheim, *The Division of Labour in Society* (first published in French in 1893, Palgrave Macmillan 1984).
[131] In this sense, see for instance Yanis Varoufakis*, Adults in the Room: My battle with Europe's Deep Establishment* (Penguin 2017); Wolfgang Streeck, 'Why the Euro Divides Europe' (2015) 95 New Left Review 5.
[132] Stiglitz (n 86).
[133] For this conclusion see Tuori (n 63) 865-868.

The outbreak of the Covid-19 pandemic has not only exacerbated the abovementioned asymmetries within the EMU, but it has also precipitated an urgent call for European solidarity. Unlike the Eurozone crisis, which was the result of a big asymmetric shock originated in the financial sector, the Covid-19 crisis is a real sector crisis affecting the world of labour and production and thus the Union as a whole. It is a two-sided crisis, health and economic, the impact of which poses common challenges for all Member States. Even though the health crisis with its intertwined economic effects has been particularly acute for some countries, the borderless nature and the fast-changing pace of the pandemic are such that they cannot but involve all the states of the Union. From a merely economic point of view, this crisis is to be considered a symmetric shock, the consequences of which do not fall within the control of the countries mostly hit by it. From a broader perspective, the pandemic has shown how the organisation of solidarity – intended as necessary public action to control the spread of the virus through the enforcement of measures such as quarantines and other restrictions of individual liberties as well as access to healthcare systems – can no longer be conceived of as an exclusively national responsibility. The existence of a common market but more importantly the free movement of persons within it show how the effects of an infectious disease cannot be tackled at the national level for their obvious externalities. A concerted action between Member States, then, is clearly necessary in the context of a pandemic, where it is the very existence of a virus that renders the risk of contagion a factor endemic to the crisis.

In anticipation of a possible cross-border threat to health, the Treaties conferred the Union the power to complement and support Member States in the fight against serious cross-border health scourges (Article 168 (5) TFEU). However, the outbreak of the pandemic has shown the inefficiency of such a supporting role with regard to the prevention and management of the coronavirus disease. Public health continues to be the main responsibility of Member States, while the Union can only coordinate national responses to the spread of the virus.[134] In the initial phase of the pandemic, these national reactions to the eruption of the crisis have been selfish and uncoordinated, with the result that the Commission had to adopt some guidelines to ensure the smooth functioning of

[134] For the legal framework of Union's action on health emergencies see Alberto Alemanno, 'The European Response to COVID19. From Regulatory Emulation to Regulatory Coordination' (2020) 11 European Journal of Risk Regulation 307.

the internal market and the free movement of persons.[135] Not only the Early Warning Response System, a mechanism designed to coordinate national public health responses and foster communication between Member States, did not effectively fulfill its function, but also the internal market did not deliver the promise to allocate the goods and services wherever they were mostly needed.

The disruption of free movement has indeed exposed how the market is a vehicle of solidarity. As has been noted, a novel rebalancing between health protection and market objectives seems to emerge.[136] The derogation regime envisaged by Article 36 TFEU - which allows for prohibition of exports for public health reasons – has long been interpreted as protecting a national non-economic interest such as citizens' health from internal market law. This traditional reading allocates the duty to defend public health with Member States, assuming that health and life protection is a national public good to be sheltered from market principles. However, the pandemic has challenged this paradigm proving that the application of a proportionality test should take into account the Union as a whole, rather than the sole national dimension. In other words, when implementing certain restrictions Member States should justify the measures adopted in light of suitability, necessity and appropriateness considering where the supply of resources is mostly felt across the EU.

This alternative reading calls the Member States to internalize the health of other citizens in their policy considerations and assumes a different conception of the internal market, which is no longer seen as a threat to the national organisation of solidarity but as a means to achieve it. Although still framed in terms of emergency and thus exceptionality, the EU's response to the Covid-19 pandemic has shown a change in direction in the achievement of further solidarity within the Union. The instruments to tackle the pandemic at the EU level, such as a joint public procurement, the EU stockpile of medical equipment or the EU Civil Protection Mechanism, are based on Member States' voluntarism to join such cooperative schemes and thus recall the 'contractual' nature of solidarity emerged during the financial crisis, when Member States negotiated

[135] European Commission, 'COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services', Brussels, 16.03.2020 C (2020) 1753 final.
[136] Anniek de Ruijter et al., 'EU Solidarity in fighting COVID-19: State of play, obstacles, citizens' attitudes, and ways forward', Vox, CEPR Political Portal, 26 March 2020 https://voxeu.org/article/eu-solidarity-fighting-covid-19 accessed 3 June 2020.

their mutual help in the realm of private law remaining the sole responsible for the wellbeing of their citizens. However, some measures adopted in the context of the pandemic have shown how the Union, as a subject distinct from its Member States, has taken responsibility over the livelihoods of European citizens. Even though the answers given by the Union pass through the intergovernmental method and thus the negotiation process between Member States, they suppose the assumption of a redistributive mandate and the adoption of entitlements that, although not directly addressed to citizens, are destined to their social protection.

In this sense, measures such as the Support to mitigate Unemployment Risks in an Emergency, the so called SURE, or Next Generation EU (NGEU) aim at correcting the results of the market for the citizens through redistribution. The 'corrective' nature of these instruments does not limit itself to restore the smooth functioning of the market leaving Member States exposed to its competitive and disciplinary mechanisms. They aim at offering protection to citizens against the employment risk or financing projects for a more inclusive and even Europe. 'Breaking a taboo',[137] which has long prevented the EU from acquiring a fiscal capacity, the Union is now allowed to borrow on financial markets to finance its expenditure. Until recently, this possibility was allegedly precluded by Article 310 TFEU, which enshrines the principle of budgetary balance specifying that all Union items of revenue and expenditure shall be shown in the budget.[138] The only exception allowed was the possibility for the Union to borrow from financial markets to finance loans to Member States under certain programmes.[139] Previous experiences such as the EFSM have witnessed this Union's borrowing capacity. Yet, the adoption of a recovery facility like the NGEU that destines the funds collected on the market to financing Union's expenditure signals an important paradigm shift from a constitutional perspective. The Union is now able to issue its own debt to finance the delivery of its own public goods.

[137] Jean Pisani-Ferry, 'La postérité du plan de relance européen sera une affaire d'exécution' *Le Monde* (Paris, 20 June 2020).
[138] See Päivi Leino, 'Next Generation EU. Breaking a taboo or breaking the law?' (*CEPS*, 24 June 2020) https://www.ceps.eu/next-generation-eu/ accessed 17 August 2020.
[139] In this sense the European Commission position expressed in its website at https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/eu-borrower/funding-characteristics-eu_fi accessed 17 August 2020.

It is not a coincidence that the adoption of this recovery plan raised criticism for its unsound legal construction.[140] Conscious of the problematic nature of this instrument, the Commission proposed the amendment of the Own Resources Decision, which due to its 'quasi-constitutional nature' is able to 'provide for the necessary democratic legitimacy' of NGEU.[141]The necessity for the Union to fulfil its objectives is indeed the justification used by the Commission to authorise this constitutional mutation. The inclusion of solidarity not only among the objectives but also the values of the Union explains well this change of direction. The conferral of grants rather than only loans to Member States for the post-pandemic recovery proved that a form of solidarity, thicker than international humanitarianism – i.e. more than a one-off transfer, such as the 'gift' proposed by one of the 'frugal four', the Netherlands, towards the countries most affected - emerged.

3.4 Conclusions

This chapter has traced the evolution of the European Economic Constitution over the last decade. It asked whether the crisis played a role in strengthening solidarity obligations within the EU. It has shown that financial assistance did not take the form of an obligation to act in solidarity with euro partners, but rather of a voluntary commitment, which has been negotiated through horizontal instruments lying outside the EU legal framework. This financial assistance has not been unconditional, but subject to strict economic policy conditions for the receiving states. Such conditionality, prescribed by EU law, aimed at ensuring and also strengthening fiscal discipline.

Therefore, the Union has not evolved into a full-fledged fiscal federation, where units have duties of solidarity towards each other according to the principle of horizontal federalism. And yet, it acts as a federation when it prescribes fiscal discipline, thus constraining Member States' economic policy options also when they act outside the EU legal framework.

In particular, following the euro crisis, the EU has implemented a visible political economy agenda centred on 'internal devaluation', which is the natural outcome of the

[140] See Leino (n 121).
[141] See European Commission, 'Q&A: Next Generation EU – Legal Construction', Brussels 9 June 2020 https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024 accessed 17 August 2020.

rules written in the European economic constitution as reformed at Maastricht (on which see 2.2.4). Although Member States remain formally responsible for their economic policies, they cannot but follow the policy choices made by the EU.[142]These distributional consequences of EU law, magnified by the crisis, have been perceived with regard not only to EMU law but also free movement law.

Besides reaffirming fiscal discipline as the central obligation by which Member States should abide, the euro crisis has contracted that incipient space of transnational solidarity opened by the ECJ's extensive interpretation of free movement provisions. The approach now adopted by the ECJ does not even fit within a functionalist paradigm, as it excludes jobseekers from the scope of application of Article 45 TFEU on free movement of workers. This hermeneutic stance, then, seems to have retreated from a purposive interpretation of movement functional to the market. Moreover, it does not consider that high mobility of labour is an automatic stabiliser in the event of an asymmetric shock within a single currency. It does not assume a European, single social space but keeps conceiving the Union as the sum of distinct and territorially bounded welfare systems.

A sign in the opposite direction might be coming from the EU's response to the pandemic, which seems to have realised that the Union needs to work as a cohesive, transnational space. For the first time, money collected on the financial markets by the EU as a whole will be distributed in the form of grants and loans. The allocation of grants does not differ from the stabilisation dynamic adopted by fiscal federations to tackle shocks, namely fiscal transfers.

In conclusion, this chapter demonstrated that, despite the mobilisation of resources between Member States, the financial crisis did not transform the EU in a transfer union. To reach this conclusion, it analysed the developments occurred in Eurozone against the institutional framework of fiscal federations. It showed empirically that, from an economic theory and institutional perspective, the EU did not become a transfer-union. The next chapter explores whether the EU can be(come) a transfer union and what limits stand in its way.

[142] For the same conclusion see Klaus Armigeon and Lucio Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) 41 Industrial Law Journal 254.

4 Chapter IV: Solidarity and Constitutional Constraints. Can the EU Be a Transfer Union?

4.1 Introduction

Chapter II of this thesis has analysed the underlying principles of the European economic constitution, in particular the assumptions on which EMU has been designed, questioning whether the principle of solidarity, intended as redistributive solidarity (as also defined in Chapter I), was part of the normative foundations of the EU legal system. Chapter III used the concept of solidarity as a methodological tool to read the developments occurred in the Eurozone. This chapter engages with the interpretation accorded to the EMU's legal provisions from both a European and a national perspective, in order to understand whether the EU has the constitutional potential to be(come) a transfer union and, more importantly, to what limits it is subject.

Specifically, Section 4.2 examines the case law of the CJEU, which has been called to pronounce on the legality of the experimental responses adopted in the aftermath of the crisis. To this end, it analyses seminal cases such as *Pringle, Gauweiler*, and *Weiss*. Section 4.3 examines these last two cases mentioned from a national perspective, specifically that of the German Constitutional Court, from which both *Gauweiler* and *Weiss* originated. It also offers a brief overview of other relevant national decisions. Section 4.4 concludes.

4.2 Constitutional limitations to a European transfer union before the CJEU

This section explores how the CJEU has interpreted the most significant among the bailout measures, namely the ESM, and also the two bond-buying programmes of the ECB, namely the OMT and PSPP. Its aim is not only to understand to what extent the ECJ has accommodated the constitutional changes occurred in the Eurozone. The ultimate goal is to understand how the interpretation of constitutional provisions setting-up the single currency has shaped and limited solidarity in the Eurozone.

4.2.1 Member States' bailouts and the question of solidarity

Judicial intervention in the area of economic and monetary union (EMU) has been something unprecedented: except one notable exception,[1] the ECJ had never interfered with the political process in the single currency area. The judgement that the ECJ released in the *Pringle* case, which concerned the legality of the ESM changed this trend and prompted the Court to interpret the EMU's normative foundations, i.e. its principles, assumptions and limits. The ECJ engaged with such a challenge by discovering an unwritten principle of the EU economic constitution, that of financial stability of the euro area, in light of which it approved the creation of the ESM.

This 'discovery' can be interpreted either as a 'judicial *coup d'etat'*, [2] intended as the subversive transformation of a legal system through the 'constitutional lawmaking of a court',[3] or as the recognition of a principle that has always been latent in the economic constitution. In light of this newly discovered principle, the Court (re)interpreted the no-bailout clause encapsulated in Article 125 TFEU, finding that this provision does not preclude financial assistance to Member States hit by the crisis (provided that strict conditionality is observed).

This subsection aims at understanding whether such hermeneutical operation is a circumvention of the no-bailout clause or, on the contrary, a strict teleological interpretation, which is then comprised in the normal hermeneutical toolkit at the disposal of judges. It examines the most significant (and controversial) aspects of *Pringle* with regard to solidarity. Ultimately, it seeks to discern whether the bailout measures taken are a mere *price stability-saving mechanism* or rather a *vehicle of transnational solidarity*.

As discussed in Chapter I, when transposed from the societal plane to the interstate level, solidarity becomes a nebulous concept. As an idea borrowed from social theory,

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[1] See Case C-27/04 *Commission v. Council* [2004] ECR I-6649, where the Court pronounced on the enforceability of the provisions regarding the corrective arm of the SGP. The case originated from an excessive deficit procedure against France and Germany initiated by the Commission in 2002 and 2003.Given the unsatisfactory measures adopted by the two states, the Commission urged the Council to take a more compelling action, but the Council did not follow Commission's recommendations. This stance was challenged before the Court of Justice, which rejected Commission's claims on the grounds that there was no 'decision' to be annulled.

[2] For the definition 'judicial coup d'etat' see Alec Stone Sweet, 'The Judicial Coup d'Etat and the Problem of Authority' in Loic Azoulai and Miguel Poiares Maduro (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010).

[3] ibid.

solidarity has always carried a distributive connotation. As noted by Stjerno, who retraced its intellectual history, solidarity implies the preparedness to share some resources.[4] However, according to a sceptical view, solidarity obligations cannot exist in the international sphere.[5] Nonetheless, sticking to Stjerno's minimal definition, it should be asked normatively whether the significant transfers of resources occurring between Member States in the aftermath of the 2008 financial crisis are an expression of solidarity. Such assistance operations pose the question of their justification.

Whereas financial assistance towards EU citizens has been justified by the argument of a 'certain degree of solidarity between nationals of different Member States' stemming from the notion of European citizenship, the bailouts measures are still quite problematic in relation to their possible justification. They can indeed be interpreted as a mere euro-saving mechanism or as the manifestation of solidary obligations between states. In order to understand their nature, it is worth then looking at the case law of the Court of Justice so as to find out what arguments the Court has put forward to justify them – premised that it had found financial assistance lawful under EU law. The next paragraphs examine the *Pringle* judgment (4.2.1.1), exploring how the personal (4.2.1.2) and material (4.2.1.3) scope of financial assistance substantiate the meaning of solidarity in the EU.

4.2.1.1 The judicial scrutiny of the ESM: *Pringle*

The question of the legality of the bailouts measures was brought before the Court in the *Pringle* case.[6] Here, the Court had to assess the compatibility of the European Stability Mechanism (ESM), established by Decision 2011/199/EU[7], with EU law. On 25 March 2011, indeed, the European Council adopted a Decision aiming at the amendment of the Treaty on the Functioning of the European Union (TFEU) through the addition of a third paragraph to Article 136, which confers on Member States the power to create a permanent crisis resolution mechanism 'to safeguard the stability of the euro area as a whole'. In a preliminary ruling, the Court has to assess the compatibility of such a

[4] For an overview of the different theories on solidarity, see Steinar Stjerno, *Solidarity in Europe: the history of an idea* (CUP 2005).
[5] See i*nfra.*
[6] C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C: 2012:756.
[7] European Council Decision 2011/199/EU amending Article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] L 91/1.

mechanism with a number of EU legal provisions. The most interesting part of the decision concerned the legality of the ESM in light of the no-bailout clause of Article 125 TFEU.

The paramount importance of such a rule from a constitutional perspective motivated the more structured approach of the decision on this point. The Court had to consider whether the ESM was in breach of Article 125 TFEU, which prevents the Union and its Member States from assuming other sovereign debts thus implying Member States' own responsibility for their public finance. At first glance, Article 125 TFEU seems to stand against any form of intervention aimed at rescuing a Member State from default. However, the Court held that such a provision does not categorically ban financial assistance *per se*. It tried to examine the ambit of application of the norm having regard to its personal and material scope, as well as its underlying rationale.

Starting by the wording of Article 125 TFEU, which states that neither the Union nor the States are to 'be liable for' or 'assume' the commitments of another Member State, the Court held that such a provision does not preclude 'any financial assistance whatever to a Member State'.[8] To corroborate this conclusion, it adopted two systematic arguments. First, it recalled the provision under Article 122 TFEU, which allows for *ad hoc* financial assistance to a Member State experiencing temporary and serious difficulties. Secondly, it referred to Article 123 TFEU, pointing at its *stricter* scope of application as a proof of the conceivability of other possible forms of financial assistance.

Having stated that under the existing legal framework not every form of financial assistance is prohibited, the Court entered into the question of what instruments of financial assistance are then allowed by Article 125 TFEU. Inquiring into the legislative history of the provision, the judgment went back to the Treaty of Maastricht that originally introduced the no-bailout provision in its Article 104b EEC. It found that the objective of that provision was ultimately market discipline, from which the necessity of a sound budgetary policy followed. According to the ECJ, the no-bailout clause 'ensures that Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline', with the consequence that

[8] *Pringle* para 132.

'compliance with such discipline contributes […] to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.[9]

This argumentation suggests that the ECJ has adopted for financial stability the same logic underlying price stability. Its insistence on budgetary considerations leads to the conclusion that financial stability obeys the same logic of the market as price stability, which is indeed closely intertwined with fiscal discipline. The ECJ seems to imply that financial *in*-stability descends from reckless fiscal behaviour rather than on structural imbalances inherent to the design of the euro area. In support of this implicit assumption, it establishes a link between financial assistance and market discipline by way of the 'strict conditionality' attached to the former. As a result, the ESM is compliant with Article 125 TFEU as far as the financial assistance disbursed is indispensable and made subject to conditions such as to prompt a sound budgetary policy implementation. In this way, the recipient Member State remains responsible for its commitments to its creditors. In sum, the disbursement of financial assistance should not result in an incentive to conduct a profligate fiscal policy.

The ECJ then turned to the analysis of the substantial instruments of financial assistance in detail, examining them singularly and assessing their compatibility with the no bail-out clause. In practice, having identify the objective of the no bailout clause, the ECJ had to assess whether those instruments would make a recipient Member State less prone to market discipline. In other words, it had to establish whether the ESM would act as a last resort lender or guarantor for the debts of the beneficiary state, i.e. ultimately, as a substantial debtor. In dealing with this point, the Court examined the array of instruments for stability support envisaged by Articles 14 to 18 ESMT. It found that financial assistance taking the form of a credit line (Article 14) or loans (Articles 15 and 16) did not amount to an assumption of the debts of the recipient Member State, but rather to the creation of a new debt which the recipient state owes to the ESM. Therefore, the ultimate debtor remains the state.

Similarly, the purchase of bonds on the primary market by the ESM pursuant to Articles 17 and 18 has the substantial nature of a loan, as the ESM merely becomes the creditor of the issuing Member State. The same holds true in the case of a purchase of bonds on the secondary market, given that by paying the price of the bond to the

[9] *Pringle* para 135.

respective holder, the ESM does not replace the original debtor (that is the issuing Member State). This conclusion, according to the ECJ, is not affected by the fact that the price paid by the ESM to the holder is different from the nominal value of that bond, as this difference depends on the rules governing the secondary market. Furthermore, the ECJ noted that the ESM does not intervene as soon as the Member State in receipt of financial assistance is experiencing difficulties on the market. The observance of a certain time lag between the emission of bonds and their purchase on the secondary market ensures that the grant of financial support is subject to a necessity test in accordance with Articles 3 and 12 (1) ESMT, so that the ESM does not automatically become a guarantor for Member States' commitments.

Lastly, the Court dismissed the claim according to which the ESMT provisions on capital calls are incompatible with the no bail-out clause. Specifically, Article 25 ESMT provides that when a Member State that is called to pay authorised unpaid capital fails to meet this obligation, other ESM Member States have to step in to restore the level of paid-in capital. According to the referring court, this revised increased capital call meant that Member States were supposed to act as guarantors for the debt of the insolvent Member State. However, the Court noted that by virtue of the same provision, the defaulting Member State remains under an obligation to settle its debt and pay the default interest.

4.2.1.2 The institutional dimension of financial assistance

One of the hard questions raised by *Pringle* concerns the *ratione personae* aspect of financial assistance on the side of the obligor, i.e. who, either compulsorily or voluntarily, is committed to it.[10] The ECJ, albeit not deliberately, touched upon this issue while addressing the compatibility of the Treaty amendment - and thus of the ESM Treaty per se - with the Union's economic policy competence and rules (in particular Article 125 TFEU). And yet, the personal scope of the no-bailout clause remains controversial. There are at least three different subjects to which it can be addressed: the Union, the Member States, and the distinct legal subjects created by Member States under private international law.[11]

[10] Actually, given the exclusion of structural stabilisation mechanisms from the EMU's architecture, the issue of compulsory financial support is of no practical relevance.
[11] See Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (CUP 2014) 122.

Financial assistance from the Union is regulated by Article 122 TFEU, which seems to stand in contradiction with Article 125 TFEU. A way to reconcile the apparent discrepancy between the permission of financial assistance under Art 122 TFEU and the preclusion of financial assistance under Article 125 is by looking at the nature of the mechanism of financial support in question. In fact, the two provisions are not in contradiction because neither of them allows for the establishment of a *permanent* mechanism. Article 122 TFEU is the basis for *ad hoc* assistance in an emergency scenario and has been used for the adoption of Regulation 407/2010 which established the European Financial Stabilisation Mechanism (EFSM), a loan facility under EU law.[12] This provision enables the Union to assist a country in financial distress when exceptional circumstances 'beyond the control' of the state occur. Hence, the exceptionality of these occurrences may justify the exclusion from the scope of application of Article 122 TFEU of situations such as fiscal crises brought about by the country's own behaviour.[13]

The other two possible forms of financial assistance are financial assistance directly provided by Member States through bilateral loans and financial assistance from funds established by Member States through intergovernmental agreements (such as the ESM). As to their relationship with Article 125 TFEU, it can be argued that both these forms stand in the same position with regard to the no-bailout clause as they raise the same kind of issue. In fact, if EU law precludes (or allows) a certain conduct, Member States are consequently prohibited (or allowed) from taking that course of action when they act either individually or collectively in their capacity of international law actors, and regardless of whether the financial facilities created by them through intergovernmental agreements have distinct legal personality or not.[14] Hence, both forms of financial assistance can be assimilated for the purposes of their compatibility with Article 125 TFEU.

Contrary to the structured opinion of Advocate General Kokott on the personal scope of the no-bailout provision, the Court did not expressly address the dimension

[12] See Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism. See Chapter III *supra* 3.2.1.1.
[13] This reading of Article 122 TFEU has been deemed ungrounded by some commentators, who have used an argument based on the legislative history of such a provision to conclude that economic crises were actually covered by its scope of application. See Tuori and Tuori (n 11) 138-139.
[14] ibid 123.

ratione personae of financial assistance under Article 125 TFEU.[15] The reason for the omitted analysis is not to be sought in a side-stepping intention, but rather in the prevalence of the exclusionary effects descending from the substantial scope over the personal scope. Once the ESM was deemed not to be falling within the material scope of Article 125 TFEU, there was no practical reason for the Court to examine the *ratione personae* aspect of the no bail-out clause.

What is left unclarified in the Court's analysis is the interaction between financial assistance from the Union under EU law and financial assistance from Member States (or financial institutions created by them) under international law. In other words, the question left open is whether Article 122 TFEU grants an 'exclusive' competence to the EU to provide financial assistance in emergency situations, thus precluding Member States from acting in the intergovernmental sphere. Having briefly examined Articles 122 TFEU and 352 TFEU, *Pringle* held that the Union does not have a legal basis to establish a mechanism such as the ESM; and yet, it did not explain why it had the competence to create the EFSM under Article 122 TFEU.[16]

The circularity of this reasoning can be justified by the implicit assumption that Article 122 TFEU does not have pre-emptive effects on treaty-making powers of Member States under international law.[17] In short, the Union does not have the power to establish a mechanism such as the ESM because Article 122 TFEU does not constitute an appropriate legal basis; however, such a provision does not prevent the Member States to resort to international instruments outside the EU framework to establish one insofar as strict conditionality is attached.

This conclusion seems to be based on the implicit scheme of pre-emption.[18] First of all, it should be premised that in the EU studies literature there are conflicting opinions

[15] See Tuori and Tuori (n 11), according to which the silence of the Court can be interpreted as intentional for two different reasons: either the Court considered the matter quite self-explanatory or it deemed a pronouncement on the issue to be unnecessary, given the exclusion of the ESM from the scope of the bail-out provision *ratione materiae*..

[16] The reluctance to engage with this evident contradiction lies in the political conundrum the Court was faced with either to declare the ESM unlawful and compromise the Eurozone's stability or to overlook this legal hurdle to save the single currency.

[17] Similarly, Article 121 TFEU and 126 TFEU do not prevent the strict conditionality - as specified by macroeconomic adjustment programmes – attached to intergovernmental bailouts.

[18] Analysis through the lens of pre-emption is suggested, although not embraced, by Tuori and Tuori (n 11) 150.

about the relevance of the doctrine of pre-emption in the context of EU law,[19] considering the fact that the principles of supremacy and sincere cooperation serve a similar, and to some extent fungible, function.[20] It is common to distinguish between three different forms of pre-emption: field pre-emption, rule pre-emption and obstacle pre-emption.[21]

The first category has the widest scope, as it implies that whenever the federation has exercised its regulatory prerogatives, the whole field in which its action situates itself is pre-empted. This form of pre-emption seems not to find place in EU law due to the principle of subsidiarity, which establishes a presumption in favour of Member States' action in areas of shared competences.[22] Of limited practical relevance is also the second category, so-called rule pre-emption, according to which the exercise of power by the centre precludes the adoption of contradictory legislation at the level of federated entities. This time, it is the principle of supremacy that militates against the import of rule pre-emption into the EU system, given that Member States are precluded from adopting legislation against EU law under the aegis of supremacy.[23] A further reason to exclude these two models from the EU legal system is the Protocol on shared competence, according to which Union action only covers the elements envisaged by the act adopted

[19] For the autonomous relevance of pre-emption vis-à-vis supremacy see *inter alia*, Mauro Cappelletti, Monica Seccombe, and Joseph H.H. Weiler, 'Integration Through Law: Europe and the American Federal Experience: A General Introduction' in Mauro Cappelletti, Monica Seccombe, and Joseph H.H. Weiler (eds), *Integration Through Law: Europe and the American Federal Experience*, Vol I (Berlin: de Gruyter, 1986); Eugene Cross, 'Pre-emption of Member State law in the European Economic Community: A framework for analysis' (1992) 29 CMLR 447. For an opposite view, see Marcus Klamert, *The Principle of Loyalty in EU law* (OUP 2014), chapter 5.

[20] Tuori and Tuori (n 11) 152.

[21] For this distinction see Robert Schütze, 'Supremacy Without Pre-emption?: The Very Slowly Emergent Doctrine of Pre-emption' (2006) 43 CMLR 1023–1048, 1038, who refers to US 'pre-emption frameworks'. A different terminology which corresponds to a similar, and yet distinct, classification can be found in Cross (n 19), who distinguishes between 'occupation of the field pre-emption', 'direct conflict pre-emption', and 'obstacle conflict pre-emption'. It should be noted that the doctrine of pre-emption, although is generally understood in the US context as regarding *legislative prerogatives*, can be extended to Treaty-making powers of Member States. There is not practical difference in terms of pre-emption between the adoption of legally binding legislation or conclusion of intergovernmental agreements.

[22] According to Article 5 (3) TEU, which incorporates such a principle, the Union should act insofar as the objectives of an action can be better achieved at the Union level.

[23] However, it should be noted that on a conceptual level the principle of supremacy and the doctrine of pre-emption are not equivalent. If the former determines *how* a certain normative conflict should be resolved (the prevalence of a legal order over another), the latter signals *when* a conflict arises. See in this regard, Amedeo Arena, 'The Doctrine of Union Preemption in the EU Single Market: between *Sein* and *Sollen*' (2010) Jean Monnet Working Paper 03/10, 10 https://jeanmonnetprogram.org/paper/the-doctrine-of-union-preemption-in-the-eu-single-market-between-sein-and-sollen/ accessed 30 October 2020. Schütze (n 21) describes supremacy as the 'superior hierarchical status of the Community legal order over the national legal orders' while pre-emption is defined as 'the actual degree' to which national law will be displaced'.

and not also the whole area.[24] Therefore, it seems appropriate to hold i) first, that pre-emption in EU law presupposes the *exercise* rather than the mere *existence* of a Union *competence* in a certain area, with the consequence that the virtual 'occupation' of the field never occurs; and ii) second, that it does not presuppose a *direct* conflict, but the mere existence of Union *legislation*. This means that Member States' action is precluded within the scope of the Union act even in the absence of a direct conflict between national rules and EU legislation and thus for the sole reason that the Union has already exercised its legislative prerogatives. Pre-emption in EU law is then somewhere in between those two categories, being broader than rule-preemption but narrower than field pre-emption.[25]

As to the third model, obstacle pre-emption, it is doubtful whether this conceptual type can have a practical significance in the EU legal order, where the duty of sincere cooperation basically performs a similar function. Despite its obscure and elusive nature, this typology can be explained as a pre-emption model in which a national legislation hinders the objectives or the proper functioning of the federal law. It then presupposes an *indirect* conflict of national law with the aims - rather than a particular rule - of the federal legislation, even when the latter has not exhaustively regulated the matter. In the EU system, obstacle pre-emption amounts to the duty of Member States to respect EU law even when they act outside the scope of a Union act.

The pre-emption paradigm, conceptually transposed to the level of Member States' treaty powers, may clarify why the Court stated that the conclusion and ratification of the ESM Treaty neither 'jeopardise in any way the objective' pursued by Article 122 (2) TFEU or by Regulation 407/2010 establishing the EFSM, adopted on the basis of that provision, nor 'prevent the Union from exercising its own competences in the defence of the common interest'.[26]

The conceptual scheme assumed by this statement corresponds to obstacle pre-emption[27] (as the language employed suggests) and at the same time excludes field pre-

[24] See Protocol no 25 on the exercise of shared competence OJ C 115, which recites that 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by Union act in question and therefore does not cover the whole area'.
[25] For the same conclusion, see Tuori and Tuori (n 11) 155.
[26] *Pringle* para 106.
[27] For the same conclusion see Amedeo Arena, 'The twin Doctrines of Supremacy and Pre-emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Law*, Vol 1 *The European Union Legal Order* (OUP 2018).

emption, given that the field has not been 'occupied' by the Regulation adopted under Article 122 TFEU.[28]

Furthermore, and more interestingly, the statement highlights a two-level order of pre-emptive effects: pre-emptive effects of primary law (Article 122 TFEU) and pre-emptive effects of secondary law (Regulation 407/2010).

As regards the first observation regarding the pre-emption paradigm employed, it is useful to recall that this typology does not require the existence of an outright contradiction between the Member State act (in this case an international agreement) and the EU legislative act, but a teleological incompatibility. Recourse to this model allows the scrutiny of the actual effects of the ESM on the EU economic constitution and the assessment of the *degree* to which this mechanism can be considered compatible with EU law. In *Pringle*, this appraisal resulted in the finding that insofar as conditionality is attached to financial assistance no risk of incompatibility arises. There might be doubts about the soundness of the doctrine of pre-emption in an area, such as economic policy, in which the Union does not have a shared competence but one of coordination. In fact, pre-emption presupposes the allocation of concurrent powers with two distinct subjects, as it adjudicates whether a 'legal space' has already been 'occupied'. In this regard, despite the *sui generis* nature of Union's economic policy competence, this power goes beyond the mere coordination and allows - as recognised by the Court - the grant of financial assistance,[29] with important implications for the applicability of the pre-emption doctrine.

Moving to the second observation made, regarding the Court's reference to both provisions of primary and secondary law, the question that arises is whether Treaties provisions can exert pre-emptive effects likewise EU legislation. Or, in other words, whether pre-emption covers Member States' intergovernmental agreements which do not fall within the scope of an EU *act*, but rather within the scope of the *Founding Treaties*. The answer of the Court was that it is possible to resort to international agreements in order to establish a permanent stability mechanism because the EU does not have a *specific* legal basis, not because it prohibits from doing so. Therefore, *Pringle* lends the

[28] Therefore, it implicitly excludes that Member States are precluded from concluding *any* international agreement in the area.

[29] For this argument see also Gianni Lo Schiavo, 'The Judicial 'Bail out' of the European Stability Mechanism: Comment on the Pringle case' (2013) College of Europe Research Paper in Law no. 9/2013 http://aei.pitt.edu/47514/1/researchpaper_9_2013_loschiavo.pdf accessed 3 June 2020.

authority to affirm that Member States can fill a *lacuna* in the Treaties by making use of their treaty-making powers.

However, another way envisaged by EU law to 'complement' the Treaties is the enhanced cooperation procedure under Articles 20 (1) TEU and 329 (1) TFEU.[30] It is then necessary to understand whether Member States need to act within the EU legal framework by resorting to the enhanced cooperation procedure or they can act outside the EU legal framework. The ECJ opted for the second solution as it interpreted the conditions required for enhanced cooperation very strictly, arguing for the necessity of not only a virtual Union's competence in the area in which cooperation takes place, but also of a specific competence basis. This reasoning seems to be based on the underlying assumption that, had the Union possessed a competence basis for the establishment of a stability mechanism, enhanced cooperation would have precluded Member States' intergovernmental action. This conclusion might dissipate the perplexities surrounding the intergovernmental road as way of side-stepping the procedural requirements prescribed by the Treaties.

And yet, although enhanced cooperation is more desirable in terms of transparency, it is not void of constitutional doubts too. In fact, this procedure cannot be employed to circumvent a political impasse over a Treaty amendment. Enhanced cooperation can certainly be used to overcome a disagreement blocking secondary legislation or other measures; but it can be hardly justified as an expedient to amend the Treaty. The constitutional difficulties would not disappear even in the case of an amendment *complementing* the Treaties.

In conclusion, the question of subjectivity vis-à-vis financial assistance, namely who between the Union and the Member States is entitled to catalyse the process of 'deepening' the EMU, is quite complex and open to political and constitutional contestation. In short, what the case law left open is whether there are some matters exclusively 'reserved' for the EU constitutional legislator. Definitely, the issue is of paramount importance for the future of the Eurozone, since it shapes the direction to give to the EMU: more intergovernmental or more democratic. In this respect, who is the

[30] According to Article 20 (1) TEU, 'Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties'. Articles 329 (1) TFEU provides that enhanced cooperation can be established in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy'.

subject granting financial support plays a crucial role. Maduro's proposal for strengthening the EMU is extensively based on *Union*'s fiscal capacity and central taxation as the supranational equivalent of fiscal transfers between Member States coming from national budgets.[31]

4.2.1.3 The substantive dimension of financial assistance

Provided that financial assistance has a more pronounced international rather than constitutional dimension, being something of which the Union is not capable and thus left to the Member States, it should be examined whether such assistance operations fit into a solidarity paradigm. In other words, what the normative content of solidarity obligations between Member States is.

As *Pringle* shows, the Court had not resorted to any solidarity argument. On the contrary, Advocate General Kokott argued that prohibiting Member States from granting financial assistance by virtue of a broad interpretation of the no-bailout clause of Article 125 TFEU would be incompatible with the concept of solidarity, and thus to the basic fundamental purpose of the Union to deepen solidarity between the peoples of Europe (Preamble to the TFEU).[32] She recalled Article 3 (3) TEU and Article 122 (1) TFEU, both provisions referring to solidarity between Member States, and defined solidarity as a 'fundamental principle of the Treaties' which, together with sovereignty, 'militate[s] against a broad interpretation of Article 125 TFEU'. For broad interpretation of the no-bailout clause, the Advocate General intended a *tout court* prohibition of financial assistance whatsoever. Instead, she found that Article 125 TFEU should be read as prohibiting only *direct* assumption of commitments of other Member States, either by making payment or by becoming the obligated party.[33]According to this reasoning, then, solidarity does not entail a *duty* to financial assistance, and thus a positive action of Member States. Nevertheless, it does not preclude any *voluntary* action of Member States, which under international law can then decide to provide financial assistance.

Therefore, in relation to the constitutional scope of solidarity, it can be affirmed that it does not *impose* but it merely *allows* financial assistance. This means that Member

[31] Miguel Poiares Maduro, 'New Governance for the European Union and the Euro: Democracy and Justice' (2013) 16 Yearbook of Polish European Studies 111.
[32] Case C- 370/12 *Pringle*, ECLI:EU:C:2012:675, Opinion of AG Kokott, paras 142-144.
[33] ibid para 121.

States are not obliged to rescue euro area partners on the basis of an EU principle of solidarity. As expressly stated, 'the existence of monetary union does not mean that there is an implicit mutual guarantee of the commitments of Member States'.[34] *A fortiori*, given the lack of a structural principle of solidarity in international law, they would not have a solidary obligation in the sphere of their horizontal relations.

Even though solidarity cannot be elevated to a legal principle prescribing a certain course of action, it can still work as an interpretative tool. Albeit not legally enforceable, solidarity as a constitutional principle can serve the hermeneutic function to (re)orient the interpretation of other provisions of the economic and monetary union, such as the bail-out clause. In the reasoning of the Advocate General, however, it did not fulfil such a function. Advocate General Kokott briefly referred to solidarity without elaborating further on it. Solidarity was more an ancillary argument supporting her conclusion than a constitutional principle guiding her reasoning. Definitely, it was not the justification adduced to validate the bailouts. She justified financial assistance only by resorting to a literal interpretation of the no-bailout clause. In her view, the ESM did not breach Article 125 TFEU because this provision only prohibits *direct* assumption of the debt with the effect of benefiting the creditors of the recipient Member State.[35]

On the contrary, the reasoning of the ECJ was mostly based on a teleological, rather than literal, interpretation of the no-bailout clause. The Court made indeed use of a principle which played a constitutional role, such as that of orienting the interpretation of other EU law provisions, and specifically of Article 125 TFEU. Surprisingly, it was not to the principle of solidarity that assumed such a function, exerting a mitigating effect on the rigor of the bail-out prohibition. It was the newly discovered principle of financial stability that the Court 'constitutionalised'.

In the ECJ's reasoning, financial stability seems to have a higher status than the cornerstone principle the EMU constitution, that is price stability. However, from a substantial point of view, financial stability does not derogate from price stability. Indeed, by virtue of so-called 'strict conditionality', these two principles do not stand in contradiction to one another. They ultimately obey the same logic: market discipline. Financial stability, as understood by the Court, is causally linked to budgetary policies -

[34] ibid para 114.
[35] ibid paras 145-9.

although economic theory proves that financial instability largely depends on factors other than fiscal profligacy (for instance, structural imbalances or unfettered capital movements). Therefore, attaching strict conditionality to financial assistance aimed at complying with the rationale of the bailout prohibition. The intervention of the ESM through loans or purchases of bonds could indeed jeopardy the attainment of the objective of market discipline. The stepping-in of Member States or the Union would not discourage moral hazard both for the beneficiary Member State and its creditors, as they will reasonably rely on a third party. A too permissive approach to Article 125 TFEU would then encourage the kind of behaviour that this provision aimed to prevent, i.e. fiscal recklessness. The constitutionalisation of 'strict conditionality', which has found its way in EU primary law through Article 136 (3) TFEU, was then the compromise introduced to respect the market paradigm underpinning EMU constitutional rules.

In this line of reasoning, the principle of solidarity was not even mentioned by the Court, which showed its reluctance to engage with such an argument by declaring inadmissible part of the question referred regarding the interpretation of Articles 2 TEU and 3 TEU. Moreover, it is not hard to observe how ESM financial assistance operations can hardly embody the principle of solidarity, considering the harsh welfare cuts and high social costs imposed on the citizenries of the receiving Member States. This conclusion is absolutely true, but it is motivated by an underlying implicit assumption that is a state-centric conception of solidarity. As shown in Chapter I, in the general understanding, the conception of solidarity is redistributive and egalitarian as it is oriented towards fairness and social justice.

And yet, solidarity has another, more mundane meaning, which dates back to Roman law and still constitutes the rationale of solidary obligations in private law. In this sense, it does not aim at fairness, but it simply entails the assumption of responsibility for someone else's debt. As shown in Chapter I, the very notion of solidarity is etymologically intertwined with the concept of debt. *In solidum obligari*, in Roman law, described a joint and several liability of more debtors towards their creditor; therefore, by virtue of an *obligatio in solidum*, a creditor can demand payment of the whole debt from each of the joint debtors. This legal construct does not apply to the relation between Member States under the ESM for the evident reason that Member States stepping in are not *directly* liable for the beneficiary state's debt. However, its underlying logic, which

is to ensure the fulfilment of the obligation that the state receiving financial assistance has towards its creditors, can explain why financial assistance under the ESM can still be framed in terms of solidarity. The function of solidarity here is to provide a contractual and insurance guarantee.

This function can be found in the ESM financial instruments. Indeed, although *Pringle* emphasises how the ESM does not constitute a guarantee of the commitments of a Member State (since neither loans nor the purchase of bonds on the primary or secondary market pays off its debts),[36] in practice it allows the satisfaction of creditors. It is true that financial assistance under ESM instruments amounts to the creation of a new debt that the beneficiary state will have to pay to the ESM[37] - and that Member States' commitments towards their creditors remain unchanged, because the ESM does not discharge the beneficiary Member State's obligations. However, by virtue of financial assistance provided via the ESM, the recipient state would be able to pay its creditors, especially when the amount of financial support received corresponds to the level of the commitments to be discharged. Therefore, the creditors of the recipient state would be satisfied indirectly and *de facto* by other Member States disbursements, similarly to what happens with solidary obligations.

These considerations suggest another possible interpretation of Article 125 TFEU. Specifically, this provision can be read as prohibition of *redistributive* solidarity, not of solidarity *tout court*. According to this reading, Member States would be allowed to step in, though without redistributing but by simply lending money. In this perspective, rescue operations would be a token of solidarity, albeit not *redistributive*. Therefore, the notion of solidarity that emerged in the Eurozone might be said to encompass forms of financial assistance that serve a guarantee function, specifically the protection of a smooth execution of an obligation. Rather than embracing a redistributive vocation, this model of solidarity rests on the market.

4.2.1.4 The dual nature of financial solidarity

As the *Pringle* case has shown, the conceptual framework developed in the case law on the euro crisis suggests that financial assistance in the Eurozone does not have any

[36] ibid paras 113-119.
[37] ibid para 122.

distributive connotation. Rather, it seems to be expression of another kind of solidarity, the definition of which stems from private law, and in particular from the law of obligations. Applied to the sphere of relationships between euro countries, such a notion of solidarity implies the responsibility that some states - similarly to private guarantors who are jointly liable - have to step in to ensure the repayment of a debt. It does not imply a redistributive act of transfer to the debtor states. Therefore, such bailout operations do not amount to genuine fiscal transfers, which in federal systems perform an automatic stabilisation function. In fact, Member States seem to act like individuals do in their sphere of private autonomy, where they interact through economic transactions.

Borrowing a dichotomy that applies to individuals - which is the distinction between society and community[38] - the Eurozone resembles more a *society* of states than a *community* of states. In the first relational dimension, i.e. society, Member States resort to loans in the horizontal plane of their relationships. States make then use of instruments that, at the interpersonal level, pertain to the contractual domain. Of course, there is no space for contract law in the international sphere. However, this analogy well illustrates how states interact horizontally and what is missing in the realm of their relations: a vertical organisation of their mutual obligations under EU law. This lack of a vertical dimension impedes the creation of a *community* of states, where members act on the basis of moral obligations mediated through public law. Actually, it is *because* of EU law that Member States cannot act in solidarity, as they are required to comply with EU law and thus with the bailout prohibition and its rationale when acting under international law.

Drawing on the comparison with individuals, it can be recalled that there is a sphere of social life in which all persons are equal as they count *qua* citizens rather than *qua* market actors. It is the space that the welfare state creates to ensure the non-market allocation of resources through citizenship entitlements. In this community, the obligations of individuals are not contractual but stemming from the common consciousness of being part of the same 'community of fate'. This shared sense of community is expressed by citizenship, which defines the membership to a political community and thus has an intrinsic and 'morally demanding component, as 'citizenship built upon ties of national solidarity […] is geared towards security through serial

[38] See Ferdinand Tönnies, *Fundamental Concepts of Sociology: Gemeinschaft and Gesellschaft* (C. P. Loomis tr., American Book Company 1940).

reciprocity and redistribution'.[39] The duties arising from this morally compelling membership are acts of subsidisation of fellow nationals. Translated into the international sphere and applied to states, this paradigm of redistribution would result in a mechanism of fiscal transfers, which are indeed present in fiscal federations. The units of a fiscal federation, as members of a political union, would act to subsidise their partners, and a central public authority would organise such redistributive acts. Membership of such a community would be the equivalent of what citizenship is for individuals.

A reference to this community dimension was for instance present in a speech that Angela Merkel gave to the *Bundestag*, in which she affirmed that 'the monetary union is a community of destiny', adding that 'if the euro fails then Europe fails'.[40] However, the bailout measures adopted in the Eurozone do not reflect this sense of community of destiny. On the contrary, they should ultimately pursue the objective that 'Member States have differentiated interest rates on the capital markets'.[41]Although they realise a framework of partial risk-sharing, they do not operate in a system of cross-border fiscal redistribution. The absence of equalisation transfers is further aggravated by the 'strict conditionality' attached to such bailouts.

Conditionality is not a new phenomenon in the realm of financial assistance disbursement, but it normally serves the function to ensure the fulfilment of policy objectives and, especially in federal and regional systems, to facilitate the institutional functions of lower government levels. In the context of the Eurozone, conditionality attached to financial assistance not only has the function to prevent future moral hazard, but it also 'punishes' the beneficiary with austerity measures.[42] Ultimately, in the words of the Court, the recipient Member State 'remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such to prompt that member State to implement a sound budgetary policy'.[43] The emphasis put on the objective of sound budgetary policy reinstates the importance of the market paradigm for the financing of Member States. Despite cross-border transfers, financial assistance in the Eurozone remains market-based.

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[39] Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 JCMS 37, 51.
[40]Angela Merkel (2010) 'Regierungserklärung von Bundeskanzlerin Merkel zu den Euro-Stabilisierungsmaßnahmen', 19 May 2010', cited and translated in Tuori and Tuori. (n 8) 129
[41] AG Kokott (n 32) para 148.
[42] Conditionality is a practice used by the IFM in the provision of financial loans.
[43] *Pringle* para 137.

Quite illustrative in this respect is the narrative of the euro crisis, which has been dominated by the argument of moral hazard. Described as a market failure, moral hazard is deeply rooted in the logic and semantics of the market with the consequence that conditionality, being a corrective measure of such a failure, aims at restoring the efficient functioning of the market. Moreover, moral hazard further confirms how the type of solidarity that emerged in the Eurozone reflected a conception of justice which pertains to private law: commutative justice.[44] This kind of justice typically arises from contractual obligations, for instance insurance relations, and can offer a conceptual paradigm for the solidarity shown by euro countries, which *de facto* acted as guarantors. This 'contractual' nature of solidarity has not thickened into distributive justice, which does not simply call for fairness but for 'fair shares'.

For some, this substantial shift from commutative to distributive justice is *a priori* precluded in the realm of international law. According to a widely accepted reading, distributive justice can only bear on individuals and not states.[45] It implies a kind of solidarity which can be found *within* states rather than *between* states. The single currency, however, blurred the contours of this polarised division. Without the instruments of devaluation and inflation, Member States no longer had sovereign instruments to ensure redistribution. The euro put a strain on solidarity *within* Member States. On the other hand, this loss had not been compensated by the creation of redistributive mechanisms *between* Member States at the supranational level. Conditionality attached to financial assistance to avoid moral hazard, then, creates a tension for the beneficiary state, which has to choose between *contractual* obligations towards creditor countries and *constitutional* obligations towards the citizenry. It ends up stigmatising Member States' recourse to public debt as a way to finance their welfare state. Without control of the currency and supranational redistributive mechanisms, how could Member States perform their core tasks? They are faced with a serious dilemma: whether to honour the social contract or loan contracts.

[44] In the same vein, Eleftheriadis speaks of 'corrective justice'. See Pavlos Eleftheriadis, 'Corrective Justice Among States' (2020) 2 Jus Cogens 7.

[45] This position is generally attributed to Savigny. For an overview of the stream of literature adhering to such a position see Eleftheriadis, (n 44). For the theories of solidarity in international relations theories see Chapter I.

4.2.2 The ECB's conduct: *Gauweiler* and *Weiss*

The ESM, the most notable experimental response that Member States adopted in the wake of the financial crisis, was not the only measure to have come under the scrutiny of the ECJ. The measures taken by the ECB have also raised unprecedented constitutional questions on the design of the single currency's legal framework. In particular, some ECB's decisions adopted in the crisis-management have exposed the problem of the scope and limits of the ESCB's mandate.

The ECJ has been confronted with these issues in two seminal case, *Gauweiler* and *Weiss*,[46] both originated from a request for preliminary ruling from the German Constitutional Court. In *Gauweiler*, in response to the first ever preliminary reference of the German Constitutional Court, the ECJ ruled on the ECB's bond buying programme *Outright Monetary Transactions* (OMT), announced by the ECB's Governing Council on 6 September 2012 following Draghi's 'whatever-it-takes' pledge.[47]As discussed in Chapter III, the aim of the programme was to restore the singleness and proper transmission of monetary policy. The mere announcement of the programme – which has never been formally adopted nor implemented – caused hostile reactions in Germany and prompted a significant number of private plaintiffs as well as a parliamentary group of the Left party *Die Linke* to challenge the OMT before the GCC. In a critical note delivered on the same day of the ECB's announcement, the *Bundesbank* publicly expressed its opposition to the bond purchase programme.[48] Reiterating a critical stance consistently maintained by its President Jens Weidmann,[49] the *Bundesbank* stated that purchases such as those under the OMT, posed a risk to the independent conduct of monetary policy and to the credibility of political leaders who committed to structural reforms. It basically

[46] Cases C- 62/14 *Gauweiler v Deutsche Bundestag* [2015] EU:C: 2015:400 and C- 493/17 *Weiss* [2018] EU:C: 2018:1000.

[47] ECB Press release, 'Technical features of outright monetary transactions', 6 September 2012 https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html accessed 10 June 2020. This decision was already anticipated on 2 August 2012. For Draghi's famous speech see Mario Draghi, 'Verbatim of the remarks made by Mario Draghi' (Global Investment Conference, London 26 July 2012) https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html accessed 10 June 2020: "Within our mandate, the ECB is prepared to do whatever it takes to preserve the euro. And believe me, it will be enough".

[48] See the statement made on 6 September 2012 https://mninews.marketnews.com/content/bundesbank-text-weidmann-reiterated-bond-buy-criticism accessed 10 June 2020.

[49] The decision regarding the OMT was not adopted unanimously, as clearly stated by Draghi at the press conference following the OMT decision. Although the vote within the Governing Council are not disclosed, the only dissenting view was attributed to the *Bundesbank* President Jeans Weidmann. See Michael Steen, 'Weidmann isolated as ECB plan approved' *Financial Times* (Frankfurt 7 September 2012).

regarded the OMT as a monetary financing measure carrying the additional risk, in a currency union, to share and redistribute considerable losses among taxpayers of different countries.

Scepticism towards bond-buying programmes has always been a constant feature in the German public debate, as similar reactions had met the first ECB's purchase programme, the *Securities Markets Programme* (SMP), in 2010 when the then *Bundesbank* President Axel Weber allegedly voted against the programme and later resigned from the Governing Council.[50] The last backlash in this sequence of critical responses has involved the Public Sector Purchase Programme (PSPP), which has been challenged before the GCC and thus referred for a preliminary ruling in *Weiss*. Adopted on 22 January 2015, the PSPP exhibits a number of features that differentiate it from the previous OMT, such as the scale of purchases, the eligibility criteria and maturity of the securities, the eligible issuers who are not limited to the countries participating in a macroeconomic adjustment programme. In light of such differences, the GCC referred a question regarding the legality of the PSPP to the ECJ.

The ECJ saved both programmes, the OMT in *Gauweiler* and the PSPP in *Weiss*. The aim of this subsection is to establish whether these judgements exposed a new conception of stability, thus redefining the role of the ECB in the EU constitutional architecture. In other words, whether they sanctioned a passage from a narrow conception of (price) stability to a broader conception of (financial) stability. For this reason, these judgments should be inscribed in the strand of the case law started with *Pringle*. The extent to which they also reflected the underlying assumptions which guided the ECJ's reasoning in *Pringle* is however dubious (see more *infra*). They are relevant to the solidarity question insofar as they uphold a certain political economy, more or less reliant on market-based adjustment mechanisms.

4.2.2.1 The Gauweiler case

[50] See Ralph Atkins, 'ECB divided over policy U-turn' *Financial Times* (Frankfurt, 11 May 2010) and Daniel Schäfer, 'Weber says hawkish views led to ECB race exit' *Financial Times* (Frankfurt, 18 December 2011).

4.2.2.1.1 The preliminary reference from the *BVerfG*

In its referral order,[51] the GCC questioned the compatibility of the OMT with EU primary law, specifically with the provisions governing the ECB's mandate and detailing its functions- such as Articles 119 and 127 TFEU, as well as Articles 17 to 24 of the Protocol on the Statute of the ESCB and the ECB - and the prohibition of monetary financing laid down in Article 123 TFEU.

In its decision on the ESM and TSCG, the GCC had already argued that 'an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Member States' budgets independently from the capital markets is prohibited […] as it would circumvent the prohibition on monetary financing'.[52] In *Gauweiler*, the GCC acknowledged that the adoption of the OMT programme had fulfilled this prophecy.

Framing its preliminary reference within the doctrine of the *ultra vires* review – a German doctrine that confers the ultimate authority to define whether EU institutions have acted within the boundaries of their competence to the national constitutional court– , the GCC considered the OMT as an instrument of economic policy exceeding the ECB's monetary policy mandate. The GCC basically described it as the functional counterpart of the ESM eluding parliamentary approval. This functional equivalence to ESM assistance found its basis in four main arguments: the *selectivity* of the OMT programme - being it addressed only to certain Member States - its *conditionality* and *parallelism* - running the OMT along the ESM and being the purchases linked to the financial assistance conditions set out therein - and *circumvention of budgetary discipline* - being it likely to undermine the terms and conditions for financial assistance required under EFSF and ESM's programmes.

According to the GCC, the principle of conferral - which informs the division of powers between the European Union and its Member States - should also apply to the functions that are assigned to the ESCB. As a result, only a narrowly shaped ECB's mandate such as that envisaged by the Treaty could fulfil the democratic requirements that the German Basic Law requires. In this perspective, the democratic legitimation of the ECB is strictly limited to "a primarily stability-oriented monetary policy". The

[51] BVerfG, 2 BvR 2728/13 of 14 January 2014 ('*BVerfG OMT'*).
[52] BVerfG, 2 BvR 1390/12 of 12 September 2012 *('BVerfG ESM & TSCG temporary injunction'*), para 174.

transfer of monetary powers to an independent supranational institution does not undermine democratic principles as far as the objective of stability is better attained by a technical body which is immune to short-term political considerations.[53] Against this background, the Court found the OMT programme to be contrary to the constitutional task of the ECB, and claimed the power to review the ECB's action, i.e. the scope and extent of its mandate. In the GCC's view, the ECB's independence could not preclude judicial review because the ECB could otherwise expand its Treaty-based powers at will.

To support its view that the OMT had transgressed the division of competences within the Union, the GCC recalled the ECJ's findings in *Pringle* and argued that the delimitation between monetary policy and economic policy lies in the objective of an act, the instruments to achieve it, and the relationship with other provisions.[54] Consequently, purchases of government bonds may not be treated as acts of monetary policy if they only *indirectly* attain monetary policy aims, such as the safeguard of the transmission mechanisms. From the point of view of the instruments, an act granting financial assistance, by definition, cannot fall within the range of tools of monetary policy as, for instance, decisions on interest rates or minimum reserves, open market and credit operations. Finally, the adherence of a monetary policy act to an overall regulation framework that consists of other measures can indicate a link with economic policy and thus its different nature. Relying on this methodology, the GCC stated that the ECB had crossed the limits of its mandate.

This issue regarding the boundaries between monetary and economic policy and thus the limits of the ECB's mandate is fundamental for the configuration of the EU as a transfer union. It determines whether the ECB can be the lender of last resort for Member States. Therefore, from the perspective of the GCC, the determination of the nature of the OMT is paramount to establish whether the ECB has acted with the limits of its mandate, which according to its reading excludes the possibility for the ECB to act as a lender of last resort for states. In this respect, the GCC asked whether the OMT was a monetary policy instrument, thus falling within the mandate of the ECB, or whether it was a financial assistance measure falling outside such mandate and thus violating the prohibition of monetary financing. The GCC adopted the latter interpretation.

[53] *BVerfG OMT* para 59.
[54] *Pringle* para 53.

In relation to the second question regarding the compatibility of the OMT programme with the prohibition in Article 123 TFEU, the GCC analysed some features of the programme to conclude that it amounted to monetary financing. Specifically, the GCC looked at the lack of quantitative limits for the purchases (*volume*), the absence of a certain time lag between the emission the bonds and their purchase on the secondary market (*unclear market pricing*), the possibility to hold bonds to maturity (*interference with market logic*), the absence of specific requirements for the credit rating of the bonds to be purchased (*excessive default risk exposure*), the equal treatment of the ESCB as private or other government bonds holders in a debt cut (*pari passu treatment*), and the encouragement of private investors to purchase newly issued bonds on the primary market (*influence on pricing mechanisms* exerted by the mere ECB's announcement).[55]

The Court substantially embraced the considerations put forward by the *Bundesbank* in relation to these points. Intervened in the proceeding, the German central bank highlighted how the OMT's rationale - according to which the sooner the purchase is made after the emission of a bond and the higher is its volume, the lower the risk for market participants- clearly aims to contribute to financing national budgets. In this scenario, market actors could unlimitedly rely on the possibility to sell their government bonds at any time. Moreover, it argued that a large-scale purchase of bonds carrying a high risk of failure due to their poor credit rating leads to an onerous debt assumption, with the ECB acting as a *de facto* full-fledged lender of last resort.[56] Even though under the ESCB Statute monetary operations encountering potential losses are not completely prohibited,[57] the risk that the Eurosystem would incur - should it enter into loss-making schemes as the OMT - is disproportionate and unnecessary. For this reason, the *Bundesbank,* in its final observation, pointed to the similarity between the OMT and the ESM as regards the fiscal burdens placed on Germany's federal budget. Finally, it held that holding the government bonds to maturity can have an impact on monetary financing: once government bonds are removed from the market and the effects arising from their sale prior to maturity (such as the price determination) prevented, a circumvention of Article 123 TFEU occurs.

[55] See the OMT Decision and the accompanying communication of the Council of the European Central Bank (n 47).
[56] As indicated in the predecessor programme SMP, see Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5) OJEU L124/8, 20 May 2010, 8.
[57] See for instance the mechanism of compensation of losses envisaged in the Article 33.2 ESCB Statute.

As an alternative to this reading, the GCC suggested a possible interpretation of the OMT in conformity with EU law. To this end, it basically proposed to construe the OMT programme as an instrument having a merely supportive nature of national economic policies. This proposed consistent interpretation reveals the conception of political economy that, according to the GCC, is inscribed in the European Economic Constitution: the choice for contractionary monetary and fiscal policies. Provided that the elements listed above were interpreted with some conditions attached (basically inspired by monetarism),[58] the programme could be brought within the ECB's mandate. In other words, the OMT programme should entail the limitation of the volume of purchases, the exclusion of a debt cut, the preserved conditionality of the EFSF and ESM assistance programmes, the prevention of interference with market pricing, the observance of certain time lags, and the option not to hold the bonds until maturity.

Despite this suggested EU law friendly interpretation, the GCC reached the conclusion that the OMT did constitute an *ultra vires* act. However, it followed the path traced by its own *Honeywell* decision, where it had promised to always request a preliminary ruling before rendering a final judgment. For this reason, the GCC referred the *Gauweiler* case to the ECJ.

Moreover, the GCC added that, should the Court of Justice not qualify the OMT decision as an *act* subject to review under Article 267 (1) (b) TFEU, being it merely an announcement, its own obligation to protect German constitutional identity would nonetheless justify its judicial review (preventive protection). Introduced in its *Lisbon* decision,[59] this kind of judicial review pertains to the unamendable core of German stateness, which is inviolable according to Articles 23 (1) and 79 (3) of the German Constitution. This core content comprises some national competences of high political salience such as those in the fiscal policy area which require 'sufficient space […] for the political formation of the economic, cultural and social living conditions'.[60] Therefore, the OMT decision may violate the German Basic Law inasmuch as it creates a mechanism

[58]Monetarism has been described as the theory around which 'neoliberal policy consensus' formed after the first oil crisis. It is the theory that 'places faith in the long-run function of the market economy in lieu of government intervention'. It is also characterized for its aversion to expansionary monetary and economic policies. For the cited definitions, see Kathleen R. McNamara, *The Currency of Ideas: Monetary Politics in the European Union* (Cornell University Press 1999) 145.
[59] *BVerfG Lisbon.*
[60] *BVerfG Lisbon* paras 246-249, 252, 256.

whereby the *Bundestag* would no longer exercise its budgetary autonomy and responsibility for budgetary decisions made elsewhere.

Consequently, the GCC referred alternative questions on the interpretation of Articles 119, 123, and 127 TFEU, and Articles 17 to 24 of the ESCB Statute, by reframing the arguments previously used against the legality of the OMT. In other words, the GCC asked whether those provisions must be interpreted as permitting the ESCB to potentially adopt a programme for the purchase of government bonds on secondary markets, *such as* the OMT.

4.2.2.1.2 The judgment of the Court of Justice

Seized with two preliminary questions regarding the compatibility of the OMT decision with EU law, the ECJ declared in the first place the admissibility of the request from Karlsruhe. Moving to the substance of the dispute, the Court found the OMT falling within the area of monetary policy. Following the methodology developed in *Pringle*, the ECJ looked at both the objectives and instruments of the OMT programme to conclude that such a measure should not be seen as an instrument of economic policy solely because it may indirectly enhance States' compliance with the macroeconomic adjustment programmes linked with EFSF and ESM financial assistance. Reference to these adjustment programmes, upon which the implementation of the OMT had been made conditional, did not alter the objective pursued or the instruments adopted to attain it. In fact, pursuant to Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU, the ESCB shall support the general economic policies in the Union besides (and without prejudice to) the objective of price stability, and the conditionality attached to monetary policy measure shall ensure that Member States stick to a sound budgetary discipline.

Stressing that the OMT programme aims at safeguarding both an 'appropriate monetary policy transmission' and' the singleness of the monetary policy', the ECJ restated that a monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects on the stability of the euro area and the means adopted to achieve those objectives entail outright monetary transactions on the secondary market. Article 18.1 of the Protocol on the ESCB and the ECB explicitly allows operations in the financial markets conducted by selling and buying marketable instruments. As a result, these purchases are covered by primary law. Neither

the selectivity of the programme implies that the OMT falls outside the realm of monetary policy since its limitation to selected countries aims at correcting the disruption to the monetary policy transmission caused by the specific situation of government bonds issued by some States. Therefore, as far as the necessity to intervene by means of general measures applicable to all Eurozone Members does not arise, the OMT's selective nature is justified.

Having addressed the most controversial features of the OMT programme, conditionality and selectivity, the ECJ turned to the proportionality analysis. It found that the adoption and implementation of the bond-buying programme did not go beyond what was necessary for the achievement of the objectives of monetary policy. In this regard, the ECJ acknowledged the broad discretion of the ESCB in its economic assessments and technical choices, but it nevertheless placed them under its scrutiny. In fact, it reserved for itself the faculty to review the compliance of such choices with some procedural guarantees, such as a statement of the reasons for a certain decision. Taking account of the information provided by the ECB about the appropriateness of the programme, the Court held that the economic analysis upon which the ECB drew for its OMT decision was not vitiated by a manifest error of assessment.

According to the ECB, the volatile and high spreads of some bonds were caused not only by the structural macroeconomic differences between Member States, but also by the excessive risk premia associated with them. This assessment on the misalignment of interest rates paid for certain government bonds passed the ECJ's proportionality test. In relation to the element of necessity, the ECJ articulated some arguments to show how the OMT programme did not exceed what was indispensable to achieve the objective of the correct transmission of monetary policy. It sustained that the operativity of the programme was dependent on safeguarding that objective and in fact under the existing circumstances there had been no concrete need to activate it. The Court also pointed to the limited size of the programme and its selectivity, in particular to the fact that the ESCB could only buy bonds of States that were recipients of financial assistance and thus subject to macroeconomic adjustment programmes. Moreover, these purchases can only regard bonds with a maturity of up to three years with the consequence that an *ex ante* announcement of a quantitative limit on the volume of purchases would undermine the effectiveness of the programme. Finally, the ECJ touched upon proportionality *stricto*

sensu, albeit more briefly than what Advocate General had done in its opinion. In fact, it merely declared that the ESCB had balanced all the possible disadvantages against the OMT programme's objectives.

Turning to the question of the prohibition of monetary financing of Article 123 TFEU, the ECJ argued that the purchases of government bonds on the secondary market should be considered permitted inasmuch as they do not have an effect equivalent to direct purchases. In this regard, it accepted the safeguards offered by the ECB's draft guidelines produced in the proceeding, which envisaged certain conditions such as a minimum period between the issue of bonds on the primary market and secondary market intervention, the commitment to refrain from any prior announcement regarding both the volume of purchases and the same decision to buy securities. The ECJ held that these safeguards did not increase primary market purchases and thus did not jeopardise Member States' fiscal discipline, which represents the rationale of Article 123 TFEU. By analogy with what it had previously done in *Pringle* with regard to the no bail-out clause, the ECJ looked at the monetary financing prohibition's objective identifying it with the imposition of budgetary discipline. Arguments such as the preamble to Regulation 3603/93[61] - which ensures that the prohibition of monetary financing is not circumvented by secondary market purchases – and the Maastricht Treaty's preparatory work – which clearly showed how the fiscal discipline was the very objective of the prohibition – supported such a teleological reading of Article 123 TFEU.

In light of all these considerations, the Court established that the OMT did not have an effect equivalent to primary market intervention nor an effect elusive of the budgetary discipline objective. Purchases on the secondary market can only take place when necessary for the transmission of monetary policy and limited to those bonds with excessive rates. They would not alter Member States' responsiveness to market discipline because it would not be possible to determine *ex ante* whether the ECB would buy certain bonds or sell certain bonds already purchased. Moreover, the limited eligibility of bonds with a maturity of up to three years and with access to the market would discourage Member States from reckless refinancing operations. For the ECJ, the fact that the ESCB could hold certain bonds until maturity does not affect its conclusion that the OMT

[61] Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104a and 104b (1) of the Treaty.

programme does not infringe Article 123 TFEU. In addition to recalling that Article 18.1. of the Statute expressly allows secondary market purchases, the ECJ argued that the overall features of the OMT prevented a circumvention of the monetary financing prohibition. Finally, it briefly touched upon further two issues singled out by the GCC, namely the risk of significant losses and the lack of privileged creditor status of the Eurosystem. In relation to the first point, the ECJ said that the existing guarantees attached to the programme would actually prevent the occurrence of such losses and that, in any case, Union law does not put any limit on the risk that the ESCB can assume. With regard to the *pari passu* treatment, the ECJ held that the risk of a debt cut is a normal consequence of secondary market purchases, which Union primary law expressly envisage and allow.In conclusion, the ECJ ruled that the OMT programme neither overstepped the ECB's mandate, nor violated the prohibition of monetary financing under Article 123 TFEU.

After resuming the case, the GCC delivered its final judgment partly overruling, perhaps for the sake of avoiding a conflict of jurisdiction, its previous order for a preliminary reference.[62]In contrast with its initial view, the GCC argued that the applicants had challenged the ECB's decision directly and declared the constitutional complaints inadmissible, as they can only be lodged against German public acts. This *revirement* – quite surprising if one considers the Maastricht decision where the GCC held that direct challenges of EU acts are admissible when affecting fundamental rights and thus triggering the Constitutional Court's duty to protect them – was nevertheless mitigated by the consideration that EU acts could be indirectly scrutinised as 'preliminary questions'.[63]

Conversely, the GCC declared admissible the complaints against the omission of the Federal Government to challenge of the OMT decision, since Article 38 (1) of the Basic Law enshrines the right to vote in federal parliamentary elections which should be interpreted as a right to also influence the political process. As a result, in the context of European integration, when EU organs violate the principle of attribution, they would

[62] BVerfG 2 BvR 2728/13, Decision of 21 June 2016 paras 95-100.
[63] On this U-turn see Mehrdad Pyandeh, 'The OMT Judgment of the German Federal Constitutional Court: repositioning the court within the European constitutional architecture' (2017) 13 EuConst 400, 407. This author noted how the judgement left open the question on whether EU regulations that directly affect citizens - and clearly, are not transformed by German organs - can be challenged.

lack democratic legitimacy and therefore infringe the people's sovereignty which informs the German constitutional identity (see *infra*).

As has been noted, the Court seems to have conflated *ultra vires* review with constitutional identity review, and more generally to have expanded the scope of application of its judicial review powers.[64] In particular, the *ultra vires* review appears to have included the violation of the prohibition of monetary financing and not just the transgression of the competences conferred to the Union.[65]

Notwithstanding its expanded review powers and perplexities about the reasoning of the Court of Justice, the GCC accepted that the OMT did not violate German constitutional law.

4.2.2.1.3 *Gauweiler* from the perspective of solidarity

The *Gauweiler* judgment is to be understood in conjunction with the case law on financial assistance developed in the *Pringle* case. The legacy of *Pringle* on the adjudication of the *Gauweiler* case is of paramount importance because it informed the reasoning of both the GCC and the ECJ. Although the two Courts initially reached different conclusions with regard to the compatibility of the OMT programme with Union law, they both based their findings on the methodology developed in *Pringle*.

They indeed looked at the objectives of the OMT programme to establish the policy nature of this measure, i.e. whether it fell within the area of monetary policy or that of economic policy. However, while the GCC focused only on the direct objective of the OMT programme, which it identified with the closure of bond spreads, the ECJ also considered its indirect objective, namely the singleness and transmission of monetary policy.[66] The GCC based its view on the premise that yield spreads between certain bonds reflect the correct functioning of the market. It embraced the *Bundesbank*'s position, according to which the task of the ECB is not to reduce the high-risk premia that certain States have to pay on the bond markets. Bond yields are indeed the natural consequence of how investors perceive a certain State and cannot be corrected by the ECB's intervention. In the view of the GCC, they do not constitute a market failure but the

[64] ibid 414.
[65] ibid 412.
[66] For this observation see Vestert Borger, 'Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*' (2016) 53 CMLR 139, 171-72.

reflection of a rational market behaviour. It would be indeed impossible to distinguish, as the ECB had claimed to do, between bond yields that are justified and those that are excessive inasmuch as not in line with economic fundamentals. The GCC then took an intransigent stance on spreads, claiming that these are 'entirely intended' and as such should not be neutralised as they express the disciplining role of the market. As has been noted, though, this position does not seem to be supported by the economic analysis.[67] The GCC merely cited a report produced by the German Council of Economic Experts, which did not offer a conclusive opinion on the issue of spreads. Actually, it even opened to the hypothesis that yield levels in 2012 did not correspond to fundamentals and were then brought back to normal after the ECB's announcement.[68]

From the perspective of solidarity, then, the GCC's position reflects a conception of the market as a place promoting competition between Member States, where differences in the yield levels are not only normal but also desirable and Member States' individual responsibility paramount. This view resonates with the neoliberal logic that sees the market as a disciplinary mechanism, rewarding the best and punishing the worst. Applied to the plane of horizontal relations between states, it perpetuates the inequalities among them disguising structural problems for individual faults (see Chapter V). This view is in line with the spirit of the crisis-driven reforms examined in Chapter III, which has shown how the market has been elevated to the main regulatory device of Member States' mutual relationships.

It is not a coincidence that the teleological reading of the GCC is biased by this mindset. For the GCC, the objective of the OMT is to alter the mechanisms of the market, which is naturally a *locus amenus*. This undertone resonates throughout the GCC's decision and evidently manifests in the arguments of the complainants affirming that 'monetary policy must relate to the entire euro currency area and must be free from discrimination with regard to individual Member States of the Eurosystem'.[69]In their view, the ECB's intervention in the secondary market constitutes 'a suspension of the market mechanisms which violates the Treaties'.[70] The argument of (formal) equality of Member States before the market neglects the fact that it is the very structure and

[67] ibid 172.
[68] ibid.
[69] *BVerfG OMT* para 5.
[70] ibid.

functioning of the market that determines the asymmetrical position of Member States. Chapter III has revealed how the EU has always been an asymmetrical free trade area. The GCC's insistence on the individual responsibility of Member States for financial policy, deriving from the independence of their national budgets and precluding redistribution between banks and taxpayers of different Member States, is the result of this ideological position. Although - to paraphrase the GCC - a system of fiscal redistribution was not part of the integration programme of the European Treaties,[71]Chapter II has shown that the authority of EU law extensively reaches national financial policies and that free movement provisions, in particular, have been interpreted for some time as creating an incipient, albeit limited, space of transnational solidarity.

Besides this scarcely nuanced take on financial responsibility, another problematic element in the GCC's reasoning is the insufficient attention given to the declared objective of the OMT, that of correcting a disruption in the monetary policy transmission. The GCC did not totally neglect this objective. However, it did not give it any weight in its assessment of the policy nature of the OMT. In other words, the fact that the ECB expressly justified the OMT with the need to safeguard the mechanism through which it sends its impulses across the money market to the various sector of the economy did not affect the pre-formed, ideological opinion of the GCC, according to which a bond-buying programme like the OMT represents an economic policy measure.

On the contrary, the ECJ took into account all the objectives pursued by the OMT. This approach is more in line with the methodology exposed in *Pringle,* where the Court did not distinguish between direct or immediate objectives and indirect objectives, as claimed instead by the GCC to support its findings. When dealing with the constitutionality of the ESM, the ECJ argued that in order to establish the nature of a measure it was necessary to look at its objectives and instruments, saying that indirect effects – not its objectives – could not affect the assessment. In *Gauweiler,* the ECJ reiterated this approach stating that a monetary policy measure cannot be equated with an economic policy measure for the sole reason that it can have *indirect* effects on stability of the euro area. As has been noted, the emphasis put by the ECJ on the indirect effects somehow downplayed the importance of financial stability as an objective to pursue in

[71] ibid para 41.

the frame of bond purchases.[72] The ECJ did not even expressly mention *financial* stability but referred to the more general notion of 'stability of the euro area' to affirm that the fact that a programme like the OMT may have indirect effects on this stability does not change its nature of monetary policy measure.

This diluted version of financial stability – which is implicitly not considered a monetary policy objective - may be the natural result of the *Pringle* judgement, a technical constraint. In that case, the Court had to resort to financial stability to determine the economic policy nature of the ESM. Financial stability was indeed functional to the distinction between monetary and economic policy and thus to the division of competences between the Union and its Member States. In *Pringle*, there was a substantive question regarding the personal scope of financial assistance (the 'institutional dimension of solidarity' discussed above).[73] It was asked whether the creation of the ESM by Member States encroached on the exclusive competence of the Union in relation to monetary policy. It was then necessary for the ECJ to pronounce on the ESM's nature of economic policy measure.

In *Gauweiler*, instead, there is not a problem of division of competences between the ECB (and thus the Union) and its Member States. The determination of the policy nature of the OMT is only functional to the delimitation of the ECB's mandate. As has been noted, the ECJ could have easily focused on Article 18 (1) of the ESCB Statute – which offers the legal basis to conduct bond purchases on the secondary market - instead of centring its reasoning on the OMT's policy nature.[74] The fact that the ECJ relied so heavily on an argument based on policy areas instead of a direct legal basis to justify the OMT is the consequence of *Pringle.* The ECJ applied to *Gauweiler* the same methodology adopted in *Pringle*, where the focus on the policy nature of a measure was a hermeneutic move required by the need to preserve the division of competences in the EU. The discovery of the principle of financial stability, as already said, was then functional to the distribution of powers in the EU composite constitutional system.

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[72] ibid 174.

[73] See *infra* 4.2.1.2

[74] Many commentators share this view. See Borger (n 66) 170; Mattias Wendel, 'Exceeding judicial competence in the name of democracy: the German Federal Constitutional Court's OMT Reference' (2014) 10 EuConst 263, 294-295; Jürgen Bast, 'Don't act beyond your powers: The perils and pitfalls of the German Constitutional Court's ultra vires review' (2014) 15 GLJ 167, 174-176. Thomas Beukers, 'The *Bundesverfassungsgericht* preliminary reference on the OMT program: 'In the ECB we do not trust. What about you?" (2014) 15 GLJ 343, 366.

However, in *Gauweiler*, while the ECJ maintained the distinction between policy areas, which was not even functional to the division of competences in the context of bond purchases, it did not refer to financial stability. Hence, the ECJ missed the chance to clarify the constitutional nature of this newly discovered principle.

The question that the ECJ should have asked is whether the meta-principle of financial stability could inform the material scope of the action of the ECB or, more broadly, its mandate. In other words, the ECJ could have clarified whether financial stability could orient monetary policy decisions of the ECB, whether it is a self-standing objective that per se the ECB can pursue. The impression is that the ECJ considered financial stability as an intermediate objective to pursue as long as instrumental and compatible with the ultimate goal of price stability.[75]

But even if the Court had considered financial stability as an autonomous objective, it is hardly possible that it would have entailed a different conception of the euro area stability. The interpretation of financial stability given by the ECJ in *Pringle* presupposes reliance on the market and therefore fiscal discipline. Although *Gauweiler* did not expressly engage with financial stability, it seems that it embraced that same vision expounded in *Pringle*. Indeed, the ECJ did not focus on financial stability elevating it to the ultimate objective of Article 123 TFEU, as it did with Article 125 TFEU in *Pringle*. However, in the underlying reasoning of the Court fiscal discipline still constituted the rationale behind the prohibition of monetary financing. In fact, the OMT programme does not hamper market discipline, which remains in place. Bond purchases do not aim at closing spreads and harmonising yields: they only respond to the need of correcting those yield levels that do not reflect fundamentals. Member States remain then exposed to the disciplinary mechanisms of the market, as the ECB cannot intervene to buy government bonds whose yields, albeit high, correspond to fundamentals.

4.2.2.2 The *Weiss* case

[75] Borger (n 66) 174.

4.2.2.2.1 The referral order from the German Constitutional Court

A second occasion of dialogue between the German Constitutional Court and the Court of Justice occurred in the *Weiss* case.[76] Only a year after the GCC delivered its final judgment on the OMT, eventually never implemented, it had to pronounce on another ECB's monetary policy instrument, the Public Sector Assets Purchase Programme (PSPP) launched in 2015.[77] Under this programme, by the time the GCC decided to submit its second ever preliminary reference,[78] the ECB had already bought a significant amount of government bonds, in a continuous attempt to fight the risk of deflation with its expansionary monetary policy.

The GCC raised several concerns on this new programme of quantitative easing, in particular on its duration, scale, and effects. The GCC noted how the PSPP departed from the limits of the ECB's action that the ECJ had set in *Gauweiler*. It therefore questioned the compatibility of the programme with the prohibition of monetary financing laid down in Article 123 TFEU and the ECB's mandate set out in Article 127 TFEU and Articles 17 et seq. of the ESCB Statute. In defining the preliminary questions, the GCC relied on the legal framework of *Gauweiler* and adapted it to the specific features of the PSPP. While in that case the object of constitutional review was the very possibility for the ECB to adopt a bond-buying programme such as the OMT, in *Weiss* the main concern related to the concrete modalities of the 2015 programme. The PSPP indeed exhibits some differences in comparison with the OMT: it is not a selective programme destined to the most crisis-hit Member States, nor conditional upon the financial

[76] BVerfG, 2 BvR 859/15 Order of 18 July 2017 ('*BVerfG Weiss'*).

[77] See Decision of the Governing Council of the European Central Bank of 22 January 2015 on an expanded asset purchase programme (ECB/2015/10). The PSPP was launched under Draghi's 'whatever it takes' strategy in the frame of the Expanded Asset Purchase Programme (EAPP). It was one of the four ECB's bond-buying programmes, being the EAPP composed by other three sub-programmes.

[78] The referral followed four constitutional actions regarding the domestic applicability and implementation of Decision (EU) 2015/774 of the European Central Bank (ECB/2015/10) and subsequent decisions,[78] the participation of the German Central Bank (*Bundesbank*) in the implementation of (or its alleged failure to refrain from) those decisions, and the alleged failure of the Federal Government as well as the Parliament (*Bundestag*) to act in respect of that participation and those decisions. All the constitutional complaints concerned ECB's decisions regarding purchases of public sector assets on the secondary markets, except for the first and fourth complaint which also concerned the Corporate Sector Purchase Programme (CSPP). The complainants claimed that the PSPP violated the principle of conferral (Article 5 (1) TEU in conjunction with Articles 119, 127 *et seq*. TFEU) and the prohibition of monetary financing (Article 123 TFEU). They basically contended that those decisions constituted *ultra vires* acts, which as such could not be implemented by German authorities, as well as an encroachment upon the budgetary powers of the *Bundestag*. In sum, the main arguments against the applicability, in Germany, of those decisions revolved around the ECB's overstepping of its monetary policy mandate, the violation of the prohibition of monetary financing, and the incursion into the constitutional identity of the Federal Republic.

assistance programmes of the EFSF or the ESM, and finally it is subject to a cap on the volume of bond purchases.

The GCC referred to the legal constraints singled out by the ECJ in *Gauweiler* to examine whether and how the PSPP violated EU law, testing to what extent the ECJ would abide by those 'legally binding criteria' which it itself had developed to assess the legality of the ECB's action. First, the GCC employed these conditions to review the compatibility of the PSPP with the prohibition of monetary financing. As stated in *Gauweiler*, in order to comply with Article 123 TFEU, secondary market bond purchases should not produce effects equivalent to those of direct purchases. This means that purchases on the secondary market should not be perceived by Member States as an incentive to stop pursuing budgetary discipline. Nor they should be perceived by investors as an indication that some bonds would be purchased by the Eurosystem once placed. In other words, the safeguards set out in *Gauweiler* aimed at preventing moral hazard and protecting the price formation of government bonds on the market.

According to the GCC, the PSPP disregarded these conditions for four main reasons. First, the information disclosed in the ECB's announcement regarding the bond purchases creates a *de facto* expectation for market operators that certain bonds will be purchased. Even though the ECB is not legally obliged to buy certain bonds, the details of which are not revealed *ex ante*, in practice it is still possible to identify the bonds that are going to be purchased. Second, the lack of information regarding the blackout period – which is the prescribed amount of time that should pass between the emission of bonds and their purchase by the ESCB to allow the formation of a market price - renders the exercise of judicial review impossible. Third, the holding of purchased bonds until maturity should be exceptional rather than normalised, as instead the PSPP risks to do. Finally, the negative yields of certain bonds create distortions.

Turning to the compatibility of the PSPP with the ECB's mandate, the GCC reinstated the *Gauweiler'*s findings on the division of competences between the Union and the Member States. Along the lines of this distinction, the GCC articulated once again the legality of the PSPP as well as the contours of the ECB's mandate. It also restated the importance of delineating the subject matters of monetary policy and those of economic policy to understand what is admissible under EU Treaties. Central to the analysis of PSPP was the principle of proportionality, which the GCC used to classify the bond-

buying programme as a measure of economic policy because of its economic effects. Despite the declared monetary policy objective to increase the inflation rate, the PSPP - with its significant volume, duration and economic impact - did not look like a proportionate means to achieve that desiderate inflation target. In the view of the GCC, the economic policy consequences of the PSPP outweighed its monetary policy objective. After an 'overall assessment of the relevant criteria of delimitation,' the GCC then concluded that the PSPP could not be qualified as a monetary policy measure but instead had to be considered as a measure of a primarily economic policy nature.[79]

In conclusion, the GCC referred five preliminary questions to the ECJ. The first and second questions concerned the compatibility of the PSPP with the prohibition of monetary financing, whilst the third and fourth questions asked about its compatibility with the ECB's mandate. The fifth question, instead, asked whether in the event of a non-repayment of bonds the consequent unlimited sharing of risks through the recapitalization of national central banks would violate the prohibition of monetary financing of Article 123 TFEU, the no-bailout clause of Article 125 TFEU, and the national guarantee clause of Article 4 (2) TEU.

4.2.2.2.2 The judgment of the Court of Justice

Conscious of the sensitive nature of the case, the ECJ rejected the request for an expedited procedure submitted by the GCC in consideration of the PSPP's irreversible effects.[80] Before deciding on the merits of the case, it rejected the objections on admissibility raised by the Italian government, which submitted that the preliminary reference from Karlsruhe did not genuinely seek to resolve a dispute but rather to give its own interpretation of an EU law act in light of German Basic Law, thereby undermining the discretion of the ECB in implementing its monetary policy mandate. The ECJ rejected these observations, stating that the ECB's action is subjected to the limits set out by EU primary law and thus should be also subjected to judicial review, provided that the conditions for it to take place were satisfied as in the case at stake.

Examining the first four questions together, the ECJ started off its analysis by addressing the issue of ECB's compliance with the obligation to state reasons laid down

[79] *BVerfG Weiss* para 114.
[80] See Order in Case C-493/17 *Weiss* EU:C:2017:792.

in Article 269 (2) TFEU. On this point, it engaged with the GCC's finding that the ECB did not explicate the reasons for its Decision 2015/774 and subsequent decisions concerning the PSPP. In its review of compliance, the ECJ argued that the ECB had sufficiently explained the reasons behind its expansionary approach both at press conferences and in the ECB's Economic Bulletin.[81] Documents such as press releases, introductory statements of the ECB's President, Q&A sessions, or the accounts of the ECB's Governing Council amply proved that the side effects of the PSPP were duly considered and weighted against the targeted monetary policy objectives.[82] With regard to the lack of information on the black-out period, the Court observed that the disclosure of such details would not have justified the measures adopted by the ESCB but rather explained their precise content. Therefore, it deemed Decision 2015/774 to be not valid in light of the duty to state reasons.

Moving to the substantive question of the limits of the ECB's mandate, the ECJ assessed the compatibility of the PSPP with primary law provisions delineating the ECB's mandate, specifically Articles 119 and 127 (1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB. To this end, it focused on three main interrelated issues: the powers of the ECB, the delimitation of Union's monetary policy, and proportionality. The scope of ECJ's judicial review powers is indeed strictly intertwined with the conception of the ECB's role as well as the outer limits of the monetary policy mandate. It is not by chance that the light proportionality review performed by the ECJ found its ground on a certain way of conceiving the ECB's mission.

The conception of the ECB's role that the ECJ espoused in *Weiss* seems to concede a broader scope of action to this monetary institution, as the very definition of monetary policy embraced by the ECJ does not limit itself to the mere price stability objective. This does not amount to saying that the ECJ's constitutional vision of the ECB's mandate acknowledges a function of lender of last resort for it. Rather, it amounts to granting the ECB a broader discretion and expertise in conducting its ultimately price-stability-focused mandate. Despite being primarily centred on price stability, monetary policy should take into consideration other factors, such as the general economic policies of Member States and Union's general objectives pursuant to Article 127 (1) TFEU.

[81] ibid paras 37-40.
[82] ibid paras 37-38.

Given the highly discretional and technical nature of the ECB's choices, the ECJ limited its scrutiny to a rationality test, which nevertheless took into account the economic effects of the PSPP. Specifically, the jurisdictional test applied by the Court consisted in checking whether the ECB's decision was affected by a manifest error of assessment. To this end, the ECJ resorted to a teleological interpretation which focused on the objectives of PSPP, in adherence to the methodological framework developed in *Pringle* and *Gauweiler*.

In order to accommodate the concerns expressed by the German Court on the PSPP's encroachment on the economic policy domain, the ECJ also considered the economic effects of the programme, in particular its impact on the balance sheets of commercial banks and on the refinancing conditions of Member States. Recalling its previous findings, it stated that the conduct of monetary policy has inevitable effects on the behaviour of market actors, and ultimately Member States. Actually, the very purpose of a bond-buying programme is to influence those economic subjects, as the transmission of monetary policy relies on 'the supply of credit to the economy and modification of the behaviour of businesses and individuals with regard to investment, consumption and saving'.[83] After all, the ECB's conventional measures on interest rates aim at producing certain effects on the real economy. All interest rate policy decisions have indeed allocative effects, as they make it more or less expensive to borrow or to save. For instance, the choice to raise inflation by lowering interest rates has a direct effect on the channels of monetary policy transmission, as it affects the interest rate at which commercial banks can borrow (main refinancing operations and overnight lending facility) or deposit funds (deposit facility). Although some effects can be also pursued in the context of the economic policy, they do not affect the qualification of a programme such as the PSPP as monetary policy measure. The ECJ rejected the GCC's observation according to which the effects that are 'knowingly accepted and definitely foreseeable' by the Eurosystem cannot be regarded as 'indirect effects' but, on the contrary, should be considered relevant to the determination of the policy nature of a measure.

Against this background, the Court reinstated that monetary policy cannot be separated from economic policy and recalled Article 18.1 of ESCB Statute which allows secondary market purchases to corroborate the conclusion that the PSPP constitutes a

[83] ibid para 65.

legitimate instrument of monetary policy. By analogy with what it had already done in *Gauweiler*, the ECJ used the appropriate legal basis for bond purchases on the financial markets as a supporting argument. Once again, the ECJ's reasoning is mainly based on the delimitation of policy areas. Therefore, after considering the objective and the means to achieve this objective, the Court concluded that the PSPP falls within the sphere of monetary policy, despite its ineluctable economic policy effects.

Once established the policy nature of the PSPP, the ECJ exercised its proportionality review. Contrary to the GCC, which uses the principle of proportionality to determine the nature of a measure, the ECJ resorts to this principle only in a second stage. Specifically, the proportionality analysis serves the purpose of understanding whether a specific measure went beyond what is necessary to achieve its objective. In this regard, the Court examined the duration and the volume of the PSPP, as well as its disadvantages. It noted how the presence of eligibility criteria for bond purchases[84] – or in other words the non-selectivity of the programme – had the effect of limiting the possibilities for commercial banks to resell securities with a high risk to the Eurosystem.[85] Likewise, the temporary nature of the programme limited its impact to the time necessary to achieve the inflation target. The short periods, decided upon by the ECB on an ongoing basis according to the changing levels of inflation, constitute a safeguard of proportionality. As regards possible negative repercussions, the Court found that the risk of losses was mitigated by some preventative measures such as the purchases by each national central bank of eligible securities of its own jurisdiction with the consequent national allocation of potential losses. In fact, only the losses deriving from securities issued by international organisations, which account for the 10% of the PSPP's volume, are to be shared. Therefore, except for this 10% to be possibly offset against the general reserve fund or the annual monetary income in proportion to the shares of capital key, the ESCB did not derogate from the general regime of risk allocation set out by Articles 32 (5) and 33 of the Protocol of the ESCB.

Having scrutinised the design and implementation of the PSPP, the Court did not find any breach of proportionality in the relative ECB's decision. In sum, what the ECJ

[84] As per Article 3 of Decision 2015/774 and purchase limits per issue and per issuer under Article 5 of the decision.
[85] *Gauweiler* para 83.

held was that nothing more than the 'use of its economic expertise and the necessary technical means at its disposal' can be asked from the ECB.[86]

Turning to the second main question, namely the PSPP's compatibility with the prohibition of monetary financing in Article 123 TFEU, the ECJ recalled its previous jurisprudence to state how this provision does not allow any kind of financial assistance from the Eurosystem to a Member State. Specifically, it recalled a paragraph of *Pringle*, in which it had argued how the wording of Article 123 TFEU is stricter than that used in Article 125 TFEU, with the consequence that the no-bailout clause does not preclude any form of financial assistance as the prohibition of monetary financing does.[87] The Court later restated this view in *Gauweiler*, but added that the strict formulation of the prohibition of Article 123 TFEU does not preclude the Eurosystem from purchasing government bonds from the creditors of the State which had issued them, provided that such purchases do not have an effect equivalent to a direct financing of public deficits.[88] Urged to abide by its own standards, the ECJ reiterated that the legality of these secondary market purchases is tied up to two main conditions: their non-equivalence with direct purchases and the presence of safeguards against a reduction of Member States' impetus to conduct a sound budgetary policy. However, despite the similarity of this approach with the one adopted in *Gauweiler*, the Court departed from the blueprint set in the OMT inasmuch as it stated that these two conditions should be adjusted to the specific features of the ECB's programmes and contextualized in light of the temporally relevant economic conditions.[89]

Turning to a more detailed analysis of such restrictions, the Court first addressed the issue of the alleged equivalence between ECB intervention on the secondary market and bond purchases on the primary market. In this regard, the ECJ dismissed the claim that private operators, knowing in advance the main features of the PSPP, would act as *de facto* intermediaries between the bond issuers and the Eurosystem. According to the ECJ, the announcement of the ECB intervention on the secondary market contributes to the effectiveness of the programme. The fact that the duration of the blackout period, instead, is not disclosed prevents private purchasers from predicting whether the ESCB

[86] ibid 91.
[87] *Pringle* para 132.
[88] *Gauweiler* paras 95-97.
[89] *Weiss* para 108.

would buy their securities. Another factor that limits the foreseeability of ECB intervention is the variable volume of monthly purchases, as certain mechanisms provided by Article 2 (3), Article 3 (3) and (4) and Article 6 (3) of Decision 2015/774 allow for some flexibility into the scheme of securities purchase and allocation. Finally, the limit of 33 % of a specific issue of bonds or of outstanding securities further prevents private operators from making assumptions about the ECB's action. In light of these safeguards, the ECJ concluded that the PSPP did not afford market actors any certainty.

With regard to the second problematic issue, i.e. the allegedly reduced impetus to conduct a sound budgetary policy, the ECJ argued that the temporary nature of the programme did not allow Member States to relax their budgetary policy as if their refinancing terms would be unconditionally eased by the ESCB's intervention. More importantly, pursuant to Article 6 (2) of Decision 2015/774, the distribution of purchases follows the capital key rule rather than Member States' levels of debt, with the consequence that the more a country enters into debt, the fewer securities issued in that Member State which the ECB will buy.[90] In the end, Member States have to 'rely chiefly on the markets to finance [their] budget deficits'.[91] Finally, the ECJ engaged with the possibility for the ECB to purchase and hold bonds, including those at a negative yield, until maturity. It stated that this possibility does not amount to waiving the right to payment which the ESCB has vis-à-vis the issuing Member State when the bond matures. According to Article 12 (2) of the Guidelines, the ESCB does not have an obligation to resell the bond purchased; therefore, the option of retaining them until maturity does not represent a derogation from a general rule. Similarly, the fact that such bonds could have a negative yield does not infringe any rule set out by primary law. Article 18.1 of the ESCB Statute does not envisage any minimum yield for bonds to be purchased. Despite the financial advantages that these bonds offer to the Member States issuing them, it cannot be said that the purchase of these instruments from the ECB amounts to a direct monetary financing, as the same conditions envisaged for any other bonds apply to them.

In light of all these considerations, the ECJ ruled that Decision 2015/774 neither exceed the ECB's monetary policy mandate, nor infringed the prohibition of monetary financing.

[90] *Gauweiler* para 140.
[91] ibid para 141.

Having confirmed the validity of such decision, the Court briefly rejected the fifth question on admissibility grounds. The issue referred, concerning the sharing of losses in the event of a Member State's default and the consequent recapitalisation of its central bank, was dismissed as hypothetical. Given the speculative nature of the question, which was deemed to bear no relation to the actual facts of main proceedings before the GCC, the Court declared it inadmissible.

4.2.2.2.3 Weiss from the perspective of solidarity

Despite the similarity of the *Weiss* findings with those of *Gauweiler*, as both the ECJ's decisions embraced the same conception of stability in the Eurozone, the reaction to *Weiss* was unexpectedly different. Contrary to the most common predictions,[92] in its final judgment the GCC did not share the ECJ's conclusions. Having resumed the proceedings and reunited them for joint decision, the GCC declared the PSPP *ultra vires* and urged both the Federal Government and the Bundestag to take the steps necessary to ensure that the ECB conducts a proportionality assessment within three months. In the event that, after this transitional period, the ECB Governing Council failed to demonstrate 'in a comprehensible and substantiated manner' that the monetary policy objectives pursued by the bond-buying programme are proportionate to its economic and fiscal policy effects, the Bundesbank might no longer participate in the programme.[93]

The reaction of the GCC was unexpected because from a legal perspective the PSPP was less problematic than the OMT programme. Unlike the OMT, the PSPP is not a selective programme, neither unlimited with regard to the purchase volume nor conditioned upon participation in financial assistance programmes. For these reasons, some commentators deemed the differences in view between the two Courts to be less conflicting and pointed how it would be 'unlikely that the FCC will declare the ECB's policy of quantitative easing ultra vires in the PSPP case'.[94]

However, despite the more accommodating tone of the *Weiss* preliminary reference, the outcome of the case once resumed before the German Court was not equally

[92] See for instance, Andrej Lang, 'Ultra vires review of the ECB's policy of quantitative easing: An analysis of the German Constitutional Court's preliminary reference order in the PSPP case' (2018) 55 CMLR 923, 936. Franz Mayer, "Rebels Without a Cause?' A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 GLJ 111.
[93] BVerfG, 2 BvR 859/15, Decision of 5 May 2020 ('*BVerfG PSPP'*) para 235.
[94] Lang (n 92).

conciliatory. Rather, in a climax of escalating adjectives, the GCC assessed the Weiss judgment as 'simply untenable', 'not comprehensible' and thus 'objectively arbitrary'.[95]The reasoning of the final judgement will be examined in full later in this chapter (see *infra*). For now, it suffices to say that the reason why the GCC rejected *Weiss*'s conclusions was the ECJ's allegedly flawed proportionality analysis. For the Karlsruhe's Court, the ECJ's proportionality review did not substantially engage with the reasons provided by the ECB to justify its conduct. It merely accepted the operational grounds on which the ECB had based its course of action, reducing the duty to state reasons to a mere procedural requirement to be satisfied by a generic assertion of the technical and economic conditions behind a decision.

Basically, the GCC assumed that the information given by the ECB and not challenged by the ECJ was not enough for exercising judicial review. At the same time, though, it was too much for market operators, who could know with certainty that the ECB would intervene on the secondary market. This inconsistency in the GCC's reasoning has not gone unnoticed[96] and is specularly reflected in the ECJ's decision. With a diametrically opposite view, the ECJ stated that the ECB had provided sufficient information about the PSPP's suitability and necessity vis-à-vis the desirable monetary policy objective but not enough to create an equivalence between secondary market and primary market purchases. Consequently, for the ECJ, the information disclosed by ECB has not circumvented the prohibition of monetary financing.

This paradox regarding the information disclosed, however, is only apparent in the ECJ's reasoning. The Luxembourg Court limited itself to a 'light touch' review, without aspiring to assess the reasons and effects of the PSPP substantially. The inconsistency is instead more pronounced in the judgement of the GCC, given its claim about the necessity of a more meaningful engagement with the ECB's appraisal of the conditions that formed the basis of its action. While the ECJ adopted a formal approach to the review of the ECB's conduct, accepting that it had put in place all the safeguards required by the rationale of Article 123 TFEU, the GCC challenged the assumptions surrounding the ECB's action. In particular, it focused on the actual effects of the

[95] *BVerfG PSPP*, paras 117-118.
[96] Mark Dawson and Ana Bobić, 'Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: Weiss and Others' (2019) 56 CMLR 1005, 1038.

safeguards adopted rather than their mere adoption per se.[97] This approach was part of its proportionality analysis, which took into account the PSPP's economic impact. The standard of review adopted by the ECJ, on the contrary, was stricter in scope, as it aimed to detect a manifest error of assessment on the part of the ECB. What the ECJ did not demand was a more thorough necessity test, providing alternative measures and calculating the costs of such different instruments.

The more intrusive test demanded by the GCC shows how this Court weaponises proportionality as an argument against solidarity. Not only against its thicker meaning of redistributive solidarity but also against solidarity stemming from commutative justice (on which see *supra* 4.2.1.4). The GCC's use of proportionality aims at defining the boundaries of the ECB's mandate, by assessing the desirability of the PSPP's effects. Given the 'strong economic policy effects' of the PSPP, consisting in the improvement of refinancing conditions for Member States, the GCC considered the PSPP an economic policy measure exceeding the ECB's mandate. The possibility to improve the position of (some) Member States before financial markets is a reason for opposing the programme.

However, the PSPP does not lead to any form of redistribution between Member States, as for its effects (see *infra*). It merely seeks to counteract deflation by increasing inflation to a target below but close to 2%, and thus restore the transmission of monetary policy and the good outlook of the price system. The PSPP is then closer to a notion of commutative justice, which is about giving what is due according to the rules of the market.[98] Therefore, the GCC ended up opposing the very objective of maintaining price stability which it had always considered the prerequisite for Germany's participation in the EMU.

Besides the political implications of a more intrusive type of judicial review - well-illustrated by the fact that all governments which intervened before the ECJ, including Germany, defended the legality of the programme - the adoption of this kind of standard of review would compromise the very possibility for the ECB to perform the tasks assigned to it by the Treaties.

The question of the constitutional collocation of the ECB in the EU legal order is a delicate and complex issue, in the sense that there are scholars who argue in favour of

[97] ibid.
[98] See for this definition, Peter Koslowski, *Principles of Ethical Economy* (Springer 2001) 184-210.

more accountability on the part of the ECB, which is not easy to reconcile with its independence.[99] In this sense, the duty to state reasons, in other words the principle of transparency, might serve as a bridge between the need for independence and the necessity of accountability. By comprehending the reasons behind a certain conduct adopted by the ECB, it would be easier to hold it accountable for the implications of its action while at the same time guaranteeing its freedom from political interference. It has been argued that independence should be interpreted as freedom from political interference and not from judicial review, as the latter has the advantages to give more space to the individual in an area, the EMU, otherwise characterised by the agency of Member States and EU institutions.[100]

However laudable the intention to potentiate the position of the individual vis-à-vis the ECB may be, the macroeconomics are not a field in which the individual belongs. It is an area in which only the aggregate effects of monetary policy count, and thus where only social groups or categories might be relevant for the purposes of an assessment of the impact of such measures. In other words, how the particular interests of a single individual might be vindicated through judicial remedies, when the effects of a monetary policy measure reverberate only at a macroeconomic level and are not justiciable?

The necessity for ECB's accountability cannot be satisfied by the means of judicial review but should be fixed in a political framework. Empowering a court to strike down a monetary policy measure would not fix the need for major responsiveness of the ECB to citizens. Moreover, provided that any kind of monetary measure has inescapable distributive effects, advantaging or disadvantaging certain social groups, a more intrusive scrutiny of the ECJ into the proportionality of such a measure would amount to making choices about who to reward or penalise. Therefore, sticking to the 2% inflation target represents a rational yardstick against which to assess the legality of the ECB's bond-buying programmes. Provided that such a criterion has been satisfied and the justification for the decision has been explained with care and accuracy, there is nothing more to ask from the ECB. Conceiving of a broader obligation to state reasons, consisting for instance in more detailed evidence on how the information has been gathered, would be highly unlikely to establish a 'correct' solution or promote a truly pluralist debate about other

[99] See Takis Tridimas and Napoleon Xanthoulis, 'A Legal Analysis of the *Gauweiler* Case: Between Monetary Policy and Constitutional Conflict (2016) 23 MJECL 17.
[100] Dawson and Bobić (n 96).

possible mechanisms to reach the inflation target. Even in this pluralist scenario regarding the process of information gathering and processing, the final say would be still in the hand of the ECJ. In sum, this kind of monetary decisions are ineluctably discretional and thus political. In other words, the reason why the standard of review should not go beyond a thin obligation to state reasons is the political nature of these monetary policy decisions, not their highly technical character.

Requiring the ECB to satisfy its duty of transparency in a more meaningful way would not change the conclusion about the necessity of a non-conventional measure such as a bond-buying programme. It might determine a different range of details of that programme, but not the very adoption of it. For instance, it would influence the concrete features of the programme such as its duration or size but generally these details are reviewed on a short-term basis. Therefore, rather than on these elements of the programme, the exercise of judicial review should be focused on other, more general, features of constitutional relevance. Among these, one may think of the selectivity or conditionality of purchases, as these elements bear a close link with EMU's constitutional design. In other words, it should be verified whether these elements are in line with the constitutional tasks of the EBC and the macroeconomic assumptions of the EU constitution.

In this regard, given the centrality of the market in the Eurozone's institutional asset, it should be asked whether the ECB's bond-buying programmes maintain this central role of the market and its corollaries in their design and implementation. Even though the element of conditionality is not present in the PSPP as it was instead in the OMT, it can be said that the fundamental principles related to market discipline and fiscal prudence are incorporated in both programmes. By way of the safeguards attached to these secondary market purchases, the ECB does not operate in a system where competition between Member States is set aside in favour of a cooperative scheme between them. In other words, the ECB operates in a system where there is not a triangular structure between Member States, a central bank and the market. The ECB does not mediate, as a central institution, between public actors, i.e. the states, and private actors, i.e. the investors. Through the rule of the capital key, the ECB has to maintain the different weight that Member States have in the Eurozone. And despite the intention to realign the yield spreads to Member States' fundamentals, the effect of the rules on bond purchases,

in particular the capital key rule, is to deepen the asymmetries between Member States which are far from being perceived as a Union. Indeed, if following the shares of subscription of the ECB's capital, the ECB has to buy, proportionally, the bonds of each Member State, even those that do not have high yields, the corrective rationale behind the secondary market intervention is lost.

As has been put by the GCC in the OMT referral order, 'pursuant to the design of the Treaty on the Functioning of the European Union, the existence of such spreads is entirely intended'.[101]

The intervention of the ECB does not aim to 'close such spreads', as rightly but also incautiously said by the ECB's President Christine Lagarde in a recent conference press amid the coronavirus pandemic.[102] A teleological reading of Article 123 TFEU, after all, confirms this view, as the ultimate objective of the provision is to preserve the market formation of prices for government bonds and prevent the ECB from acting as a lender of last resort.

The rationale underpinning these bond-buying programmes, then, is to restore the mechanisms of monetary policy transmission. As explained by the economic literature but also by ECB itself, given the strict relationship between banks and sovereigns, high government bond spreads worsen the borrowing conditions for banks, which in turn affect their lending capacity to households and businesses.[103] Therefore, the ECB's intervention aims at correcting this market inefficiency, caused by the irrational and herd behaviour of the market participants. In a vicious spiral of self-fulfilling expectations, private market operators' scepticism over a country's solvency makes market prices rise to unsustainable levels and the risk of default real.[104] This account, referred to as the theory of 'bad

[101] *BVerfG OMT* para 71.
[102] For the same conclusion see Carsten Gerner-Beuerle, Esin Küçük and Edmund Schuster, 'Law meets economics in the German Federal Constitutional Court: Outright Monetary Transactions on trial' (2014) 15 GLJ 281, 300, where they argued that 'the OMT Decision is not intended to 'neutralize' the differences in yields of bonds of different Member States, but to 'break' the expectations leading to a bad equilibrium'.
[103] See Thomas Mayer *Europe's Unfinished Currency: The Political Economics of the euro* (Anthem Press 2012), 110 who explains that the 'monetary policy intentions of the ECB as reflected in short-term interest rates […] were no longer transmitted to longer duration bonds and hence borrowing rates for households and companies'. For a general overview on monetary transmission mechanism see European Central Bank, 'The monetary policy of the ECB' (Frankfurt am Main, 2011) https://www.ecb.europa.eu/pub/pdf/other/monetarypolicy2011en.pdf accessed 5 July 2020, 58-62.
[104] See Dariusz Adamski, 'National power games and structural failures in the European macroeconomic governance' (2012) 49 CMLR 1319. See also Paul De Grauwe and Yuemei Ji, 'Self-fulfilling crises in the Eurozone: an empirical test' (2013) 34 Journal of International Money and Finance 15; Daniel Gros, 'On the Stability of public debt in a monetary union' (2012) 50 JCMS Annual Review 36; Michael Hüther,

equilibria', is not embraced by the GCC, which on the contrary assumes the smooth functioning of the sovereign bond market and looks with suspicion at any form of ECB's intervention.

The conception of market emerging from its line of argumentation does not envisage the possibility of market failures which are not imputable to the fiscal behaviour of Member States. On the other hand, despite the declared intention to correct these bad equilibria, the ECB's action – specifically its purchases in the context of the PSPP - did not solve these inefficiencies but rather reinforce the flight of capital towards those securities perceived as safe assets (flight to quality). The capital key rule does not allow to consider the Eurozone as a unitary entity and the ECB as a subject acting for the benefit of the Union as a whole. As emerges from the GCC's interpretation given to the ECB's remit, the aim 'to safeguard the current composition of the euro currency' cannot amount to avoiding the disintegration of the euro area as the later 'is obviously not a task of monetary policy but one of economic policy'.[105] The view of the ECB in this regard is quite different, as it claims that the singleness of the monetary area justifies its intervention on the sovereign bond secondary market.

The semantics of the singleness of monetary policy remains undefined, as both the ECB and the ECJ did not substantiate the actual content of this expression.[106] The only indication tentatively given by the ECJ in *Gauweiler* regarded the possibility for the Eurosystem to operate through a range of instruments not necessarily applicable to all Member States across the euro area.[107] Specifically, the Court excluded the necessity of a uniform monetary policy by means of general measures, making room for a plurality of monetary policy approaches throughout the Eurozone. Despite this clarification, what remains open to contestation is whether the capital key criterion is a constitutional rule that must be respected by every bond-buying programme of the ECB. The fact that the monetary policy instruments can be diversified throughout the euro area might point to the conclusion that this rule can be overlooked. The OMT was in this sense a selective

Guntram Wolff and Marcel Fratzscher, 'Taking the mandate of the ECB seriously' (*Bruegel* Opinion, 13 February 2014) https://www.bruegel.org/2014/02/taking-the-mandate-of-the-ecb-seriously accessed 30 October 2020. All cited in Adamski *op. cit.*

[105] *BVerfG OMT* para 72.

[106] See Fabian Amtenbrink and Christoph Hermann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 688.

[107] *Gauweiler* para 55.

programme but still valid upon conditionality, i.e. provided that a link with macroeconomic adjustment programmes was established. On the contrary, it is not clear whether selectivity can be severed from conditionality to be considered a standalone element. In other words, it remains an open question as to whether constitutional obstacles prevent the adoption of a programme which is selective but non-conditional. The new pandemic programme might answer to this question. So far, the programmes adopted have been either selective and conditional like the OMT or non-selective (and thus anchored to the capital key rule) and non-conditional programme like the PSPP.

The conception of market emerging from the ECB's position is then different from the one of the GCC. It is far from acknowledging an ample role for solidarity as it does not replace the market mechanism with monetary financing. Therefore, it does not constitute the monetary counterpart to unconditional financial assistance instruments between Member States. The pregnant role of the market is always latent in their implementation – both in the case of the OMT through the link with the EFSF and the ESM and in the PSPP through the capital key rule. This is not to say that monetary financing can be the panacea to any problem. It clearly has its limits and cannot solve alone the structural problems of the Eurozone. But it can be conceived of in different terms, as Member States were actually members of a Union rather than competitors on the market.

4.3 National constitutional constraints

This section looks at the judicial reception of euro-crisis measures by national courts. Subsection 4.3.1 offers a brief overview of how national courts have reacted to Eurozone developments. Subsection 4.3.2 focuses on the German Constitutional Court (GCC), which has been the most vocal in its opposition to EMU's constitutional transformation. The aim of the section is to unravel the limits that, from a national perspective, preclude further integration in the economic and fiscal area.

4.3.1 Overview of national decisions

The GCC was not the only national court which has been confronted with questions about the legality of the experimental measures adopted amid the financial

crisis. The involvement of national courts in the adjudication of euro-crisis developments varied to a different extent. There have been two strands of national cases, the first regarding the protection of social rights against the Memoranda of understanding (MoUs) signed by the countries receiving financial assistance, and the second challenging Member States' participation in EMU reforms.[108]

As has been noticed, this judicial involvement has been the consequence of the intergovernmental method through which the EU response to the crisis has been articulated. The adoption of international agreements outside the EU legal framework has indeed produced a greater degree of judicialization than what would have occurred with regard to measures adopted within the EU legal order.[109] The use of international law for the adoption of economic adjustment programmes, such as austerity measures or budgetary constraints and financial assistance mechanisms, has empowered some national courts, which in some jurisdictions have the power to review *ex ante* some international treaties.[110]

A significant number of courts have rendered decisions on austerity measures adopted in the frame of MoUs or the Eurosemester,[111] and few others have been asked to pronounce on the general reforms of the EMU architecture and their compatibility with national constitutions.[112] In particular, with regard to this second category of measures, the constitutionality of the ESM Treaty has been scrutinized in Ireland,[113] Estonia,[114] Austria,[115] Poland[116]and the Netherlands,[117] while the Treaty on Stability, Coordination,

[108] See on this classification Alicia Hinarejos, *The euro area crisis in constitutional perspective* (OUP 2015) 144-151.
[109] Federico Fabbrini, 'The Euro-crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley Journal of International Law 101-160.
[110] ibid. According to Fabbrini, the adoption of such measures as EU legislation would not have allowed national courts to review their legality but only to initiate a preliminary reference procedure. For a more nuanced account see Thomas Beukers, Bruno de Witte, Claire Kilpatrick, *Constitutional Change through Euro-Crisis Law* (CUP 2017) 273.
[111] For an overview of this case law, forming the aforementioned first category of national cases, i.e. the challenges to austerity measures, see Claire Kilpatrick and Bruno De Witte, 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges', EUI Working Paper, Law 2014/05.
[112] For an overview of these cases see Hinarejos (n 108) 147- 151.
[113] Supreme Court, *Pringle v. The Government of Ireland* [2012] IESC 47.
[114] *Riigikohus* (Supreme Court of Estonia) 12 July 2012, 3-4-1-6-12, Judgment of the Supreme Court.
[115] *Verfassunsgerichtshof* (Constitutional Court of Austria) 16 March 2013, SV 2/12 18.
[116] Polish Constitutional Tribunal, judgment of 26 June 2013, K 33/12.
[117] *Rechtbanks'-Gravenhage* (District Court of the Hague), decision of 1 June 2012, case 419556/KG ZA 12-523.

and Governance (TSCG) has been reviewed in France and Poland.[118] All these courts have saved both the ESM and the TSCG, showing a considerable amount of deference to the EU crisis-management law-making process and judicial self-restraint.[119]

The most notable exception to this trend has been the GCC, which with its activism has contributed to shaping the constitutional settlement of the EMU and orienting the legal debate about the future of the euro area. Already in its seminal decisions *Maastricht Urteil* and *Lisbon Urteil,*[120] the GCC had set the limits to further integration. Lately, it had specified these limits in the EMU context, spelling out its caveats with regard to fiscal matters and thus putting a cap on transnational economic solidarity in the EU.[121] Through the *Gauweiler* and *Weiss* preliminary reference procedures, it has established a dialogue with the ECJ on these limits. These two cases have basically developed some of the points the GCC had made over the years. Some hermeneutics patterns are indeed recurring in the GCC's decisions and are well epitomized in the most recent judgment rendered in the *Weiss* case, which for its importance and disruptive impact on the interjudicial cooperation will be analysed in more detail.

For the first time ever, the GCC did not follow the ECJ's verdict and threatened to stop the *Bundesbank*'s participation in the ECB's bond purchase programme, the PSPP. This act of disobedience breaks with a tradition that has seen the EU top courts in dialogue with one another through the tools of mutual recognition and a spirit of cooperation. In its EMU- related judgments, the GCC had already expressed its perplexities about crucial developments in the Eurozone, but it had nonetheless maintained an open, albeit critical, attitude towards European integration. For instance, when asked to pronounce on the request for a temporary injunction to stop the ratification of the ESM Treaty and the

[118] See respectively the French *Conseil Constitutionnel*, *Décision* 2012-653 of 9 August 2012 and Polish Constitutional Tribunal, judgment of 28 March 2013, K 11/13 and K 12/13.
[119] Besides courts, there have also been parliamentary bodies such as the EU Committee of the UK House of Lords or the Constitutional Law Committee of the Finnish Parliament which have reviewed some of these legal developments. See for instance the Opinions of the Finnish Constitutional Law Committee, PeVL 5 and 14/2011 on the EFSM Framework Agreement, PeVL 22 and 25/2011 and 13/2012 on the ESM Treaty, PeVL 24/2011 on the economic governance framework as revised by the Two-Pack, Six-Pack, and TSCG, all cited in Tuori and Tuori (n 11) 194- 199, notes 16,19,24.
[120] See respectively, *BVerfG*, BvR 2 2134/92 and 2159/92, Decision of 12 October 1993 (*Maastricht Urteil*); *BVerfG*, BvR 2 2/08 of 30 June 2009 (*Lisbon Urteil)*.
[121] See *BVerfG*, 2 BvR 987/10 of 7 September 2011 ('*BVerfG Greece & EFSF'*); *BverfG*, 2 BvR 1390/12 of 12 September 2012 ('*BVerfG ESM & TSCG temporary injunction'*); *BVerfG*, 2 BvR 1390/12 of 18 March 2014 ('*BVerfG ESM & TSCG principal proceedings'*).

TSCG, it had held that 'a continuous further development of the monetary union may be necessary', thus acknowledging the dynamic and changing nature of the EMU.[122] The stance recently assumed in the *Weiss*, instead, betrays a static and 'conservative' approach to the European economic constitution and also sounds as a threat to the newly adopted ECB's Pandemic Emergency Purchase Programme (PEPP).

4.3.2 The German Constitutional Court

4.3.2.1 The PSPP judgment: limits to transnational solidarity

The PSPP judgment, delivered on 5 May 2020, brought the *Weiss* saga concerning the Public Sector Purchase Programme (PSPP) to an end. Following the preliminary ruling of the ECJ, which found that the PSPP did not exceed the ECB's monetary policy mandate, nor it violated the prohibition of monetary financing (see *supra* 4.2.2.2.2*)*, the Second Senate resumed the proceedings and delivered its final judgement.

In its PSPP decision, while the GCC reluctantly agreed with the ECJ on the compatibility of the PSS with the prohibition of monetary financing expressed in Article 123 TFEU, it did not share the ECJ's conclusion that the PSPP falls within the ambit of ECB's competences. It held that, albeit flawed in some respects, the *Weiss* judgement is 'methodologically tenable'[123] to the extent it assesses the PSPP in light of Article 123 TFEU. On the contrary, on the point addressing the EU order of competences, the judgement is not acceptable.[124]

Therefore, the GCC declared founded the constitutional complaints that challenged the omission on the part of the Federal Government and the *Bundestag* 'to take action against the PSPP'[125] and precisely to avoid that the ECB could overstep its monetary policy mandate and encroach upon the economic policy of Member States.[126] According to the Court, this inaction resulted in a violation of the complainants' right to democratic self-determination under Articles 38 (1) first sentence in conjunction with

[122] This observation is made by Berger (n 66). The author highlights the mixed signals sent by the GCC in its pronouncements on EMU.
[123] *BVerfG PSPP* para 116.
[124] ibid para 117 and 118. The Weiss judgment is considered 'simply untenable', 'not comprehensible', and thus 'objectively arbitrary'.
[125] ibid 85.
[126] ibid 97.

Article 20 (1) and (2), and Article 79 (3) of the Basic Law (*Grundgesetz*- GG). As specified by Article 23 (1) first and third sentence GG, this right to democratic self-determination also applies to the process of European integration. The Basic Law does not allow the German state to transfer powers to the European Union in a way that undermines the principle of democracy and authorises the Union to create new competences for itself. According to a GCC's long-standing understanding, the scope of sovereign prerogatives to be transferred to the Union must preserve the principle of democracy and, in particular, the budgetary powers of the Parliament, which express the principle of sovereignty of the people and thus form part of the constitutional identity of Germany.

From its perspective, the *Weiss* judgment represented an *ultra vires* act, in that the ECJ failed to adopt a comprehensive standard of review in relation to the measures adopted by the ECB in the exercise of its broad discretion. In the words of the CGG, the ECJ's limited judicial review 'fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of Member State competences'.[127] For this reason, it did not follow the ECJ's preliminary ruling and urged the Federal Government and the Bundestag to take the steps necessary to ensure that the ECB conducts a proportionality assessment within three months. In the event that, after this transitional period, the ECB Governing Council failed to demonstrate 'in a comprehensible and substantiated manner' that the monetary policy objectives pursued by the bond-buying programme are proportionate to its economic and fiscal policy effects, the Bundesbank might no longer participate in the programme.[128]

Comprehensibly, the GCC's judgment has received fierce criticism from the scholarly community, which has either criticised its analysis on a point of law – in particular, as regards the principle of proportionality, democracy, and the right to vote[129] - or warned against its legal and political implications – especially for the primacy of EU law and the rule of law backsliding in Eastern Europe.[130] Here, the PSPP judgement is

[127] ibid headnote no 4.
[128] ibid para 235.
[129] See the vastness of contributions published on *Verfassungsblog* (https://verfassungsblog.de).
[130] See, inter alia, the comment of Maduro, and the appeal of academics about the respect of EU law's primacy. See Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (*Verfassungsblog*, 6 May 2020) https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/ accessed 3 June 2020. Daniel Kelemen *et al.*, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal

analysed from the point of view of solidarity. The relevance of this decision in terms of integration deepening in the area of EMU is noteworthy. It summarises all the obstacles that the GCC, the main guardian of the stability conception of the Eurozone, has theorised against fiscal solidarity.

The central issues on which the GCC has developed its reasoning in the PSPP decision concern the divide between monetary policy and economic policy constructed through the lens of proportionality, and the German constitutional identity, to which the electoral rights of German citizens and the budgetary autonomy of the *Bundestag* belong. The concept of democracy seems to be the underpinning common thread that holds these issues together, as in setting the limits to further integration at the EU level the GCC has assumed an unamenable and unalienable core of sovereign functions which pertain to the social contract between the State and its citizens.

The arguments put forward by the GCC for each of these issues are worth exploring from the perspective of solidarity because they articulate the obstacles that from a national angle might prevent a further development of redistributive practises across the EU. The following paragraphs offer an analysis of the GCC's proportionality analysis and the concept of constitutional identity, which the GCC has developed over the most recent years. This legal analysis is indeed functional to understanding and then overcoming the actual limits of EU transnational solidarity, whose significance Chapter V will attempt to reconstruct.

4.3.2.1.1 Proportionality

As already said, the GCC rejected the ECJ's conclusion that the PSPP fell within the ambit of ECB's competences. According to the GCC, the ECJ failed to consider the real effects of the PSPP since it did not apply the principle of proportionality, enshrined in Article 5 (1) and (4) TEU, to the division of competences within the EU. The standard of review adopted was indeed too deferential to the ECB's discretion, given that the ECJ limited itself to a self-restrained review of 'manifestly disproportionate' errors of

Order' (*Verfassungsblog*, 26 May 2020) https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ accessed 3 June 2020.

assessment.[131] As a result, for the GCC, the *Weiss* judgment itself is an *ultra vires* act with no binding effect upon the Federal Court.

This quite bold tone seems very far from the usual 'barking-but-not-biting' stance that the GCC has been maintaining in its relationship with the ECJ. Only in a very laconic passage, the Karlsruhe Court recalled, in an apparently dialogic attempt, that the ECJ's interpretation of Treaty provisions and acts of EU institutions, bodies, agencies and offices is, *in principle*, binding upon national courts, including constitutional courts.[132] In practice, though, it reserved for itself the faculty to conduct its own review of EU acts, specifically of the ECB decisions implementing the PSPP.

The fact that the GCC reserves for itself the faculty to scrutinize the jurisdictional limits of the EU is not something new and is not even the only constitutional court spelling out the idea of existing constitutional limits to the primacy of EU law. The Karlsruhe Court has always claimed a residual competence to declare ultra vires European *legislative acts* exceeding the limits of conferred competences. It started doing so after the establishment of the European Union under the Maastricht Treaty, but even earlier than that, in its famous *Solange* line of jurisprudence, it reserved to itself the protection of fundamental rights. To this first 'natural' function, it soon added the protection of sovereign prerogatives of the German legislative bodies (ultra vires review) and, more recently, 'constitutional identity'.[133]

In the PSPP case, however, the scrutiny of the Court involved an act, the ECB's decision, which falls within Union's exclusive competence, monetary policy. As such, this act cannot be said, *prima facie*, to erode national prerogatives since Member States had transferred their monetary sovereignty to the EU. However, given the blurred line separating monetary policy from economic policy, which formally rests in the hands of Member States, the GCC subjected the ECB's decision to review on the grounds that its indirect effects, in light of proportionality, place such a measure in the context of

[131] ibid para 156, citing the ECJ's Weiss judgment in paras 56,78,91 ('manifest error of assessment'), 79,81,92 ("the PSPP 'manifestly' goes beyond what is necessary to achieve its objective") and 93 *et seq.* ('its disadvantages are "manifestly" disproportionate to the objectives pursued').
[132] ibid para 118.
[133] For an overview in chronological succession of the different functions of review corresponding to the developments of European integration (ultra vires review after Maastricht and constitutional identity review after Lisbon) see Torsten Stein, 'Always Steering a Straight Course? The German Federal Constitutional Court and European Integration' (2011) 12 ERA Forum 219.

economic policy. Therefore, the ECB's decision would amount to an economic policy measure beyond the competences of the EU.

And yet, this analysis contradicted the limits of the *ultra vires* review that the GCC itself had traced in the *Honeywell* decision.[134] As reminded by the same Court, for an act to be successfully reviewed it should satisfy a double high standard: it must be manifestly ultra vires and it must result in a 'structurally significant shift of competences contrary to the principle of conferral'.[135] The ultra vires review should then be exercised cautiously and only when Union's action evidently goes beyond its attributed competences so as to no longer be covered by the German act of accession.

Notwithstanding these theoretical problems and the practical perplexities, the GCC resorted to the proportionality argument to declare the *Weiss* judgement inapplicable. Actually, from its reasoning, it is not clear whether it applied proportionality only to the ECB's decision or also to the interpretation given to such a decision by the ECJ. In other words, it is not clear whether the *ultra vires* act was the ECB decision on the PSPP or the ECJ's *Weiss* judgment. In a confused passage, the GCC states that the ECB decisions related to the PSPP constitute a qualified exceeding of the competences attributed to the ESCB.[136] This finding is corroborated in the subsequent paragraph, where it holds that 'ECB decisions must be qualified as ultra vires acts in light of Articles 119 and 127 *et seq*. TFEU as well as Article 17 *et seq*. ESCB Statute'.[137] On the other hand, it argues that the ECJ judgment itself constitutes an ultra vires act.

Whatever is the path which led to the inapplicability of the *Weiss* judgment, the ultra vires review conducted by the GCC seems flawed in many respects, especially in relation to proportionality. As has been noted, the GCC criticises the ECJ's application of proportionality – which has allegedly rendered the principle 'meaningless' –[138]without offering an irreproachable exercise itself.[139]In fact, the most problematic aspects of the GCC's decision concern the application of proportionality to the division of competences within the EU and the outcomes of this proportionality review. These aspects convey the

[134] BVerfG 2 BvR 2661/06, Decision of 6 July 2010 (*BVerfG Honeywell*).
[135] *BVerfG PSPP* paras 55-66.
[136] ibid para 116.
[137] ibid para 117.
[138] ibid para 127.
[139] See Toni Mazal, *Is the BVerfG PSPP decision "simply not comprehensible"?: A critique of the judgment's reasoning on proportionality* (*Verfassungsblog* 9 May 2020) https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not- comprehensible/ accessed 3 June 2020.

impression, already anticipated above (see supra 4.2.2.2.3), that proportionality is instrumentally used to impede the correction of market mechanisms in the sign of solidarity.

In relation to the first issue, the GCC criticised the fact that the ECJ had rendered this principle meaningless with regard to its function to delimit EU competences. However, as has been pointed out, the ECJ in *Weiss* did not use the principle of proportionality to distinguish between monetary and economic policy.[140] The GCC confuses two points addressed by the ECJ, the first being whether the PSPP was indeed a monetary measure and the second concerning the proportionality of a monetary measure as such.[141]In order to determine whether the PSPP was actually a monetary measure, the ECJ did not rely on proportionality, but on the purpose of the PSPP.

The critique moved by the GCC is that the ECJ should have also looked at the economic policy effects of the PSPP, which is exactly what the ECJ purposely decided not to do. *Weiss* adopts a purposive interpretation rather than an effects-centred hermeneutic approach exactly because distinguishing monetary policy from economic policy is simply impossible. In fact, monetary policy is just one aspect of economic policy or, as has been put, 'an accident waiting to happen' without fiscal union, in that monetary policy is 'simply one side of fiscal policy'.[142]

If the ECJ had challenged the ECB's assertion that the PSPP pursues a monetary policy objective and had relied on proportionality to check whether the ECB had ventured in an area of Member States competence, it would have made the exercise of the ECB's mandate meaningless and the achievement of its monetary policy objectives impossible. It would have replaced an independent – albeit not politically neutral - assessment with its own policy considerations.

From a methodological perspective, the most striking element of the GCC's decision is the fact that the principle of proportionality serves the unusual function to safeguard the EU division of competences – a function normally performed by the principles of conferral and subsidiarity, with the latter considered 'the safeguard of

[140] ibid.
[141] ibid.
[142] Kenneth Rogoff, 'Crash Time' (*Project Syndicate*, 7 September 2018) https://www.project-syndicate.org/onpoint/crash-time-by-kenneth-rogoff-2018-09?barrier=accesspaylog accessed 3 June 2020.

federalism'.[143] In the past, some commentators have doubted the soundness of subsidiarity and advocated instead a 'competence function' for proportionality, predicated on the capacity of this principle to mediate between Union and Member States interests.[144] However, proportionality does not address a competence problem, which is logically antecedent to the function it is called to serve. Proportionality is a head of judicial review, distinct from both the principle of conferral (Article 5 (1) and (2) TEU) and the principle of subsidiarity (Article 5 (3) TEU). It governs the *exercise* of Union action, precisely its content and form, which should not exceed what is necessary to achieve the Treaty objectives (Article 5 (4) TEU). Therefore, proportionality presupposes the *existence* of a Union competence: it does not indicate *whether* the Union can act, but *how* it should act once competence is established.

Nonetheless, the GCC made this principle perform the function to delimit the *ambit* of competence of the Union, whereas it normally serves the function to delimit the *action* of the Union within its ambit of competence. Not only did the GCC wrongly apply the principle of proportionality to the division of competences, but it also used it to review an act which falls within Union's *exclusive* competence. Even though scholarly analyses have resorted to proportionality as a form of competence control,[145] they have always placed such a function within the subsidiarity calculus since at stake was the exercise of Union's shared competence or supporting competences. In other words, when the power to act is not shared nor the Union has supporting/coordinating/supplementing powers, the problem of how the power should be divided between the centre and its Member States does not arise because Member States have voluntarily decided to transfer their sovereign prerogatives in limited subjects to the centre.

The Treaty reflects this political choice, which is internalized *in abstracto* by its provisions and should not then scrutinized in *concreto* by a court. Primary law already embodies a certain balance between Union and Member States interests, especially in those fields which are in the remit of Union's exclusive competences. An *ex post* judicial

[143] Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68 CLJ 525.
[144] Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CMLR 63. For a critique see Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 JCMS 72. The use of proportionality to safeguard the division of competences within the EU is reminiscent of the debate on competence creep surrounding the free movement of persons.
[145] See Davies (n 144) but also Schütze (n 143) 532, who considers subsidiarity as 'federal proportionality'.

scrutiny on such a balance would be highly problematic for a number of reasons. First, it would disregard the Treaty constitutional schema, rendering the political preferences, unanimously expressed by Member States, meaningless. Second, it assumes that there is a competence creep, i.e. a potential encroachment on national prerogatives by the action of EU institutions, when instead the Union has exclusive competence and Member States have no scope of action. Third, even assuming that the ECJ should check Union's incursions into national autonomy by balancing Union's action against national interests, this balancing control assumes that Member States have uniform instances and similar positions vis-à-vis the Union.

Yet, if in principle this assumption may hold true, in reality Member States do not have the same interests. This is even more evident in the PSPP case, as the ECB's quantitative easing programme does not have the same impact upon Member States, not so much for its distributive consequences[146] but because of different political economy preferences at the domestic level. The application of proportionality by the GCC resulted in a nation-centric assessment of the PSPP's effects, which reflects a particular macroeconomic view and policy objectives. Macroeconomics is a field highly political and discretional and therefore not juridified in the majority of national constitutions, which generally contain very few economic principles hardly justiciable.[147] By invoking a jurisdictional control on the part of the ECB, and thus operating itself a balancing exercise, the GCC entered uncharted territory and ended up assuming that the outcome of its judicial scrutiny was the correct and desirable solution for every Member State.

In sum, the merit of the GCC's proportionality analysis is to have exposed the ambiguity of monetary policy decisions that cannot be separated from their broader economic effects. It has shown the need for further democratisation in the EMU area, while respecting ECB's independence. However, such contestation of the *effects* of monetary policy decisions needs to unfold within a political frame rather than in a judicial context. Courts are not suited to this kind of control, as they would end up conducting a political scrutiny. The outcomes of the GCC's proportionality application are the evident example of this undesirable judicial politicisation.

[146] Klaus Tuori, "Has the Euro Area Monetary Policy Become Redistribution by Monetary Means? 'Unconventional' Monetary Policy as a Hidden Transfer Mechanism" (2016) 22 ELJ 838.
[147] Kaarlo Tuori, *European Constitutionalism* (CUP 2015).

As mentioned above, the results of the GCC's review are the other problematic aspect of the PSPP decision. The Court basically underplayed the policy-making effects of interpretation,[148] which are the reason why courts tend to exercise a light-touch review of measures such as those at stake in the PSPP case. Proportionality is a standard of review which is traditionally used to protect individuals, every time the exercise of public power threatens or compresses their rights. Its use in cases involving national interests, as advocated by the GCC, would lead to the circumstance that a Court like the ECJ ought to pick up which national interest to protect. Therefore, claiming that a principle naturally destined to protect *individual interests* should apply to protect *national interests* would create an unsolvable predicament for the ECJ.[149]

And yet, the critique that the GCC moves to the ECJ regards the light-touch review of the ECB's decision under proportionality *stricto sensu*. According to the Karlsruhe Court, the ECJ should have pedantically followed the three distinctive conceptual steps composing the proportionality test: suitability, necessity, and appropriateness (or proportionality *stricto sensu*). Instead, the ECJ did not sufficiently engage with the third step of this test, as it did not consider all the effects of the PSPP. In particular, the ECJ assessed the disadvantages of the programme, arguing that the adoption of measures to limit the losses potentially arising from the PSPP ensures its overall proportionality. According to the GCC, though, the ECJ failed to explicitly consider the 'opposing interests' that those measures are supposed to balance. In particular, the Luxembourg Court did not consider the full range of economic policy effects of the PSPP as it focused only on the risk of losses, thus failing to weight the adverse consequences of the PSPP against its beneficial effects. In this regard, the PSPP judgment seems to assume, on the one hand, that these measures serve the fiscal policy interests of Member States; on the

[148] Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 YEL 105.

[149] This instrumental transformation of proportionality, from a principle protective of individual rights into an instrument of protection of national welfare, is a pattern visible also at the micro-level, namely in the area of free movement. A shown in chapter III, the citizenship-dismantling case law has promoted a teleological re-reading of proportionality which has tilted towards the protection of Member States' public finances from illegitimate claims. It has similarly become an instrument to shield Member States' public finances from illegitimate claims of equal treatment rather than serving its traditional and inherent function of protecting individuals from administrative powers. A reinvigoration of proportionality at the micro level, i. e. free movement of persons, and at the macro level is necessary to address the tension between EU solidarity and nation-centric, if not nativistic, welfare policies of Member States.

other, it does not clarify what the opposing interest against which the ECJ should have balanced those budgetary interests of Member States is.[150]

The GCC presents this tripartite proportionality test as a technical necessity and, to this end, it enumerates a number of European legal orders that make use of this tripartite scheme, or as in the case of Italy, a quadripartite scheme.[151] While it is true that proportionality, intended as the exercise of balancing between conflicting instances, is a tool known by many legal experiences, it is not accurate to assume that the conditions and the modalities under which such a tool is applied are the same across Europe. Quite the contrary, there is not a uniform methodology with regard to proportionality.[152]

Even if nowadays proportionality is a cornerstone of (global) modern constitutionalism, it does not necessarily follow the conceptual scheme outlined by the GCC. In many constitutional systems, there is not an explicit systematisation of the proportionality review based on logically distinct sub-tests. Moreover, not only proportionality review is not articulated through the same module across Europe, but its concrete application depends on different approaches which reflect diverse contextual conditions and are indebted to different philosophical and political preferences.[153]

Therefore, the GCC adopted and imposed a parochial understanding of proportionality. And by doing so, it *de facto* imposed German preference over a certain political economy choice, which is monetary dominance.

The GCC suggests that the ECJ should have embarked in a balancing test so to take into account a vast range of PSPP's effects. In practice, it suggests the outcome of this balancing exercise. In its own proportionality review, the GCC gives precedence to

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[150] ibid para 132.

[151] As the Italian *Corte Costituzionale* resorts to the additional element of reasonableness. See Giuseppe Martinico and Marta Simoncini, 'An Italian Perspective on the Principle of Proportionality' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 235.

[152] For a detailed analysis of proportionality in national and international experiences, Aharon Barak, *Proportionality* (CUP 2012), Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 73 cited in Marta Cartabia, 'I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana' (Conferenza trilaterale delle Corte costituzionali italiana, portoghese e Spagnola, Roma, Palazzo della Consulta 24-26 October 2013) https://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf 3-6, accessed 3 September 2020.

[153] In cases where proportionality *strictu senso* applied, which are those regarding fundamental rights, the outcomes of this balancing exercise would be oriented towards freedom in countries with a more 'libertarian' conception of human rights and, on the contrary, towards more communitarian value in countries with a more 'dignitarian' tradition.

those effects which stick to the German ordoliberal agenda. Among these, it lists the impact on economically unviable companies, which would be artificially kept afloat as a result, as well as the disincentives to sound budgetary policies of Member States.[154]By stating that the ECJ should have included in its balancing test some PSPP's consequences such as the issuance of low-yield governments bonds, the benefits of some Member States in their refinancing, or the economic boost given to the credit rating of some commercial banks,[155] the GCC implicitly admits that these economic and social effects constitute costs or literally a 'high collateral damage'.[156] It conveys a precise political view on public debt, state intervention, pensions, the insurance system, and real estate prices.

Although the GCC accused the ECJ of allowing the ECB to 'pursue an economic policy agenda by means of bonds purchases,[157] it did exactly the same: pursuing its political economy agenda of ordoliberal descent. The critique moved to the ECJ has then exposed the myth of neutrality that has long surrounded money and monetary policy.[158]The alleged violation of proportionality has indeed revealed the emperor's new clothes: central banks' decisions have distributive effects and repercussions on fiscal policy. The use of proportionality as a lever to declare the ECB's decision on the PSPP *ultra vires* is instrumental to the GCC's own vision of how the Eurozone should work. The PSPP is not disproportionate because it empowers the ECB to determine the fiscal policies of Member States, thus resulting in fiscal dominance.[159] It simply does not reflect the German 'stability conception', which does not allow for an expansion of central banking activities. As long as the ECB maintained an overt price-stability oriented monetary policy, the Court did not find any violation of proportionality, as the ECB had arguably stayed within the latitude of its mandate. Nevertheless, even this restrictive monetary policy has economic policy effects and, to say it with the GCC, determines the fiscal policies of Member States.

The reason why these restrictive monetary policy measures had not been challenged before might be found in the EMU constitutional design which allegedly does

[154] *BVerfG PSPP* para 139.
[155] ibid para 137.
[156] ibid para 140.
[157] ibid para 162.
[158] See Adam Tooze, 'The Death of the Central Bank Myth' (*Foreign Policy*, 13 May 2020) https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/ accessed 3 September 2020.
[159] *BVerfG PSPP* para 170.

not allow for an expansionary monetary policy given the primacy accorded to price stability. However, the fact that price stability is the ultimate objective of monetary policy does not mean that the ECB cannot adopt quasi-fiscal instruments like bond-buying programmes when pursuing such objective. A programme like the PSPP is a means to an end, which does not purposely seek certain distributive consequences. Nonetheless, it does have an allocative impact as all monetary measures which by definition have distributional effects. For instance, a decision on interest rates has consequences for borrowers or savers, and consequently for certain social groups. Hence, monetary policy is not and cannot be neutral.[160]

The ECJ clearly highlighted this point in *Weiss*, where it argued that the separation between monetary and economic policy, namely the asymmetry at the heart of the EMU's design is not absolute.[161] In unveiling this truth, the ECJ recalled Article 127 TFEU, which states that the ECB should support the general economic policies of Member States when acting towards price stability. The price stability mandate should be then mitigated by economic policy considerations at the national level. This does not amount to 'fiscal dominance', as the ECB - like every other central bank whose legitimation relies on its own independence – should refrain from policymaking. Taking into account the economic effects of its monetary policy decisions simply means that the ECB does not act in a vacuum and that the price stability goal needs to be considered not as a numerical formula but in a broader context. That means that in a deflationary scenario, the ECB should resort to a stimulus package and embrace an expansionary monetary policy. Before the economic crisis, the ECB's decisions did not come under closer scrutiny and were not challenged for their economic effects. Only when its monetary policy started to follow a different direction, the ECB met criticism, especially in Germany, where the common economic thinking sees monetary dominance as a constitutional rule both domestically and at the EU level.

Although an imbalance in favour of monetary dominance is perceivable in the Treaties, the ECB's monetary policy should nonetheless be coherent with national fiscal policies. In a situation where there is no growth and risk of deflation, the very target of inflation – which still remains a priority for the ECB - justifies expansionary measures.

[160] Tooze (n 158).
[161] *Weiss* para 60.

In any case, the ECB stimulus should be read in the context of other Treaty provisions, and in particular of Article 127 TFEU – which, by affirming the principle of an open market economy, assumes that market allocative dynamics should be the preferred way of distributing resources and consequently that the ECB intervention should remain marginal.

In conclusion, although the ECB's scope of action is broader than it used to be before the crisis, its ultimate objective of price stability has not changed. The limit put by the GCC to a more expansive monetary policy by way of the proportionality principle can be easily overcome, as expansionary monetary policy does not render the separation between monetary and economic policy meaningless, but simply not absolute. From the perspective of the GCC, however, the distinction between monetary policy and economic policy is not only relevant to the division of competences between the EU and its Member States. It has a bearing on the principles of democracy and popular sovereignty, as it 'determines the level of democratic legitimation and oversight of the respective policy area'.[162]

4.3.2.1.2 Constitutional identity

The PSPP judgment is not only flawed with regard to its proportionality analysis and its underpinning conception of monetary policy. It is also problematic for the vision of democracy it embraces, and consequently for the constitutional rights which are the corollaries of democracy: the right to vote and the budgetary power of the Parliament.

As briefly said above, the question of democracy has been developed in strict relationship with the *ultra vires* review of EU acts. As many other top courts in Europe, the GCC has claimed the power to scrutinize the compatibility of EU acts with the national constitution. The subjection of EU acts to national constitutional limits ensures that courts fulfil their duty to protect national constitutional settlements from illegitimate incursions. Despite the acceptance of the supremacy of EU law, most national constitutional courts do not acknowledge the 'original' nature of the EU legal order. On the contrary, they make EU law's supremacy derive from their national constitutions, in particular from an act conferring the EU specific and limited competences, thus rejecting the ECJ's monist conception about the interactions between the two legal orders. National

[162] *BVerfG PSPP* para 159.

courts, therefore, accept the supremacy of European law as long as the EU has acted within its sphere of competence and EU acts do not run up against the limits placed by the national legal order.

The Italian Constitutional Court (ICC), for instance, has elaborated the doctrine of *controlimiti*, which subjected the applicability of EU acts to the fundamental principles of the constitutional order and inalienable human rights.[163] According to the jurisprudence of the ICC, the acceptance of the supremacy of EU law is then not unconditional but subordinated to some counter-limits, the infringement of which would open a breach in the core of the Constitution.

Another example of jurisdictional control over EU action has come from the German Constitutional Court, which has claimed the residual power to review acts of the European institutions contravening the German Constitution. In particular, as stated above, the three different heads of review under which the GCC has addressed (or claimed to address in the future) questions of constitutionality related to EU law are 1) the fundamental rights review, 2) the *ultra vires* review, and 3) the identity review. Although acknowledging the primacy of EU law, the GCC could in practice exercise its reserved competence to control EU acts impinging on fundamental rights (the so-called *Solange* doctrine),[164] exceeding the scope of EU competence (*ultra vires* review),[165] or violating the content of the constitutional identity of the Basic Law ('identity review').[166]

These distinctive models aim to fulfil the duties of the GCC with regard to 1) fundamental rights protection, 2) the safeguard of democracy and sovereign prerogatives of the Republic and 3) the preservation of the inalienable functions of the state.

The first and oldest model developed the so-called *Solange* formula to safeguard the 'essential content' of basic rights against the sovereign powers of the then European Communities.[167] The second type of judicial review, the *ultra vires* review, was expounded in the context of a case concerning the ratification of the Maastricht Treaty.

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[163] For the *controlimiti* doctrine see the seminal decisions of the Italian Constitutional Court, *Corte Costituzionale*, n. 183/1973 *Frontini v. Ministero delle Finanze* and n. 170/ 1984 *Granital v. Amministrazione delle Finanze*.

[164] See *BVerfGE* 37, 271, *Internationale Handelsgesellschaft vs. Einfuhr und Vorratstelle für Getreide Futtermittel (Solange I)* [1974] 2 CML Rev 540; *BVerfGE* 73, 339, *Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CML Rev 225.

[165] *BVerfG*, 2 BvR 2134/92 and 2159/92, Decision of 12 October 1993 (*Maastricht Urteil*).

[166] *BVerfG*, 2 BvE 2/08, Decision of 30 June 2009 (*Lisbon Urteil*).

[167] According to this formula, as later revised by the GCC, the scrutiny of EU acts is required only 'as long as' ('solange') the ECJ fails to ensure effective human rights protection.

In a seminal decision of 1994, the so-called *Maastricht Urteil*, the GCC extended its judicial review over those acts transgressing the division of competences between the Union and Member States. The GCC qualified the Union as an association of democratic and sovereign states ('*Staatenverbund*'), based on the principle of attributed competences. It made the authority of EU law dependent upon the voluntary transfer of sovereign functions to which Member States had given assent in some delimited fields. Therefore, for an EU act to be valid it should be adopted within the Union sphere of attributed competences. The GCC claimed for itself the power to review this condition, to which it subjected the validity and applicability of EU law in Germany. The reason for this 'conditional' supremacy accorded to EU law lies in the connection between the transfer of sovereignty and the principle of democracy. For the GCC, only the EU acts which fall within the scope of application delimited by the Treaties are covered by a democratic mandate. It is only within its respective sphere of competence that EU law has the authority deriving from the people, who by way of the ratification process voted by their national Parliament authorised a transfer of sovereign powers.

Against this background, the GCC set a limit to a potentially open-ended integration process, arguing that some areas of competences cannot but remain in the purview of the state because they require a level of democratic legitimation which the current configuration of the EU, being a *Staatenvernbund*, is not able to satisfy.

The *Lisbon* judgment further expanded these considerations, as the GCC reinstated the need for a national allocation of certain competences, which belong to the core content of the constitutional identity of a state. The GCC deemed some public powers to be essential to the very existence of the state, in that they qualify its economic, cultural and social living conditions. Among these, the GCC identified the 'fundamental fiscal decisions on public revenue and expenditure' as well as 'decisions on the shaping of the social state.'[168]The idea behind this jurisdictional reserve is that there are some domains which belong to the core of 'stateness', and thus cannot be alienated to an entity, such as the Union, which does not satisfy the conditions for democracy and legitimation.

These 'reserved domains' were enlisted together with decisions on substantive and procedural criminal law, the monopoly over the use of legitimate force, choices of cultural importance such as those pertaining to the education system or family law. In this

[168] BVerfG *Lisbon Urteil* para 252.

list the GCC basically included all those elements which shape 'the citizens' living conditions, in particular the private sphere of their own responsibility' but also their sphere of participation to the political life of a country.[169]

The inclusion of fiscal policy in this list of reserved competences requiring a high degree of democratic participation is redolent of a long-established tradition epitomised in the principle of 'no taxation without representation'. The current EU constitutional framework, which has not (yet) evolved into a fully-fledged democratic settlement having the democratic legitimation of a (EU) federal state, would prevent the conferral of fiscal competences to the Union.

In the aftermath of the euro crisis, the GCC has then mobilised the limit of 'constitutional identity' to shield the budgetary powers of the *Bundestag*. In the context of three constitutional complaints directed against financial aid measures for Greece and the giving of guarantees to the EFSF, the Court stressed the link of budgetary powers with representative democracy;[170] similarly, in its decision on the ESM, it restated the necessity of parliamentary approval for any increase in Germany's contribution to the fund.[171]Even though the GCC did not find that these crisis-management measures were in contrast with the German Constitution,[172] it set out the conditions under which the authorisation to adopt measures of solidarity towards other Member States should be given. In this regard, the GCC required the prior consent of the *Bundestag* with regard to any financial commitments of the Federal Government, including those arising under international treaties or in a system of intergovernmental administration.[173] This mandatory consent, moreover, should consist in a precise authorisation whose object cannot be undetermined or too generic as this would compromise the Parliament capacity to determine and monitor the present and future budget. The fiscal burdens should be then predicable and calculable, so as to not only avoid the erosion of budgetary powers of the Bundestag but also to preserve representative democracy as the expenditure decisions of the latter should be taken in the name of the people it represents.

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[169] ibid para 249.
[170] *BVerfG Greece & EFSF* (n 111).
[171] *BVerfG ESM & TSCG temporary injunction* (n 121).
[172] Specifically, the acts contested in the Greek bailout case (n 170*)* were the Monetary Union Financial Stabilisation Act, which authorised financial assistance to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism.
[173] *BVerfG Greece & EFSF* headnotes 2 and 3.

It is not by coincidence, indeed, that the group of Eurosceptics who challenged the German and European measures before the GCC used Article 38 (1) of the Basic Law as the legal basis for their complaints. This constitutional provision envisages a right to vote for the election of the *Bundestag* and, combined with Article 20 (1) and (2) which affirms that all state authority emanates from the people, gave the standing to challenge EU law. The principle of parliamentary representation of the popular will, unamendable according to the eternity clause in Article 79 (3) of the Basic law, has been instrumentally turned into an *actio popularis*.[174] By way of the right to vote under Article 38 (1), any person can then challenge an EU act before the GCC, thus circumventing the European rules governing the system of judicial remedies in the EU.[175] As a result, the GCC will extend its jurisdiction not only to the action of EU institutions on which both the Federal Government and the Bundestag may interfere, but on the conduct of the ECB which pursuant to Article 130 TFEU must be independent from political influence, especially from that of a highly political institution such as the Parliament. This indirect review of the GCC is also in contrast with German constitutional law, precisely with Article 88 (2) of the Basic Law.[176]

The conception of democracy embraced by the Court has been criticized for being inward-looking and parochial, as it does not take into account the interests of other citizenries of the Union. It opposes the view that sees EU law as the result of a discursive process and a corrective instrument of national political processes, through the inclusion and representation of the instances of the nationals of other Member States in the national deliberative sphere.[177] This view argues that EU law could promote a different understanding of citizenship, no longer linked with traditional bonds of nationality which build on a ethno-cultural homogeneity of the demos.[178] This form of citizenship would

[174] In these terms the Dissenting Opinion of Judge Gerhardt, BVerfG, 2 BvR 2728/13 et al. *OMT*, Order of 14 January 2014, paras 6- 7. He criticized the expanding scope of *ultra vires* review, which came close to granting the voters a general right to have the laws enforced. For a similar critique see Wendel (n 74) 277. This author argues that a paradigm shift has occurred in the GCC's case law on *ultra vires* review, in that the right to vote is no longer linked with the plausible and demonstrable loss of parliamentary powers (right to democracy), nor with a fundamental right violation. The right to vote can be invoked on the basis of a mere allegation of its violation.

[175] Specifically, Article 263 TFEU regarding the actions brought against the acts of the European institutions.

[176] This provision was introduced in 1992 to allow the ratification of the Maastricht Treaty.

[177] Maduro, *We, the Court. The European Court of Justice & the European Economic Constitution* (Hart Publishing 1998) 168.

[178] For this conception of European citizenship see Joseph H. H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219. See also Joseph H. H. Weiler, Ulrich

then be distinct from traditional state-based citizenship: European citizenship and national citizenship would coexist on different planes and reinforce each other.

Despite its self-proclaimed openness to European integration, the GCC seems instead to have adopted an 'organic' conception of citizenship and consequently of democracy, defined as the expression of the 'cultural social and political homogeneity of a people'.[179] The reasoning of the Karlsruhe's judges seems to equate the broad concept of democracy with its parliamentary and majoritarian version. As has been pointed out, it neglects other conceptions of democracy, especially those elaborated in the context of EU law. These accounts enrich the classical model of representative democracy with elements of the so-called deliberative democracy which presupposes a reflexive understanding of politics.

Conceived in these terms, democratic legitimacy might stop to be a limit to further European integration in fiscal matters because it would imply the fact that the EU can generate its own public goods through mechanisms other than classical channels of representative democracy. In some accounts discussing the so-called EU democratic deficit, it is the nature of the limited competences transferred to the Union that does not allow the latter to benefit from said post-national democratic legitimacy.[180] Competences in fiscal matters per se imply a high degree of democratic legitimacy and enough room for contestation because they insist on distributive and redistributive choices such as decisions on taxation and public expenditure. The fact that these competences are left to Member States' political processes justifies the thin degree of democratic legitimacy of the Union, which for this reason should not even resemble that of a state. In this argument, democratic legitimacy and constitutional identity come together as limits to further European integration.

In the next chapter, I will prove however how these objections can be overcome, in an attempt to reconstruct the meaning of solidarity in the Union.

R. Haltern and Franz C. Mayer, 'European Democracy and Its Critique (1995) 18 West European Politics 4.

[179] See Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (OUP 2020) 322, citing Weiler (n 177) and BVerfG *Maastricht Urteil* paras 41-42.

[180] See Andrew Moravcsik, In Defense of the 'Democratic Deficit': Reassessing the Legitimacy of the European Union' (2002) 40 JCMS 603; Giandomenico Majone, ''Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 ELJ 5.

4.4 Conclusions

This chapter posed the question of whether the constitutional mutation through which the European economic constitution has gone on the surface has been accompanied by a deeper transformation of its underlying normative assumptions and principles. Specifically, whether these underlying principles now allow the EU to potentially be a transfer union, i.e. to have a re-distributive capacity beyond the distributive mechanisms of the market.

The first section of this chapter focused on the bailout measures, the most evident sign of transformation given the no-bailout clause, to understand whether they have been a genuine expression of solidarity or a price stability-saving mechanism. To this end, it analysed the *Pringle* judgment and showed that the ESM, the most significant of these measures, did not amount to a circumvention of the prohibition under Article 125 TFEU because it did not alter the underlying market logic that still governs the relationships between Member States. Price stability, with its underlying rationale of market discipline, remains the central focus of the bailout measures and a limit to transnational solidarity.

The second section focused on the unconventional monetary policy measures adopted by the ECB to understand whether the crisis has had an impact on the ECB's mandate. The question asked was whether the principle of financial stability discovered in *Pringle* could have meant a change for the ECB's mandate. Specifically, whether this new principle could have oriented the ECB's action in the sense of a different and more expansive monetary policy. The analysis of *Gauweiler* and *Weiss* showed that, contrary to the no-bailout clause enshrined in Art 125 TFEU, the prohibition of monetary financing of Article 123 TFEU does not have as its ultimate objective financial stability. Therefore, ECB's action continues to be oriented towards price stability. If financial assistance pursuant to Article 125 TFEU is now allowed under strict conditions, ECB's financial assistance under Article 123 is firmly precluded.

In conclusion, although EMU's constitutional design has partially changed over the last decade through the institutional innovations brought about by Member States within and without the EU legal framework and unconventional monetary policy measures of the ECB, its macroeconomic assumptions have not changed. The crisis has played a limited role as regards EMU. It has relaxed some rules but has not deeply altered its functioning, which continues to be centred around the discipling role of the market.

Finally, the third section explored the constitutional limits to EMU's transformation from a national perspective. It showed that the resistance to institutional changes opposed by the GCC is not justified because the crisis has not led to a new conception of 'stability' of the euro area. Nevertheless, it engaged with these limits – the constitutional separation between monetary policy and economy policy protected by the principle of proportionality and the constitutional identity – to understand whether they can be overcome if a true transformation of EMU is to happen. The next chapter deals with this question.

5 Chapter V: Reconstructing solidarity

5.1 Overcoming the limits to further European integration

The emphasis that the German Constitutional Court (GCC) has put on the budgetary autonomy of the *Bundestag* and the need to subject supranational fiscal obligations to prior parliamentary approval are elements recurring in the opinions delivered by the Finnish Constitutional Committee on the management of the Eurozone.[1] Like the GCC, this quasi-judicial body has argued that the Parliament cannot relinquish its responsibility over budgetary decisions. In its decision on the EFSF Framework Agreement, for instance, it has spelled out two conditions under which the Parliament's powers can be said respected. The first one was institutional, consisting in the involvement of the Parliament in every phase of the giving of guarantees; the second regarded the governance of this instrument which, requiring the unanimity of the Board of Directors, allows the Committee to determine, pursuant to Article 96 of the Finnish Constitution, the position that the Government will take. Similarly, in rendering its opinion on the ESM Treaty, the Committee saved this instrument on the basis that it does not require a full disbursement of the unpaid capital without a previous decision of the Board of Governors, which also in this case decides by unanimity thus making it possible for a country to exercise a veto. The Committee accepted the restrictions on the budgetary powers of the Parliament also in its assessment of the Two- and Six-Pack legislation. On the contrary, it raised concerns about the TSCG at least in its original version envisaging an obligation for Member States to introduce a balanced budget rule in their Constitutions.[2] For such a structural change in the Constitution, it required a qualified majority in the Parliament.

The Committee grounded its *ex ante* review of European financial relief measures in the state's constitutional commitment to safeguard citizens' economic and social rights. The welfare protection of its citizenry has indeed been the main ground of review as well as the major obstacle to the creation of a European shared debt. Although the Finnish

[1] See the Opinions of the Finnish Constitutional Law Committee, PeVL 5 and 14/2011 on the EFSM Framework Agreement, PeVL 22 and 25/2011 and 13/2012 on the ESM Treaty, PeVL 24/2011 on the economic governance framework as revised by the Two-Pack, Six-Pack, and TSCG, all cited in Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (CUP 2014) 194- 199.
[2] For an overview of these decisions see Tuori and Tuori (n 1).

Committee has never formally adopted a quantitative limit to the total amount of fiscal liabilities compatible with the state's ability to fulfil its constitutional duties, it has nonetheless reserved to itself the faculty to concretely review international agreements and legislative bills in light of this fiscal capacity to deliver on constitution-based responsibilities.

In its recent opinion on European proposals related to the Covid-19 crisis, the Finnish Committee has reinstated this position, recalling the principle according to which EU acts cannot impose a legal obligation on Member States 'to contribute to the budget of the Union beyond the framework of their financial obligations as defined by the own resources system'.[3]The Committee has raised concerns regarding Member States' assumption of further financial obligations through EU secondary law. It considered decision-making procedures requiring unanimity of all Member States involved a guarantee for the budgetary autonomy of the Parliament. Given that according to the Finnish model, Parliament has significant information and participation powers in EU matters, as well as the capacity to set the Government's agenda on these matters given that its opinions are de facto binding.

The Finnish case shows then how further solidarity between Member States is basically left to their voluntary cooperation: in the absence of an EU competence, it is up to them to fill the *lacunae* of EU primary law. The limit is *prima facie* procedural because the Parliament should be consulted and involved; second, it is also substantive because the Committee should assess the financial commitments assumed at the EU level against the substance of social rights. And yet, even in the event of a negative opinion the commitments can be honoured as long as approved by the majority required for constitutional amendments.[4] So far, however, the Committee has always found the financial stability measures adopted for the Eurozone to be compatible, sometimes with some adjustments, with the Constitution.

[3] See Päivi Leino-Sandberg, *Solidarity and Constitutional Constraints in Times of Crisis* (*Verfassungsblog*, 8 April 2020) https://verfassungsblog.de/solidarity-and-constitutional-constraints-in-times-of-crisis/ accessed 20 July 2020, citing the Legal Service of the Council of the European Union, 'Interinstitutional File' 2018/0213 (COD), 15 October 2019 https://data.consilium.europa.eu/doc/document/ST-13116-2019-INIT/en/pdf accessed 20 July 2020. This document expressed a legal view on the proposed budgetary instrument for convergence and competitiveness (BICC).
[4] Tuori and Tuori (n 1) 196.

A similar approach has been taken by the GCC, but with a slightly different focus. At least before the *Weiss* final judgment, the GCC has never found the EMU developments to be in contrast with the Basic Law. However, unlike the Finnish Committee, the limits it has spelled out are more theoretical than practical. The major obstacle is not simply the concrete capacity for the state to live up to its constitutional commitments, but rather the constitutional identity of the Federal Republic. Specifically, it has put a constitutional ban on the debt mutualization at the European level arguing that a permanent mechanism which implies the assumption of fiscal liabilities for the choices of other countries is incompatible with German constitutional identity.[5]

This criterion echoes Article 4 (2) TEU, which acknowledges the 'national identities inherent in their fundamental structures, political and constitutional', and represents not only as a domestic counter-limit but also a limit from a pure European constitutional law perspective. According to the GCC, EU law not only does not oppose national parliaments' budgetary autonomy but also presupposes it.[6] The deep reason why budgetary powers cannot be relinquished by the Parliament should be found in the redistributive character of fiscal policies that require a high degree of democratic legitimacy and financial solidarity between citizens.[7]

It is a common position in EU legal studies to distinguish between regulatory policies and distributive or redistributive policies. This distinction justifies the conferral of certain competences to the EU and the retention of others with Member States. If the former can be decoupled from the nation state by virtue of their regulatory character, the latter need to stay in the purview of national democratic arenas as they touch upon the allocation of resources, taxation and welfare organisation.

This qualitative difference between the two types of competences fits the neo-functionalist account of European integration as a non-political process implementing a

[5] See *BVerfG*, 2 BvR 987/10 et al., Decision of 7 September 2011 ('BVerfG Greece & EFSF'), headnote 3 (b), according to which the 'no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate'. This limitation is not only linked with the necessary parliamentary approval, but it is framed within a constitutional discourse on budgetary autonomy as a way for a democratic state to shape itself (see headnote 2.a) according to which 'the decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself').

[6] ibid headnote 4.

[7] For this conclusion see Alicia Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration' (2012) 14 CYELS 243, 261-267. The author identifies also the principle of conferral and the constitutional identity of Member States among the constitutional limits to future fiscal integration.

basic principle of classic liberalism, namely the separation of economic from politics. The legacy of this thought is still present in the mainstream narrative about the European Union and its internal market. The EU is seen as a regulatory agency to which Member States have delegated some competences that can be better exercised at the supranational level because they do not require political deliberation.

In this account, regulation is about the correction of market failures and the attainment of economic efficiency, a goal consisting in the allocation of resources according to a Pareto-criterion (i.e. a situation where everyone is better off and there are no losers). This theory relies on the implicit assumption that the market is a mechanism which, albeit not self-regulating, needs regulatory intervention to restore its Pareto-efficiency anytime some failures compromise its normal functioning. The transfer of these regulatory competences to a supranational level aims to isolate certain policies from the political pressure of majoritarian institutions, which can pursue other, usually short-term, objectives at the expense of efficiency. In this conception, then, the market should not pursue allocative values or (re)distributive outcomes, being merely concerned about the efficient allocation of resources.

This framework has been influential in EU studies, and relies on the depoliticisation of the market, which for many is also the key to the success of European integration and the justification of its diminished democratic legitimacy.[8] In this vein, other accounts on EU allegedly democratic deficit, such as Moravcisk's liberal-intergovernmental theory, assume that regulatory competences are by their nature insulated from distributive issues. The legitimacy of the EU, then, would lie in the nature of these policies whose isolation from majoritarian democratic mechanisms is not only possible but also desirable in consideration of the Pareto optimal outcomes to achieve. As has been clearly put, EU legislative action is 'inversely correlated with the salience of issues of European voters',[9] who care more about fiscal issues such as taxation and public expenditure fundamentally dealt with at the national level.

This reading has been criticised for simplifying the panoply of effects of EU legislative measures, which, albeit *prima facie* regulatory, are never neutral with regard

[8] This is basically the position of Majone, which is exposed in Giandomenico Majone, *Regulating Europe* (Routledge 1996) and revised in light of the crisis in Giandomenico Majone, *Rethinking the Union of Europe post-crisis: Has Integration gone too far?* (CUP 2014).

[9] Andrew Moravcisk, 'In Defense of the 'Democratic Deficit': Reassessing the Legitimacy of the European Union' (2002) 40 JCMS 603, 615.

to their distributive consequences.[10] The dichotomy between purely regulatory policies and distributive or redistributive policies is then simply untenable, although it still has a grip on the current understanding of how the single market or EMU works.

For instance, it has been acknowledged that EMU is its current set-up produces some distributive effects. For instance, higher inflation has distributive advantages for debtors rather than creditors; similarly, lower interest rates incentivise borrowers disadvantaging savers.[11] However, according to this view, such consequences are not expressive of allocative-value choices but are the unintended result of a market-based mechanism. This account basically disconnects the (re)distributive effects of pure social policies -which are meant to redistribute and not simply to correct the functioning of the market – from regulatory policies which find their justification in the single market. The former, albeit linked with the single market, can be adopted and implemented regardless of their connection with the market. It is the lack of justification for EU action beyond the single market that causes conceptual troubles in allocating purely distributive competences to the EU, in that the latter involve budgetary expenditure.

And yet, this allocation is conceptually possible and has partially happened. The authority of EU law has touched upon matters with a very thin link with the internal market. Free movement of persons has exemplified for some time this kind of dynamic. Despite its assimilation with the other freedoms and the emphasis put on the indivisibility of the internal market, free movement of persons is qualitatively distinctive. It cannot be exclusively framed within the strict contours of the market, because mobile individuals are not reducible to goods, services or capital. The 'fourth freedom' resists this assimilation and opposes a commodified ontology of the migrant as 'human capital'.[12] For quite a while, EU law has acknowledged this dimension because its authority did not look at mobile individuals in their only economic subjectivity. Even before the introduction of Union citizenship, which framed intra-EU migration as something more

[10] See Andreas Follesdal and Simon Hix, 'Why there is a Democratic Deficit in the EU: a Response to Majone and Moravcsik' (2006) 44 JCMS 533, 542-43. These authors point how many EU regulatory policies have winners and losers so as not to be purely Pareto-efficient. See also Paul Pierson and Stephan Leibfried,'The Dynamics of Social Policy Intgration' in Stephan Leibfried and Paul Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (The Brookings Institution 1995).

[11] The critique and these examples are made by Hinarejos (n 7).

[12] For this paradigm of migrants' dehumanisation, especially in the context of Brexit, and the false progressive's dilemma, which puts in opposition mobility to the protection of welfare entitlements and labour rights, see Owen Parker, 'Critical political economy, free movement and Brexit: Beyond the progressive's dilemma' (2017) 19 The British Journal of Politics and International Relations 479, 490.

than mobility of factors of production, the inclusion of part-time workers within the protective scope of EU law expressed a form of solidarity that predated the official sanction of this inclusion through the language of citizenship.

The subsequent extension of free movement rights to non-economically active citizens generated a debate which has been well epitomised by the so-called progressive's dilemma. Adapted to the reality of EU free movement, this dilemma postulates a trade-off between migration and the welfare state and has fuelled the narrative according to which EU law, to borrow Menéndez's terminology, has become 'more human' but 'less 'social'.[13] The claim is that free movement of persons has eroded the capacity and the 'republican legitimacy'[14] of welfare states to delimit their respective political communities and thus to maintain a high level of welfare provision and labour standards. This frame - which recurs in some theoretical accounts on post-national citizenship[15] and in a body of literature on the political economy of the EU- [16] assumes that political closure is a prerequisite for any demos that wants to democratically determine its own fate, which is built on values such as solidarity and civic allegiance that cannot be found at any level above the nation state. Scholars working in this strand of literature point how the nation-state is the privileged site where the market can be controlled and social rights protected.[17] The social settlements at the national level would shield against the marketisation deriving from the EU and defend society from the dehumanising forces of supranational neoliberal structures.

This narrative should be rejected because it is based on debatable premises, both practical and theoretical. First, there is no evidence that EU nationals' access to social benefits dilutes social justice at national level. For instance, a study commissioned by the European Commission in 2013 showed that non-active EU migrants represent only a very

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[13] Augustín Menéndez, 'European citizenship after Martínez Sala and Baumbast: Has European law become more human but less social?' (2009) ARENA working paper no 11 https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2009/WP11_09_Online.pdf accessed 3 August 2020.

[14] See Fritz Scharpf, 'The European Social Model' (2002) 40 JCMS 645; Fritz Scharpf, 'Legitimacy in the multilevel European Polity' (2009) 1 European Political Science Review 173; Fritz Scharpf, 'After the crash: A perspective on multilevel European democracy' (2015) 21 ELJ 384.

[15] See Menéndez (n 13). See also Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 ELR 787.

[16] For an overview of this literature see Parker (n 12) 481-484. This author calls this strand 'Critical Political Economy' (CPE) of the political Left. Among the most critical voices in EU studies there are those of Scharpf and Streeck.

[17] See Menéndez (n 13), Scharpf (n 14), Somek (n 15).

small percentage of each Member State's total population and are more likely to be employed if compared with its own nationals. Moreover, contrary to the counterfactual image of 'welfare scroungers' moving only for the purposes of benefitting from social benefits, the majority of those inactive are mostly pensioners, students, jobseekers, or former workers.[18] Therefore, the argument used by Member States to derogate from equal treatment of EU nationals in matters of cross-border access to welfare benefits, namely the need to protect the fiscal sustainability of national systems of social protection, although accepted as a legitimate objective in theory, might not be justified in practice.

Second, the generally accepted argument according to which EU nationals and own nationals are not in a comparable situation since duties of social solidarity arise only in bounded communities whose membership is bestowed by nationality or earned through economic contribution and/or the passage of time[19] downplays the fact that solidaristic communities are artificial constructs as well as the normative role of the law in creating these solidarity networks. Therefore, on a normative level, nothing prevents EU law from shaping equal relationships between EU nationals in more fundamental terms and promoting inter-citizen solidarity at a transnational level.[20] To be a meaningful idea,

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[18] ICF GHK and Milieu Ltd, 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence' *Final Report* (2013) http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes# accessed 15 May 2021. See also European Commission, 'European Commission upholds free movement of people', 15 January 2014, MEMO/14/09 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_9 accessed 15 May 2021. For a fiscally positive impact of EU intra-migration on the UK, where the issue of welfare tourism has been strongly debated and instrumentalised, see Christian Dustmann and Tommaso Frattini, 'The fiscal Effects of Immigration to the UK' (2013) CReAM Discussion Paper Series No 22/13 https://www.cream-migration.org/publ_uploads/CDP_22_13.pdf accessed 15 May 2021.

[19] For a study on the justifications for the delimitation of social solidarity systems see Michael Dougan and Eleanor Spaventa, "Wish you weren't here…': new models of social solidarity in the European Union' in Michael Dougan and Eleanor Spaventa (eds), Social welfare and EU law (Hart Publishing 2005). For an analysis of the evolution of the interpretation of economic justifications see Eleanor Spaventa, 'Economic Justifications and Union Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in Panos Koutrakos, Phil Syrpis, Niamh Nic Shuibhne (eds), *Exceptions from EU free movement law: derogation, justification and proportionality* (Hart Publishing 2016). For a critical appraisal of the notion of 'real link', which Member States can use to exclude non-nationals from welfare provision see Charlotte O'Brien, 'Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity' (2008) 33 ELR 643.

[20] For a theoretical account of equality as a goal of Union citizenship and a philosophical justification for equal treatment even in the absence of ex ante belonging and democratic pedigree see Païvi Neuvonen, *Equal Citizenship and its Limits in EU Law: We the Burden?* (Hart Publishing 2016).

Union citizenship should necessarily challenge a nationality-based conception of welfare mechanisms, or it could hardly be called citizenship at all.

Against this backdrop, the political economy of free movement of persons that envisages some restrictions to human mobility or different degrees of assimilation of migrants into the host welfare system through diversified access to public services and social benefits runs counter the very idea and normative potential of Union citizenship. The view underpinning the 'progressive's dilemma' is not immune from a latent nativist bias – which sees the welfare state as a system devoted to the wellbeing of the sole citizens – as well as nationalistic political implications. It presents the EU as an inevitably neoliberal device that undermines rather than supports the social protection of individuals and largely ignores the already existing European dimension of welfare law.

Indeed, the EU has made a positive contribution to the protection of social rights. Examples of this social dimension are Union's anti-discrimination law or the body of provisions of the Charter of Fundamental Rights under the heading 'Solidarity' of Chapter IV. More importantly, it has been the horizontal application of some social provisions, such as the general principles of EU law but also some Charter's provisions,[21] that have signalled the emergence of solidarity bonds among nationals of different Member States.[22] However, the most important contribution of the EU to the social protection of individuals in cross-border situations has come from the Treaty citizenship provisions and the EU social security coordination regime.

Before the ECJ's judicial retreat occurred with the restrictive line of jurisprudence described in Chapter III, the forging of solidarity bonds between nationals of different Member States has been attempted through the citizenship provisions which, combined with the principle of non-discrimination on grounds on nationality, tried to grant cross-border access to welfare provision in the host State also to citizens without market credentials. In the earlier case law, the conditions and limitations attached to Treaty citizenship provisions and detailed in secondary legislation, most notably in Directive 2004/38, had to be interpreted restrictively and in light of proportionality. Similarly, Regulation 883/2004 on the coordination of social security systems extended the granting

[21] The horizontal application (of at least part) of the Charter is a new development of the ECJ's case law, which before the *Bauer* case had affirmed the horizontal application of the sole general principles.
[22] For this point, see Filippo Fontanelli, 'General Principles of the EU and a Glimpse of Solidarity in the Aftermath of *Mangold* and *Kücükdeveci'* (2011) 17 European Public Law 225.

of special non-contributory benefits listed in Annex X thereof to economically inactive citizens.[23] The inclusion of this category of subjects with no connection with the market and the nature of those benefits which are not based on economic contribution prove how Member States reached a political agreement to commit to forms of financial solidarity not based on insurance (i.e. benefits not linked with the exercise of an economic activity or the payment of contributions) for citizens who do not participate in the economic life of the host society.[24] This was the result of a compromise according to which Member States were no longer obliged to pay exportable mixed-type welfare benefits[25] to persons no longer resident in their territory but the flip side of the coin was that they had to pay these benefits to all habitual residents regardless of their nationality. The rationale for this choice, whose consequences were fully anticipated and accepted by the EU legislature,[26] is to prevent that individuals who exercise their free movement rights are left without protection as they would not be able to claim minimum subsistence benefits in any State.

Therefore, the ECJ's retreat in its recent citizenship case law, which interpreted the personal scope of Regulation 883/2004 through the lens of Directive 2004/38 by making the payment of the benefits falling within the scope of Regulation 883/2004 conditional upon the fulfilment of the conditions for 'legal residence' required by the Directive, has rendered the objective of Regulation 883/2004 meaningless. The transplant of the conditions of the Directive into the Regulation sacrifices a crucial piece of EU welfare

[23] Admittedly, the predecessor of Regulation 883/2004 on the coordination of social security systems, namely Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, had already partially included categories of economically inactive citizens. See Herwig Verschueren, 'European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems (2007) 9 European Journal of Migration and Law 307, 312-313.

[24] Verschueren (23).

[25] These are benefits that exhibit characteristics pertaining both to social security (which is under the coordination regime of Regulation 883/2004) and social assistance (which is instead excluded from the scope of application of the Regulation according to Article 3 (5) thereof). The ECJ tried to draw the distinction between the two branches based on factors such as the purpose and the conditions related to each benefit, but it mostly relied on a case-by-case approach. For instance, the two guiding criteria elaborated by the ECJ in order to qualify a benefit as belonging to social security are the coverage of one of the risks mentioned in Article 3 (1) and the legally defined position of the claimant so as to have a right to the benefit in question. See Cases C-249/83 *Hoeckx* [1985] ECR I-973 para 11 and C-122/84 *Scrivner and Cole* [1985] ECR I-1027 para 18.

[26] The EU legislature intentionally amended the previous regime which gave rise to controversies about the classification of minimum subsistence benefits, so-called 'special non-contributory benefits of mixed kind' (SNCBs), which lie in between social security and social assistance. As a reaction to the broad interpretation of social security adopted by the ECJ, which allowed the inclusion of these hybrid benefits in the scope of application of the Regulation on social security coordination and thus their exportability, Member States created a separate regime of non-exportability for SNCBs. See Verschueren (23) 316.

law, and, besides being methodologically questionable, seems to be motivated by an unfounded anxiety, that is preventing the pressure of cross-border welfare claims on national welfare systems.

However, the problem of 'illegitimate' cross-border claims has always been prevented in EU law, which has never granted unconditional access to welfare benefits. While EU economically inactive citizens' claims related to special non-contributory benefits under Regulation 883/2004 were politically agreed upon by Member States and are thus to be considered legitimate, claims regarding benefits not covered by Regulation 883/2004 have always been subject to the requirement of a meaningful link with the host state. The real link case law, despite accommodating the needs of those citizens with a loose connection with the market and their social-integration claims through the principle of proportionality, has not curtailed the power of Member States to exclude economically inactive citizens from welfare entitlements.[27] It has more tepidly guaranteed a right for the EU migrant 'to be assessed'.[28]

From this brief overview of EU welfare law and free movement law, it is possible to ascertain how the concept of solidarity emerging in the EU was not exclusively based on a contractual economic arrangement - at least before the ECJ fell under the pressure deriving from the politicisation of EU free movement provisions (a trend which has largely informed the debate surrounding the Brexit referendum, when the spectre of welfare tourism haunted the public discourse on UK membership of the EU). Even non-market actors, who did not contribute economically to nationally bounded welfare systems were, to some extent, included into them. As soon as the terms of the progressive's dilemma became unconsciously internalised by case law, which seemed to be more reactive to the political environment, social interactions explicated through reproductive labour, care activities or any other activities not remunerated ceased to have any legal relevance for the purposes of the assimilation of certain groups of migrants within the welfare sphere of the host community due to the mechanical application of the

[27] Already in *Grzelzyck* the ECJ put emphasis on the fact that the claimant 'must not become an unreasonable burden on the public finances of the host Member State'. *Collins* affirmed that the granting of a jobseeker's allowance could be granted only after establishing that a 'genuine link exists between the person seeking work and the employment market of that state'; similarly, *Bidar* referred to the 'need to demonstrate a certain degree of integration into the society of the host State'. See respectively C- 184/99 *Grzelzyck* [2001] ECR I-6193 para 44; Case C-138/02 *Collins* [2004] ECR I-2703 69*;* Case C-209/03 *Bidar* [2005] ECR I-2119 para 57.

[28] O' Brien (n 19).

conditions for legal residence in Directive 2004/38 (sufficient resources and comprehensive health insurance) and the dismissal of the case-by-case proportionality assessment. As has been noted, this restrictive approach risks undermining even certain categories of workers, such as atypical workers or those in casualised employment relationships,[29] whose existence is not fully determined by their capacity to trade themselves on the market.

The impression is that after the economic crisis there has been a resurgence of a neoliberal understanding of the market: the progressive's dilemma exemplifies this trend because it accepts, instead of challenging, the logic inherent in the tension between permissive migration regimes and sustainable welfare settlements. Framing the relationship between the two issues in terms of trade-off presupposes a causal correlation between human mobility and the welfare state's retrenchment. In this perspective, mobile human beings are instruments of the capital who serve its ends of reducing welfare provision and exacerbating wage competition. And yet, rather than being the vectors of capital's instances, mobile migrants are the victims of the driving forces of the market.

Besides the lack of evidence regarding the adverse impact of intra-EU mobility on domestic welfare systems and labour markets, it should be noted how the movement of these migrants seems to be treated as functional to an efficient allocation of resources than to the aspiration of improving their own living and working conditions, which the Preamble to the TFEU identifies as one of the ultimate objectives of European integration. The Covid-19 crisis has proved how they represent that essential workforce needed to fill labour shortages, and yet they do not enjoy sufficient welfare protection and their work is often valued as nothing more than a commodity.

Despite the downgrading of free movement provisions to one of the structures of neoliberalism, the significance that EU free movement has had before its recent stigmatisation suggests that a meaningful redistributive role for the EU is possible. Emphasis on the EU as a regulatory state agency notwithstanding, the EU is and can be a redistributive enterprise. The limits to an EU which is solidarity-capable are not theoretical, but practical. They urge for a process of democratisation of the European

[29] Charlotte O' Brien, '*Civis Capitalist Sum*: Class as the New Guiding Principle of Free Movement Rights' (2016) 53 CMLR 937.

economic governance through the strengthening of representative democratic institutions. These limits do not exclude a priori the redistributive capacity of the EU (see *infra* 5.3).

The EU has indeed represented a form of cooperation beyond the internal market. Despite the centrality of the internal market in the design and functioning of the Union, EU law has regulated aspects of social life which are not centred around the market. Free movement of persons and the adoption of a single currency clearly display – or should have displayed - a redistributive attitude. Indeed, while in the free movement field such a distributive vocation is inherent in the very idea of mobility and cross-border access to social benefits on a non-discrimination basis, the governance of the single currency still remains largely based on the market as the main system of regulation and conflict resolution.

This observation on a still market-based EMU does not intend to diminish the importance of the market or advocate for the end of a market economy. Rather, it suggests a different conception of the market: although the latter has become a synonym for *capitalistic* market, it does not need to be so. The false premise is to think that market-based mechanisms deliver 'natural' outcomes, without acknowledging that these results are instead the product of a precise set of rules. In the case of EMU, the credo in the market obfuscated the fact that market-based solutions are not neutral, but they rely on a precise construction of the market, which seems to be largely centred on competition rather than cooperation. The EMU's design makes Member States compete against each other on the financial markets. In the absence of a triangular structure, where the EU can foster mutual forms of solidarity and cooperative solutions among them, Member States regulate their horizontal relations through the instrument of private law. Instead of acting like members of a Union, they ultimately rely on the market as a disciplinary regime of their conduct. This was particularly evident during the Eurozone crisis when, after the banking sector crisis escalated into a sovereign debt crisis, the costs of financial instability have been passed on to debtor countries and their citizens. Countries in the periphery with high levels of public debts or whose banks needed to be recapitalised have been deemed to be responsible for their fate due to their risky and reckless behaviour. As has been

noted, in that context the 'market as a resolution regime decide[s] why and how those that take the risks must carry the responsibility'.[30]

5.2 The way forward: reforming the Eurozone in the sign of solidarity

The narrative in which the Eurozone's sovereign debt crisis has been framed depicts Member States in the periphery as living beyond their means and shifts the burden of economic adjustment exclusively on them. Rather than conceding that the failures inherent in the EMU's design have been the cause of the Eurozone turmoil, this framework stigmatises the individual conduct of Member States with bad fundamentals. It basically displays a moral judgment on them, putting emphasis on their lack of fiscal discipline and neglecting the structural flaws in the EMU's architecture.

Against this backdrop, the concept of debt ceased to be expression of social solidarity, a function that it had been playing after the Second World War when it had supported the expansion of European welfare states. It became a conceptual – and in the German language also semantic – equivalent of guilt, acquiring a moralistic dimension which it did not have in the post-war political economy of redistribution. Whereas in the Keynesian paradigm the moral of public debt was grounded in social solidarity, with the advent of neoliberalism there has been a transformation of this original moral into the moralism of austerity.[31]

The EMU's design embodied such a political and economic thought in that it institutionalised an asymmetric debtor-creditor relationship, exposing a 'moral geography' along the divide North-South.[32] As has been shown in Chapter II, the EMU lacks a macroeconomic stabilisation mechanism because it was built on an already unbalanced trade area, where surpluses run by core countries are recycled through financial markets. Before the outbreak of the crisis, the Commission had already reported persistent imbalances in the Eurozone's current accounts, warning against the risks deriving from deficits not covered by long-term loans such as direct investments from

[30] Sakari Hänninen, 'Neoliberal Politics of the 'Market'' (2013) 10 No Foundations: An Interdisciplinary Journal of Law and Justice 40, 42.
[31] For this observation see Bo Stråth, 'Debt and Guilt: Moral Economics and Europe's Division between North and South' (*HERA*, 31 January 2017) http://www.ub.edu/thedebt/2017/01/31/moral-economics/ accessed 3 August 2020.
[32] ibid.

abroad.[33] Rather, these deficits – especially those of Greece, Spain and Portugal - were covered on financial markets, through short-term financing such as bank loans or portfolio investments.[34]

This market-based dynamic, whilst enhancing the possibility for peripherical states to finance their deficits, widened the gap between surpluses countries and deficits countries in the Eurozone. In this system, the burden of adjustment is placed exclusively on debtor countries, which are forced to adopt domestically depressive economic policies. This unilateral expectation, which in a currency union with no possibility of devaluation like the EMU becomes an obligation sanctioned by the Maastricht criteria, produces asymmetries not just between states but especially between citizens within the same Union.

An unbalanced trade area, then, runs counter to the very idea of political union and betrays the proclaimed Union's objectives of promoting the well-being of its people as well as the economic and social cohesion of its Member States (Article 3 TEU). It fundamentally neglects the fact that every transaction presupposes two parts: a debtor who is a purchaser and a creditor who is the seller. Without a debtor counterpart, the seller would not have anyone to sell its commodities to. Every market economy is indeed based on a relationship, that between a creditor and a debtor, which cannot be commodified. As has been noted, what financial markets do nowadays, instead, is to commodify this relationship, making some countries specialise in one of the two positions of such a relation. This phenomenon has been described as 'financialisation of the relations between Member States', whereby financial operators in exporting countries are responsible for capital inflows to importing countries.[35] This market-based transfers became a structural feature on which importing countries were almost totally reliant, given the impossibility to recur to an adjustment of exchange rates. In the absence of an extra-market mechanism - such as that working internally in every nation, where the wealth is (re)distributed territorially through direct transfers or direct investments – there

[33] See European Commission, 'Quarterly Report on the Euro Area' 5 (4) (2006), cited in Massimo Amato and Luca Fantacci, *Saving the Market from Capitalism: Ideas for an Alternative Finance* (Polity 2014), 107.
[34] ibid 107.
[35] ibid.

is no pressure on exporting countries to readjust, for instance by implementing expansionary policies.

Critical of the asymmetrical distribution of the burden of adjustment was Keynes, who at Bretton Woods proposed an International Clearing Union (ICU) conceived of as a surplus recycling mechanism not based on the market. This proposal consisted in a system forcing both creditors and debtors to adjust their respective imbalances. In particular, it envisaged a penalty mechanism charging interest anytime not only a deficit limit but also a surplus limit was exceeded.

The idea of a clearing house basically draws on a conception of money that does not neglect the function for which it was originally conceived. In the Keynesian theory, money is not a commodity, but it incorporates a credit risk, i.e. the 'fundamental uncertainty' that a debt might not be repaid. In the current functioning of financial markets, instead, the risk is that such a debt might not be sold. Nowadays, finance is based on the principle of liquidity, which transforms the ineluctable uncertainty of any economic transaction into a sellable product.

A mechanism such as the Keynesian ICU would reinstate the principle of credit and the importance of cooperative schemes, avoiding the liquidity trap and the competitive race to pass the risks of unsellable securities to someone else. It would not be a philanthropic solution, a system built out of generosity from creditor countries. On the contrary, a clearing house would be an adjustment structurally necessary and fair, because without debtor countries creditors would not have markets where to sell their products. It is a solution functional to enlightened self-interest, which is the missing piece of the EMU's current edifice.

The Keynesian mechanism has inspired a proposal for the creation of a clearing house specific to the Eurozone.[36] As has been noted, Europe was already equipped with such a clearing system: it was the European Payment Union (EPU), which was replaced by the European Monetary Agreement (EMA) first and by European Economic Community (EEC) later. The EPU was designed with the aim of promoting economic transactions between European countries by way of an automatic credit system. This would have helped the trade in the post-war devasted economies and thus the continent's recovery. A clearing house in fact works like a bank but without the tools generally

[36] ibid.

associated with it, such as reserves or deposits. It simply records a transaction, whose sum is added respectively as a credit and as a debit to the accounts of the countries concerned. While the debtor has to pay interest on its negative balance, the creditor has to equally pay a commission on its positive balance. The clearing house is conceived as a zero-sum mechanism, where even the creditor has to give something because it has received a service through this intermediation system.

In the abovementioned proposal, it would be the existing TARGET2 – which is the system of payments of the Eurozone - to be transformed into a clearing house. Conditions for its functioning are: first, that the transactions to be taken into account are those between countries of the Eurosystem (considering that each state has to spend its credit within this circuit); second, that the domestic income policies are coordinated so that real exchange rates can be adjusted (given the fixity of nominal exchange rates in a single currency union).

Such an accounting system would hold accountable creditors for the benefits they have gained from the single currency and make the Eurozone an actual union where participating states are truly equal. The resulting readjustment on the part of creditors would not be a gesture of humanitarianism but an enlightened solution free of moral considerations. This engine would force Member States to grant each other reciprocal credit and to spend it within the clearing union. It would basically finance the Eurozone's internal imbalances without resorting to international financial markets.

The advantage of this mechanism is its triangular structure, which would put an end to the voluntarism and bilateralism of an adjustment solution left to Member States' agreements.[37] It adds a vertical dimension to the otherwise merely horizontal relations between Member States, sanctioning the institutionalization of European solidarity at a more structural level.

The establishment of a clearing union is undoubtedly a very radical reform, but it is not the only way through which the Eurozone could acquire a more solidary dimension. If one wants to remain within the logic of financial markets, there are other solutions which can curb the deepening of the asymmetries between Member States. There are two proposals which go in the direction of ensuring all Member States a fairer position on the

[37] Even though Regulation (EU) 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8 established a procedure to detect macroeconomic imbalances no sanctions have been taken for surplus countries.

financial markets: the creation of a European debt agency[38] or/and the establishment of a fiscal union.

The first option would see the creation of a third and impartial subject, the Debt Agency (DA), which would filter the risks for each state while avoiding mutualisation. The design of the DA responds to the demand for safe assets, which are debt instruments expected to maintain their value despite adverse events (generally high-ranked sovereign debts).[39] The DA would in fact issue a safe common asset, a solution which had received support during the financial crisis when many economists proposed to create such a European public and common safe asset through the pooling of single sovereign debts.[40] Such a safe asset would curb the divergence in sovereign bonds' yields and would also break the vicious nexus between national banking systems and their public debt. It would also foster financial integration in the direction of a true Capital Markets Union. A proposal which went in the same way dated back to 2010[41] and recent studies have evaluated possible technical approaches to the creation of safe assets without mutualisation,[42] including the establishment of a public intermediary such as a Debt Agency.[43]

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[38] See Massimo Amato, Edoardo Belloni, Paolo Falbo, Lucio Gobbi, 'Transforming Sovereign Debts into Perpetuities through a European Debt Agency' (2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579496 accessed 9 September 2020.

[39] Debt securities issued by sovereign states are considered the emblematic safe assets given the fiscal capacity of governments to raise and collect taxes.

[40] See for instance Paul De Grauwe and Wim Moesen, 'Gains for All: A proposal for a common Eurobond' (CEPS Commentary, 3 April 2009) https://www.ceps.eu/ceps-publications/gains-all-proposal-common-eurobond/ accessed 8 August 2020; Daniel Gros and Stefano Micossi, 'A Bond-issuing EU Stability Fund Could Rescue Europe' (*Europe's World*, spring 2009) http://www.europesworld.org/NewEnglish/Home/Article/tabid/191/ArticleType/articleview/ArticleID/21306/Default.aspx accessed 8 August 2020; Jean C. Juncker and Giulio Tremonti, 'E-bonds would end the crisis' *Financial Times* (London, 5 December 2010), all cited in Amato *et al*. (n 38). On the necessity of such a safe asset see Vítor Constâncio, 'European financial architecture and the European safe asset' (Speech at the 'Conference on European Financial Infrastructure in the face of new challenges', Florence 25 April 2019) https://macroviews.net/wp/wp-content/uploads/2019/05/VC-speech-in-Florence-on-Sovereign-debt-and-safe-assets-April-25-2019-complete-fv2.pdf accessed 8 August 2020.

[41] Junker and Tremonti (n 40).

[42] See Álvaro Leandro and Jeromin Zattelmeyer, 'The Search for a Euro Area Safe Asset' (2018) PIIE Working Paper n. 3/18 https://www.piie.com/system/files/documents/wp18-3.pdf accessed 8 August 2020 and Álvaro Leandro and Jeromin Zattelmeyer, 'Creating a Euro Area Safe Asset without Mutualizing Risk (Much) (2019) PIIE Working Paper n. 14/2019 https://www.piie.com/publications/working-papers/creating-euro-area-safe-asset-without-mutualizing-risk-much accessed 8 August 2020.

[43] Álvaro Leandro and Jeromin Zettelmeyer, ''Safety Without Tranches: Creating a 'real' safe asset for the euro area' (2018) CEPR Policy Insight No 93 https://cepr.org/active/publications/policy_insights/viewpi.php?pino=93 accessed 8 August 2020.

The limits of these past proposals lay in the level of public guarantees which have to be offered, in that capital endowment through such public guarantees involves a form of risk sharing. The most recent proposal for the creation of a European Debt Agency, instead, would minimize such a risk, because its safety would lie in its very structure. In fact, the agency will collect funds on the markets through the issuance of plain vanilla bonds and use these funds to finance Member States with infinite maturity loans. In this scheme, perpetual are not the bonds issued by the agency (given the difficulty to sell perpetuities on the market) but the debts of Member States, which will pay instalments (aligned to their fundamentals) to the agency for the infinite maturity loans received from it. Basically, the DA would be indebted on the financial markets, while Member States would be indebted to the DA so as to not be exposed to the liquidity risk.

Ultimately, the architecture of such a debt agency would transform the Eurozone into a cohesive space, allowing for the creation of a true European safe asset which can be bought by the ECB on the secondary market. In practice, the DA would act as a 'Synthetic Treasury',[44] which in turn empowers the ECB to directly buy its bonds without infringing the capital key rule.

This last criterion, which basically expresses the prohibition for the ECB to favour a state, has basically caused a reversed 'mutualisation'. Mutualisation is the very concept to which Northern Member States are greatly adverse without realising that they have been the main beneficiaries of it. What has happened in the Eurozone in the aftermath of the financial crisis is that the intervention of the ECB, constrained by its own capital key rule, had helped some sovereign bonds reach negative yields. Counterparts to such negative bond yields, caused by the flight to quality of capitals desperate for safe assets, have been unjustifiably high yields in peripherical countries.[45] Therefore, not only the narrative of mutualisation as a gift to prodigal countries does not hold true, but it also

[44] Amato *et. al.* (n 38) 11.

[45] See Leibniz-Institut für Wirtschaftsforschung Halle (iwh) (ed), 'Germany's Benefit from the Greek Crisis' (2015) IWH Online 30/2015 https://www.iwh-halle.de/nc/en/press/press-releases/detail/germany-benefited-substantially-from-the-greek-crisis/ accessed 9 August 2020. According to this report, Germany saved more than 100 billion euro on its debt service between 2010 and 2015, thanks to the Greek sovereign debt crisis. Similarly, the cost of flight to quality for Italy has been estimated in 70 billion euro more to pay on its debt service, an amount not in line with its economic fundamentals: see Massimo Amato, 'L'Eurozona fra il pericolo della dissoluzione e l'occasione di un ripensamento' (2020) 19 Economia e Politica https://www.economiaepolitica.it/_pdfs/pdf-12685.pdf accessed 9 September 2020.

contradicts the real Eurozone dynamics which have advantaged those countries hostile to any form of risk-sharing but involuntarily responsible for other countries' higher bills.

A form of mutualisation, then, has already occurred and it has not been shouldered by countries of the core, which on the contrary have saved on their debt service at the expenses of other fellow European citizens. Despite their apparent convenience for the citizens of the countries issuing them, however, bonds with negative yields constitute a distortion for insurance companies and pension funds. In sum, they prove how the lack of structural cooperation is even against national self-interest. This observation is even more poignant if one considers that the first structural solution examined, i.e. the creation of a European debt agency, does not even require significant risk-sharing.

A solution involving an important degree of mutualisation, instead, is the second mentioned above, namely the implementation of a fiscal union at the European level. The practical ways in which this goal can be achieved are different, ranging from the conferral of taxing powers to the EU to the delegation of such powers to the Member States acting as EU agents.[46] In any case, the main feature of such an option would be a single debt exposure, which means that the Union would have its own debt linked with a euro area budget. This option would also entail the creation of a safe asset but, contrary to the first option, would be backed up by the guarantees inherent in the very existence of a Eurozone budget - which could finance the instalments of the safe asset.

Until recently, this option was considered not only politically unviable and but also juridically unfeasible, given the fact that the Treaties do not confer upon the Union the possibility to issue its own debt instruments. However, in the aftermath of the financial crisis, with the establishment of the European Financial Stabilisation Mechanism (EFSM),[47] the European Commission was empowered to borrow up to 60 billion euro on financial markets on behalf of the Union and to distribute the proceeds in the form of loans to Member States. Legal basis for the adoption of this loan facility was Article 122 TFEU, which allows Union's financial assistance for 'exceptional occurrences'. Recently, this provision has also been activated for two recovery instruments adopted in response to the economic crisis generated by the coronavirus pandemic: the programme SURE and the Recovery Instrument within the Next Generation EU (NGEU).

[46] For these practical solutions see Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 66.
[47] Adopted with Regulation (EU) 407/2010 of 11 May 2010 on the basis of Article 122 TFEU.

Therefore, the possibility for the Union to be an autonomous subject on the financial markets, issuing bonds linked to its own debt has been made possible, even though it is still relegated to a conceptual framework of emergency and exceptionality. The borrowing powers of the Commission are indeed limited in time, size, and scope, as well as destined to financing specific Union programmes in the frame of NGEU. However, the newly adopted recovery plan for Europe signalled how the paradigm of emergency is no longer anchored to the rescue of a single Member State but to the survival of a collective entity, the Union. For this reason, the use of Article 122 TFEU, which was originally conceived for helping a single country in distress, might not be the appropriate legal basis for tackling the effects of a crisis that involves the Union as a whole.

The pandemic has indeed exposed the deep interdependencies between Member States, showing that the destine of a nation is tied with that of the other nations which form part of the same socio-economic system. The EU's response to the pandemic, then, whether or not it is considered a Hamiltonian moment, can be read as an incipient, albeit temporary in nature, fiscal union. In fact, even the last taboo concerning taxation has been broken, given the proposed introduction of Union's taxes[48] which will form the new revenues in the amendment of the Own Resources Decision.

In conclusion, the two proposals to curb the inequalities between Member States on financial markets, i.e. the creation of a debt agency and the implementation of a fiscal union, are not mutually excluding. Both are expression of solidarity and represent a significant step in the direction of a better functioning Union. Yet, they reflect such a solidary commitment to a different degree.

The creation of a debt agency embodies a conception of *corrective* justice – limiting itself to the correction of the otherwise 'wrong' outcomes of an unfettered market – and constitutes an expression of solidarity between Member States at an institutional level, mediated through a triangular structure which would give a vertical dimension to their relations. A fiscal union, instead, is a more advanced stage of cooperation and a form of *redistributive* justice, as it also presupposes a significant degree of solidarity between European citizens.

[48] Such as taxes on non-recycled plastic waste, a carbon adjustment mechanism, a digital levy, a revised Emission Trading System (ETS), and longer-term plans for a Financial Transaction Tax (FTT).

5.3 Justification for thicker solidarity

It is the problem of solidarity between citizens of different Member States that has represented a conceptual limit to further fiscal integration at the European level. The no demos thesis has indeed dominated the debate on the future of the EMU, stating limits on a theoretical level that have been overcome in practice by the emergency-driven recovery plan imposed by the pandemic. Even though outstanding national debts have not been mutualised, the agreement reached on 21 July 2020 by the European Council on the Commission's proposal for a 750 billion euro package marks a quasi-Hamiltonian moment at least in a future perspective, as also suggested by the name "Next Generation EU" attributed to the plan.

The reason why the obstacles to a fiscal union have been temporarily set aside lies in the interconnection realised by the existence of a transnational market with its value and supply chains but also its chains of essential workers, such as care workers.[49] Interdependent economies are also interdependent societies, as the economic system cannot be separated from its social substrate. The necessity for the market to be re-embedded in a social context explains the desirability of Union's corrective and distributive intervention. Such an action finds its justification in the very existence of a Union's competence on the internal market, provided that an ample concept of 'market' – irreducible to an economistic definition – is embraced. In this perspective, the Union would become a space of solidary obligations between citizens, and not only Member States, thus realizing the promise enshrined in Article 2 TEU of a European society in which solidarity prevails.

The extraterritorial quality of social relations that the market promotes makes it necessary for the Union to ensure that the advantages reaped by some are compensated by symmetric obligations. In this perspective, the existence of tax havens within the Union or an incomplete Banking Union without a common fiscal backstop for the Single Resolution Fund and a common European Deposit Scheme (EDIS) can be hardly justified.

[49] See Raluca Bejan, 'Covid-19 and Disposable Migrant Workers' (*Verfassungsblog*, 14 April 2020) https://verfassungsblog.de/covid-19-and-disposable-migrant-workers accessed 9 September 2020.

The development of some activities beyond the national borders implies a relationship of mutual responsibility between European citizens. If the free movement of persons has catalysed a modicum of solidarity between nationals of different member states, the free movement of capitals has not yet implied a similar response at the transnational level. However, the integration of financial markets has accelerated the process of 'privatised Keynesianism',[50] which has become 'Europeanised' to a significant degree. This trend has been described as the replacement of public debt – which in the Keynesian framework had an aggregate demand management function – with private debt, which becomes the functional substitute for welfare benefits and wage rises. It was the inflow of capitals moving from the core to the periphery that made possible a massive expansion of consumer credit: foreign capitals, then, have played a role historically assigned to the welfare state.

This movement signals how 'solidarity' between European citizens has taken the form of loans, which amount to investments in the economy of another country– although hardly increasing its productivity. If one considers lending a form of solidarity, given the faculty for investors to move their capital where the returns are higher and for beneficiaries in the host country to have easy access to credit - it becomes more acceptable to conceive a form of fiscal union at the European level. As said, a fiscal union presupposes a high degree of mutualisation of risks and the addition of a vertical dimension to the horizontal relations between citizens (and to this effect also residents) of two different countries through a public system that would sanction mutual obligations between the two parts as already happens in the welfare state.

In a context such as the one just mentioned, a European taxing system would look reasonable: the existence of a transnational market has already created a European society. The only limit for its transformation into a 'community of fate' lies in the artefact of nationality, which in a globalised and interconnected world is lastly a by-product of identity politics. Insisting on a common identity, as the no demos thesis does, diminishes the importance of a highly integrated market. Intended as a place of economic exchange and social interaction, the single market is the site of a post-national division of labour. Sharing a market, then, entails not only economic agency but also social citizenship –

[50] C. Crouch, 'Privatised Keynesianism: An unacknowledged policy regime' (2009) 11 The British Journal of Politics and International Relations 382.

unless one accepts to consider the market as a structure which should be left to the allocative principle of marginal productivity with no space for political intervention. In other words, if the principle of efficiency is the only benchmark to assess the smooth functioning of the market, as it is in a capitalistic system, a public intervention based on the allocative principle of need and citizenship entitlement would not have any legitimacy.

A different conception of the market, which recognises its endemic element of sociality, is nonetheless possible for the EU. To a certain extent, the EU has already proven to be – to cite Macron's words – more than a market. Or better, it has proven that it is more than that because a market is never just a market. It can also be a fair and just society, where equality and solidarity prevail.

Conclusions

This thesis engaged with a number of questions pertaining to the constitutional status of solidarity in the European Union. Its aim was to describe the constitutional scope and normative justification for solidarity in a composite legal system such as the EU.
To this end, it first fleshed out the meaning of solidarity in theoretical terms retracing its intellectual genealogy (Chapter I). It touched upon its function at the national level – where solidarity enables redistribution - and gave account of the debate about whether the EU can replicate at the supranational level the solidarity arrangements that classically pertain to the domestic sphere.

Therefore, this thesis sought to test EU's redistributive capacity (Chapters II and III). It did so empirically, by exploring the mechanisms that might deliver solidarity. Specifically, it looked at two interlinked areas, free movement of persons and EMU, which by reason of their nature can conceptually accommodate a redistributive capacity of the EU. The thesis drew a connection between these two areas, which are explored separately in EU studies. And yet, they are deeply interconnected not only from a political but also from an economic perspective.

The thesis proved how mobility of persons is an element required for the good functioning of a single currency area. The high mobility of labour works as an automatic stabiliser every time the single currency area faces an asymmetric shock. The Maastricht Treaty did not acknowledge this function, as Article 45 TFEU on free movement of workers continued to be framed as enabling movement to accept offers actually made. The CJEU, however, gave an extensive interpretation to this provision, including jobseekers in its scope of application. It held that excluding jobseekers from movement would undermine the effectiveness of Article 45 TFEU.[1] After the euro crisis, the Court retreated from this purposive approach and, contrary to what previously held, denied jobseekers benefits that favoured their access to the labour market. This case law on cross-border access to welfare proves how even a strictly functionalist approach no longer guides the interpretation of free movement of persons provisions. Therefore, the Maastricht Treaty did not create momentum for a closer Union. It could have been the opportunity to bridge the two dimensions of integration, that between Member States and

[1] C-292/89 *R v. Immigration Appeal Tribunal, ex p. Antonissen* [1991] ECR I-745.

that between citizens, and marked a constitutional shift towards a new understanding of the EU as a true federation. Instead, the interstate and interpersonal levels of integration did not intersect. The thesis proved how these two institutional dimensions, at which solidarity unfolds did not meet. The micro and macro dimensions of the European Economic Constitution remained separated: individuals, although reached by EU law in their capacity of citizens thanks to the earlier judicial activism of the CJEU, retained a merely economic agency.

For this reason, the thesis put more emphasis on the other solidarity arrangements, those situated at the interstate level. It addressed the main interpersonal solidarity mechanism, i.e. the principle of non-discrimination as regards welfare benefits, only marginally, inasmuch as functional to the general solidarity theme.

Consequently, the thesis focused more on Member States' political agreements and their legal incorporation within (and without) the EU constitutional order. In fact, it explored the principles and underlying economic and theoretical assumptions of the EU's constitutional architecture from its inception to its current configuration. The aim was to uncover the political economy of these agreements and provisions. In this regard, the main findings were that, while the original framework had the nature of a compromise, the framework resulting after Maastricht and the euro area crisis reforms exhibited a more visible 'market fundamentalism', i.e. faith in the disciplining role of the market. The Maastricht Treaty first, with the introduction of the euro, and the crisis-management measures later imprinted a more neoliberal character to the EU constitutional setting. Some of these measures were adopted within the EU legal framework, specifically those enhancing fiscal discipline and constitutionalising austerity. The bailout measures, instead, were adopted through international and private law instruments. It is then interesting to notice how measures designed to provide financial assistance, which might have been a vehicle for transnational solidarity, were adopted by Member States and not the Union outside the EU legal order. In fact, the thesis asked whether Member States were acting as members of the Union or as international actors. This circumstance is relevant to the material scope of solidarity, namely to the set of mutual obligations between Member States. In this respect, the thesis showed that the notion of solidarity emerging from these bailouts could be defined as 'commutative', inasmuch as these

measures aimed at restoring the pre-existing market order. This underlying rationale also underpinned the ECB's unconventional measures.

This nature of both bailouts and monetary policy measures has been explored in the frame of the ECJ's case law (Chapter IV). The aim was to understand, first of all, whether, from a constitutional law perspective, the adoption of those measures was permissible. The analysis of the relevant judgments was instrumental, secondly, to the understanding of the political economy of the European constitution.

In this regard, the thesis demonstrated that the ECJ showed deference towards the most significant bailout instrument, the ESM, and the ECB's bond-buying programmes, the OMT and the PSPP. Despite the fact that it 'discovered' a new principle in the economic constitution, i.e. financial stability, the ultimate objective of economic policy remains price stability. This discovery, then, served the purpose of legitimising financial assistance otherwise precluded by the bailout prohibition. With regard to the ECB's mandate, financial stability was not even featured in the ECJ's discourse, proving how the aim of unconventional monetary policy was not to provide assistance to Member States with high-yield bonds, but rather to correct high yields not corresponding to fundamentals.

Established that price stability and consequently market discipline, which is its underlying rationale, represent a constitutional limit to genuine transnational solidarity, the thesis explored the constitutional limits that from a national perspective impede further integration. It argued that, while democracy may constitute a limit on a practical level given the democratic deficit in the European economic governance, it cannot also represent a conceptual limit to further integration in fiscal matters (Chapter V).

On a normative level, nothing prevents the EU from becoming a true space of transnational solidarity. The ever more interconnected nature of social life gave rise to political and social relations that – to recall the Habermasian terminology - can count for the purposes of distributive justice.

The recent Covid-19 crisis seems to have led to the realisation that nationality is not 'what motivates people to make the sacrifices that distributive justice requires'.[2] It is the awareness to be part of a social system that cannot be simply reduced to a transnational market. The EU's response to the pandemic seems to have shifted the focus from the

[2] David Miller, 'The Left, the Nation-State, and European Citizenship' (1998) 45 Dissent 47 – 51, 48.

market to the protection of society, or better to have embraced a different understanding of the market as an instrument at the service of society. The strict rules on fiscal discipline have been temporarily suspended through the activation of the general escape clause contained in the Stability and Growth Pact and rules on state aids relaxed. Moreover, health seems to emerge as a European public good, justifying transport green lanes for primary goods and distribution according to need. It has also become a criterion according to which distributing grants and loans of Next Generation EU, given that this programme is going to finance to a greater extent the most hit countries.

This ongoing crisis has clearly unveiled why economy and health, market and society, economic production and social reproduction cannot be separated. The EU's reaction to the pandemic, albeit initially slow and temporally limited, seems to go in this direction. It could certainly represent the beginning of new transformation of the EU.

The legal question that remains open is whether the EU constitutional framework can accommodate such a change. The argument put forward by this thesis is that the market continues to be the central device of regulation for both individuals and Member States. At the interpersonal level, the market remains the crucial structure for social reproduction: the restrictive case law on cross-border access to welfare provision, internal devaluation adopted by euro countries, 'strict conditionality' in the form of austerity are all elements which convey a neoliberal conception of the EU market as the crucial instrument that shapes conditions of social and material life for individuals. Similarly, at the interstate level, Member States 'reproduce' themselves through the dynamics of the (financial) market(s), in the sense that the exercise of their 'existential' functions is ever more dependent on access to capital markets.

However, this thesis has also shown that this understanding of the market as the arbiter of creditworthiness of individuals and Member States was not embedded in the Founding Treaties. As already said, the original constitutional framework was not imbued with 'market fundamentalism' either at the microeconomic or at the macroeconomic level. Free movement provisions did not coherently adhere to a market access paradigm and the balance of payment provisions of the Rome Treaty were designed to achieve equality between Member States.

This thesis has indeed traced the spaces of solidarity drawn by the Treaties and followed their evolution over the integration process. It has argued that Maastricht was

an ambivalent moment because, on the one hand, it expanded the scope of transnational solidarity and, on the other, it contracted the domestic spaces of solidarity. And while the introduction of the euro can be deemed responsible for the 'unsocial' face of the EU, free movement of persons provisions provided a different imagine of the EU. More importantly, they show that 'social-friendly' outcomes are the result of a hermeneutical choice and not of a technical necessity. Similarly, although the EMU framework is less prone to solidarity-friendly interpretations, the 'discovery' of the principle of financial stability not necessarily had to imply austerity. As this thesis suggested, austerity is just one of the means to ensure fiscal discipline.

In conclusion, this thesis argued that redistribution as a corollary of the principle of solidarity is not currently part of the EU's self-representation, its 'constitutional imaginary', which is still largely absorbed by a disembedded market. The EU value of solidarity does not have the capacity to challenge the distributive outcomes of the market. However, it can have (and has had) a redistributive meaning in the domain of free movement, where it can be articulated within the doctrine of public law. Conversely, solidarity exhibits a different content in the EMU context, where it is coded in the institutions of private law.

This divide reflects the hybrid nature of solidarity, which is caught in two different legal worlds: the one of the Union, as a unitary political actor with its own autonomous general interest, and the one of Member States with their own national interests. If in the first domain, solidarity is a mechanism of correction of inequalities between states and citizenries, in the second it is a mechanism by which inequalities between Member States are perpetuated and reinforced through the logic of insurance and the language of 'moral hazard'. In this second world, solidarity is *negotiated* through the intergovernmental process, which by definition presupposes different gradients of political influence of Member States, the political actors.

The constitutional status of solidarity in the EU composite system, then, can be explained as a tale from two worlds. The hope is that the world in which solidarity shapes the constitutional imaginary of the Union as an 'imagined community' of people and states will finally win.

Some encouraging signs that might suggest a more constitutional relevance of solidarity, intended as an EU principle demanding redistribution, are identifiable in the

post-Covid initiatives, most notably in the proposal for a European Health Union and in the EU recovery plan 'Next Generation EU'.

The EU budget has indeed thickened to support those public goods that are now perceived as EU priorities and new funding programmes have been introduced in the 2021-2027 Multiannual Financial Framework (MFF). EU4Health Programme, established by Regulation (EU) 2021/522,[3] is the most significant step in the construction of a European Health Union as it aims to protect and improve citizens' health and reduce health inequalities across the EU. To this end, it allocates grants which are then distributed according to the Gross National Income (GNI). The most ambitious programme in the post-covid scenario, however, is undoubtedly the Recovery and Resilience Facility (RRF)[4] included in Next Generation EU (NGEU).

Aimed to reinforce the EU's 2021-2027 multiannual financial framework (MFF) and for this reason combined with it in the same political package, NGEU is a EUR 750 bn recovery instrument that allows the Commission to borrow funds on behalf of the Union on the capital markets to be distributed in the forms of grants or loans through Union programmes, the most important of which is the newly created Recovery and Resilience Facility (RRF). The allocation of raised funds and financing modalities of NGEU are envisaged in the European Union Recovery Instrument (EURI),[5] adopted in the form of a Council Regulation on the basis of Art 122 TFEU. This instrument links the empowerment of the Commission to borrow from financial markets with the Own Resources Decision (ORD), which is the 'quasi-constitutional' act that sets out the financing system of the EU budget (Article 311 TFEU). Following a Commission's proposal in May 2020, the ORD has been recently amended during the negotiations of the 2021-2027 MFF,[6] so as to authorise the full amount of borrowing, establish the conditions for repayment, and increase the own resources ceiling. This review of the

[3] Regulation (EU) 2021/522 establishing a Programme for the Union's action in the field of health ('EU4Health Programme) for the period 2021-2027 [2021] OJ L 107/1-29.
[4] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17-75.
[5] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2020 L 433/23.
[6] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J. 2020, L 424.

system of own resources has been accompanied by a roadmap towards the introduction of new own resources.[7]

Against this background, the creation of NGEU seems to constitute a paradigm shift in the EU's trajectory of economic and fiscal integration and to challenge the normative foundations of EMU. It appears to be a constitutional change in the understanding of the EU value of solidarity.

First, NGEU seems to hardly reconcile with the no-bailout clause in Article 125 TFEU. It raises the question of the constitutionality of the financial assistance provided through the envisaged recovery instruments. Although the Council Legal Service argued that the clause of Article 125 TFEU does not prohibit forms of financing such as the recovery instruments, which do not aim to 'assume the liability of Member States before or in lieu of the markets',[8] the compatibility of NGEU with the EMU's underlying assumptions and legal principles seems controversial. Admittedly, NGEU is not a mechanism through which the Union assumes *existing* liabilities of Member States. However, it would create new liabilities on behalf of the Union. Practically, the credit strength of the Union would financially help heavily indebted states, which would be less exposed to the discipline of financial markets. In other words, market discipline - the objective of the no-bailout clause according to *Pringle* - [9] seems to be mitigated by the supranational redistributive mechanism created by NGEU. Whether the nature of the borrowed funds channelled through the Union's programmes can be compared to fiscal transfers - which in Optimum Currency Areas (OCAs) perform a macroeconomic stabilisation function and are an expression of solidarity in fiscal federations - needs to be explored.

[7] For instance, taxes on non-recycled plastic waste, a carbon adjustment mechanism, a digital levy, a revised Emission Trading System (ETS), and longer-term plans for a Financial Transaction Tax (FTT). See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Budgetary Discipline, on Cooperation in Budgetary Matters and on Sound Financial Management, as well as on New Own Resources, Including a Roadmap Towards the Introduction of New Own Resources; O.J. 2020 L 433 I/28.

[8] Council Legal Service, *Opinion on the Proposals on Next Generation EU*, 9062/20 (24 June 2020) 63 https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf accessed 12 April 2021.

[9] C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C: 2012:756 para 135.

Second, the legal construction of NGEU might suggest a change in the EU constitutional configuration. In the opinion of the Council Legal Service cited above, the Union programmes in which NGEU consists pursue a different policy objective than the one underpinning Article 125 TFEU, most notably that of cohesion. Despite EURI being based on Article 122 TFEU – which allows Union's financial assistance for 'exceptional occurrences' and already offered a legal basis to the European Financial Stabilisation Mechanism (EFSM) during the Eurozone crisis – the main vehicle through which the NGEU collected funds are disbursed is the RRS, adopted on the basis of Article 175 (3) TFEU on cohesion policy.

This combination of legal bases begs the question as to whether NGEU created a true, albeit limited in size and time, space of transnational solidarity. Cohesion policy, indeed, is redistributive at heart and not dissimilar to regional policies within nation-states, where solidarity stemming from the concept of citizenship has a territorial expression, that is ensuring equal standards of living and welfare to all citizens of the political community. On the other hand, the apparent unsuitability of Article 122 TFEU as the appropriate legal basis for tackling the effects of a crisis that involves the Union as a whole, because of it being originally conceived for helping a single country in distress, signals how the emergency paradigm embedded in that provision is no longer anchored to the rescue of a single Member State but to the survival of a collective entity, the Union.

It is then necessary to look into the use of Article 122 TFEU and question why the implementation of NGEU was subject to an amendment of the ORD, considering that this Treaty provision had already allowed the Commission to borrow on financial markets in the context of the EFSM cited above. This investigation needs to consider the principle of institutional balance inherent to different legislative procedures and the limits of EU's action in the field of economic policy. In particular, NGEU would require a critical analysis through the lens of pre-emption, which addresses the problem of competence creep.

While during the euro area crisis Article 122 TFEU was deemed to be unsuitable to the creation of a permanent stability mechanism so as to force Member States to resort to international law instruments outside the EU legal framework, with the NGEU the limitations ingrained in Article 122 TFEU have become immaterial. Even though rooted in a conceptual framework of emergency and exceptionality, NGEU makes the Union an

autonomous subject on the financial markets and ‘breaks a taboo’, which has long prevented the EU from acquiring a fiscal capacity. The Union is now allowed to borrow on capital markets to finance its expenditure, and thus to deliver its own public goods. The choice to create the recovery instruments within the EU legal framework, contrary to what agreed upon amidst the euro crisis - might suggest a different constitutional self-representation of the Union.

In conclusion, the Union looks progressively closer to a state than an international organisation. Whether this temporary transformation of the Union is destined to endure will depend on political and legal questions which need to be explored in future research endeavours. More importantly, the success of this long-term strategy for economic recovery will depend on the content of the social policies implemented and on their distributional effects for the most vulnerable EU citizens. The question of whether the ‘EU is more than a market’ is inextricably linked with what kind of transnational society the EU envisions: NGEU could be a perfect exercise of legal imagination.

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