



“The application of the principle of European Solidarity: Another victim of the EU Financial Crisis?”

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**THE APPLICATION OF THE PRINCIPLE
OF EUROPEAN SOLIDARITY:
ANOTHER VICTIM OF THE EU
FINANCIAL CRISIS?**

This paper is heavily drawn on the research and content of a Dissertation submitted by the author to the University of Nottingham (UK) in 2014 as the final element for the award of an LLM degree in European Law.

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Abstract

The focus of this paper is on the application of the principle of European Solidarity in the Euro area through the European Stability Mechanism (ESM), since the beginning of the EU financial crisis. Along this background the paper will *inter alia*, answer the questions of; whether the principle of solidarity is undermined rather than promoted, ending in being the victim of the Eurozone crisis whose mechanisms, namely the ESM and/or the comprehensive EU strategy, merely grow atomisation and national introversion instead of cooperation and unification.

The paper firstly analyses the conceptual background of solidarity, its legal development within the EU and the idea that it is the essential component to solve the current crisis, which constitutes the theoretical background of the research. Afterwards, the legitimacy of establishing the ESM will be examined, since even though it was designed to safeguard financial stability, doubts exist regarding its legitimation. This examination focuses on issues such as the compatibility of the ESM with EU Treaties and the Charter of Fundamental Rights, according to EU case law. An assessment on the exercise of solidarity during the crisis in practice will follow, discussing the specific type of solidarity applied, the terms of conditionality and the aftermath of assistance packages, in order to identify reasons that might have hampered the application of solidarity. Moreover, the role of the media during the Eurozone crisis will be examined to see how their attitude has affected the application of solidarity in practice. Finally, short and long term suggestions are made aiming at a more effective application of European solidarity, in relation to the current on-going financial crisis, as well as possible future situations of emergency.

The paper aims at proving that the ESM represents a legitimate and efficient mechanism capable of promoting solidarity between the Member States, despite the deficiencies that can be detected, such as the inconsistency with the Charter and the lack of a democratic EU institution in the decision-making process. However, the mechanism's wrong usage during the Eurozone crisis has indeed hampered solidarity, contrary to the European ideal, for reasons that are identified and explained in the paper.

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1. Introduction

The idea of solidarity can be traced back for more than two centuries. It has entered the modern lexicon as a development of the notion of fraternity at the time of the French Revolution, explicitly occurring in the 1804 Code Civil. Although the meaning, scope and significance of solidarity seem permanently contested since its development, the term has been used in a variety of contexts as an attractive idea. It was pursued by theorists in a range of meanings including theoretical, political and social, with different aims. On the other hand, the principle has been both decried and declaimed by numerous theorists who describe solidarity as an elusive and irrelevant concept in the today's modern world of the 21st century. For instance, the principle was characterised as “a largely empty feel-good slogan” by Vischer.¹ However, the paper will condemn this argument and advocate the great significance of solidarity, especially within the European Union.

In the EU, there is not a single definition on what solidarity is or means, but it is routinely mentioned in European Union documents as a fundamental value and may be considered as a cornerstone of European integration. Since the Schuman declaration, solidarity has been used in different legal contexts: as one of the values upon which the Union is based, as the principle of Community solidarity contained in Article 4(3) TEU, as solidarity between Member States in general, as principle of financial solidarity² and as solidarity between the Union and Member States against terrorist attacks or other disasters (Article 222 TFEU).³

The debate on European Solidarity increased since 2008, when increasing numbers of European countries were hit by the global financial crisis and the principle is persistently

¹ Robert Vischer, 'Solidarity, Subsidiarity and the Consumerist Impetus of American Law' (2007) University of St. Thomas Legal Studies Research Paper No. 07-08 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=971184> accessed 26 June 2014

² For the purposes of this research paper, the term 'financial crisis' is used to describe a broader variety of financial crisis situations that have globally emerged, including those related to banking panics, stock market crashes and bubbles currency crises. On the other hand the term 'sovereign debt crisis' is used to describe specifically the financial situation in several Eurozone Member States that were unable to repay or refinance their government debt.

³ Egle Dagilyte, 'Solidarity after the Lisbon Treaty: a new general principle of EU law?' (Conference 'The First Year of the Treaty of Lisbon - Consolidation and Enlargement', Dubrovnik, April 2011)

presented as an essential component to solve the current Eurozone crisis. As the then Commission President Jose Manuel Barroso stated, “It is very important that in times of difficulty all countries of Europe are working together and we need to do things in the spirit of true solidarity”.⁴ The Eurozone crisis has forced EU Member States to take new steps in the exercise of solidarity through new mechanisms that the Economic and Monetary Union (EMU) was actually lacking and were unimaginable just some years ago, in order to cope with the crisis. One of the most important solidarity mechanisms is the European Stability Mechanism (ESM) which has replaced two earlier temporary EU funding programmes: the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). The ESM is now the permanent crisis resolution mechanism for the countries of the euro area and it issues debt instruments in order to finance loans and other forms of financial assistance to euro area Member States which are experiencing or are threatened by severe financial problems.⁵

Even though the ESM and the comprehensive EU strategy are designed to safeguard financial stability within the euro area and promote solidarity, the alleged exercise of the principle of solidarity through these strategies has prompted a sharp debate on how much solidarity is needed to get out of the crisis and what solidarity means in the context of the EMU. Moreover, the exercise of solidarity has also been subject to an intense judicial and academic debate, regarding the legitimacy of its mechanism and ultimately the question of whether solidarity is in reality undermined rather than promoted.

In line with this background, the paper will critically assess how, if at all, the principle of solidarity ends up being another victim of the EU financial crisis, whose mechanisms merely grow individualism, atomisation of societies and national introversion,⁶ instead of unification and cooperation. This is to be done firstly, by looking at the rationale behind the solidarity principle and at the development and application of the principle within the

⁴ Honor Mahony, ‘New Member States call for EU solidarity’ (EU observer, 1 March 2009) <<http://euobserver.com/news/27694>> accessed 15 June 2014

⁵ ‘European Stability Mechanism’ (2014) <<http://www.esm.europa.eu/about/index.htm>> accessed 16 June 2014

⁶ Elvire Fabry, ‘European Solidarity: Where Do We Stand? Should We Foster It and How?’ (European Forum of Think Tanks, Barcelona, 2010) <<http://www.institutdelors.eu/media/cr-forum-think-tanks-barcelone-2010-en.pdf?pdf=ok>> accessed 11 October 2016

European Union (2). These will serve the understanding of subsequent debates as to why solidarity is an essential principle in approaching the current financial crisis. Secondly, the paper will focus on the concept of the EU financial crisis and specifically examine the legitimacy of the ESM, which is arguably the primary solidarity mechanism during the crisis. The examination will be made according to the CJEU's ruling in the case of *Pringle*,⁷ and issues such as the compatibility of the ESM with the EU Treaties and the Charter of Fundamental Rights will be discussed (3). Further, an assessment will follow on the exercise of solidarity in practice during the crisis and the reasons (if any) that hampered its application, resulting in the victimisation of the principle (4). The last section of the paper will focus on short and long term suggestions, aiming at a more effective application of the principle of solidarity, in order to fully confront the current financial crisis and its social consequences, as well as future situations of emergency that could emerge in the future (5).⁸

2. The concept of Solidarity

The concept of solidarity was first brought to prominence within social science by Emile Durkheim when *The Division of Labour in Society* appeared in 1893, and it has received sporadic attention within the discipline of sociology ever since.⁹ Consequently, 'solidarity' may come top as both the least theorised and most used concept of contemporary politics and due to the fact that little attention has been paid in establishing a precise meaning for solidarity, the principle is often used in an unclear and indefinite sense. As Rehg indicates, sociologists seek models of solidarity that explain social order and change, whereas philosophers will tend to link it with normative theories of legitimate government, the good society, and morality.¹⁰ On the other hand, legal scholars have been rather slower to respond, other than in the specific context of healthcare and other aspects of social provision in the EU where the tensions between

⁷ Case C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General, ECLI:EU:C:2012:756

⁸ Methodology: The research adopts an interdisciplinary approach combining the disciplines of law, economics and communications as well as a socio-legal perspective.

⁹ Lawrence Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) 9 BJPIR 171

¹⁰ William Rehg, 'Solidarity and the Common Good: An analytic framework' (2007) 38 Journal of Social Philosophy 7

market and non-market paradigms have been the paramount focus.¹¹ A conceptual analysis on solidarity is thus necessary, before examining the connection of the principle with the current financial crisis.

2.1 Conceptualising Solidarity

In spite of the diversity of theoretical applications and aims of the principle, solidarity in essence, is regarded as the “feeling of reciprocal sympathy and responsibility which promotes mutual support among members of a group”.¹² Moreover, the majority of theorists identify some of the most important conceptual features of solidarity that are worth mentioning for clarifying the features of the principle.

Firstly, solidarity is known as a *hybrid* concept, used to describe both an observable empirical behaviour amongst people and the normative grounds on which there ought to be such behaviour.¹³ In this regard, solidarity is close to legitimacy and therefore, as expected, it brings about similar debates regarding normative philosophical and social scientific accounts. Moreover, solidarity is a *social* concept that defines a relation between agents of a society. References to the social concept of solidarity are increasingly heard during the last years, since the crisis is not only economic and financial, but also social, with direct effects on social and intra-European cohesion.

Thirdly, solidarity speaks to *motives*. Behaving (or being disposed to behave) in a specific way is not sufficient to be in solidarity but as Harvey argues, “such behaviour needs to be accompanied by an appropriate kind of belief”.¹⁴ Therefore, to establish that one is acting *from* solidarity, it is not sufficient to benefit someone else through specific actions. For instance, if someone is acting only out of pure self-interest it would not

¹¹ Malcom Ross, *Promoting Solidarity in the European Union* (Malcom Ross and Yuri Borgmann-Prebil eds, OUP 2010) 24

¹² Phil Johnson and Michael Brookes, ‘Legal Origin and Social Solidarity: The Continued Relevance of Durkheim to Comparative Institutional Analysis’ (2015) *Sociology* SAGE Publications
<<http://soc.sagepub.com/content/early/2015/11/11/0038038515611049.full.pdf+html>> accessed 11 September 2016

¹³ Gordon Bajnai et al, ‘Solidarity: For Sale? The Social Dimension of the New European Economic Governance’ (2012) *Europe in Dialogue* 1/2012, 19 <http://www.bertelsmann-stiftung.de/cps/rde/xbcr/bst/Europe_in_Dialogue_01_2012_Solidarity.pdf> accessed 10 July 2014

¹⁴ Jean Harvey, ‘Moral Solidarity and Empathetic Understanding: The Moral Value and Scope of the Relationship’ (2007) 38 *Journal of Social Philosophy* 22

normally amount to an act from solidarity, neither if someone would act only out of pure selfless or altruistic motives. As Nikolaidis and Viehoff argue, solidarity describes a relationship that is underlined to some extent by each of “the powerful motives of self-interest, community, altruism and obligation, but irreducible to either one of them”.¹⁵

More specifically, in relation to the third conceptual feature that solidarity speaks to *motives*, Durkheim notably distinguished between ‘mechanic’ and ‘organic’ solidarity. The ‘mechanic’ solidarity can be found in small, homogenous groups where the urge to help fellow members is stemming from emotions. While the ‘organic’ solidarity is stemming from the acknowledgment of interdependence, where the members are not homogenous and do not necessarily feel the emotional link.¹⁶ The Member States within the EU arguably rely on their interdependence, through the obligations created by the Treaties and thus on the ‘organic’ solidarity, since as a modern heterogeneous Community, lacks the emotional impulse. However, the acknowledgment that ‘mechanic’ solidarity cannot apply between the Union Members and that they rely on their interdependence instead, does not mean that they can only produce solidarity based on self-interest. In this light, among the manifestations of the ‘organic’ solidarity, a further important distinction can be made between the ‘direct reciprocity’ (or ‘direct solidarity’) and the ‘enlightened self-interest’ solidarity, that will be emphasised in the paper.

Lastly, solidarity is arguably a multi-leveled concept and can move ‘back and forth’. The traditional narrative is that solidarity is stemming from the initiatives of the powerful nations/parties to the weaker through the motives explained. Yet, solidarity can also be ‘reversed’ whereby the weaker parties ‘call for solidarity’ from the more powerful, while at the same time the weaker party can be the one exercising solidarity in the future. This is arguably the case within the financial crisis in the Eurozone where Member States in need ‘call for solidarity’, by requesting financial assistance from the ESM, based on the provisions of the ESM Treaty (Recital 8). Before any ‘stability support’ is granted, the

¹⁵ Kalypto Nikolaidis and Juri Viehoff, ‘Solidarity: For Sale? The Social Dimension of the New European Economic Governance’ (2012) *Europe in Dialogue* 1/2012, 19 <http://www.bertelsmann-stiftung.de/cps/rde/xbcr/bst/Europe_in_Dialogue_01_2012_Solidarity.pdf> accessed 10 July 2014

¹⁶ Emile Durkheim, *The Division of Labor in Society* (Palgrave Macmillan 2013)

request needs to be assessed against sustainability considerations and potential risks to the financial stability of the Eurozone issues.¹⁷

However, regardless of all the different conceptual classifications and expositions of solidarity, the question of why solidarity is remarkably important and not an ‘empty feel-good slogan’ arises. Why should there be this revival of interest in an idea that at first sight seems perhaps “at best quaint or at worst irrelevant in today’s technological, individually-oriented and consumerist post-modern (western) world”?¹⁸ One incentive, for some theorists, is exactly in order to find a ‘remedy’ to change these conditions and prevent the world from being individually-oriented and antagonistic or at least eliminate the most destructive symptoms. Indeed, it has been claimed that solidarity is “what keeps an entity from disintegrating”.¹⁹

In addition, according to Kontochristou, solidarity may be used as a ploy in political rhetoric to hide that the phenomenon of solidarity is missing or to denote that there is a feeling of togetherness, a sense of loyalty, trust and fairness.²⁰ What is thus clearly visible is the fact that as Stjernø points out, the advance of individualism poses a clear threat to the idea of solidarity.²¹ What is more, state-centred conceptions of democracy recommend that a diminution of solidarity presumably would result in the weakening of collective social provision. Such conceptions apply to Stjernø, who defines solidarity as “the preparedness to share resources with others by personal contribution to those in struggle or in need through taxation and redistribution organised by the state”.²²

¹⁷ Treaty Establishing the European Stability Mechanism (ESM) [2012] D/12/3, Article 13

¹⁸ Malcom Ross, *Promoting Solidarity in the European Union* (Malcom Ross and Yuri Borgmann-Prebil eds, OUP 2010) 24

¹⁹ David Heyd, ‘Justice and Solidarity: The Contractarian Case against Global Justice’ (2007) 38 *Journal of Social Philosophy* 112

²⁰ Maria Kontochristou and Evi Mascha, ‘The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press’ (2014) 6 *Review of European Studies* 50

²¹ Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 2

²² *Ibid*, 326

2.2 The development and importance of solidarity in the European Union

Notwithstanding the different theoretical applications of the principle, the genuine importance of solidarity has constantly shown up between the Union Member States, way before the emergence of financial crisis, as this section will demonstrate. The reason is that solidarity has always been extremely significant in the EU, from the very first days of its creation until today, during the on-going Eurozone crisis.

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity”.²³ These are the words of Robert Schuman, one of the founding fathers of the EU, which demonstrate the fact that solidarity has been part of the Union’s equation for decades. It was recognised since the Treaty Establishing the European Coal and Steel Community Treaty (1951) indicating in its preamble that “Europe can be built only through real practical achievements which will first of all create real solidarity and through the establishment of common bases for economic development”. Moreover, in both the Single European Act (1986) and the Maastricht Treaty (1992) later, ‘solidarity’ appeared alongside ‘cohesion’ as one of the central objectives of the EU.²⁴

There were pessimistic conclusions as well, especially in the aftermath of the failed Constitutional Treaty (2004), when Stjerno, emphasised the difficulty of being “optimistic about immediate developments regarding solidarity”.²⁵ Moreover, the climate for a constitutional reform was described as the “least favourable and least promising –to put it mildly- moments for optimistic outbursts regarding the future of European solidarity”.²⁶ The Treaty of Lisbon in 2009 not only managed to continue the commitment of solidarity but also expanded it by mentioning in its preamble the desire “to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”. In addition, solidarity is recognised in the Treaty as one of the Union’s founding values in Articles 2 and 3 TEU. The text of the Treaty therefore, recognises the principle as a

²³ Jesse Russell and Ronald Cohn, *Schuman Declaration* (Book on Demand 2012) 14

²⁴ Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33(1) *Oxford Journal of Legal Studies* 1

²⁵ Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 352

²⁶ Stefano Giubboni, ‘Free movement of Persons and European Solidarity’ (2007) 13 *European Law Journal* 360

value binding together not only EU Member States but also the citizens of each and every Member State and the Union.

Despite the significance attributed to solidarity, it is surprising that the Treaties do not shed much light on the concept of this principle and it is not obvious what solidarity could mean in the context of the EU. It is not clear how the notion of European solidarity is defined and what are the political, economic, legal and moral limits that apply in the framework of the EU. It is clear however, that it is not only affecting the popular macro-economic issues but the entire European policy umbrella, including among other areas, the energy issues (Article 194 TFEU), social and labour agenda, migration and immigration, environmental protection and agriculture,²⁷ as well as the case law of the CJEU.

It is argued that the principle of solidarity undertakes the form of a social concept within the EU. Particularly, the concept of social market economy that was introduced by the Treaty of Lisbon under Article 3(3) TEU is structured by the elements of competition, cooperation and solidarity. It is for the first time in the history of integration, that the concept of social market economy found its way into the Treaty objectives and it is described as being of constitutional importance.²⁸ This form of economy relies on the development and protection of social capital by aiming to provide help to the marginalised without undermining the processes of the free market operated in conjunction with state provision. The focus on solidarity in the social market economy fosters the ability and willingness to take on social responsibility and at the same time to contribute to society.²⁹ Social market economy is further strengthened by the newly inserted 'horizontal social clause' under Article 9 and also by provisions of the Charter of Fundamental Rights. Accordingly, besides occupying important places in the EU

²⁷ Andreas Raspotnik and Laura Ventura, 'The issue of solidarity in the European Union' (2012) TESPAs Brief <<http://www.tepsa.eu/download/TEPSA%20Policy%20Paper%20The%20Issue%20of%20Solidarity%20in%20the%20European%20Union.pdf>> accessed 15 June 2014

²⁸ Václav Šmejkal, 'CJEU and the Social Market Economy Goal of the EU' (2014) Charles University in Prague Faculty of Law Research Paper No. 2014/I/1, 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513377> accessed 19 September 2016

²⁹ Markus Vogt, 'Towards a European social market economy' (2011) Ludwig-Maximilians Universität München <http://www.kaththeol.uni-muenchen.de/lehrstuehle/christl_sozialethik/personen/1vogt/texte_vogt/vogt_european-social-market.pdf> accessed 19 September 2016

treaties, the principle of solidarity was also dedicated a whole title (“Solidarity”) in the Charter in the context of welfare related rights, such as the right to fair and just working conditions (Article 31).³⁰

Likewise, the Court of Justice of the European Union (CJEU) has now developed a line of jurisprudence (in the area of competition and freedom of movement law) in which it routinely refers to ‘principles of solidarity’ to determine the proper balance between market principles and social protection objectives in EU law.³¹

In other parts of the Treaty, ‘mutual solidarity’ and fair sharing of responsibility are presented as principles which govern relations among Member States in the domains of external and security policies, and of freedom security and justice. Particularly, solidarity appeared in the field of security and defence in two provisions introduced by the Treaty of Lisbon. It firstly appears in the event of humanitarian or natural disasters, or with a view to burden sharing. The so-called ‘Solidarity Clause’ framed in Article 222 of the TFEU, formulates an explicit demand on the Member States to come to each other’s assistance in the event of terrorist attacks, natural or man-made disasters³² and distinguishes the EU’s code of conduct from traditional intergovernmental military alliances. Secondly, the so-called ‘mutual defence clause’ of Article 42(7) TEU, requires Member States to collaborate in the case of armed aggression.³³ The introduction of a mutual assistance clause in the Treaty of Lisbon constituted a major innovation in the development of the Union. The ‘mutual defence clause’, consists of “a replica of the historical WEU and NATO military alliance etiquette” and encompasses the “collective obligation of Member States to assist one another in the vent of attack on their territory by deploying their military assets”.³⁴

³⁰ Title IV of the Charter of Fundamental Rights of the European Union, *OJ* [2010] C 83/389.

³¹ Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33(1) *Oxford Journal of Legal Studies* 1

³² Sara Myrdal and Mark Rhinard, ‘The European Union’s Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the TFEU’ (2010) *Occasional Ulpapers* 2/2010 <<http://www.ui.se/upl/files/44241.pdf>> accessed 20 June 2014

³³ Andre W.M. Gerrits, ‘Solidarity and the European Union: From the Welfare State to the Euro Crisis’ (2013) *International / European Union Studies*, Leiden University <<http://media.leidenuniv.nl/legacy/solidarity-and-the-european-union.pdf>> accessed 30 July 2014

³⁴ Theodore Konstadinides, ‘Civil Protection in Europe and the Lisbon ‘Solidarity Clause’: A genuine legal concept or a paper exercise?’ (2011) *Uppsala Faculty of Law Working Paper* 2011:3

Following the atrocious terrorist attacks in Paris on the 13th of November 2015, the French President Hollande evoked Article 42(7) TEU. Even though France is a member of the NATO, the President triggered the EU's mutual assistance clause rather than that of NATO, so as to avoid complicating any diplomatic and military cooperation with countries such as Russia and to "appeal for help from a civilian rather than hard military power".³⁵ In addition, France chose not to invoke Article 222 TEU, since according to Hillion its "mandatory language emphasises the shared responsibility of the Member States *and* the EU institutions", while once Article 42(7) TEU is approved by the Defence Ministers, "the request for assistance could immediately be discussed and agreed on a bilateral basis rather than in an EU context, keeping EU involvement to the minimum".³⁶ Both Article 222 TFEU and Article 47(2) TEU, have introduced commitments amongst Member States to realise the whole spectrum of threat scenarios identified in the European Security Strategy.

Moreover, in the context of the construction of the EMU, apart from the launch of the Euro, the Treaty of Maastricht introduced provisions related to financial solidarity and coordination within the EMU. These treaty provisions demonstrated the impact of the EMU on the weaker economies and their national governments' capacity to stabilise them, as well as a new cohesion instrument, the Cohesion Fund, created to help the poorest countries to join the EMU. Yet, in the "wake of the sovereign-debt crisis, the European Union is confronted for the first time with the prospect of direct fiscal transfer of wealth from one group of citizens to another, on a scale that calls for a reappraisal of the ideal and impact of solidarity in this Union".³⁷ Thus, the financial crisis and the need to provide instant access to financial assistance programmes, pushed the Member States to adopt new measures to exercise financial solidarity. The last block in the new architecture of financial solidarity is arguably the permanent European Stability Mechanism (ESM).

<<http://www.jur.uu.se/LinkClick.aspx?fileticket=tUq0GRu0pKA%3D&tabid=5502&language=sv-SE>> accessed 17 August 2016

³⁵ Christophe Hillion and Steve Blockmans, 'Europe's self-defence: Tous pour un et un pour tous?' *CEPS Commentary* (20 November 2015) <<https://www.ceps.eu/publications/europe%E2%80%99s-self-defence-tous-pour-un-et-un-pour-tous>> accessed 17 August 2016

³⁶ Ibid

³⁷ Bajnai et al, 'Solidarity: For Sale? The Social Dimension of the New European Economic Governance' (n 9)

The ESM was indeed designed to provide assistance to Eurozone Member States experiencing financial difficulties, safeguard financial stability within the euro area and promote European solidarity, together with the comprehensive EU strategy, as explained in the preamble of the ESM Treaty.³⁸ In addition, as will be analysed further, it can be argued that the introduction of the ESM constituted a permanent result of the transition from negative to positive solidarity, rendering it the most important mechanism in terms of financial solidarity. The ESM was established in September 2012 to refinance highly indebted Member States and provide assistance of up to €500 billion. It also cooperates very closely with the International Monetary Fund (IMF) in providing stability support. Specifically, the ESM Treaty states that “the active participation of the IMF will be sought, both at technical and financial level and a euro area Member State requesting financial assistance from the ESM is expected to address, a similar request to the IMF”.³⁹

It is therefore evident, that solidarity lies at the heart of the European ideal from the very first days of the Union’s creation, as a founding value and as a guiding principle for numerous policies. The same applies in the financial policies of the Union, especially in times of emergency, when behind every financial assistance, measure and subsidy lies the solidarity principle through the funding programmes, which also operate as political parameters necessary for sharing responsibility of the Member States for financial implications.⁴⁰

However, the solidarity Robert Schuman was referring to in 1950, built up over six decades ago, seems to be constantly tested. For instance, in countries such as Greece, that have already received financial aid packages, there are scenes of violent protest, increasing numbers of destitute people being provided with food by charities and extremist and divisive politics.⁴¹ These scenes run counter to Schuman’s vision of

³⁸ Treaty Establishing the European Stability Mechanism (ESM) [2012] D/12/3, Recitals 1 and 5

³⁹ Ibid, Recital 8

⁴⁰ Maria Kontochristou and Evi Mascha, ‘The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press’ (2014) 6 Review of European Studies 50

⁴¹ Charles Jenkins, ‘The Euro: A message of solidarity’ (OECD Observer, November 2012)

<http://oecdobserver.org/news/fullstory.php/aid/3884/The_euro:_A_message_of_solidarity.html> accessed 20 June 2014

peace and solidarity and lead to questions, that this paper will try to answer, to what extent the measures established by the EU and the aid packages given to face the crisis, accompanied by strict conditions, are indeed proof of solidarity.

Likewise, numerous commentators argue that solidarity is an elusive idea in the EU, initially because of the last enlargement which increased the heterogeneity between the Member States even further and more recently due to the to the financial crisis that has widened further the social disparities within and between the Member States. However, the persistent reference of the principle, as seen above, and its victorious process in the EU even after the failure of the Constitutional Treaty, refute that argument and show that solidarity is not just some occasional reference point. Europe was once characterised as the ‘continent of solidarity’ in the Laeken European Council. Furthermore, it was correctly stated that the EU is a success story over half a century now “as a result of mutual solidarity and fair distribution of the benefits of economic development”.⁴² Therefore, it would be tragic and disastrous if we were to lose solidarity and everything that evolves around it, on the road to save Europe from the financial crisis.

3. The European Stability Mechanism: Legitimacy of the main solidarity mechanism

3.1 A word on the crisis

The effects of the financial crisis started in 2007 and by 2010 it was already clear that various economies of the Eurozone were seriously affected. This is due to the fact that countries continuously refinance their public debt by paying debts that have matured by borrowing new money from the markets and selling financial instruments such as bonds.⁴³ As Hinarejos argues the crisis has changed the cost of funding; once the markets paid more attention to the specifics of each euro economy, they started to have doubts as to specific countries’ credibility as debtors.⁴⁴ Therefore, due to this lack of confidence the costs of borrowing and refinancing are rising driving the troubled

⁴² European Council Meeting in Laeken 2001

⁴³ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 11

⁴⁴ *Ibid*, 12

countries at the risk of being shut out of private markets. Accordingly, the markets started to doubt the ability of some euro countries to repay their debt for numerous reasons (initially, Ireland, Portugal and Greece) driving the Euro area to the so-called sovereign debt crisis. However, besides the obvious public debt deficits and financial consequences for numerous Member States, this crisis has a much broader scope affecting the Union as a whole. From a political or constitutional perspective, the crisis has cast doubt not only on the viability of a mechanism of integration such as the one envisaged in the EMU, but also on the future of the European Union as a political project in the face of citizens' growing disaffection.⁴⁵

The EU has thus tried to tackle the euro area crisis while at the same time staying within its limited powers and relying on legitimate responses. Since the beginning of the Eurozone crisis, multiple responses have been given to overcome the financial debts and stabilise the European markets. In a nutshell, the responses to the crisis, were firstly actions taken by the European Central Bank (ECB), whose role and practices dramatically changed after the crisis, secondly the Mechanisms of Financial assistance and lastly numerous reforms in order to improve the economic coordination and financial supervision. In order to facilitate the ongoing development of solidarity in the EU, principally through the Mechanisms of Financial assistance, there were legal hurdles that had to be overcome, such as the prohibition under Article 125 TFEU, to allow the mechanisms to comprise lending capacities. Moreover, in terms of the establishment process of the new solidarity mechanisms, legitimation of the process had to be secured.

Initially, the creation and functioning of the first emergency mechanisms, the EFSM and the EFSF in 2010, contributed to the stability of the Eurozone but had proved to be a temporary solution. In order to ensure balance and stability in the Eurozone, a permanent crisis mechanism was needed. Consequently, the ESM was created, as an intergovernmental international institution to refinance highly indebted Member States, safeguard financial stability within the euro area and allegedly promote solidarity between Union Member States on a permanent basis. The ESM has maximum lending

⁴⁵ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 11

capacity of €500 billion to provide assistance and when a Member State addresses a request to the ESM, the procedure for granting stability support will be examined and assessed by the so-called Troika of International lenders, which is consisted by the European Commission, the ECB and the IMF, to assess whether public debt is sustainable and what kind of support programme should be offered.⁴⁶

However, the establishment and setting of the ESM has produced two main parameters. Firstly, the Member States have concluded and ratified an intergovernmental international Treaty (ESMT) beyond the Treaty rules on the EMU, with a view to assure financial stability of the euro area as a whole.⁴⁷ Secondly, the ESM has pushed the Member States to insert a new indent in Article 136 paragraph 3 TFEU through the use of the simplified amendment procedure under Article 48 paragraph 6 TEU.⁴⁸ It is thus not surprising that these settings and ultimately the entire establishment of the ESM, were legally contested, *inter alia*, before the CJEU to rule on whether Member States could actually follow this path under EU law.

Pringle is the awaited judicial response of the European Court of Justice, ruling on the establishment of the ESM and it is particularly important in terms of solidarity, since the ESM is arguably the main mechanism designed to promote cooperation and solidarity between the Member States. It is further argued, as will be seen, that *Pringle* has also facilitated and illustrated the fact that the ESM comprises the first big step in the on-going transition from negative to positive solidarity, within the alteration process of the economic governance of the Union.

3.2 **Thomas Pringle v Government of Ireland**

The *Pringle* case, a preliminary reference from the Irish Supreme Court, is a significant judgment of the ECJ on one of the most remarkable crisis-related reforms; the establishment of the ESM. The case concerned a challenged by Thomas Pringle, to the

⁴⁶Treaty Establishing the European Stability Mechanism (ESM) [2012] D/12/3, Article 13

⁴⁷ Gianni Lo Schiavo, 'The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?' (Evolving Europe: Voices of the Future, Loughborough, July 2013)

⁴⁸ Ibid

ratification of the ESM Treaty by the Irish Government. The appellant put a number of questions to the Supreme Court including whether the ESM Treaty runs counter to the Irish Constitution and needs a referendum to be ratified and whether the Supreme Court should refer to the CJEU to examine the compatibility of Ireland's ratification of the ESM Treaty with the EU Treaties.⁴⁹ The first argument was rejected by both the High Court and the Supreme Court, but the Supreme Court agreed to make a preliminary ruling to the CJEU. Its importance, *inter alia*, appears from the fact that the Court decided to sit 'as a full court' (27 judges at that time), a very exceptional occurrence. In addition to the eleven governments of the Union Member States, who clearly deemed the outcome of the case of utmost importance and therefore decided to intervene in the proceedings; the European Council intervened as well for the first time ever.

The creation of this permanent crisis management mechanism for the euro area can support the overall structure of the EMU and safeguard against imbalances in individual countries. It intends to give "euro area countries in distress, the time necessary to implement measures to restore fiscal sustainability, competitiveness and financial stability in the medium term".⁵⁰ However, despite the good intentions of ESM's creators, the idea of structuring a permanent international body capable of granting financial assistance to Eurozone members in need, to some extent goes against the foundations of the EMU, which aims at ensuring price stability through sound government budgets. This issue is also discussed in *Pringle*.

The judgment is twofold based on the questions referred to the Court. The first part,⁵¹ explores the constitutional feasibility of the simplified Treaty revision procedure to create the ESM, namely the insertion of a new paragraph 3 to Art.136 TFEU through the

⁴⁹ 'Case Summary: Pringle v Government of Ireland and Others' (Bloomsbury Professional, 7 August 2012) <<http://www.bloomsburyprofessionalonline.com/applib/newsitem/216/case-summary-pringle-v-government-of-ireland-and-others>> accessed 12 October 2016

⁵⁰ European Central Bank, 'The European Stability Mechanism' (Monthly Bulletin Issue 7, 14 July 2011) <https://www.ecb.europa.eu/pub/pdf/other/art2_mb201107en_pp71-84en.pdf?b3569e974bd4de5f032f20f009ab2bc8> accessed 24 August 2016

⁵¹ Case C-370/12 *Pringle v Ireland*, ECLI:EU:C:2012:756, para 29

European Council Decision 2011/199.⁵² The second part,⁵³ deals with the right of the Eurozone Member States to conclude and ratify an international agreement such as the ESM by way of interpretation of the Treaty rules, namely, Articles 2, 3, 4(3) and 13 TEU and Articles 2(3), 3(1)(c) and (2), 119 to 123, and 125 to 127 TFEU, as well as of the general principles of European Union law.⁵⁴

Thus, after establishing the admissibility of the question and the jurisdiction of the Court, the case examined whether the amendment of Article 136 increases the competences of the Union in the Treaties. The ECJ reached the conclusion that the ESM pursues the objective of maintaining the stability of the euro area as a whole whereas the Eurosystem pursues the objective of price stability.⁵⁵ Therefore according to the Court, it is clear that the formation of the ESM does not have any conflict over the monetary policy since the objective of the ESM is “to safeguard the stability of the euro area as a whole that is clearly *distinct* from the objective of maintaining price stability, which is the primary objective of the Union’s monetary policy.”⁵⁶ Moreover, the Court defined that the ESM does not interfere with the new regulatory framework for strengthened economic governance of the Union as envisaged in a number of other new measures.⁵⁷ Therefore, by establishing the mechanism, no interference with the Union’s exclusive competence of monetary policy occurs. Consequently, Decision 199/2011 satisfies the condition under Article 48 TEU “that a revision of the FEU Treaty by means of the simplified procedure may not have the effect of increasing the competences of the Union”⁵⁸ and the amendment of Article 136 is in compliance with the law. It also satisfies the condition stated under the first and second subparagraphs of Article 48(6) that the simplified revision procedure may concern solely provision of Part Three, since it amends Article 136 from Part Three. In other words, the amendment of the Treaty that

⁵² 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 09/2013 <<http://aei.pitt.edu/47514/>> accessed 5 July 2014

⁵³ Case C-370/12 *Pringle v Ireland*, ECLI:EU:C:2012:756, para 77

⁵⁴ 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 09/2013 <<http://aei.pitt.edu/47514/>> accessed 5 July 2014

⁵⁵ *Ibid*

⁵⁶ Case C-370/12 *Pringle v Ireland*, ECLI:EU:C:2012:756, para 56

⁵⁷ *Ibid*, paras 58 and 59

⁵⁸ *Ibid*, para 71

would authorise the Eurozone countries to establish a stability mechanism in order to exercise and promote solidarity between the Member States, was found legitimate.⁵⁹

In the second part of the judgment, the Court was called upon to analyse the power of the Union to conclude international agreements and the provisions regarding its exclusive competences in the monetary policy. The ECJ denied that the role and tasks of the ESM would fall within the monetary policy under the TFEU, because according to Articles 3 and 12(1) of the ESMT, the ESM is not entitled to set the key interest rates for the euro area or to issue euro currency, but it seeks to provide financial assistance entirely granted by the ESM from paid-in capital or by the issue of financial instruments.⁶⁰ The Court had to determine, *inter alia*, whether the no-bailout clause can be compatible with the 'change in solidarity' between the euro area Member States. Legally speaking, it means that the Court had to decide whether the no-bailout clause in Article 125 TFEU allows the granting of assistance by the ESM in order to safeguard the financial stability in the euro area.⁶¹

The Court thus interpreted the ESM in light of Articles 123 and 125 TFEU. After examining in more depth the 'spirit' of Article 125 TFEU, the Court managed to reconcile the ESM with the no-bailout clause. It started its analysis by stating that Member States have the power to conclude between themselves, an agreement for the establishment of a stability mechanism, provided that the commitments entered into in the context of such an agreement comply with Union law.⁶² Moreover, according to the Court, the granting of assistance by a stability mechanism is allowed if; "first the recipient Member State stays responsible for its commitments to its creditors", secondly any "assistance is granted subject to strict conditionality and lastly this is indispensable to safeguard the

⁵⁹ The ESM Treaty was originally signed by finance minister of the 17 euro area countries on 11 July 2011. A modified version of the Treaty was signed on 2 February 2012, incorporating amendments aimed at improving the effectiveness of the mechanism and entered into force on 27 September 2012. The ESM was inaugurated on 8 October 2012 following ratification by the then 17 Eurozone Member States.

⁶⁰ 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 09/2013 <<http://aei.pitt.edu/47514/>> accessed 6 July 2014

⁶¹ Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7

⁶² Ibid

financial stability of the euro area as a whole”.⁶³ Therefore, provided that the ESM Treaty adheres to these conditions, the Court concluded that it does not violate the no-bailout clause under Article 125 TFEU.⁶⁴

Despite the difficult position of the Court, after analysing the case in an accelerated procedure taking almost four months, it rejected all the arguments challenging the validity of the financial rescue instruments and the lawfulness of the ESM. However, the decision of the Court came as no surprise since a broad reading of the prohibition of Article 125 and an affirmative answer as to whether the establishment of the ESM acted in breach of EU law, would arguably go against two basic principles of the Union, namely sovereignty and solidarity as will be seen in the section that follows.

3.3 **Commentary on Pringle regarding the solidarity principle**

The principle of financial solidarity with nationals of other Member States has been discussed in the *Pringle* case and was also particularly mentioned in the earlier Opinion of AG Kokott on the case, as one of the main points. The Court came to the same conclusion as AG Kokott and correctly recognised the necessity of assistance and curative action to Member States with serious financial problems that risk destabilising the entire Eurozone. Similarly, Advocate General Kokott rightly pointed out that a broad interpretation of the prohibition contained under Article 125 TFEU would have been at odds with the desire expressed by the parties to the EU Treaty ‘to deepen the solidarity between their peoples’.⁶⁵ On that understanding, AG Kokott went on in her Opinion by stating that “Member States should not be prevented from voluntarily assisting each other in cases of emergency, for instance to prevent the economic and social effects of a State bankruptcy”.⁶⁶ It can be therefore argued, based on the approach of AG Kokott in her Opinion, that a different outcome of the Court in *Pringle*, would have been in conflict with solidarity, one of the main values on which the EU is based and thus in conflict with the entire idea of the European Union. In addition, as Van Malleghem

⁶³ Ibid

⁶⁴ Case C-370/12 *Pringle v Ireland*, ECLI:EU:C:2012:756, paras 138, 142-143, 145-147

⁶⁵ Francisco Javier Mena Parras, ‘The European Stability Mechanism through the legal meanderings of the Union’s constitutionalism: Comment on Pringle (2013) 38 European Law Review 848

⁶⁶ View of A.G. Kokott in *Pringle* (C-370/12) at [143]

argues by upholding the mechanism of ESM in *Pringle*, the Court “preserved the political compromise reached among the Member States on a balance between a reinforced safety net and an increased control over their fiscal policies”.⁶⁷

Moreover, the reference made by AG Kokott to the purpose of EU integration is important since “it helps to understand how the ESM reconciles individual and collective solidarity between interdependent euro-area Member States, by organising a system of assistance to be activated when difficulties in one of them endanger the financial and monetary stability of the whole”.⁶⁸ Collective solidarity refers to the collective action by the Member States, in the current case, outside the EU legal order in upholding the Stability Mechanism, whereas individual solidarity refers to an action taken individually by a Member State towards providing assistance to another Union Member State in need. In two judgments of the early nineties,⁶⁹ the Court had already accepted collective action by the Member States concerning humanitarian and development aid, outside the Community, even though no specific legal basis existed in primary law. More importantly, it has been long recognised that the competence of the Union in these fields is complementary in nature and that its exercise can never result in Member States being prevented from acting individually or collectively.⁷⁰

On the other hand, there are commentators being critical of the ‘teleological’ reasoning in the *Pringle* decision arguing that it only provides an ideal example of the combination of legal reasoning influenced by political decision making, rather than a model for concrete legal reasoning. For instance, as Beck argues, *Pringle* demonstrates that, ultimately, “judicial independence seems unable to insulate judicial decision-making from the vested interests of the financial markets represented by the ECB as well as

⁶⁷ Pieter-Augustin Van Malleghem, ‘Pringle: A Paradigm Shift in the European Union’s Monetary Constitution’ (2013) 14 German Law Journal 162

⁶⁸ Francisco Javier Mena Parras, ‘The European Stability Mechanism through the legal meanderings of the Union’s constitutionalism: Comment on Pringle’ (2013) 38 European Law Review 848

⁶⁹ Cases C-181/91 and 248/91 Parliament v Council and Commission (Bangladesh aid), ECLI:EU:C:1993:271; Case C-316/91 Parliament v Council (‘Lome’), ECLI:EU:C:1994:76

⁷⁰ Francisco Javier Mena Parras, ‘The European Stability Mechanism through the legal meanderings of the Union’s constitutionalism: Comment on Pringle’ (2013) 38 European Law Review 848

pressures flowing from pronounced political preferences of national governments”.⁷¹ He then continues that, the *Pringle* judgment of the Court of Justice and the ESM judgment of the Federal Constitutional Court provide, “not a model for legal reasoning, but an illustration of the sad, brute fact that the rule of law is, in the end, no more than a fair-weather phenomenon”.⁷²

The Court in *Pringle* was indeed influenced by the political integration and financial pressures to come to a decision, due to the urgent assistance needed by numerous Member States. This is mainly evident from the accelerated judicial procedure and the unprecedented interpretations of Treaty provisions, such as Article 136 and 125 TFEU. Yet this fusion should not always be condemned, but also be praised. Namely, the Court together with the legal bases, had to choose between promoting solidarity to prevent the crisis and help save the Member States with severe difficulties or on the contrary to leave those Member States helpless, endangering the stabilisation in the entire Union. Therefore, choosing to promote solidarity was the right decision at least morally and ethically speaking, even if the Court now has to face intense negative criticism by commentators. The reason is that the law and especially EU Treaties, should work as living instruments that adjust themselves to the needs of the society and the people. When considering more broadly the nature of legal reasoning in the light of Beck’s critique, Craig argued that the “conjunction of text and teleology is a legitimate part of legal discourse” and “there are instances where some recourse to background teleology is a necessary step in the resolution of the particular case, although the text will necessarily constrain the interpretation and application of such objectives”.⁷³

In any case, as De Witte correctly stated, if the Court had given a different outcome, other than the establishment of the ESM, “it might have caused serious relapse in the sovereign debt crisis that has plagued the eurozone, and the European Union, since

⁷¹ Gunnar Beck, ‘The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means’ (2014) 39 European Law Review 234

⁷² Ibid

⁷³ Paul Craig, ‘Pringle and the Nature of Legal Reasoning’ (2014) 21 Maastricht Journal of European and Comparative Law 205-220

2010”.⁷⁴ Therefore, the Court found a way to interpret the provisions that opposed the granting of financial assistance to Member States, namely Articles 123 and 125 TFEU, in a way that the ESM does not infringe them, but rather reinforces the restrictive reading of their prohibitions.

It is argued that the same approach was also followed in the case of *Gauweiler*⁷⁵ where *Pringle* was confirmed and the stability of the Eurozone was further developed with the ECB’s Outright Monetary Transactions (OMT). The OMT Programme is part of the series of measures taken by the ECB as a response to the crisis, which allows the ECB to buy government bonds from euro countries in trouble, with the added formal element of conditionality that the Member State in question would need to obtain financial assistance from the ESM. In his Opinion in the case, AG Cruz Villalon built on *Pringle* and argued that the Court’s ruling can be applied in this case, that “a monetary policy measure does not become an economic policy measure merely because it may have indirect effects on the economic policy of the Union and the Member States”.⁷⁶ As it had done in *Pringle*, the Court concluded that the objectives of the OMT programme “to safeguard both an appropriate monetary policy transmission and the singleness of the monetary policy”, contributed to the ultimate aim of monetary policy, namely to maintain price stability.⁷⁷ On the facts, the Court’s discussion in *Gauweiler* focused on the specific features of the OMT programme rather than on the role of solidarity within its constitutional framework.

Another question the Court had to answer in *Pringle* was whether the ESM fell outside the scope of the application of the EU Charter of Fundamental Rights due to the fact that the rescue fund fell outside EU legal order, since it was established by an international agreement between the Eurozone Member States. The applicant argued that the right to effective judicial protection under Article 47 of the Charter precluded the

⁷⁴ Bruno De Witte and Thomas Beukers, ‘The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*’ (2013) 50 Common Market Law Review 805

⁷⁵ Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400

⁷⁶ Opinion of AG Cruz Villalon in Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:7, para 129

⁷⁷ Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400, para 49

conclusion of such an international agreement.⁷⁸ However, the Court indicated that based on Article 51(1) of the Charter, “its provisions are addressed to the Member States only when they are implementing Union law” and are not intended to “extend the field of application of Union law beyond the powers of the Union”.⁷⁹ Therefore, the Court concluded that the general principle of effective judicial protection together with the other provisions of the Charter did not apply to the stability mechanism since the Member States are not implementing Union law within the meaning of Article 51(1) of the Charter for the conclusion of the mechanism.

The decision of the Court regarding the Charter is surprising and has raised intense debate. Firstly, because Recital 4 of the Preamble to the ESM Treaty makes clear that the ESM members will observe Union law, especially “the economic governance rules of the European Union” set out in the TFEU,⁸⁰ even if the ESM Treaty is established outside the EU legal order. Therefore, bearing in mind that the Charter has the same legal status as the Treaties in Union law, Member States must normally observe its provisions. Consequently, the ruling in *Pringle* can be characterised as inconsistent with the text of ESM Treaty.

Secondly, the decision that the Charter does not apply to the stability mechanism, is also inconsistent with the Court’s own position in its previous decisions. The Member States are under a general duty of loyal co-operation recognised in Article 4(3) TEU, to observe Union law when entering into mixed agreements or even when signing bilateral agreements to which the Union does not take part. In previous cases, such as *Commission v Greece*,⁸¹ the Court of Justice repeatedly held and affirmed that “these duties of action and abstention bind Member States when they negotiate, conclude,

⁷⁸ Gunnar Beck, ‘The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means’ (2014) 39 European Law Review 234

⁷⁹ Case C-370/12 *Pringle v Ireland*, ECLI:EU:C:2012:756, para 180

⁸⁰ Gunnar Beck, ‘The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means’ (2014) 39 European Law Review 234

⁸¹ Case C-45/07 *Commission v Greece*, ECLI:EU:C:2009:81; See further Case C-246/07 *Commission v Sweden*, ECLI:EU:C:2010:203, para 91

ratify or implement international agreements either without co-operating with the Commission or the Union being a party to the agreement”.⁸²

More importantly, AG Kokott in her Opinion in *Pringle*, made clear that even though no infringement of EU law was discerned in the case, “the Commission remains...an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights” even when it acts within the framework of the ESM (outside the scope of EU law).⁸³ More recently, the Court in *Ledra Advertising Ltd* stated that “the Charter is addressed to the EU institutions, including when they act outside the EU legal framework” and “in the context of the adoption of a MoU the Commission is bound...to ensure that such a MoU is consistent with the fundamental rights guaranteed by the Charter”.⁸⁴ The duty of loyal cooperation to the Union objectives and policies indeed includes respect for fundamental rights and the *Pringle* case appears to be inconsistent with this position. Undoubtedly, this is another intimation of the enormous economic pressure which is arguably going too far since fundamental rights of citizens is a significant element when establishing a stability mechanism that has as its endmost purpose to help the citizens of the EU.

While the ESM may have major weaknesses, such as alleged lack of legitimacy under EU law, few expected the Court of Justice to dismantle an emergency mechanism that had broad political support, and whose demise would likely have sent the euro area back into the acute phase of the crisis.⁸⁵ Although this is arguably a strained reasoning, one cannot lose sight of the difficult position of the Court due to the economic pressures exerted. Thus the degree of deference shown by the Court to the process in *Pringle* is not surprising, and it is arguably justified in such exceptional circumstances. The EMU provisions in the Treaties were allegedly designed to prevent a crisis, but not to manage one; as such, they needed to be interpreted in a “purposive and dynamic manner to

⁸² Gunnar Beck, ‘The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means’ (2014) 39 *European Law Review* 234

⁸³ View of AG Kokott in Case C-370/12 *Pringle*, para 176

⁸⁴ Case C-8/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701, para 67

⁸⁵ Alicia Hinarejos, ‘The Court of Justice of the EU and the legality of the European Stability Mechanism’ (2013) 72 *Cambridge Law Journal* 237

ensure that the EU's legal framework does not become obsolete and that the Eurozone is capable of dealing effectively with this crisis of confidence".⁸⁶ This was the role of the Court, and one that it discharged well, while ratifying a move away from a rules-based EMU to a policy-based following the crisis. Therefore, the judicial rulings of the Court in *Pringle* and *Gauweiler* can be apprehended through the philosophy of judicial activism. Although the term 'activism' occasionally takes a pejorative connotation of excessively creative interpretation or interpretation that approximates legislation,⁸⁷ others see it as "a just and necessary safeguard".⁸⁸ This exact 'safeguard' was provided by the Court in *Pringle*, in order to deal effectively with the crisis and protect the objectives and values preserved in the Treaties as required by its constitutional responsibility.⁸⁹

To sum up, as AG Kokott rightly argued, prohibiting Member States from granting assistance to their European partners in a case of emergency would run counter to the basic fundamental principle of solidarity and, therefore, to the very purpose and objectives of the Union.⁹⁰ Despite what was at stake, an opposite solution would have jeopardised the project of monetary union in Europe. However, it can be argued that one of the biggest shortfalls in the Court's ruling is not the broad interpretation of Article 125 TFEU, but the fact that according to the Court, the Charter does not apply to the stability mechanism. This is so because the Charter directly affects the citizens and their fundamental rights and not only public authorities.

To conclude, *Pringle* will be remembered as the first landmark decision in which the Court has endorsed financial assistance between Member States as a "catalyst" to increase further financial, economic and perhaps political interconnection between Member States.⁹¹ Following the judgment, the ESM had passed all the legal hurdles for

⁸⁶ Ibid

⁸⁷ Genard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 17

⁸⁸ P. Pescatore, 'Jusqu'ou le juge peut-il aller trop loin?' in *Festschrift til Ole Due* (Kobenhaven, 1994)

⁸⁹ Nic Shuibhne Niamh, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice*. (Oxford University Press 2013) 8-15

⁹⁰ View of A.G. Kokott in *Pringle* (C-370/12) at [143 and 144]

⁹¹ 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 09/2013 <<http://aei.pitt.edu/47514/>> accessed 7 July 2014

its establishment through a legitimised procedure and it was arguably another step forward to develop financial solidarity between the Union Member States.

3.4 **Does the ESM strengthen the idea of European Solidarity?**

After the ECJ's reasoning in *Pringle*, all the legal hurdles raised on the establishment of the ESM were passed, and the ESM Treaty which entered into force on 27 September 2012 could not be overturned. The Court on its part clearly found a way to promote and deepen European solidarity between the Member States, by using the notion of solidarity as an argument against an extensive interpretation of the Treaty provisions restraining the establishment of the mechanism. However, the question that derives is to what extent the ESM as a stability mechanism and through its provisions and its format, is sufficiently adequate and capable of strengthening the idea and the application of solidarity principle between the Union Member States.

There is no doubt that the establishment of the ESM constituted the first big step in a transition from negative to positive solidarity which has taken place to tackle the financial crisis, thus rendering the ESM the main solidarity mechanism. The system arguably focused on negative solidarity through the strict ban on co-responsibility for Member States' debts, the prohibition on monetary financing (Article 123 TFEU) and the no-bailout clause (Article 125 TFEU).⁹² Therefore, the decision of the European Council to introduce a permanent stability mechanism, which replaced the temporary facilities EFSM and EFSF and passed the legal hurdles that focused on negative solidarity, constituted a transition from negative to positive solidarity. However, according to Borger, besides the legitimation of the ESM's establishment, this so-called "increasing shift from negative to positive solidarity between euro area Member States, will only prove durable if it enjoys the support of their peoples", without that support, in the end, the law will not suffice as an agent of change.⁹³

However, doubts existed from the very beginning as to the use of an intergovernmental agreement to reinforce the EMU. The ESM Treaty falls outside the Union legal order

⁹² Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7

⁹³ Ibid

and takes the form of an intergovernmental treaty framed in conformity with the rules of international law. In this way, Member States allegedly have the power to contract and conclude international Treaties between each other, such as international agreements to provide financial assistance and safeguard the stability of the Eurozone and the Union as a whole. One of the reasons the ESMT was concluded as an international agreement is that the EU budget does not have sufficient funds to “provide the required financial assistance to create a strong system of assistance, and thus the Heads of Government and State decided to conclude an international agreement acting in their power as international Treaty law makers”.⁹⁴ In addition, Member States employed an international instrument because they were not capable of adopting an ESM-type instrument, under the Treaty rules and the budgetary constraints.⁹⁵

Nevertheless, the fact that an intergovernmental agreement is beyond the realm of the EU legal order, does not necessarily mean that the ESM is irrelevant to EU law. On the contrary, the fact that Member States could not adopt an ESM-type instrument due to the constraints under EU Treaty rules, demonstrates that the Union legal framework is of great influence. At the same time Recital 4 of the ESM Treaty importantly states that “Strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, *should remain the first line of defence against confidence crises affecting the stability of the euro area*”. Even the Memorandum of Understanding (MoU) must be consistent with the “measures of economic policy coordination provided for in the TFEU, in particular with any act of EU law...”⁹⁶

Some authors consider the use of international law treaty making powers as an instrument of cooperation for the Member States acting in the EU context bearing in mind that before the Treaty of Lisbon, a considerable number of complementary

⁹⁴ Gianni Lo Schiavo, ‘The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?’ (Evolving Europe: Voices of the Future, Loughborough, July 2013)

⁹⁵ Ibid

⁹⁶ Treaty Establishing the European Stability Mechanism (ESM) [2012] D/12/3, Article 13 (3)

agreements were concluded by Member States.⁹⁷ Arguably, De Witte has been one of the most proactive defendants of the use of the intergovernmental option for Member States, after the Amsterdam Treaty. He sustained that the use of intergovernmentalism remains popular as “i) the legal conditions for taking the ‘outside’ route are less onerous than the conditions set for intra-EU closer cooperation and ii) Member States preserve, when acting under international law, complete control over the negotiation process and almost complete control over the implementation and enforcement of the obligations which they accept in the agreement”.⁹⁸ This argument, however, does not eliminate any duty on the part of Union Member States. Specifically, the Court in *Pringle* reaffirmed the ruling of *Gottardo*⁹⁹ according to which, even when concluding international agreements outside EU competences, Member States need to comply with EU law when exercising their competence in their reserved competence area.¹⁰⁰ In that case the test of proportionality applied by national courts ensures the compatibility with EU law while at the same time the “task of the CJEU is to ensure the coherence and unity of application of EU law through the preliminary reference procedure”.¹⁰¹ Similarly in *ERT*¹⁰² the Court firstly established that Member States were bound by the general principles of EU law when seeking to derogate from EU rules, provided for in the Treaty. Therefore, it can be argued that theoretically, there is no reason to believe that the intergovernmental form of the Treaty establishing the ESM, in accordance with the EU standards and values, can in any way hamper the development of solidarity within the EU.

⁹⁷ Bruno De Witte, *International law as law of the European Union* (Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel eds, Nijhoff Publishing 2012) 143

⁹⁸ Bruno De Witte, ‘Old-fashioned Flexibility: International Agreements between Member States of the European Union’ in *Constitutional Change in the EU – From Uniformity to Flexibility* (G. de Burca and J. Scott eds, Hart Publishing 2001) 42

⁹⁹ Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)*, ECLI:EU:C:2002:16

¹⁰⁰ Gianni Lo Schiavo, ‘The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?’ (Evolving Europe: Voices of the Future, Loughborough, July 2013)

¹⁰¹ Takis Tridimas, ‘Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction’ (2011) 9 *International Journal of Constitutional Law* 737-756

¹⁰² Case C-260/89 *ERT*, ECLI:EU:C:1991:254

On the other hand, as a result of its intergovernmental structure, the ESM's governance and decision-making processes are arguably complex and lengthy.¹⁰³ More importantly, the use of an intergovernmental agreement generates concerns as to its democratic nature and the involvement of the main actors, disputing the mechanism's efficiency. Particularly, concerns are raised regarding the use of European institutions in the ESM Treaty in general and as to whether the ESM-concerned Member States are effectively involved in the decision-making process. The MoU is concluded after the Troika of International lenders (ECB, Commission and IMF) supervises the conditionality attached to the financial assistance facility while previously reflecting the severity of the weaknesses to be addressed in order to grant assistance to a Member State.¹⁰⁴ It is therefore manifested, based on the ESMT that the ESM-concerned Member States have limited powers in negotiating and concluding the MoU as well as in assuring that proper monitoring takes place.¹⁰⁵ The MoU rather reflects predominantly the decisions of the Troika and the Board of Governors.¹⁰⁶

Moreover, in examining whether it is consistent with EU law to 'use' the EU institutions outside the natural habitat of the EU legal order, the Court of Justice rightly distinguished between the case of the Court itself, and the case of other institutions.¹⁰⁷ The text of the ESM Treaty repeatedly makes reference in various provisions to the action to be taken by the European institutions. Article 13 of the ESMT confers important powers to the Commission and the ECB to proceed with the granting of stability support. They function as 'agents' of the ESM both in appraising the actual financial needs of the Member State beneficiary of financial assistance, and also in negotiating the MoU. Further, both the Commission and the ECB will monitor the compliance with the conditionality measures attached to the financial assistance

¹⁰³ The Five Presidents' Report: 'Completing Europe's Economic and Monetary Union', Final Report by Jean-Claude Juncker, 22 June 2015

¹⁰⁴ Gianni Lo Schiavo, 'The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?' (Evolving Europe: Voices of the Future, Loughborough, July 2013)

¹⁰⁵ Ibid

¹⁰⁶ Board of Governors consists of the Minister of Finance of each ESM Member, the Member of the European Commission in charge of economic and monetary affairs, the President of the ECB and the President of the Euro Group as observers

¹⁰⁷ Bruno De Witte and Thomas Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*' (2013) 50 Common Market Law Review 805

facility.¹⁰⁸ However, in the appeals of *Ledra Advertising Ltd and Others*,¹⁰⁹ the Court interestingly stated that “the Commission, retains within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a MoU whose consistency with EU law it doubts”.¹¹⁰ Finally, they will coordinate the implementation of the rescue operation and members participate as observers in the meetings of the Board of Governors.

At the same time, in the case of *Konstantinos Mallis and Others*¹¹¹ the parties appealed challenging the General Court’s decision of dismissing their actions for annulment of the Eurogroup statement of 25 March 2013, concerning the restructuring of the banking sector in Cyprus. The Court stated that the fact that “the Commission and the ECB participate in the meetings of the Eurogroup does not alter the nature of the latter’s statements and cannot result in the statement at issue being considered to be the expression of a decision-making power of those two EU institutions”. The Court further stated that the Eurogroup “cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU” and thus appeals were dismissed.

The ESMT also confers some powers to the ECJ when a dispute between an ESM Member State and the ESM arises. Things are less complicated with respect to the Court because according to Article 273 TFEU, the Court has jurisdiction in “any dispute between Member States which relates to the subject matter of the Treaties” provided that it is submitted “under a special agreement between the parties”. Moreover, the ESMT expressly mentions Article 273 TFEU at Recital 16, as the provision to confer jurisdiction to the Court in such cases, where the ESMT is declared to be a “special agreement”.

¹⁰⁸ Gianni Lo Schiavo, ‘The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?’ (Evolving Europe: Voices of the Future, Loughborough, July 2013)

¹⁰⁹ Case C-8/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701

¹¹⁰ *Ibid*, para 59

¹¹¹ Cases C-105/15 P to C-109/15 P *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:702

In general, the use of EU institutions in the ESMT should be supported as a positive aspect of the Treaty making the mechanism more effective and strengthening solidarity. Firstly, the adoption of an intergovernmental agreement that does not depart from the established functions of the EU institutions is welcome.¹¹² A different ruling would have detached too much the objectives of the ESM from the fundamental values of the EU such as solidarity and cohesion, that the mechanism should be based on, and from the institutional bodies serving for such purposes. Further, according to Lo Schiavo, the use of the EU institutions outside the European legal order as well, “does not appear in contrast with the overall purpose of assuring unity and stability of the euro area” but indeed shall be appraised as “an institutional guarantee that the Member States have assured in order not to distance themselves too much from the established Union legal order”.¹¹³ Lastly, the use of the EU institutions and their powers outside the Union legal order shows that they can still play a leading role beyond the Treaty’s legal basis.

Although the use of EU institutions in the ESMT is seen as a positive development, the absence of the European Parliament from the institutions engaged, disputes the efficiency of the mechanism. The Council that decided to conclude the ESMT, along with the ECB, the Commission and the IMF that compose the Troika, have been accused over the years of lacking democratic legitimacy. Particularly, the European Parliament in its report in 2014, on the role of the Troika, highly criticised the composition of Troika and the nature of the Troika decision-making process, stating that “Troika’s mandate has been perceived as being unclear and lacking in transparency and democratic oversight”.¹¹⁴ The European Parliament further noted with concern “that the fact that the Troika is made up of three independent institutions with an uneven distribution of responsibility between them, coupled with differing mandates, as well as negotiation and decision-making structures with different levels of accountability, has

¹¹² Gianni Lo Schiavo, ‘The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?’ (Evolving Europe: Voices of the Future, Loughborough, July 2013)

¹¹³ Ibid

¹¹⁴ European Parliament Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI)) (A7-0149/2014), para 48

resulted in a lack of appropriate scrutiny and democratic accountability of the Troika as a whole”¹¹⁵

On the contrary, the European Parliament, the main democratic institution in the EU whose MEPs are directly elected by the EU citizens, has no influence in the decision-making process and its involvement is non-existent. Notably, the European Parliament in one of its resolutions regarding the establishment of the ESM, importantly highlighted that “the establishment and functioning of the permanent stability mechanism must fully respect the core principles of democratic decision-making such as transparency, parliamentary scrutiny and democratic accountability” and it must not “give rise to a new model of European governance which falls short of the level of democratic standards achieved in the Union”.¹¹⁶ Consequently, the lack of a democratic institution from the decision-making process could indeed hamper the legitimacy of the mechanism as well as the effect of solidarity and this is arguably the most significant weakness of the conclusion of the ESM Treaty. This ‘lack of democracy’ is yet somehow equalised by the fact that national Parliaments are involved in the process of ratification of the ESMT, yet still not effectively enough.

The last question raised in relation to the ESMT and its success in promoting solidarity, is the conditionality requirement, deriving from the Court’s interpretation of Article 125 TFEU. The main criterion in granting financial assistance to Member States in need, through the ESM is strong conditionality. Article 12 ESMT states that, “conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions”. In *Pringle* the Court required strict conditionality in order for the mechanism to be compatible with Article 125 TFEU and even if it does not follow directly from the text, a basis can convincingly be found in the objective of Article 125 TFEU. By requiring strict conditionality in *Pringle*, the Court shows that it is aware of the very delicate context of Article 125 TFEU, illustrated by the fact that it is best known

¹¹⁵ Ibid, para 56

¹¹⁶ European Parliament resolution of 23 March 2011 on the draft European Council decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (00033/2010 – C7-0014/2011 – 2010/0821(NLE)), paragraph 8

as the “no-bailout” clause.¹¹⁷ Moreover, the Court also emphasised in every opportunity available, that the envisaged ESM conditionality serves to ensure compatibility with EU law.¹¹⁸ Consequently, as De Witte argues, the ESM conditionality cannot modify, in particular weaken, Union measures adopted under the excessive deficit procedure of Article 126 TFEU.¹¹⁹ In general, conditionality of the ESM and the stability programmes, is necessary to make it highly unattractive to seek liquidity support without real need and prevent in this way a moral hazard which could prove detrimental for the stabilisation of the Eurozone. However, the real problem arises on the exercise of solidarity in practice which will be discussed in the next part. Broadly speaking, it is argued that the existence of the conditionality requirement itself does not restrain the development of solidarity, but rather the extent and the kind of conditions imposed on the Member State subject to macro-economic adjustments programmes, within the realm of this requirement.

To sum up, even though the ESM is unique in nature as an international intergovernmental agreement, it arguably represents an efficient mechanism that indeed should promote solidarity, provided it is correctly used. Moreover, despite the fact that the ESM was established through a procedure that was highly disputed, it has been held that the mechanism is legitimate, concluded in a way that is compatible with EU law “viewed from the outside” and allegedly based on the values of the Treaties. The creation of the ESM should, therefore, not be seen as an ‘intergovernmental plot’ through which the euro area governments sought to escape from the constraints of EU law and to exclude any involvement of the Commission and the Parliament.¹²⁰ Indeed, a significant number of links with the EU legal order were preserved through the use of the EU institutions. The primary weakness of the mechanism originating from the conclusion of the ESM Treaty, is the lack of democratic oversight and transparency of the processes involved, primarily due to the composition of the so-called ‘Troika’ and

¹¹⁷ Bruno De Witte and Thomas Beukers, ‘The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*’ (2013) 50 Common Market Law Review 805

¹¹⁸ *Ibid*

¹¹⁹ *Ibid*

¹²⁰ Bruno De Witte, ‘Using International Law in the Euro Crisis: Causes and Consequences’ (2013) ARENA Working paper 04/2013 <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf>> accessed 15 July 2014

the nature of its decision-making process and secondly due to the absence of the European Parliament from the decision-making process which, as explained, is somehow balanced by the fact that national Parliaments are involved in the process of ratification of the ESMT. This *lacuna* in the decision-making process can indeed prove to have adverse effects for the democratic legitimacy and accountability of the mechanism and consequently on the exercise of solidarity within the EU.

The ESM and its intergovernmental nature have opened a new era in the process of European integration. An updated EMU reform plan, even envisaged that in the medium-term (between 2017-2025) the ESM's governance should be fully integrated within the EU Treaties.¹²¹ It is the most important mechanism for financial assistance until now, and seems that it has the perspective and potential to cope with the daunting effects of the financial crisis and assure that financial stability in the Eurozone is achieved. These objectives however, can only be reached through the proper exercise of the mechanism and not in a way that would impede the development of solidarity, running counter to the mechanism's initial aims.

4. The exercise of solidarity during the crisis through the ESM

After having analysed the different conceptions of solidarity, the development of the principle in the EU and the different crisis-related financial instruments, the paper particularly examines the legitimacy and efficiency of the creation of the ESM through the *Pringle* judgment. As examined, the ESM has two easily-detected weaknesses; namely the absence of the 'most democratic' EU institution from the decision-making process, which is a flaw originating from the ratification of the ESM Treaty, and more importantly the inconsistency with the Charter which, although not demonstrated in the ESM Treaty at all, has derived from the ruling of the Court. Yet, the ESM was evaluated as a mechanism capable of financially stabilising the Eurozone and promoting financial solidarity between the Member States. This section of the paper aims to evaluate the application of solidarity *in practice*, through the use of the ESM and the reasons, if any,

¹²¹ The Five Presidents' Report: 'Completing Europe's Economic and Monetary Union', Final Report by Jean-Claude Juncker, 22 June 2015

that hampered the development and/or application of the solidarity principle between EU Member States.

4.1 **Type of solidarity exercised during the crisis**

The principal point to examine, regarding the exercise of solidarity between the Member States, is the type of solidarity exercised based on the motives behind the Member States' actions. When considering the heterogeneity between the Member States, it is argued that behind every act of inter-state solidarity, the 'organic' solidarity lies, which is based on the acknowledgment of the interdependence between the Member States.¹²² The 'organic' solidarity can be further divided between two different rationales as discussed above (Section 2.1); a rationale based on 'direct reciprocity' and one based on 'enlightened self-interest'.

The first rationale (direct reciprocity) is associated with the help to others that could be given back in the future in a case of need, since the members of the group are all confronted to the same risks and it inspires "the classical insurance-type schemes".¹²³ Examples of direct reciprocity are the EU Solidarity Fund and the 'solidarity clause' under Article 222. According to Fernandes and Rubio, through these schemes, EU countries "commit themselves to reciprocal aid in face of a risk that is equally spread among Member States and all EU countries are thus potential givers and receivers of help".¹²⁴

The second rationale (enlightened self-interest), relates to help given to other Member States with the knowledge that acting in that way ultimately serves the helper's own self-interest and benefits them. It inspires the EU cohesion policy. In particular, "richer EU countries help poorer EU countries to develop their economies in exchange for their engagement in the process of economic integration – which in the short term brings more benefits for richer than for poorer economies – and because they realise the

¹²² Emile Durkheim, *The Division of Labor in Society* (Palgrave Macmillan 2013)

¹²³ Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (2012) Notre Europe Policy Paper 51/2012 <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok> accessed 5 September 2016

¹²⁴ Ibid

development of the poorer EU economies has positive economic returns” for richer EU countries.¹²⁵

There are several differences between the two rationales. Direct reciprocity tends to be permanent, where all EU Member States are equal givers and receivers of help, trying to confront a risk affecting all the Member States. Moreover, the risk is created by negative exogenous factors, beyond the control of the State affected. At the same time, enlightened self-interest tends to be temporary, where the Union members are unequal and the stronger is helping the weaker to guarantee the stability of the whole group.¹²⁶ Further, contrary to the insurance-type schemes, in this case the countries in risk are not necessarily seen as irresponsible from the cause and creation of neediness.

It can be argued that in order for a sustainable solidarity to be achieved, a combination of both rationales of solidarity is needed, especially in relation to the current euro crisis. However, the type of solidarity exercised all over the crisis decisions on bail-outs and solidarity arrangements, is mostly the non-reciprocal, driven by enlightened self-interest considerations. Even though in relation to the debt crisis the Member States are regarded as, at least, partly responsible, it can be argued that it is also a consequence of exogenous factors beyond the power of the States. Therefore, exercising solidarity only with enlightened self-interest could challenge rather than support solidarity, especially in long-term development. Nevertheless, an element of reciprocity exists as well. The creditor nations’ agreement to these financial transfers does not rely upon the “expectation that they may eventually benefit from comparable assistance by the present creditor countries (the ‘insurance’ option), but rather on the idea that these measures are in their own longer term interests, i.e. on the expectation that these transfers serve the viability of the euro as a common currency”.¹²⁷ Reciprocity is also to

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Andre W.M. Gerrits, ‘Solidarity and the European Union: From the Welfare State to the Euro Crisis’ (2013) International / European Union Studies, Leiden University <<http://media.leidenuniv.nl/legacy/solidarity-and-the-european-union.pdf>> accessed 30 July 2014

be found in the structural political and economic reforms which the creditor nations require the debtor countries to take.¹²⁸

Moreover, even the enlightened self-interest solidarity that led the way throughout the financial crisis was not evident from the very beginning; a fact that severely hampered the effectiveness of the European solidarity efforts. Some of the reasons were the absence of ready-to-use instruments to provide financial assistance to EMU countries and the fact that EU leaders were totally unaware of the potential effects and dimensions of the debt crisis. It is only later, when the lack of response to Greece sparks a major sell-off of other EMU government bonds that the “Greek problem” starts to be seen as an “EMU problem” potentially affecting five EMU economies corresponding to almost 40 percent of Eurozone public debt.¹²⁹

4.2 **Causes and consequences in terms of conditionality**

The way solidarity has been developed and exercised since the breakout of the crisis, has been heavily influenced by the way EU leaders are interpreting the alleged roots of the financial crisis. All over the crisis, the primary interpretation has been that the EMU sovereign debt crisis is the consequence of the irresponsible behaviour of certain governments which, “relying on an implicit bail-out guarantee cheated in the implementation of the SGP rules or which, during the years preceding the crisis, did not undertake the necessary unpopular reforms to improve the competitiveness of their economies”.¹³⁰ As a result this narrative and interpretation of the crisis has consequences in the way of applying conditionality.

As seen above, in *Pringle* the Court required strict conditionality in order for the mechanism to be compatible with Article 125 TFEU. Particularly, the prohibition under Article 125(1) TFEU seeks to minimize the moral hazard problem that exists in any currency union by “indicating that Member States are on their own when despite all the

¹²⁸ Ibid

¹²⁹ Sofia Fernandes and Eulalia Rubio, ‘Solidarity within the Eurozone: how much, what for, for how long?’ (2012) Notre Europe Policy Paper 51/2012 <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok> accessed 25 July 2014

¹²⁹ Ibid

¹³⁰ Ibid

precautions incorporated in the Union legal framework, they let their budgets deteriorate, causing them difficulties to pay off their debt and refinance themselves at the markets”.¹³¹ Consequently, in order to allow the ESM to pass the legal hurdles, the Court broadly interpreted the prohibition under Article 125 TFEU, while requiring strict conditionality to stay within the spirit of the Treaties. Therefore, conditionality is necessary in exercising solidarity through the ESM not only for legitimation purposes but also in relation to the dynamics of moral hazard which could occur where a Member State takes more financial risks when someone else seems to bear their costs (ultimately the cost remains with the debtor state), as well as when the actions of a Member State could lead to the financial detriment of another. Moreover, as Fernandes and Rubio argue, solidarity cannot be properly exercised if unconditional; “as in any exercise of solidarity, the provision of help should be coupled by an adequate dose of “*ex post*” responsibility from the countries receiving help, be in form of conditions attached to the use of the aid or the obligation of introducing certain structural reforms in their economies”.¹³²

Even though it is obvious that conditionality is necessary for solidarity to work properly, the graveness of the conditions attached to aid packages should not be determined based on the countries’ *ex ante* responsibility for the cause of neediness. For instance, the interest rates attached to the bail-outs have been very high, due to the logic of ‘punishing’¹³³ the governments of the Member States that had committed errors and less for the need to avoid a moral hazard, since the grievousness of certain conditions that are analysed further, goes beyond the financial markets’ perception of avoiding moral hazard. Particularly, the conditions attached to the loans given to non-Eurozone countries in 2009 under Article 143 TFEU, namely to Romania and Latvia, were ‘softer’ than those attached to the loans granted to the EMU countries in 2010 and 2011. While, the interest rate of the 2009 loans was 3.5%, the loans in 2010 and 2011 to Ireland,

¹³¹ Vestert Borger, ‘How the Debt Crisis Exposes the Development of Solidarity in the Euro Area’ (2013) 9 EuConst 7

¹³² Sofia Fernandes and Eulalia Rubio, ‘Solidarity within the Eurozone: how much, what for, for how long?’ (2012) Notre Europe Policy Paper 51/2012 <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok> accessed 25 July 2014

¹³³ Ibid

Greece and Portugal had an interest rate higher than 5%.¹³⁴ Grievous provisions on conditionality, including the higher interest rates, can severely impede the EMU governments' efforts and the ESM's 'bail-outs' to reduce the deficit as well as to slow down the path of debt accumulation.

In a nutshell, the conditionality requirement itself, is not negatively affecting the application of solidarity between the Member States, since it is a necessary 'ingredient' for the appropriate use of the ESM. On the contrary, it is the harshness of specific provisions attached to conditionality that are capable of impeding the application of solidarity. This phenomenon could arguably be attributed to the wrong narratives on the causes of the crisis and on the consequences of solidarity, which can cause the ESM to have detrimental consequences in the development of solidarity.

4.3 **The assistance packages and the aftermath**

As examined above, conditionality is a necessary requirement in exercising financial solidarity but what matters is the way this conditionality is expressed. For instance, hostile climate is generated against solidarity measures, where the assistance packages encompass unusually severe conditions to the ESM-concerned states. It is argued that the European governments have continually applied measures that favour them and the European banks but not the citizens and that when it comes to helping the weaker people and the weaker economies, there is no solidarity.¹³⁵ It is further argued, that the financial packages have devastated peoples' lives by increasing inequality, unemployment, homelessness and impoverishment rather than stabilising the euro. Therefore, by having such arguments seemingly valid, questions are raised as to the solidaristic nature of the financial measures. Can solidarity really exist if the solidarity mechanisms and packages lead a state to such conditions?

¹³⁴ Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (2012) Notre Europe Policy Paper 51/2012 <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok> accessed 13 October 2014

¹³⁵ Eric Toussaint, Monique Van Dieren and Claudia Benedetto, 'The EU has never been a European Solidarity Organisation. The European Peoples must create their own Unity' (Global Research, 17 July 2013) <<http://www.globalresearch.ca/the-eu-has-never-been-a-european-solidarity-organisation-the-european-peoples-must-create-their-own-unity/5342998>> accessed 1 August 2014

The first issue that raises concerns about the altruistic motivations behind the financial aid packages and questions their solidaristic nature, is the strict conditions attached to the aid packages. In the wake of the debt crisis in 2010, fiscal austerity programmes were announced in many EU Member States, differing from country to country in terms of their time span. For instance, Greece and Ireland received financial support from the EU and the IMF due to their high levels of public debt during 2010. Both countries had to sign Memoranda of Understanding with the funders setting out tough conditions, the fulfillment of which would be regularly reviewed for the funding of their borrowing needs.¹³⁶ On March 2013, Ireland managed to regain complete lending access on financial markets, after the issuance of new 10-year bonds that led to the sale of €5 billion in bonds at a yield of 4.3%.¹³⁷

Likewise, in 2011, Portugal also requested a €78 billion IMF-EU aid package in order to stabilise its public finances. The new government adopted a range of austerity measures necessary under the bailout conditions, including a 5% pay cut of top earners in the public sector, a VAT rise of 1% and income tax hikes for high-earners.¹³⁸ Portugal managed to leave the EU bailout mechanism on 18 May 2014, without additional need of support as it had regained complete access to lending markets. However, Portugal still has tough years ahead as it could take until 2040 for the country to pay off their EU loans and achieve a sustainable debt level. In addition, Spain was also granted a financial support package of €100 billion mostly aimed to recapitalise banks and on 23 January 2014, Spain formally exited the IMF-EU bailout mechanism since the foreign investor confidence was restored. Austerity policies in all countries that were granted a financial support package, have *inter alia*, resulted in drastic cuts in welfare state spending and sweeping cuts in wages and pensions leading to high percentages of unemployment hitting a rate above 50% for young people (Spain).

¹³⁶ Sotiria Theodoropoulou and Andrew Watt, 'Withdrawal symptoms: an assessment of the austerity packages in Europe' (2011) European Trade Union Institute Working paper 02/2011

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221838> accessed 1 August 2014

¹³⁷ Gavan Reilly, 'Ireland sells first 10-year government bonds since before bailout' *The Journal* (Dublin, 13 May 2013) <http://www.thejournal.ie/ireland-auction-10-year-bonds-830376-Mar2013/?r_dir_d=1> accessed 6 September 2016

¹³⁸ 'EU austerity drive country by country' *BBC News* (Europe, 21 May 2012) <<http://www.bbc.com/news/10162176>> accessed 6 September 2016

As a consequence, serious doubts exist about the efficiency of the imposition of austerity measures upon EU Member States. For instance, the economist Peter Bofinger considers the drastic measures imposed on Greece by the EU Troika (EU Commission, ECB and IMF), to be counter-productive because “even though saving, they do not encourage enough investment and thus slow down growth, leading to more job losses”.¹³⁹ There are currently 27 million jobless workers in countries such as Spain and Greece with an unemployment rate of 27%, the highest after the US Great Depression. He further argues, that the policy of budget consolidation is above all being pushed through at the expense of lower and medium-income persons, as well as Europe’s younger generation.

In particular, austerity packages are composed of expenditure cuts in specific areas and tax rises. On the expenditure side, social protection and public administration are the two areas in which most national governments are cutting expenditures.¹⁴⁰ On the other hand, research and development, education and environmental protection are the least mentioned areas affected. On the revenue side, indirect taxes are most commonly raised as part of an austerity package. The question is therefore, whether the composition of austerity packages can be considered ‘progressive’ and solidaristic in relation to the areas mostly affected and the type of taxes that were raised.

Regarding the revenue side, tax increases are generally likely to be regressive if they are concentrated heavily on indirect taxes, “as the poor spend a greater proportion of their income on domestic goods than higher-income population group who save more and consume more abroad”.¹⁴¹ However, the effect of the measures differs according to the product category affected. For instance, raising value-added tax on necessities would be regressive, while raising it on luxury goods can be progressive. Income taxes are usually more progressive in nature, while together with higher taxes on property/wealth, inheritances and land can also work as conducive to decreasing

¹³⁹ Martin Alespach and Jan Machning, *Roadmap to a Social Europe* (Anne-Marie Grozelier et al eds, 2nd edn, Social Europe Journal 2013) 93

¹⁴⁰ Sotiria Theodoropoulou and Andrew Watt, ‘Withdrawal symptoms: an assessment of the austerity packages in Europe’ (2011) European Trade Union Institute Working paper 02/2011

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221838> accessed 1 August 2014

¹⁴¹ Ibid

inequality. On the expenditure side, even though it is not easy to determine, the spending cuts are likely to affect those on low incomes more, since as Watt argues, the “usage of most public services declines as income rises, having the rich more likely to use the greater choice available on the market”.¹⁴²

Moreover, austerity measures also include pensions levels being cut (especially in Eastern Europe and Greece), which is considered as regressive in distributional terms unless imposed on those with higher incomes, and restrictions to early retirement. As a result, pensioners, people approaching retirement and especially public workers were mostly affected by austerity measures conditionality, suffering job cuts and pay cuts. Other population groups particularly affected in most EU Member States are recipients of various welfare benefits. For instance, unemployment benefits were tightened in most countries, “minimum social benefits have been frozen in Spain and Portugal and a number of countries have reduced child allowances or other forms of family support”.¹⁴³ Indeed, large families are reported as being amongst the main ‘victims’ of the cuts in Austria.

Altogether, according to a recent qualitative assessment, the austerity packages in at least eight countries (Poland, Ireland, Cyprus, Germany, Latvia, Spain, Denmark and Greece) had a direct regressive effect on income distribution, since in “all these countries revenue hikes are concentrated in the area of indirect taxation” and “spending cuts focus on various government transfers and public services”.¹⁴⁴ Furthermore, national experts have mostly evaluated the “austerity packages negatively from the perspective of both social considerations and the provision of solutions to the economic problems that they are meant to help to resolve and the stated longer-term goals of policymakers for the EU economy”.¹⁴⁵ In addition, as Vignon argues, the risk that such conditionalities, of austerity measures bring with them is that “they weigh unfairly and

¹⁴² Andrew Watt, ‘Spending cuts will hit the vulnerable hardest – so find another way!’ (Social Europe, 20 November 2010) <<http://www.social-europe.eu/2010/11/spending-cuts-will-hit-the-vulnerable-hardest-so-find-another-way/>> accessed 5 August 2014

¹⁴³ Sotiria Theodoropoulou and Andrew Watt, ‘Withdrawal symptoms: an assessment of the austerity packages in Europe’ (2011) European Trade Union Institute Working paper 02/2011 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221838> accessed 1 August 2014

¹⁴⁴ Ibid

¹⁴⁵ Ibid

seriously on the most vulnerable populations: by depriving them of a minimum unconditional solidarity, and by excessively subordinating this material solidarity to disproportionate demands, they condemn them to definitive precariousness".¹⁴⁶ Consequently, it can be argued that the exercise of solidarity is severely hampered by the strict conditionality measures attached to financial aid packages and the austerity measures, making solidarity almost impossible to be effectively exercised between the Member States. Also, to a great extent, these conditionalities can imply that "access to work, good health or mastery of essential knowledge are personal goods, whilst it is in the general interest that everyone is in as good health as possible and that everyone masters the knowledge necessary to deal with how professional life is currently changing".¹⁴⁷

Notwithstanding the negative evaluations of austerity packages, it is believed that austerity is necessary for consolidation and counterbalance measures exist as well, but due to their minor influence they fall short of attaining their purpose. Austerity packages were progressive only in France and Luxembourg, where the fiscal consolidation is disproportionately sustained by the relatively wealthier. The decisions taken in July 2011, to lower the interest rates of EFSF loans and to increase the co-financing rates of the EU funds in countries under financial assistance, seemed to indicate that "EU leaders have finally recognised the negative effects of a too strict conditionality and the need to be less severe and more helpful with the countries in need".¹⁴⁸ However, even after the establishment of the ESM, strict and unfair conditionality is still imposed on EU Member States, calling into question the application European solidarity, as for example in the case of Cyprus which is of exceptional interest.

The Eurozone crisis knocked the door of Cyprus due to numerous failures of the financial and fiscal policies, as well as due to the belated reaction of the then Cypriot

¹⁴⁶ Jerome Vignon, 'Solidarity and responsibility in the European Union' (2011) Notre Europe Policy Brief Paper 26/2011 <www.notre-europe.eu/media/Bref27_JVignon_EN.pdf> accessed 3rd August 2014

¹⁴⁷ Ibid

¹⁴⁸ Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (2012) Notre Europe Policy Paper 51/2012 <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok> accessed 25 July 2014

government¹⁴⁹ to avoid the need for external financial assistance. Although Cyprus is not alone in this regard, as the crisis was also a cause of exogenous factors beyond the control of the government, it has been described as “one of the worst cases of self-inflicted damage in the EU”.¹⁵⁰ Factors that have driven the country to the need of financial assistance include; the overexpansion of the Cyprus banking sector, ineffective supervision, regulatory problems, excessive public deficits and the ‘haircut’ of the Greek State bonds in a previous bailout agreement.¹⁵¹ Particularly, the most important internal cause of Cyprus’ banking crisis was the insufficient awareness that the banks’ apparent business success of support economic growth, created enormous vulnerabilities for Cyprus if the conditions changed for the worse, as they did.¹⁵² Unfortunately the banks were not operating wisely and the national policy failed to recognise that running a substantial banking industry does not only involve rewards but risks as well.¹⁵³

Consequently, Cyprus became the fifth Eurozone country to request financial aid and in March 2013, a €10 billion international bailout was announced by the Eurogroup and the Troika. In return for the financial aid, Cyprus agreed to close the country’s second-largest bank, the Cyprus Popular Bank and impose a one-time bank deposit levy on all uninsured deposits of this bank, and around 40% of uninsured deposits in the island’s largest commercial bank, the Bank of Cyprus. The conditions of the financial aid package also included strong austerity measures, such as cuts in civil service salaries, allowances, social benefits and pensions as well as increases in VAT, tobacco, alcohol and fuel taxes, taxes on lottery winnings, property, and higher public health care charges.¹⁵⁴ On the contrary, the agreement was silent on measures to promote Cyprus’ economic recovery and growth. The terms of the agreement, compared to the standards of previous euro area

¹⁴⁹Government of Demetris Christofias 2008-2013, (previously General Secretary of the Progressive Party of Working People)

¹⁵⁰ Independent Commission on the Future of the Cyprus Banking Sector, Final Report and Recommendations (October 2013), 31

¹⁵¹ Thomas Papadopoulos, ‘Cyprus Bailout Deal: The Current State of Affairs’ (2013) 10 European Company Law 137

¹⁵² Independent Commission on the Future of the Cyprus Banking Sector, Final Report and Recommendations (October 2013), 31

¹⁵³ Despina Christofi, ‘Reforms of the banking sector in response to the financial crisis within the EU: comparative analysis of the UK and Cyprus’ (JMMWP 1/2016, School of Law, UCLan Cyprus, April 2016)

<http://www.uclan.ac.cy/files/5514/6314/7804/JMMWP_1of2016.pdf> accessed 12 October 2016

¹⁵⁴ Kang H. Park, ‘Lessons and Implications from the European Sovereign Debt Crisis’ (2015) 3 Journal of Finance and Economics 72-88

bail-outs, were exceptionally severe. The focus of strict austerity measures with greater proportions at the beginning of the process and the restructuring of the banking sector had put additional stress on the severely weakened economy.

Even though no insured deposit of €100,000 or less was affected, the strict bailout conditions imposed to Cyprus have left its two main banks crippled, but also imposed considerable losses on large foreign investors on the island causing negative impact on the depositors' confidence. The haircut also devastated the Cyprus savings markets, both for personal savers and provident funds while the forced pace of the shrinkage of the banking system had created fire sale losses.¹⁵⁵

The conditions imposed on the Cypriot bailout received intense criticism. For instance, the economist Richard D. Wolff described the bailout agreement as 'blackmail', stating that "it basically forced the mass of people who had nothing to do with the crisis to pay the costs of the crisis and the bailout by giving their own deposits".¹⁵⁶ This call for solidarity had also terrified the other governments of Europe facing similar financial problems and as a result 'solidarity' had become undesirable in several Union Member States. As was stated in Germany's Der Spiegel, "in strategic terms the EU hurt not only Cyprus and itself, but also the interests of the US and other allies in the West. Europe pushed Cyprus directly into the arms of the Russian government."¹⁵⁷ The Cypriots undoubtedly are responsible for a range of remarkable mistakes on their own but their actions do not justify the harshness of the bailout conditions. Stacey further stated in Der Spiegel, that it was "an abject and unnecessary error, since the EU seemed not to realise that investors would see this as an EU money-grab by fiat" and it brought back a euro crisis that many had thought was largely over.¹⁵⁸ Lastly, the Cyprus bailout was

¹⁵⁵ Independent Commission on the Future of the Cyprus Banking Sector, Final Report and Recommendations (October 2013), 28

¹⁵⁶ Richard Wolff, 'A People's Revolt in Cyprus: Richard Wolff on Protests Against EU Plan to Seize Bank Savings' (Citizen Action Monitor, 28 March 2013) <<http://citizenactionmonitor.wordpress.com/2013/03/28/events-in-cyprus-expose-eu-plan-to-steal-peoples-savings-and-bailout-private-banks/>> accessed 20 August 2014

¹⁵⁷ Jeffrey Stacey, 'Abject Error: How the Cyprus Deal Hurts EU Strategic Interests' (Spiegel Online International, 3 April 2013) <<http://www.spiegel.de/international/europe/cyprus-bailout-woes-harmful-to-eu-strategic-interests-a-892331.html>> accessed 20 August 2014

¹⁵⁸ Ibid

described as unfair, short-sighted and self-defeating as it had no coherence in the larger context.¹⁵⁹

The second thing that raises concerns on whether the aid packages are indeed proof of EU solidarity, but to a lower extent, is the delay in helping by the European partners. For instance, in the case of Cyprus the bailout, first requested in June 2012, was delayed partly because of concerns expressed by Eurozone states, notably Germany, that its financial sector was opaque, thus aiding money laundering.¹⁶⁰ It was therefore necessary to include provisions in the MoU towards increasing financial transparency such as the anti-money laundering (AML) framework.¹⁶¹ This delay also was the result of the slow negotiations on the part of the Cypriot politicians.

To sum up, it is evident that the way solidarity has been exercised did not have the expected results in most Member States. It seems that the austerity packages and strict conditionality put solidarity in the euro area to the test as they undermine the values of the State concerned and even if the goal of saving money is achieved for the governments, it is devastating for peoples' lives.

4.3.1 The assistance packages challenged before the Courts

The severe conditionality attached to the financial assistance packages and the intense academic criticism, *inter alia* demonstrate the fact that the regimes adopted have increased inequalities within the Member States and have arguably led to violations of fundamental rights of the Union citizens. Therefore, the numerous measures adopted to address the crisis discussed above, have also been challenged before the CJEU and the National Courts.

Particularly, “applicants throughout the EU have relied on fundamental rights to mount challenges to austerity measures that affect social rights and entitlements and they

¹⁵⁹ ‘The Cyprus bail-out; Unfair, short-sighted and self-defeating’ (The Economist, 16 March 2013) <<http://www.economist.com/blogs/schumpeter/2013/03/cyprus-bail-out#comments>> accessed 20 August 2014

¹⁶⁰ Michele Kambas, ‘Cyprus to ease citizenship requirements, attacks EU ‘hypocrisy’’ *Reuters* (Nicosia, 14 April 2013) <<http://www.reuters.com/article/2013/04/14/us-cyprus-president-russia-idUSBRE93D09720130414>> accessed 21 August 2014

¹⁶¹ Memorandum of Understanding Cyprus (2013) para 1.19 <http://www.mof.gov.cy/mof/mof.nsf/MoU_Final_approved_13913.pdf> accessed 19 September 2016

have also relied on their national constitutions to challenge their Member States' participation in post-crisis developments such as the ESM".¹⁶² The cases brought before the Courts, include a substantial number of cases challenging the compatibility of the national adjustments, on the basis of social, welfare and equality rights. Despite on whether these cases are successful or not, and how willing the Courts are to consider them, it can be argued that they demonstrate even further, the fact that the crisis is not merely financial but has turned into a social one as well. The need for solidarity both financial and social is thus even greater. The reason is mainly the national adjustments made that had great consequences on EU societies and the lives of EU citizens, as analysed above.

For the purposes of an indicative overview, in the example of Cyprus numerous applicants have tried to get damages for losses suffered because of the 2013 bail-in and the haircut of depositors' rights.¹⁶³ Moreover, the legality of the measures adopted to impose the 'bail-in' were contested in *Myrto Christodoulou* where the majority decision, classified the matter as one belonging to the sphere of private law, and therefore the proper course of action was to initiate actions for damage for breach of contract and tort law.¹⁶⁴ The recourse filed under Article 146 of the Cypriot Constitution was thus dismissed and the majority judgment did not examine the EU aspect of the matter or the possibility of sending a preliminary reference.¹⁶⁵

Moreover, in Portugal the Constitutional Court was asked to examine the legality of various austerity measures on an annual basis since 2012. In that year, certain measures were deemed unconstitutional but the Court decided to delay the effects of its decision, so as for Portugal to continue to have access to external financial assistance.¹⁶⁶ The same challenge arose, against the next annual budget where the

¹⁶² Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 144

¹⁶³ *Christodoulou v Central Bank of Cyprus*, Case No 551/2013

¹⁶⁴ Kombos C. and Lahlé Shaelou S. "The Cypriot Constitution under the impact of EU law: an asymmetrical formation" in Albi A. (ed.), *The Role of national Constitution in European and global governance* (TMC Asser Press, 2016)

¹⁶⁵ *Ibid*

¹⁶⁶ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 147

Court found again that the measures were unconstitutional.¹⁶⁷ As Hinarejos indicates, the defence of the national constitutional settlement in these cases, unfortunately comes down to setting the minimum of social rights that needs to be protected when making hard economic policy choices in times of financial instability.¹⁶⁸

The cases, challenging the assistance packages and the measures adopted to address the crisis both before the CJEU and the national Courts, are rapidly increasing. Assisting a country, while at the same time increasing inequalities and unfairness within that state, cannot be considered as an assistance stemming from solidarity. European solidarity should rather involve Member States that are willing to subordinate national interests for the sake of the common good rather than imposing conditions that severely affect the most vulnerable populations driving states into chaos.

4.4 **The invalid ideas on the costs of solidarity**

Despite the wrong narrative on the causes of the economic crisis and the Member States' neediness of help, there is also a wrong idea on the costs of solidarity. The Eurozone debt crisis has received remarkable coverage by the media. Whether solidarity within the EU is indeed generated through a crisis, substantially depends on the way the news media cover the circumstance, what sort of information is communicated to the public and how they represent basic actors. Consequently, by restoring "stereotypes and being biased, they can generate a lack of understanding as well as delimit a sense of belonging and unity".¹⁶⁹ The same applies with the principle of solidarity having as a result the obstruction of its development. Therefore, as one of the main constitutional principles of the European framework and the main theme in the European agenda, solidarity gained intense acknowledgment by the media, since it mainly rises during times of emergency such as the Eurozone debt crisis.

According to a one year study of the media coverage, by Kontochristou and Mascha, it was shown that the types of European news that deal with aspects of European

¹⁶⁷ Pt. Const. Ct., Acórdão 186/2013, judgment of 5 April 2013

¹⁶⁸ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 145

¹⁶⁹ Maria Kontochristou and Evi Mascha, 'The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press' (2014) 6 *Review of European Studies* 50

solidarity can be categorised into two broad primary groupings: (a) news that deals with EU affairs and covers aspects of economic and political solidarity and (b) news that tackles various aspects of social solidarity in Europe.¹⁷⁰ The study showed that news referring to the first category, namely EU summits, Eurogroup meetings and decision related to political and financial issues, are more frequent in the agendas of the examined newspapers. The second category mainly includes stories regarding social solidarity, namely, unemployment, human and trade rights, immigration and EU values. Particularly, 78 percent of the coverage focused on reports that discuss the presence or absence of financial and political solidarity, while 22 percent falls towards the coverage of the social aspects of solidarity.¹⁷¹

This focus of the news on the economic and political decisions regarding Europe, demonstrates that the Eurozone crisis was and still is primarily a debt financial crisis rather than social. In fact, this crisis has started as a financial one but soon turned into a social crisis as well. It can be argued that by concealing the social aspects of the crisis, the public is not well informed of the social failures that occurred mainly through the financial aid packages, and is thus unaware of the need for social solidarity, besides the financial.

In addition, a great deal of asymmetry can be noted in the ways different countries hit by the crisis are treated by international media, particularly Greece who was the country concentrating the most coverage by international media. Greece was also the Eurozone country that concentrated the most negative media coverage.

Mainstream mass media of different Western countries succeeded in organising a crisis discourse “by objectifying the crisis as something caused by the supposed reckless, exploitative and sly behaviour of specific people”.¹⁷² As Mylonas argue, such a rationale “was organised on the premise of the systematisation and instrumentalisation of popular, exotic stereotypes of people and localities by media spectacle”.¹⁷³ A notorious

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Yiannis Mylonas, ‘Media and the Economic Crisis of the EU: The ‘Culturalization’ of a Systematic Crisis and Bild-Zeitung’s Framing of Greece’ (2012) 10(2) TripleC 646

¹⁷³ Ibid

example of such a rationale developed by the media is the front cover image of the German magazine “Focus” depicting the famous statue of Milos’ Aphrodite pointing the finger and making an obscene gesture to the Greek people “for betraying the Euro family” (*sic*) with the title ‘Cheats of the Euro Family’.¹⁷⁴ The particular cover image triggered worldwide attention and received equal malicious public reactions by Greek mainstream media and Greek publics.

Other examples of headlines with similar rationales were repeatedly published by the German ‘Bild-Zeitung’ newspaper. For instance, on the 4th of March 2010 the headlines of the paper were; “Greek Crisis: Bankrupt Greeks won’t get a cent from us! Greek Prime Minister Papandreou comes to Germany today, invited by Chancellor Angela Merkel. Sole Theme: The dramatic financial condition of Greece!”. Further, the headlines of the 24th of April 2010 were; “Greece-Help. Expert Mind: We will not see our money again. All Europe is talking about Greece!”. There were also culturalist frame, producing “what Greece is” aiming at grounding the economic crisis as a crisis that concerns a particular nation state and as a crisis that is caused by the particularities and the shortcomings of the Greek society.¹⁷⁵

Through this kind of publications, solidarity is severely hampered since the countries in need such as Greece, are presented as responsible for the debt crisis due to their alleged wasteful lifestyle and the help provided is presented as an altruistic sacrifice that the Germans are forced to make. In other words, publications are driven by popular stereotypes emphasising a carefree and idle lifestyle of the warm-climate countries. It is thus not adequate enough to establish a legitimate mechanism to exercise financial solidarity between the Member States. The support of the people is also needed to achieve the ultimate objective of exercising solidarity, beyond the stabilisation of the euro, which shall be to help EU citizens of the States in financial need. The examples of malicious and hostile publications against the crisis-struck countries are endless and

¹⁷⁴ A copy of which can be found here: <<http://www.theguardian.com/commentisfree/2011/apr/22/germany-focus-magazine-europe>> accessed 31 July 2014

¹⁷⁵ Yiannis Mylonas, ‘Media and the Economic Crisis of the EU: The ‘Culturalization’ of a Systematic Crisis and Bild-Zeitung’s Framing of Greece’ (2012) 10(2) TripleC 646

unfortunately, they influence European citizens by spreading the wrong ideas and cultivating a hostile climate on the costs of solidarity.

4.5 **Breakout of trust**

Yet, despite the influences by the media, there are occasions where the solidarity assistance packages allegedly pursue on their own, a hostile climate due to the conditions applied to the ESM-concerned states, merely due to the lack of confidence and trust that Member States in financial need would not be able to pay off their debts. Moreover, this lack of confidence can also result in severe delays in helping the countries in need, as explained above in the case of Cyprus and thus aggravating the financial situation of a country.

This breakout of trust between the creditor and the debtor countries is another factor impeding the development of European solidarity during the crisis. It is mainly caused by conditionality, either because it is too strict for the debtor or not adequate enough for the creditor country 'to safeguard their money'. As a result this breakout of trust leads to a lack of credible commitment to help in various aspects, as also indicated under Article 4(3) TEU¹⁷⁶ and the principle of sincere cooperation.

For instance, one of the main results of the lack of trust is a continuous reluctance to increase the size of the EU solidarity mechanisms (ESM), despite knowing that such funds are insufficient to cover the needs of all EMU countries under severe market pressures.¹⁷⁷

5. **Proposals for effective application of European solidarity**

Having examined the exercise of solidarity in practice during the crisis and the reasons that hampered its development, it is time to put forward some proposals to eliminate those obstructions to solidarity. During the crisis, European solidarity has been exercised through the stability mechanisms, imposing strict austerity measures on the

¹⁷⁶ Article 4(3): "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"

¹⁷⁷ Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (2012) Notre Europe Policy Paper 51/2012 <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok> accessed 25 July 2014

Member States. As examined the ESM is not flawless, it has major weaknesses such as the absence of a democratic institution in the decision-making process and the inconsistency with the Charter, as well as negative features stemming from the exercise of the mechanism in practice, such as the grievous conditions attached to the aid packages. These negative aspects of the mechanism are indeed obstructing the development of solidarity, leading to the mechanism always being contested. However, it is believed that with a more appropriate exercise of the mechanism and a few strategic changes, the mechanism can be far more efficient in promoting solidarity than it has been until now.

5.1 **Short-term solidarity challenges**

In the short term, the EU priority should be to ensure the stabilisation of EMU sovereign debt markets and at the same time provide effective responses to the social consequences of the crisis. As analysed above the EU austerity regimes have devastated European citizens' lives through the severe conditionality applied and seem to have potentially violated basic human and fundamental rights, on economic grounds.

It is thus important to revise the conditionality of IMF/Commission emergency loans to Eurozone countries, since it seriously affects EU citizens' lives as also demonstrate from the case law of national and EU Courts. Cutting huge amounts of social expenditures at current times has aggravated the already difficult social situation experienced in these countries due to their financial difficulties.¹⁷⁸ The international lenders should either relax these conditions or increase the financial help to these countries "in order to compensate for the loss of domestic capacity to mitigate the social effects of the crisis",¹⁷⁹ as well as invest more on social policies and employment rather than economic, so as to try and offset and detrimental social consequences of the financial regimes adopted through development.

EU policy makers should bear in mind that 'behind the numbers' there are people, the European citizens, and it is not enough to find a way to save money (such as through

¹⁷⁸ Eulalia Rubio, 'Social Europe and the crisis: defining a new agenda' (2009) Notre Europe Policy Paper 36/2009 <<http://www.notre-europe.eu/media/policypaper36-en-agenda.pdf?pdf=ok>> accessed 22 August 2014

¹⁷⁹ Ibid

the austerity measures) but also to take concrete measures to fight poverty and inequality. One way to achieve this is to invest in favour of employment. European policy-makers believe that job creation is not only a goal in itself, but should also be regarded as a strategy to lift people out of poverty and to strengthen social cohesion. Increasing employment was already an important objective of the so-called Lisbon Process.¹⁸⁰ When the Lisbon Strategy failed in 2010, it was replaced by the long-term challenge of the 'Europe 2020 Strategy', proposed by the European Commission, whose ambition was to help the EU move out of the crisis. Particularly, the strategy aimed at turning the EU into a 'smart, sustainable and inclusive economy' to recover from the implications of the crisis, improve its competitiveness and productivity and overcome the counterproductive exercise of solidarity. In the preparation of this new strategy, there was the conviction that in order to achieve a verifiable progress the related assessments should be grounded in an indicator-based analysis. Therefore, a set of eight headline indicators, with targets and expected results was proposed to the Member States.¹⁸¹

This so-called 'Europe 2020' development strategy, for the decade following the crisis, is about "delivering growth that is: smart, through more effective investments in education, research and innovation; sustainable, thanks to a decisive move towards a low-carbon economy; and inclusive, with a strong emphasis on job creation and poverty reduction".¹⁸² The strategy is thus, focused on five ambitious targets agreed for the whole EU, in the areas of employment, investment in research and development, climate change and energy sustainability, education and fighting social exclusion and poverty. In order to achieve these targets, the EU budget is strategically used to support the priority areas of the strategy and the EU's trade policy promotes stronger trade relations that can provide European enterprises with access to government

¹⁸⁰ Martin Alespach and Jan Machning, *Roadmap to a Social Europe* (Anne-Marie Grozelier et al eds, 2nd edn, Social Europe Journal 2013) 134

¹⁸¹ Francesco Pasimeni and Paolo Pasimeni, 'An Institutional Analysis of the Europe 2020 Strategy' (2016) 127 Soc Indic Res 1021-1038

¹⁸² 'Europe 2020' (European Commission, 2014) <http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/index_en.htm> accessed 25 August 2014

procurement and research programmes in third countries.¹⁸³ In addition, public finances need to be put on a surer footing and a more stable and responsible financial sector is needed.

However, it is argued that the targets of the Europe 2020 strategy for greater social cohesion and social inclusion are highly controversial in relation to the approach taken by EU institutions to tackle the crisis. Many Member States have introduced and still have in force, constraints on the access, the level and duration of social benefits, which are an unequal burden for welfare recipients and the unemployed, and they increase the risk of living a life below the poverty line, and exacerbate national income distribution differences.¹⁸⁴ Particularly, as seen above, the conditions attached to the financial aid packages included cost-reducing reforms of the national pensions, healthcare benefits, welfare systems and unemployment benefits. Therefore, a substantial progress is not expected towards achieving the targets, at least for the foreseeable future, since economies are mired in post-crisis stagnation, likely to be prolonged by premature fiscal austerity.¹⁸⁵

In 2015, the European Commission reviewed the Europe 2020 strategy in order to draw lessons from the first four years of the strategy and ensure that it acts as an effective post-crisis strategy for growth and jobs in Europe. Under the national level analysis, six Member States saw their performance deteriorate. Cyprus had the biggest drop (-9), due to the drop in employment rate (by 5% points) and the increase in poverty or social exclusion rate (+3% points).¹⁸⁶¹⁸⁷ Greece and Portugal lost three index points between 2010 and 2012 and in both cases this deterioration was due to employment rate losses

¹⁸³ 'Europe 2020: Europe's growth strategy' (The European Union Explained, European Commission, 2014) <http://ec.europa.eu/europe2020/pdf/europe_2020_explained.pdf> accessed 8 September 2016

¹⁸⁴ Gordon Bajnai et al, 'Solidarity: For Sale? The Social Dimension of the New European Economic Governance' (2012) Europe in Dialogue 1/2012, 19 <http://www.bertelsmann-stiftung.de/cps/rde/xbcr/bst/Europe_in_Dialogue_01_2012_Solidarity.pdf> accessed 10 July 2014

¹⁸⁵ Ibid

¹⁸⁶ Lewis Dijkstra and Stergios Athanasoglou, 'The EUROPE 2020 INDEX: The Progress of EU countries, Regions and Cities to the 2020 Targets' (2015) European Commission Regional and Urban Policy Paper 01/2015, 4 <http://ec.europa.eu/regional_policy/sources/docgener/focus/2015_01_europe2020_index.pdf> accessed 7 September 2016

¹⁸⁷ The Europe 2020 index at national level under EU-wide targets: 100=meets or exceed all targets, 0=very far removed from all targets.

(-9 and -4% points) and increases in poverty or social exclusion (+5 and +3% points).¹⁸⁸ The three Baltic States have made the most progress to the EU targets while Sweden and Denmark have met or exceeded all the 2020 EU targets. The rest of the Member States have also made some or significant progress to the targets.

Overall, it can be argued based on the statistical review, that the consequences of the crisis and the implications of strict conditionality, for the crisis-struck Member States, have made it harder to reach the employment and poverty reduction targets. In addition, the EU has made progress towards the research and development (R&D) target, but the trend is not strong enough to reach the target by 2020. Even though, the Europe 2020 strategy has set remarkable targets and introduced a more solidaristic and developed Union, it seems that it can only be invested with years delay when it may already be too late for Europe. The reason is arguably, that even if a major crisis is avoided, the goals set, are highly unlikely to be achievable in a context of persistently sluggish growth and regressive distributional tax-and-spend policies and cutbacks in areas such as public investment, education and active labour market policy.¹⁸⁹ In a nutshell, “there is a major policy contradiction between the ‘positive’ goals of the Europe 2020 strategy and the imposition of draconian austerity requirements”¹⁹⁰.

In addition, for a sustainable strategy, the five long-term Europe 2020 growth targets need to be converted into national targets. Thus, if a government fails to manifest that it is making a serious effort to introduce the requisite reforms, then all that can be done is to bring “peer pressure” to bear on the country concerned.¹⁹¹ The EU should therefore make sure that national governments encourage socially-inclusive recovery strategies with more frequent checks on the Member States’ economic coordination than the ‘European Semester’. At the same time, Member States should be willing to undertake systematic social impact assessments of all prospective economic recovery

¹⁸⁸ Lewis Dijkstra and Stergios Athanasoglou, ‘The EUROPE 2020 INDEX: The Progress of EU countries, Regions and Cities to the 2020 Targets’ (2015) European Commission Regional and Urban Policy Paper 01/2015, 4 <http://ec.europa.eu/regional_policy/sources/docgener/focus/2015_01_europe2020_index.pdf> accessed 7 September 2016

¹⁸⁹ Theodoropoulou and Watt, ‘Withdrawal symptoms’ (n 92)

¹⁹⁰ Sotiria Theodoropoulou and Andrew Watt, ‘Withdrawal symptoms: an assessment of the austerity packages in Europe’ (2011) European Trade Union Institute Working paper 02/2011

¹⁹¹ Ibid, 17

measures¹⁹² and one could even imagine the establishment of more concrete obligations, such as spending a certain percentage on child-related social infrastructures.

As seen from the progress review of Europe 2020 strategy, some countries (mostly those who were not granted austerity measure packages) manage better than others to 'square the circle' and overcome the crisis. In order to avoid territorial and social imbalances within the Union, that could be aggravated due to the differences in the social weight of national stimulus plans, the EU governments must be pushed to spend a minimum percentage of the budgetary stimulus plan on social-related investments. In addition, around a third of the EU budget is invested in key areas in line with the Europe 2020 strategy in 2014-20. To maximize the impact of this investment the EU needs to be more focused on the Member States who struggle the most in reaching the targets of the strategy, due to the fact that they have been previously asked to apply measures that run contrary to these targets, in return for the financial aid packages. It is not related with subsidising Member States but rather with supporting EU-wide development of an appropriately skilled and developed Union.

In a globalised world, no country can effectively address the challenges it faces by acting alone and especially within Europe, where such challenges are more effectively tackled through measures adopted at EU level. It is thus necessary to have a solidaristic Union that involves Member states who are willing to subordinate their national interests for the EU-wide common good by promoting a European integration process valuing economic growth but also sustainability, social inclusion, democracy, and solidarity.

5.2 **Long-term development**

Beyond the struggle for short-term solutions, the crisis has also prompted a significant discussion as to the long term future of the EMU and even as to the Union's future as a political project. The Eurozone crisis has undoubtedly showed that the EU's Economic and Monetary Union has several flaws in its design and maintaining the architecture of

¹⁹² Eulalia Rubio, 'Social Europe and the crisis: defining a new agenda' (2009) Notre Europe Policy Paper 36/2009 <<http://www.notre-europe.eu/media/policypaper36-en-agenda.pdf?pdf=ok>> accessed 22 August 2014

the EMU in its current fragile situation would possibly leave the Union vulnerable to future crises.¹⁹³ Thus, the long-term priority of the EU must be to prevent the repetition of a crisis like the current one and to appropriately equip the EMU to manage such crises *inter alia*, through solidarity, in case of a new recession.

The proposals currently on the table, institutional as well as academic, are varying from institutional improvements that do not require any Treaty amendments, to the scenario of the EMU becoming a full economic and fiscal Union. All reports however, agree with the fact that more democratic legitimacy is required if the Treaties are to be reformed to pursue a further fiscal and economic integration.¹⁹⁴ As it is unanimously recognised if a default occurs by one Member State in a common currency area, it could have disastrous implications on the rest. Therefore, the priority for the long-term development must be the enforcement of fiscal discipline in order to prevent fiscal and financial imbalances that occurred in the past and ensure the Eurozone's sustainability. For instance, future reforms could give the EU more powers in the national budget making process, such as a potential veto right over draft national budgets for the EU.¹⁹⁵ A strengthened budgetary surveillance could even grant the power to the Commission to oblige Member States to produce new draft budgets or to revise individual decisions of budget execution, something that would require a Treaty amendment.¹⁹⁶

According to the Commission, the heterogeneity among EMU Member States renders the currency Union susceptible to asymmetric shocks.¹⁹⁷ Therefore, in matter of addressing and mitigating structural imbalances and asymmetric shocks reforms must aim to enhance economic coordination as well as strengthen common financial regulation and push for the completion of the banking Union. In addition, in terms of the

¹⁹³ Xavier Vander Bosch and Stijn Verhelst, 'What Future for the Eurozone? Combining Discipline, Solidarity and Institutional Reform' (EGMONT - The Royal Institute for International Relations, March 2014) <<http://www.egmontinstitute.be/wp-content/uploads/2014/03/EPB-27.pdf>> accessed 14 October 2016

¹⁹⁴ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 193

¹⁹⁵ Xavier Vander Bosch and Stijn Verhelst, 'What Future for the Eurozone? Combining Discipline, Solidarity and Institutional Reform' (EGMONT - The Royal Institute for International Relations, March 2014) <<http://www.egmontinstitute.be/wp-content/uploads/2014/03/EPB-27.pdf>> accessed 9 September 2016

¹⁹⁶ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 193

¹⁹⁷ 'Quarterly Report on the Euro Area' (2015) European Commission, Economic and Financial Affairs Volume 14, No 2, 28 <http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip001_en.pdf> accessed 9 September 2016

macroeconomic surveillance, the creation of the Single Supervisory Mechanism (SSM) and its important role in macroprudential supervision are also key achievements in order to prevent excessive financial cycles in the future.¹⁹⁸ The SSM is the first established part of the EU banking Union along with the Single Resolution Mechanism (SRM). As a further step to a fully-fledged Banking Union, in November 2015, the Commission put forward a proposal for a European Deposit Insurance Scheme (EDIS), which would provide a stronger and more uniform degree of insurance cover for all retail depositors in the banking Union.¹⁹⁹ Once the Banking Union becomes fully operational, the necessity for a common approach during financial crises will grow even more. The reason is that the pooling of supervisory responsibilities implies that the Members of the Banking Union will also have to deal jointly with problems in their banking sectors.²⁰⁰ Therefore, there will be an inevitable need for long-term European solidarity in the form of risk-sharing instruments.

In order for the fiscal discipline and surveillance proposals to be successful they need to be counterbalanced and combined with more solidarity and financial support. The ESM does not arguably provide the needed insurance function because it only provides loans that need to be paid-off and no transfers. As briefly put by the Commission: “Further financial mutualisation requires commensurate political integration”.²⁰¹ Namely, a European shock absorption mechanism would allow compensation for a part of the economic and social consequences in the Member States that are hit by a crisis the hardest. This possibility was also discussed in the Commission’s Blueprint for a deep and genuine EMU, as a long-term development by stating that: “based on the progressive pooling of sovereignty and thus responsibility as well as solidarity competencies to the European level, the establishment of an autonomous euro area

¹⁹⁸ Jürgen Matthes, ‘On the Future of EMU: Targeted reforms instead of more fiscal integration’ (2016) Cologne Institute for Economic Research IW-Report 17/2016, 13 <<https://www.iwkoeln.de/en/studies/beitrag/juergen-matthes-anna-iara-targeted-reforms-instead-of-more-fiscal-integration-what-is-the-future-for-the-economic-and-monetary-union-emu-going-to-be-like-289397>> accessed 9 September 2016

¹⁹⁹ ‘Banking and Finance’ (European Commission 2016) <http://ec.europa.eu/finance/general-policy/banking-union/index_en.htm> accessed 9 September 2016

²⁰⁰ Xavier Vander Bosch and Stijn Verhelst, ‘What Future for the Eurozone? Combining Discipline, Solidarity and Institutional Reform’ (EGMONT - The Royal Institute for International Relations, March 2014) <<http://www.egmontinstitute.be/wp-content/uploads/2014/03/EPB-27.pdf>> accessed 9 September 2016

²⁰¹ ‘Blueprint for a deep and genuine economic and monetary Union: launching a European debate’ COM(2012) 0777 final, 35

budget providing for a fiscal capacity for the EMU to support Member States in the absorption of shocks should become possible.”²⁰² Similar sentiment was also expressed in the so-called ‘Four presidents’ report’ in the same year,²⁰³ as well as in the ‘Five presidents’ report’ in 2015 where it was indicated that a significant progress towards ‘completing EMU’ “would be...for each euro area Member State to participate in a shock absorption mechanism”.²⁰⁴ The main inspirations for such a reinsurance mechanism is that it can incorporate significant stabilising effects while at the same time remain realistic regarding administrative burdens, costs and contributions and most importantly it can contribute to the development and exercise of European Solidarity. Accordingly, a genuine and sizeable economic shock absorption mechanism would allow for transfers between countries of the monetary union, *inter alia*, to address differentials in economic output or unemployment owing to such shocks.²⁰⁵

Bosch and Verhelst correctly indicated that “without additional solidarity instruments in the EMU architecture, the emphasis will continue to lie on the fiscal and economic discipline of each individual Member State” and “as a result, all the burden of the adjustment is borne by the countries that are hit the hardest by a crisis”.²⁰⁶ Likewise, it is argued that if the support coming from the rest of the EU Member States, is limited to loans, in cases of major financial distress such as the current financial crisis, it will be insufficient to balance between discipline and solidarity in the EMU, as well as to overcome the financial and social consequences of the crisis.

Another way to develop solidarity in the long-term is to create an insurance mechanism with a deductible alongside with the ESM. Namely, to create a system of reinsurance for national unemployment insurance systems, under which the national systems would

²⁰² ‘Blueprint for a deep and genuine economic and monetary Union: launching a European debate’ COM(2012) 0777 final, 12

²⁰³ ‘Towards a genuine Economic and Monetary Union’, Interim Report by President of the European Council Herman Van Rompuy, Brussels, 26 June 2012; Final Report by President of the European Council Herman Van Rompuy, Brussels, 5 December 2012.

²⁰⁴ The Five Presidents’ Report: ‘Completing Europe’s Economic and Monetary Union’, Final Report by Jean-Claude Juncker, 22 June 2015

²⁰⁵ Xavier Vander Bosch and Stijn Verhelst, ‘What Future for the Eurozone? Combining Discipline, Solidarity and Institutional Reform’ (EGMONT - The Royal Institute for International Relations, March 2014)

<<http://www.egmontinstitute.be/wp-content/uploads/2014/03/EPB-27.pdf>> accessed 9 September 2016

²⁰⁶ Ibid

pay regular premiums to a central Eurozone fund.²⁰⁷ This fund would then support the national system in countries where the unemployment rate has increased suddenly above a certain threshold.²⁰⁸

From a political perspective, a shock absorption mechanism or reinsurance for national unemployment insurance systems would be a significant demonstration of European solidarity and could contribute to the political discourse on how to make Europe work better for all its citizens, provided that they are properly used to avoid any moral hazard. Moreover, the reinsurance of national unemployment insurance systems could also serve as pilot project for other policies that might need a form of supranational reinsurance in the future.²⁰⁹

Proposals on further integration of the EMU, to the point where the degree of centralization of fiscal and economic powers is at the EU level, seem far away enough to render this scenario unlikely. Particularly, such a scenario would include the centre ending up with its own revenues and corresponding degree of economic policy-making autonomy, while at the same time having a degree of unprecedented control over national budgets and policies.²¹⁰ Moreover, according to Hinarejos, a full economic and fiscal union would require a high degree of financial solidarity, in that such a union would most likely encompass some sort of transfer or automatic equalisation mechanism between euro Member States.²¹¹ However, as examined in the current paper, from a political point of view such a scenario is highly unlikely, taking into account that the required degree of solidarity would not be achieved, at least without any additional solidarity mechanisms.

Another long-term challenge of the EMU is the establishment of a proper institutional framework for the Eurozone which would contribute to the requirement of democratic

²⁰⁷ Miroslav Beblavy, Daniel Gros and Ilaria Maselli, 'Reinsurance of National Unemployment Benefit Schemes' (2015) CEPS Working Document No.406/2015, 12 <<http://aei.pitt.edu/59221/>> accessed 9 September 2016

²⁰⁸ Ibid, 12

²⁰⁹ Miroslav Beblavy and Ilaria Maselli, 'Time for some shock (absorption): Priorities for the New Commission' (2014) CEPS Working Document, CEPS, Brussels <<https://www.ceps.eu/system/files/MB%20and%20IM%20EI.pdf>> accessed 9 September 2016

²¹⁰ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 196

²¹¹ Ibid, 166

legitimacy for further EMU integration. The institutional organisation will need to ensure the legitimacy and efficiency of the EMU, which requires a reflection on the governance procedures and the degree of Eurozone specific decision-making.²¹² Particularly, the role of the ECB and the European Parliament in the decision-making processes need to be revised.

As discussed above although the involvement of the EU institutions in the decision-making process of the ESM is considered as a positive development, the absence of the European Parliament is seen as a major weakness of the mechanism. The role of Parliaments in general is mostly limited to legislative work, with little involvement in the governance procedures. However, in terms of democratic legitimacy and national ownership of the economic governance procedures, the involvement of the European Parliament and its national counterparts needs to be revised. One way of improving the role of the European Parliament is to allow a voting process on the EU recommendations and national commitments in relation to the financial aid packages and the conditionality attached to them. Strengthening the role of the European Parliament was also the focus of the European Commission's proposal in relation to the institutional arrangements stating that: "whatever the final design of EMU, the role of national parliaments will always remain crucial in ensuring legitimacy of Member States' action in the European Council and the Council but especially of the conduct of national budgetary and economic policies even if more closely coordinated by the EU".²¹³ However, increased involvement of parliaments needs to be balanced with the need to ensure the procedures' efficiency, since parliamentary decisions can take more time and effort especially at the national level.

At the same time, the ECB's primary task is to ensure price stability in the euro area and conduct EU economic and monetary policy, yet the crisis has prompted dramatic changes to its role and practices. The role of the ECB has been expanded in ways other than through the adoption of non-standard measures: for instance, "together with the

²¹² Xavier Vander Bosch and Stijn Verhelst, 'What Future for the Eurozone? Combining Discipline, Solidarity and Institutional Reform' (EGMONT - The Royal Institute for International Relations, March 2014) <<http://www.egmontinstitute.be/wp-content/uploads/2014/03/EPB-27.pdf>> accessed 8 September 2016

²¹³ 'Blueprint for a deep and genuine economic and monetary Union: launching a European debate' COM(2012) 0777 final, 35

Commission and the IMF, the ECB is part of the ‘Troika’²¹⁴ that negotiates and monitors economic conditionality in countries that request financial assistance”, and it may be invited to accompany the Commission on enhanced surveillance missions.²¹⁵

It is argued that as the role of the ECB continues to evolve and expand, to address the crisis, concerns are raised as to the legality of its actions. As the ESM Treaty and Regulation No 472/2013 state, the Commission should work ‘in liaison with the ECB’, thus reducing the ECB’s role to an advisory one. However, the European Parliament in its Report on the role of the Troika of International lenders noted that “because of the evolving nature of the EU’s response to the crisis, the *unclear* role of the ECB in the Troika”²¹⁶ is perceived as lacking transparency and democratic oversight.

The European Parliament further emphasised its concerns on the “potential conflict of interest between the current role of the ECB in the ‘Troika’ as ‘technical advisor’ and its position as creditor of the four Member States (Greece, Ireland, Portugal and Cyprus)”.²¹⁷ Throughout the crisis the ECB “has had crucial information on the health of the banking sector and financial stability in general, and that with this in mind it has subsequently exerted policy leverage on decision-makers, at least in the cases of the Greek debt restructuring, where the ECB insisted that CACs were to be removed from government bonds it held, the Cypriot ELA operations, and the Irish non-inclusion of senior-bondholders in the bail-in”.²¹⁸ Therefore the ECB’s contributions in addressing the crisis and the crucial liquidity policies must be carefully scrutinised.

In order to reflect a more democratic procedure with increased transparency and accountability and which effectively exercises solidarity, the crisis governance in relation to the bailout programmes for the concerned Member States needs to be revised. Particularly the role of the ECB shall be reduced by giving it the status of a silent observer with a transparent and clearly defined advisory role while, not allowing it to be

²¹⁴ Following the bail-in in Cyprus and the referendum in Greece (July 2015) the name of ‘Troika’ does not appear anymore and reference is made to ‘International lenders’

²¹⁵ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 23

²¹⁶ European Parliament Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI)) (A7-0149/2014) para 48

²¹⁷ *Ibid*, para 54

²¹⁸ *Ibid*, para 54

a full negotiation partner. In addition, the European Parliament recalled that “the preparation of future assistance programmes shall be placed under the responsibility of the Commission, which should seek advice, from third parties such as the ECB” and the IMF, where appropriate.²¹⁹

The way forward during the after-crisis period, needs to be carefully balanced between discipline and solidarity in each and every phase of the development of EMU. As indicated by the Commission: “the deeper integration of financial regulation, fiscal and economic policy and corresponding instruments must be accompanied by commensurate political integration, ensuring democratic legitimacy and solidarity.”²²⁰

6. Concluding remarks

In modern society, the principle of solidarity has come to be seen as an elusive and abstract concept within the EU. Especially after the beginning of the financial crisis, the question of whether solidarity has remained a common principle for the EU has arisen many times, due to the dissatisfaction of EU citizens from the decisions of EU institutions. However, the inconvenient truth is that there is no magic, no cost-free solution to the Eurozone debt crisis and it is only through solidarity efforts, where richer EMU countries help the most distressed ones that Europe can get out of the crisis. If, as Durkheim and Simmel have stated, society is not possible without solidarity, then it is hard to imagine the current European society and the European Union’s future without solidarity.²²¹

Therefore, the Member States had to introduce new measures to get out of the crisis and promote the development of solidarity. The ESM was designed for this reason, to safeguard financial stability within the euro area and promote European solidarity. Doubts, however, existed as to the efficiency of the mechanism and the legitimation of its establishment process. As seen above, in the *Pringle* case, the Court established the stability mechanism and rejected all the arguments challenging the validity of the

²¹⁹ Ibid, paras 91-92

²²⁰ ‘Blueprint for a deep and genuine economic and monetary Union: launching a European debate’ COM(2012) 0777 final, 11

²²¹ Maria Kontochristou and Evi Mascha, ‘The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press’ (2014) 6 Review of European Studies 50

financial rescue instruments. The Court's ruling made clear that its formation does not have any conflict over the monetary policy and that the ESM Treaty does not violate the no-bailout clause under Art.125 TFEU. Moreover, in relation to the Charter of Fundamental Rights, the Court concluded that the general principle of effective judicial protection together with other provisions of the Charter did not apply to the mechanism, since the Member States are not implementing Union law within the meaning of Article 51(1) of the Charter. It is therefore argued that while the mechanism was clearly created to promote European solidarity and had passed all the legal hurdles for this objective, the decision of the Court regarding the Charter was surprising and inconsistent with the text of the ESM Treaty and previous decisions of the Court.

The ESM is not the ideal financial rescue instrument, since weaknesses can be easily detected, such as the inconsistency with the Charter and the lack of a democratic EU institution in the decision-making process. However, despite the ESM's unique nature and bearing in mind the urgent need for such a stability mechanism, it can be argued that it represents an efficient mechanism, capable of promoting solidarity provided it is correctly exploited. The reason solidarity has been severely hampered within the EU, is the incorrect exercise of solidarity and the wrong usage of the mechanism. This paper has identified the main reasons solidarity has been impeded during the crisis.

The first has to do with the type of solidarity exercised during the crisis. The paper argued that in order for a sustainable solidarity to be achieved, a combination of both 'direct reciprocity' and 'enlightened self-interest' rationales is needed. Secondly, the logic of 'punishing' the Member States that have committed errors and the wrong narratives on the causes of the crisis, have had negative impact on the conditionality attached to the financial aid packages. Even though as seen, conditionality is necessary for solidarity to work properly, considerations of the countries' *ex ante* responsibility for the cause of neediness should be abrogated since they lead to detrimental consequences in the development of solidarity. Therefore, the severe austerity conditions attached to the measure packages and the delay in assistance by the European partners have also negatively influenced the development of solidarity within the Union. The problem is arguably that the rescue mechanisms, have been exercised

without any thoroughgoing discussion on their impacts onto the citizens, while at the same time EU institutions have failed to recognise the need for a mechanism to promote growth and overcome the social consequences of the crisis, along with the need to save money through the austerity measures.

Moreover, the invalid ideas on the costs of solidarity mainly stimulated by the media, is another obstruction to the principle's development. For instance, various publications are driven by popular stereotypes emphasising a carefree and idle lifestyle of the countries in need and the help provided to them is presented as an altruistic sacrifice that the wealthier countries are forced to make. This paper reached the conclusion that measures which underestimate the values of a Member State and cause inequality, unemployment, homelessness and impoverishment cannot be regarded as solidaristic and result in the victimisation of European solidarity.

Building the EU was never going to be easy and especially after the crisis, it became even harder as growing skepticism has been created among citizens towards the EU. As the Union expands, it may become necessary to strengthen the bonds between the Member States and do it in a way that is visible to EU citizens. One of the essential elements that creates and deepens bonds among people and between people and countries is solidarity, which is also seen as a "corollary of the mutual trust between Member States".²²² The paper further makes suggestions of short and long-term proposals to deepen the bonds between Member States through an improved exercise of solidarity. Solidarity is only to be preserved within the Union and stop being 'the victim' of the crisis, if the ESM is correctly exploited having as first consideration the European citizens that constitute the Union. A way of accomplishing this in the short-term is to invest on growth and social development such as employment, education and research. At the same time, proposals for the long-term concern the fiscal and economic discipline of the Member States, combined with the establishment of new solidarity mechanisms for promoting social development.

²²² Ines Hartwing and Phedon Nicolaides, 'Elusive Solidarity in an Enlarged European Union' (2003) Eipascope 2003/3 <http://aei.pitt.edu/5920/1/scop_3_2b.pdf> accessed 10 August 2014

Solidarity is not simply a set of procedures, it incorporates a long history behind it, social and moral values that have been into effect since the very first declaration that established the European Union. Solidarity within the economic and financial crisis is a new thing and while new rules and features are continuously offered, most of them are put on trial and criticism, rendering solidarity a victim of this crisis. It would thus, be tragic to lose solidarity in our way to save Europe from the crisis. Several solutions offered were successful to an extent and even more is expected in the future to enable the principle of solidarity to play its role as one of the main foundations of the Union.

Finally, solidarity should be a principle and an outcome in every political debate among unequal partners, especially during the financial crisis. Beyond, any rhetoric solidarity should represent a mutual commitment to jointly cultivate a European model founded on loyal cooperation, democracy, liberty, and respect, a model based on “unity in diversity”.²²³

²²³ Maria Kontochristou and Evi Mascha, ‘The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press’ (2014) 6 *Review of European Studies* 50

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